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PROPERTY IN THIN AIR

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PROUDHON got it all wrong. Property is not theft—it is fraud. Few other legal notions operate such gross or systematic deception. Before long I will have sold you a piece of thin air and you will have called it property. But the ultimate fact about property is that it does not really exist: it is mere illusion. It is a vacant concept—oddly enough rather like thin air.

With private property, as with many illusions, we are easily beguiled into the error of fantastic projection upon the beautiful, artless creature that we think we see. We are seduced into believing that we have found an objective reality which embodies our intuitions and needs. But then, just as the desired object comes finally within reach, just as the notion of property seems reassuringly three-dimensional, the phantom figure dances away through our fingers and dissolves into a formless void.

Of course, legal theorists have long sought to sidestep the unattainable quality inherent in the notion of private property by conceptualising property not as a thing but rather as a "bundle of rights". Now, if one accepts for a moment the "bundle of rights" explanation, it is clear that in jurisdictions of common law derivation the amplest or fullest bundle of rights which can exist in relation to land is the estate in fee simple. The rights enjoyed by the owner of the fee simple come closest to the *dominium* spoken of by civil lawyers, and indeed represent the nearest approximation to absolute ownership known in our modern system of law. For lawyers therefore the fee simple estate occupies a pre-eminent position in the more

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general field of property concepts. It carries a plenitude of rights and powers over the ultimate immovable—land.

Something of this plenitude used to be captured, albeit over-enthusiastically, in the medieval Latin maxim *Cuius est solum, eius est usque ad coelum et ad inferos*. That is, the owner of the soil has a prima facie ownership of everything reaching up to the very heavens and down to the depths of the earth. This brocard appeared first in the writings of the 13th century Accursius of Bologna,[1] and was rapidly incorporated[2] into the rhetoric of the common law estate in fee simple.[3] In its original context the phrase seemed to articulate the extensive nature of private property rights in land.

I. Rights in Airspace

Whatever the maxim *cuius est solum* . . . may have signified to the common lawyer of earlier centuries, it has since become obvious that its legal meaning is now heavily qualified by the advent of more recent technologies. For instance, fee simple ownership cannot possibly confer on the modern landowner a limitless dominion over the vertical column of airspace grounded within the territorial boundaries of his or her realty. Nowadays it is generally agreed that for legal purposes a pragmatic distinction must be drawn between two different strata of the superjacent airspace, the "lower stratum" and the "upper stratum" respectively.[4] It is further agreed that the maxim *cuius est solum* . . . has no relevance at all to the higher of these strata. Ownership of airspace *usque ad coelum*—if indeed it was ever taken wholly seriously[5]—has now been commuted to a

[1] *Glossa Ordinaria* on the *Corpus Iuris* (*Digest*, VIII.2.1) (see H. Guibé, *Essai sur la navigation aérienne en droit interne et en droit international* (Paris 1912), p.35ff.). It has been suggested that the maxim may have derived, not from Roman origins, but from even earlier Jewish origins (see (1931) 47 L.Q.R. 14; *Deuteronomy*, xxx: 11–14, *Isaiah*, vii: 11), but see D.E. Smith, "The Origins of Trespass to Airspace and the Maxim 'Cujus est solum ejus est usque ad coelum'" (1982) 6 Trent Law Journal 33, 38. See also C.L. Bouvé, "Private Ownership of Airspace" (1930) 1 Air L.Rev. 232; H.H. Hackley, "Trespassers in the Sky" 21 Minn.L.Rev. 773 (1936–37).

[2] It has been pointed out that Franciscus, the son of Accursius, appears to have travelled to England in 1274 at the invitation of Edward I (see Lord McNair, *The Law of the Air*, 3rd ed. (London 1964), p. 397).

[3] For the earliest English reference, see the terminal note in *Bury* v. *Pope* (1586) Cro. Eliz. 118, 78 E.R. 375, where the maxim is said to have been known from the time of Edward I (1239–1307). The maxim was later incorporated in *Co. Litt.*, p. 4a; *Bl. Comm.*, vol. II, p. 18.

[4] See *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd.* [1978] Q.B. 479, 486D, 487F. See also S.S. Ball, "The Vertical Extent of Ownership in Land" 76 U. of Penn. L. Rev. 631 (1928).

[5] It may be that the maxim *cuius est solum* . . . never meant very much at all. In *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd.* [1978] Q.B. 479, 485C, Griffiths J. dismissed the maxim as merely "a colourful phrase". The formula has been said to be "imprecise" and "mainly serviceable as dispensing with analysis" (*Commissioner for Railways et al* v. *Valuer-General* [1974] A.C. 328, 351G *per* Lord Wilberforce), and to have "no place in the modern world" (*United States* v. *Causby*, 328 U.S. 256, 261, 90 L. ed. 1206, 1210 (1946)). In no sense can the maxim be understood to mean that "land" comprehends the whole of the space from the centre of the earth to the heavens, not least since "so sweeping, unscientific and unpractical a doctrine is unlikely to appeal to the common law mind" (*Commissioner for Railways et al.* v. *Valuer-*

recognition that the landowner's property rights over airspace are restricted to the "lower stratum". This stratum comprises merely that portion of the immediately superjacent airspace whose control is necessary for the landowner's reasonable enjoyment and purposeful use of his land at ground level.[6] As Justice Douglas once said in the United States Supreme Court,[7] the landowner must have "exclusive control of the immediate reaches of the enveloping atmosphere" since otherwise "buildings could not be erected, trees could not be planted, and even fences could not be run". By contrast, no fee simple owner can claim ownership of the "upper stratum" of superjacent airspace, for this falls into the category of *res omnium communis*[8] and is open to innocent exploitation by all.[9]

The precise boundary between the lower and higher strata of airspace has never been fixed. Courts are notoriously unwilling to quantify the extent of the airspace which falls within the dominion of the landowner, but in most cases the lower stratum seems unlikely to reach beyond an altitude of much more than 200 metres above roof level.[10] Were it otherwise, there would follow the absurd result that actionable trespass is committed by every plane (or satellite) which passes over a suburban garden.[11] There is instead a plain recognition in both common law[12] and modern legislation[13] of the legal immunity of overflying aircraft engaged in "innocent passage" in the upper stratum of airspace. For example, in *People* v. *Cook*[14] the Supreme Court of California recognised that such innocent use of the upper stratum may often lay open to inspection "everything

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General, supra, 351H–352A *per* Lord Wilberforce). Compare, however, *Davies* v. *Bennison* (1927) 22 Tas. L.R. 52, 55; *Bursill Enterprises Pty. Ltd.* v. *Berger Bros. Trading Co. Pty. Ltd.* (1971) 124 C.L.R. 73, 91 *per* Windeyer J; *National Carriers Ltd.* v. *Panalpina (Northern) Ltd.* [1981] A.C. 675, 708C *per* Lord Russell of Killowen.

[6] See *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd.* [1978] Q.B. 479, 488A; *Staden* v. *Tarjanyi* (1980) 78 L.G.R. 614, 621f. See also *Davies* v. *Bennison* (1927) 22 Tas. L.R. 52, 57; *Swetland* v. *Curtiss Airports Corporation*, 55 F.2d 201, 203 (1932); *Griggs* v. *Allegheny County*, 369 U.S. 84, 88f., 7 L.Ed.2d 585, 588 (1962); *Laird* v. *Nelms*, 406 U.S. 797, 799f., 32 L.Ed.2d 499, 503 (1972).

[7] *United States* v. *Causby*, 328 U.S. 256, 264, 90 L.ed. 1206, 1212 (1946).

[8] *Re The Queen in Right of Manitoba and Air Canada* (1978) 86 D.L.R. (3d) 631, 635 *per* Monnin J.A.

[9] See *e.g.* Air Commerce Act of 1926 (49 U.S.C., § 171), which declared a "public right of freedom of interstate and foreign air navigation" in the navigable air space of the United States (see now 49 U.S.C., § 1304 (Supp. 1990)).

[10] In *Smith* v. *New England Aircraft Co.*, 170 N.E. 385, 393 (1930), the Supreme Court of Massachussetts regarded as trespass the overflight of an aircraft at a height of 100 feet. In Britain no aircraft may ever fly "closer than 500 feet to any person, vessel, vehicle or structure" (Civil Aviation: The Rules of the Air and Air Traffic Control Regulations 1985, S.I. 1985/1714, reg. 5(1)(e)). An exception is made for aircraft "while landing or taking off" (reg. 5(2)(d)(i)) and for gliders "while hill-soaring" (reg. 5(2)(d)(ii)).

[11] See *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd.* [1978] Q.B. 479, 487G *per* Griffiths J.

[12] Such recognition appeared first in relation to overflight in hot air balloons (see *e.g. Pickering* v. *Rudd* (1815) 4 Camp. 219, 220f, 171 E.R. 70, 71).

[13] See *e.g.* Civil Aviation Act 1982, s. 76(1).

[14] 221 Cal. Rptr. 499 (1985), 505 *per* Grodin J.

and everyone below—whether marijuana plants, nude sunbathers, or family members relaxing in their lawn chairs", these presumably being the characteristic features of Californian landscape which leapt most naturally to the mind of the Court. The Court nevertheless conceded that ground-dwellers may simply "have to put up with the occasional downward glance of a passing pilot or passenger".[15]

The law of the upper stratum is not, however, the primary concern of this paper, save to say two things. First, the terminology of "innocent passage" has of course required the courts to delineate the permitted uses of the upper stratum. Courts in various jurisdictions have proved reluctant to categorise as "innocent passage" such activities as industrial espionage,[16] noisy aerobatic displays over private property,[17] intrusive photography of the homes of celebrities,[18] and the detection of crime through police aerial surveillance of areas otherwise inaccessible without a duly obtained warrant. For instance in *People* v. *Cook*[19] a majority on the Californian Supreme Court overturned a defendant's conviction for unlawful cultivation of marijuana, where the activity concerned had been detected by means of intense warrantless search conducted from 1600 feet with the aid of a 200mm telephoto lens. The Court condemned this means of gathering evidence as an arbitrary violation of the individual's reasonable expectation that his home and private yard would not "be spied upon from the air by police officers scrutinising the property for evidence of crime".[20] (It is perhaps worth noting that in the land where the price of liberty is eternal vigilance, the price of eternal vigilance seems to be dismissal from judicial office: Chief Justice Rose Bird and Associate Justices Grodin and Reynoso, three of the majority judges in *Cook*, were unceremoniously sacked by the Californian electorate at the next available opportunity.[21])

[15] 221 Cal. Rptr. 499, 501.

[16] *E.I. duPont deNemours & Company, Inc.* v. *Christopher*, 431 F.2d 1012, 1015 (1970), cert. denied 400 U.S. 1024, 27 L.Ed.2d 637 (1971), reh. denied 401 U.S. 976, 28 L.Ed.2d 250 (1971).

[17] See J.E. Richardson, "Private Property Rights in the Air Space at Common Law" (1953) 31 Can. Bar Rev. 117, 120.

[18] It was clearly implied in the observations of Griffiths J. in *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd.* [1978] Q.B. 479, 489G, that overflight would constitute trespass (and possibly nuisance) if the aircraft interfered with the owner's use of his land, as, for instance, through the "harassment of constant surveillance of his house from the air accompanied by the photographing of his every activity".

[19] 221 Cal. Rptr. 499 (1985).

[20] 221 Cal. Rptr. 499, 504. See now, however, *California* v. *Ciraolo*, 476 U.S. 207, 214ff., 90 L.Ed.2d 210, 217f. (1986); *Dow Chemical Co.* v. *United States*, 476 U.S. 226, 239, 90 L.Ed.2d 226, 238 (1986); *Florida* v. *Riley*, 488 U.S. 445, 449ff., 102 L.Ed.2d 835, 841ff. (1989).

[21] Following the retention election held on 4 November 1986, Rose Bird, Joseph Grodin and Cruz Reynoso lost their places on the Californian Supreme Court with effect from January 1987 (*L.A. Times*, 5 November 1986, Part I, p. 1, col. 1). It is fair to add that much of the campaign orchestrated against the unsuccessful candidates was prompted by the openly liberal stance adopted by them on such matters as the death penalty and electoral control of legislative redistricting. See R.S. Thompson, "Judicial Independence, Judicial Accountability, Judicial

A second, and final, comment on the upper stratum of airspace is this. The upper stratum, it is said, "belongs to the world".[22] It is the property of no individual and the property of no state. American courts have often referred to the upper stratum as constituting "free territory . . . a sort of no-man's land".[23] It is certain beyond doubt that, with respect to the upper stratum, the landowner "has no greater rights in the air space than any other member of the public".[24] This "no-man's land" status of the upper stratum is significant in many ways,[25] and indeed carries one implication which is of compelling importance in the present context. Although property law is intrinsically concerned with the allocation of resources, not all resources are—to use an ugly but effective phrase—"propertised".[26] Contrary to popular perception the vast majority of the world's human and economic resources still stand *outside* the threshold of property and therefore remain unregulated by any proprietary regime. Lawyers, whose primary concern so often appears to be the allocation of propertised resources, would do well to be just as keenly interested when a particular resource is *not* propertised.

The upper stratum of airspace provides a prime example. Here the denial (or is it the withdrawal?) of propertised status ensures that by far the larger portion of airspace survives effectively as part of the original commons, free for use and exploitation by all mankind. Just like the high seas, the upper stratum enjoys immunity from self-interested claims of property, and remains available to facilitate the commerce and intercourse of humanity. But the important point is this: the refusal to propertise a given resource is absolutely critical—because logically anterior—to the formulation of the current regime of property law. The decision to leave a resource outside the regime is, pretty clearly, a fundamental precursor to all property discourse. Yet the factors weighing on

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Elections, and the California Supreme Court: Defining the Terms of the Debate" 59 S. Cal. L. Rev. 809 (1985–86). For a personal view of the 1986 recall election, see also J.R. Grodin, "Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections" 61 S. Cal. L. Rev. 1969, 1980 (1987–88); *In Pursuit of Justice: Reflections of a State Supreme Court Justice* (Berkeley 1989).

[22] *Hinman* v. *Pacific Air Transport*, 84 F.2d 755, 758 (1936), affd. 300 U.S. 655, 81 L.ed. 865 (1936).

[23] See *e.g. Thrasher* v. *City of Atlanta*, 173 S.E. 817, 826 (1934).

[24] *Bernstein of Leigh (Baron)* v. *Skyviews & General Ltd.* [1978] Q.B. 479, 488B.

[25] For instance, the Canadian Province of Manitoba fell flat on its face in 1978 when it attempted to impose a sales tax in respect of transactions on board aircraft flying over the province: the Manitoba courts held that the sales had not taken place "within the province" and were therefore outside the jurisdiction of the then current taxing statute (see *Re The Queen in Right of Manitoba and Air Canada* (1978) 86 D.L.R. (3d) 631).

[26] Thus, for instance, it has long been recognised at common law that there can be no "absolute permanent property", but only "qualified property", in fire, light, air, water and wild animals (*Bl. Comm.*, vol. II, pp.14, 391, 395). See also *Case of Swans* (1592) 7 Co. Rep. 15b, 17b, 77 E.R. 435, 438; *Blades v. Higgs* (1865) 11 H.L.C. 621, 638, 11 E.R. 1474, 1481 *per* Lord Chelmsford.

this decision—even the fact there there is a decision to be made—remain largely unrecognised and unanalysed in legal discussions of property. It is perhaps here that the core notions of the property concept lie waiting to be discovered. This is a theme to which we must shortly return.

But first we should focus on the lower stratum of airspace, for it is with the lower domain that the remainder of this paper is concerned. Within the limited cubic space of the lower stratum proprietary discourse is entirely valid—a proposition rendered no less true by the fact that the landowner's dominion over the lower stratum may often be qualified by adverse rights of a proprietary character vested in others. The landowner may, for instance, be subject to restrictions agreed with a neighbouring landowner or imposed by a local authority or state agency by way of planning or zoning regulation.

The propertisation of the lower stratum is amply confirmed in a number of legal rules which ensure that invasion of this airspace is prima facie actionable in trespass and often in nuisance as well.[27] It is well known, for example, that where the branches of your neighbour's tree overhang your land, you are entitled without giving prior notice[28] to lop off the branches which intrude into your airspace, so long as you do not enter upon your neighbour's land for the purpose.[29] Likewise trespass is committed through the projection of a horse's head over a boundary fence,[30] by overhanging eaves,[31] advertising signs,[32] overhead cables and wires,[33] by the intrusion of

[27] Some doubt has been expressed whether the law of trespass provides the most suitable forum for dealing with tortious invasion of airspace (see *e.g. Lyons* v. *The Queen* (1985) 14 D.L.R. (4th) 482, 500f. *per* Estey J.). It may even be questioned at a more fundamental level whether actionability in trespass necessarily indicates that the plaintiff has any "property" in the land. It is, of course, true that access to remedies in trespass (and for that matter nuisance) rests traditionally upon "possession" rather than "title" (see *Malone* v. *Laskey* [1907] 2 K.B. 141, 151; *Nunn* v. *Parkes & Co.* (1924) 158 L.T. Jo. 431; *Lewisham B.C.* v. *Roberts* [1949] 2 K.B. 608, 622; *Simpson* v. *Knowles* [1974] V.R. 190, 195; *Hull* v. *Parsons* [1962] N.Z.L.R. 465, 467f.; *Oldham* v. *Lawson* (No. 1) [1976] V.R. 654, 657; *Moore* v. *MacMillan* [1977] 2 N.Z.L.R. 81, 89). It remains, however, a salutary fact that possession and title are by no means discrete concepts (see *Bl. Comm.*, vol. II, p.8). In relation to land, for instance, possession is prima facie evidence of seisin in fee and seisin "gives ownership good against everyone except a person who has a better, because older, title" (*Newington* v. *Windeyer* (1985) 3 N.S.W.L.R. 555, 563E–F *per* McHugh J.A.). See also C.M. Rose, "Possession as the Origin of Property" 52 U. Chi. L. Rev. 73 (1985–86).

[28] *Lemmon* v. *Webb* [1895] A.C. 1, 6, 8.

[29] *Lemmon* v. *Webb* [1895] A.C. 1, 4; [1894] 3 Ch. 1, 14f., 17f., 24.

[30] *Ellis* v. *Loftus Iron Company* (1874) L.R. 10 C.P. 10, 12. ("That may be a very small trespass, but it is a trespass in law".)

[31] *Baten's Case* (1610) 9 Co. Rep. 53b, 54a/b, 77 E.R. 810, 811f.; *Fay* v. *Prentice* (1845) 1 C.B. 828, 838, 840, 135 E.R. 769, 773f.; *Ward* v. *Gold* (1969) 211 Estates Gazette 155, 159. See also *Corbett* v. *Hill* (1870) L.R. 9 Eq. 671, 673f.

[32] *Gifford* v. *Dent* (1926) W.N. 336; *Kelsen* v. *Imperial Tobacco Co. (of Great Britain and Ireland) Ltd.* [1957] 2 Q.B. 334, 345.

[33] *Barker* v. *Corporation of the City of Adelaide* [1900] S.A.L.R. 29, 33f.; *Graves v. Interstate Power Co.*, 178 N.W. 376, 377 (1920). See also *Wandsworth Board of Works* v. *United Telephone Co.* (1884) 13 Q.B.D. 904, 927 *per* Fry LJ.

low-flying aircraft[34] or ballistic projectiles,[35] and by the jibs of sky cranes.[36] Indeed the sky crane alone has significantly prolonged the working life of the law and economics school. Law and economics devotees can debate, seemingly endlessly, the externalities of downtown commercial development and the extortionate holdout prices demanded by the supposed victims of the sky crane's lateral invasion.[37]

Further evidence of the propertisation of the lower stratum emerges from the conveyancer's definition of land. "Land" is of course capable of almost infinite horizontal (and, for that matter, vertical) division.[38] It follows that there can be multiple (and quite distinct) fee simple estates in the same "land", as for example where X owns the fee simple in the surface layer of the earth[39] and Y owns the fee simple in a subterranean stratum[40] and Z is simultaneously entitled in fee simple to the standing timber.[41] But then none of this should cause the least surprise to any lawyer who has experience of strata titles.

There is, however, one implication of the foregoing which

[34] See *Smith* v. *New England Aircraft Co.*, 170 N.E. 385, 393 (1930); *Thrasher* v. *City of Atlanta*, 173 S.E. 817, 826 (1934).

[35] See *Davies* v. *Bennison* (1927) 22 Tas. L.R. 52, 55ff. *per* Nicholls C.J. (shooting of neighbour's cat on hot tin roof). English courts have sometimes sought to draw an uneasy distinction between the firing of a gun across a field *in vacuo (Pickering* v. *Rudd* (1815) 4 Camp. 219, 220, 171 E.R. 70, 71 *per* Lord Ellenborough C.J.) and the case where bullet fragments fall on the land (*Clifton* v. *Viscount Bury* (1887) 4 T.L.R. 8, 9). The attempt to deny the existence of trespass in the former case is explicable less by logic (see *Kenyon* v. *Hart* (1865) 6 B. & S. 249, 252, 122 E.R. 1188, 1189 *per* Blackburn J.) than by the courts' clear reluctance to accord a civil remedy for purely trivial intrusion into airspace (see *e.g. Gifford* v. *Dent* [1926] W.N. 336). In his review of the case law Sir Frederick Pollock inclined against Lord Ellenborough's view that it is no trespass "to interfere with the column of air superincumbent on the close" (*The Law of Torts*, 8th ed. (London 1908), p. 347f.).

[36] *Graham* v. *K.D. Morris & Sons Pty. Ltd.* [1974] Qd. R. 1, 4D. See also *Woollerton and Wilson Ltd.* v. *Richard Costain Ltd.* [1970] 1 W.L.R. 411, 413D–E; *John Trenberth Ltd.* v. *National Westminster Bank Ltd.* (1979) 39 P. & C.R. 104, 106f.; *Anchor Brewhouse Developments Ltd.* v. *Berkley House (Docklands Developments) Ltd.* (1987) 38 B.L.R. 82, 94f.

[37] See *Lewvest Ltd.* v. *Scotia Towers Ltd.* (1982) 126 D.L.R. (3d) 239, 240f. Here it appeared that by trespassing the defendant building contractor was saving approximately $500,000, but Goodridge J. ruled that if "a third party can gain economic advantage by using the property of another, then it must negotiate with that other to acquire user rights. The Court cannot give it to him." See also *Austin* v. *Rescon Construction (1984) Ltd.* (1989) 57 D.L.R. (4th) 591, 593ff.

[38] See *e.g.* Law of Property Act 1925, s. 205(1)(ix).

[39] In England if a highway is maintainable by the relevant statutory highway authority at public expense, that authority holds a determinable fee simple interest in the surface of the highway and in so much of the subjacent land and superjacent air-space as is required for the discharge of its statutory duties (see *Coverdale* v. *Charlton* (1878) 4 Q.B.D. 104, 118, 121, 126; *Foley's Charity Trustees* v. *Dudley Corpn.* [1910] 1 K.B. 317, 322; *Tithe Redemption Commission* v. *Runcorn U.D.C.* [1954] Ch. 383, 398; *Wiltshire County Council* v. *Frazer* (1984) 47 P. & C.R. 69, 72; Highways Act 1980, s. 263. See also *Muswellbrook Coal Co. Ltd.* v. *Minister for Mineral Resources and Energy* (1986) 6 N.S.W.L.R. 654, 657G–658A.

[40] See *e.g. Cox* v. *Colossal Cavern Co.*, 276 S.W. 540, 542f. (1925) (underground cavern); *Metropolitan Railway Co.* v. *Fowler* [1893] A.C. 416, 422 (tunnel); *Grigsby* v. *Melville* [1974] 1 W.L.R. 80, 83D–E (cellar); *Williams* v. *Usherwood* (1981) 45 P. & C.R. 235, 253 (minerals).

[41] That there may be a distinct fee simple estate in standing timber alone has been recognised since *Herlakenden's Case* (1589) 4 Co. Rep. 62a, 63b, 76 E.R. 1025, 1029f. See also *Liford's Case* (1614) 11 Co. Rep. 46b, 49a, 77 E.R. 1206, 1211; *Eastern Construction Co. Ltd.* v. *National Trust Co. Ltd.* [1914] A.C. 197, 208; *Southwestern Lumber Co.* v. *Evans* 275 S.W. 1078, 1082 (1925); *Commonwealth of Australia* v. *New South Wales* (1923) 33 C.L.R. 1, 34.

may catch even the lawyer slightly unawares. This is the initially implausible notion that, as an issue of strict definition, the term "land" is quite capable of including a cubic space of lower stratum air which is separate from the physical solum. From this there follows the seemingly improbable idea that a fee simple estate (or even a term of years[42]) can exist literally in thin air, a proposition which neatly gives the lie to any assumption that land is necessarily a tangible resource. A three-dimensional quantum of airspace can exist as an "independent unit of real property".[43] Impeccable case law authority confirms that such airspace can be conveyed in fee simple;[44] it can be leased;[45] it can be subdivided;[46] and it can even be subjected to land taxes.[47] So there you are: I can sell you thin air and, like it or not, you have to agree that there has been a transfer of property.

II. Visual Trespass

It is perhaps just as well that we accepted earlier that property is not a "thing". When I sell you a quantum of airspace the whole point is that—apart from molecules of thin air—there is absolutely *nothing* there. (Indeed I would be in breach of my agreement with you if it were otherwise.) The key is, of course, that I have transferred to you not a thing but a "bundle of rights", and it is the "bundle of rights" that comprises the "property". But what are the rights in the property bundle? Or, more accurately, wherein lies the "property" character of the rights in the bundle? What constitutes the "propertiness" of "property"?

One possible approach to this question runs as follows. Absent some legal disposition or resumption the landowner of course owns the fee simple estate in his lower stratum airspace. His various rights in this quantum of thin air merit investigation, but let us concentrate our attention specifically on the subject of abstract or non-corporeal incursion into this airspace. Has the owner any right, for instance, to resist merely *visual* intrusion into his airspace? Here, in effect, we

[42] *Re Trizek Manitoba Ltd. and City Assessor for the City of Winnipeg* (1986) 25 D.L.R. (4th) 444, 452.

[43] *Macht* v. *Department of Assessments of Baltimore City*, 296 A.2d 162, 168 (1972); *Re Trizek Manitoba Ltd. and City Assessor for the City of Winnipeg* (1986) 25 D.L.R. (4th) 444, 450.

[44] *Reilly* v. *Booth* (1890) 44 Ch.D. 12, 23 *per* Cotton L.J., 26f. *per* Lopes L.J.

[45] *Macht* v. *Department of Assessments of Baltimore City*, 296 A.2d 162, 168 (1972); *Re Trizek Manitoba Ltd. and City Assessor for the City of Winnipeg* (1986) 25 D.L.R. (4th) 444, 452.

[46] *Bursill Enterprises Pty. Ltd.* v. *Berger Bros Trading Co. Pty. Ltd.* (1971) 124 C.L.R. 73, 91 *per* Windeyer J.; *Ratto* v. *Trifid Pty. Ltd.* [1987] W.A.R. 237, 255 *per* Brinsden J.

[47] *Re Trizek Manitoba Ltd. and City Assessor for the City of Winnipeg* (1986) 25 D.L.R. (4th) 444.

are questioning the legal plausibility of trespass without entry.[48] Can I, the fee simple owner of land, claim any legal remedy merely on the ground that you, without physically entering my premises, invade my privacy by visual penetration of my airspace? Does such intrusion[49] detract from the sum total of my property rights? Does it, we might say, take away any of my "property"? In short, does the intrusion have any proprietary impact[50] or register?

Although historically there has been doubt,[51] the generally accepted conclusion can be traced back to the statement of Lord Camden C.J. in *Entick* v. *Carrington*[52] that "the eye cannot by the laws of England be guilty of a trespass". There is no common law tort of invasion of privacy,[53] and as yet in England[54] no general right of privacy exists in statutory form.[55] Just as the law of easements does

[48] See *e.g.* P.H. Winfield, "Privacy" (1931) 47 L.Q.R. 23, 24ff. Compare cases where a complaint of trespass was successfully brought against a defendant standing on a highway which was part of the land belonging to the plaintiff (*Harrison* v. *Duke of Rutland* [1893] 1 Q.B. 142, 146ff.; *Hickman* v. *Maisey* [1900] 1 Q.B. 752, 755ff.).

[49] If intrusion it be, for the real question may be whether for legal purposes this situation is correctly analysed as merely one in which light from persons or objects on the land overlooked travels to the retina of the viewer (see *Bathurst City Council* v. *Saban* (1985) 2 N.S.W.L.R. 704, 706B *per* Young J.).

[50] It is significant that, at least in the early English and American case law, claims of privacy were discussed and decided in proprietary or quasi-proprietary terms. See *Pope* v. *Curl* (1741) 2 Atk. 342, 26 E.R. 608; *Denis* v. *Leclerc* (1811) 1 Mart., O.S., (La.) 297, 5 Am. Dec. 712, 714ff.; *Hamilton* v. *Lumbermen's Mutual Casualty Co.*, 82 So.2d 61, 63f. (1955); *Love* v. *Southern Bell Telephone and Telegraph Co.*, 263 So.2d 460, 465f. (1972), affd. 266 So.2d 429 (1972).

[51] See *e.g. Cherrington* v. *Abney* (1709) 2 Vern. 646, 23 E.R. 1022 ("privacy is valuable"). See also P.H. Winfield, (1931) 47 L.Q.R. 23, 28.

[52] (1765) 19 Howell's State Trials 1029, 1066.

[53] *Malone* v. *Metropolitan Police Commissioner* [1979] Ch. 344, 357F *per* Megarry V.-C. See also *Clerk and Lindsell on Torts*, 16th ed. (London 1989), paras. 1–45, 24–66; H. Street, *The Law of Torts*, 8th ed. by M. Brazier (London 1988), pp. 153, 476; *Halsbury's Laws of England*, 4th ed., vol. 8, p. 557 (para. 843). The classic argument for legal recognition of a general right of privacy is still that of S.D. Warren and L.D. Brandeis, "The Right to Privacy" 4 Harv. L. Rev. 193 (1890–91).

[54] Compare section 652B of the American Restatement of Torts (Second), which provides that "[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person" (*Restatement of the Law, Second: Torts 2d.* (St. Paul, Minn. 1977), vol. 3, p. 378ff.). As was indicated in *N.O.C., Inc.* v. *Schaefer*, 484 A.2d 729, 731 (1984), the case law demonstrates that this form of liability requires "a balance test: social need is to be weighed against the individual's right to privacy". In *N.O.C., Inc.* v. *Schaefer*, the Superior Court of New Jersey refused to impose liability on a defendant who had exercised surveillance of the neighbouring plaintiff's hazardous waste facility by means of systematic observation of its operations from a position in a "tree fort" in her own backyard. The Court held that the plaintiff's privacy interests were here outweighed by the defendant's "legitimate interest" in protecting herself and her community, by vigilant monitoring, against hazardous waste violations by the plaintiff. On the delimitation of "legitimate" or "justifiable" expectations of privacy under the Fourth Amendment to the United States Constitution, see *Katz* v. *United States*, 389 U.S. 347 (1967), 360f., 19 L.Ed.2d 576, 587f. *per* Harlan J; *Smith* v. *Maryland*, 442 U.S. 735, 740f., 61 L.Ed.2d 220, 226f. (1979).

[55] In 1972 the Younger Committee decided by a majority not to recommend the creation of a general right of privacy (see *Report of the Committee on Privacy*, Cmnd. 5012, paras. 33ff., 661ff.). The Committee did, however, urge that surreptitious surveillance by technical device should give rise, in certain circumstances, to both criminal and civil liability (paras. 53, 562ff.). In some jurisdictions a tort of violation of privacy has been created by statute, *e.g.* Privacy Act (R.S.B.C. 1979, c. 336), s.1(1). See *Silber* v. *British Columbia Broadcasting System Ltd.* (1986)

not protect any right to a good view or prospect,[56] there is likewise no easement of indefinite privacy.[57] There is, in general, no common law right to resist having one's land and one's activities on that land overlooked by one's neighbours or indeed by others.[58] There are, of course, certain exceptional circumstances in which the act of overlooking may constitute a civil or criminal wrong. A common law nuisance may be committed where a defendant, by "watching and besetting" the plaintiff's home, has sought to coerce the plaintiff to take action (such as a strike of labour) in which he would not otherwise have participated.[59] It seems, moreover, that a breach of the peace may be committed where the act of "peeping in through a slit in the curtains" of a dwelling-house during the hours of darkness "allows the vision to penetrate into a lighted room with the hope of seeing what female modesty will properly desire to be unobserved by the public".[60]

Historically the forum in which issues of visual invasion were most keenly debated was provided by the surge of 19th and early 20th century litigation on rights of light and the competing interests presented by emerging forms of urban and technological development. The courts were not unwilling to recognise that the "comparative privacy" of land might be "destroyed" and its value "diminished" by reason of a neighbouring building development.[61] Nevertheless the courts disclaimed that the mere fact of being overlooked could constitute any justiciable wrong.[62] No *legal* remedy was available for

25 D.L.R. (4th) 345, 349. Modern French law even attaches criminal liability to certain kinds of invasion of privacy (*Code pénal*, art. 368). See note 78, *post*.

[56] *William Aldred's Case* (1610) 9 Co. Rep. 57b, 58b, 77 E.R. 816, 821.

[57] *Browne* v. *Flower* [1911] 1 Ch. 219, 225. See, however, P.H. Winfield, (1931) 47 L.Q.R. 23, 29f., for reference to the possibility which existed in British India that, in virtue of local custom, a landowner might acquire an easement of privacy pursuant to the Indian Easements Act 1882, s. 18.

[58] *In re Penny and the South Eastern Railway Co.* (1857) 7 E. & B. 660, 669ff., 119 E.R. 1390, 1393f. See also *Report of the Committee on Privacy*, Cmnd. 5012 (1972), para. 392. It seems that in the different cultural climate of certain parts of British India during the 19th century customary law intervened to prevent the overlooking of land where otherwise the privacy and seclusion of *parda-nashin* women would have been threatened. See *Gokal Prasad* v. *Radho* (1888) I.L.R. 10 Allahabad 358, 385ff. *per* Edge C.J.; C.S. Kenny, *Cases on the English Law of Tort*, 5th ed. (Cambridge 1928), p. 367; P.H. Winfield, (1931) 47 L.Q.R. 23, 29.

[59] See *e.g. J. Lyons & Sons* v. *Wilkins* [1899] 1 Ch. 255, 267 *per* Lindley M.R., 271f. *per* Chitty L.J., 276 *per* Vaughan Williams L.J.; *Ward Locke & Co. (Ltd.)* v. *Operative Printers' Assistants' Society* (1906) 22 T.L.R. 327, 328ff. In some jurisdictions watching and besetting may also be a criminal offence (see *e.g.* Crimes Act 1900 (N.S.W.), s. 545B).

[60] This certainly appears to be the law in Scotland (*Raffaelli* v. *Heatly* 1949 J.C. 101, 104f. *per* Lord Mackay. See also *Butcher* v. *Jessop* 1989 S.L.T. 593, 600 *per* Lord Murray). Compare, however, *Frey* v. *Fedoruk* [1950] S.C.R. 517, 520, 525ff. (Supreme Court of Canada), reversing the majority decision of the British Columbia Court of Appeal (1949) 95 Can. C.C. 206. In England, under the Justices of the Peace Act 1361, the peeping Tom can be bound over to keep the peace or to be of good behaviour (see *Stone's Justices' Manual 1990*, 122nd ed. (London 1990), vol. 1, paras. 3-131ff.). The peeping Tom may also be guilty of a criminal assault and/or an offence under the Vagrancy Act 1824, s. 4 (see *Smith* v. *Chief Superintendent, Woking Police Station* (1983) 76 Cr.App.R. 234, 237f.).

[61] *Johnson* v. *Wyatt* (1863) 2 De G.J. & S. 18, 27, 46 E.R. 281, 284 *per* Knight Bruce L.J.

[62] *Tapling* v. *Jones* (1865) 11 H.L.C. 290, 317, 11 E.R. 1344, 1355 *per* Lord Chelmsford. The

"invasion of privacy by opening windows".[63] "No doubt", said Kindersley V.-C. in 1861,[64] "the owner of a house would prefer that a neighbour should not have the right of looking into his windows or yard", but no court would interfere.[65] Remedy lay at best in the unsympathetic advice that the person overlooked might, at any time before the effluxion of the prescription period, obstruct the neighbour's sightlines by erecting a fence or some other physical barrier.[66]

Thus was maintained the laissez-faire dogma that each might "use his own land by building on it as he thinks most to his interest".[67] After all, as Lord Westbury L.C. noted astutely in *Tapling* v. *Jones*,[68] the new building might well be a "manufactory". The Lord Chancellor was here addressing, as a hypothetical, the problem arising where A was the owner of beautiful gardens and pleasure grounds and B, the adjoining landowner, proceeded to build a "manufactory with a hundred windows" overlooking those pleasure grounds. In such circumstances A had no action against B; but the Lord Chancellor doubtless appreciated the irony that, in the name of the god of industrial expansion, the courts were not prepared to avert the oafish gaze of the new urban proletariat from intruding upon members of the leisured class relaxing in their pleasure garden below.

Very much the same approach prevailed in the 19th century to preclude compensation for injurious affection where the claimant's land was overlooked by a newly constructed railway.[69] As one judge

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same general conclusion emerges from the American case law (see *Cohen* v. *Perrino*, 50 A.2d 348, 349 (1947); 2 C.J.S. *Adjoining Landowners*, §70).

[63] *Tapling* v. *Jones* (1865) 11 H.L.C. 290, 305, 11 E.R. 1344, 1350 *per* Lord Westbury L.C. See also *Cross* v. *Lewis* (1824) 2 B. & C. 686, 688 ff., 107 E.R. 538, 539f.

[64] *Turner* v. *Spooner* (1861) 30 L.J. Ch. 801, 803.

[65] This conclusion was echoed more recently in the Younger Committee's statement that "[i]t is not trespass to watch your neighbour's pursuits in his garden as long as you do not enter his land, even if you employ binoculars to improve your view" (see *Report of the Committee on Privacy*, Cmnd. 5012 (1972), Appendix 1, para. 12). Tort lawyers of a previous generation would have been aware of the unreported case in 1904 of the Balham dentist who failed to obtain any remedy against his neighbours, where those neighbours had carefully positioned large mirrors in such a way as to be able to observe operations in his surgery. See C.S. Kenny, *op. cit.*, p. 367; *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor* (1937) 58 C.L.R. 479, 504 *per* Rich J., 520f. *per* Evatt J.

[66] *Chandler* v. *Thompson* (1811) 3 Camp. 80, 81, 170 E.R. 1312, 1313 *per* Le Blanc J.; *Cross* v. *Lewis* (1824) 2 B. & C. 686, 689, 107 E.R. 538, 539 *per* Bayley J.; *Tapling* v. *Jones* (1865) 11 H.L.C. 290, 317, 11 E.R. 1344, 1355 *per* Lord Chelmsford. Over a century later the Younger Committee could advocate no better remedy for the same problem. The Committee did not think "that the practices of neighbours . . . are so new or offensive or have so changed in character as to justify any change in the law" (*Report of the Committee on Privacy*, Cmnd. 5012 (1972), paras. 398, 553ff.).

[67] *Tapling* v. *Jones* (1865) 11 H.L.C. 290, 311, 11 E.R. 1344, 1353 *per* Lord Cranworth. See also *Harris* v. *De Pinna* (1886) 33 Ch.D. 238, 260 *per* Cotton L.J.

[68] (1865) 11 H.L.C. 290, 305, 11 E.R. 1344, 1350.

[69] *In re Penny and the South Eastern Railway Co.* (1857) 7 E. & B. 660, 669ff., 119 E.R. 1390, 1393ff. Compensation for loss of privacy was likewise denied where the plaintiff's land was overlooked by a newly constructed public roadway (see *Duke of Buccleuch* v. *Metropolitan Board of Works* (1870) L.R. 5 Ex. 221, 237 *per* Blackburn J.)

said, "[t]he line must be drawn somewhere".[70] The "comfort and value" of the property overlooked might have been diminished, but it was "impossible to know where such claims would end . . ."[71] When measured against the competing merits of economic development, the claim to extreme (and what may have seemed self-indulgent) forms of personal privacy came off very much second best.[72] (It is, incidentally, at least questionable how relevant the 19th and 20th century case law is to modern problems of visual trespass. The competing concerns of the present era may not involve a simple confrontation between individual comfort and economic progress but may touch more heavily upon the juxtaposed claims of the individual and the state[73] or of rival multinational corporate conglomerates.)

If, however, it is no trespass just to look into private airspace, the question arises whether it is trespass to make a permanent record of what one sees. The next contributor to the law of visual trespass is, of course, the camera. There is much case law, particularly in the United States, relating to the extent of the privacy rights enjoyed by the subjects of the photographer's intrusive focus.[74] Our own immediate focus is upon photographic invasion of premises *ab extra*. In *Bathurst City Council* v. *Saban*,[75] for example, the plaintiff City

[70] *In re Penny and the South Eastern Railway Co.* (1857) 7 E. & B. 660, 669, 119 E.R. 1390, 1394 *per* Wightman J.

[71] *In re Penny and the South Eastern Railway Co.* (1857) 7 E. & B. 660, 671, 119 E.R. 1390, 1394 *per* Crompton J.

[72] It is noteworthy that 19th century courts were similarly unsympathetic to other claims to adventitious benefit which, if conceded, would have curtailed the scope of urban development within the vicinity. See *e.g. Webb* v. *Bird* (1861) 10 C.B. (N.S.) 268, 284, 142 E.R. 455, 461 (affd. (1863) 13 C.B. (N.S.) 841, 143 E.R. 332), where Erle C.J. rejected a claim of unobstructed access to a current of wind for a windmill on the ground that such a claim "would operate as a prohibition to a most formidable extent to the owners of the adjoining lands—especially in the neghbourhood [sic] of a growing town".

[73] It is not irrelevant, however, that even in those jurisdictions most solicitous of constitutional rights of privacy the courts have denied that any unlawful invasion of privacy occurs where law enforcement officers have been able to observe evidence of criminal activity by means of inspection or surveillance from a position *outside* the premises of the defendant. Visual penetration of airspace has not, in itself, vitiated the detection of crime. See *e.g. United States* v. *Lee*, 274 U.S. 559, 563, 71 L.ed. 1202, 1204 (1927); *Fullbright* v. *United States*, 392 F.2d 432, 434f. (1968), cert. denied 393 U.S. 830, 21 L.Ed.2d 101 (1968).

[74] See generally 86 A.L.R.3d 374. American courts have often restrained the commercial publication of photographs of persons unwittingly caught in embarrassing poses. Thus the courts ruled against the surreptitious photography of a woman caught in an unintended Marilyn Monroe-type pose above an air vent. See *Daily Times Democrat* v. *Graham*, 162 So.2d 474 (1964), but compare *Ann-Margret* v. *High Society Magazine, Inc.*, 498 F. Supp. 401 (1980); *Shields* v. *Gross*, 448 N.E.2d 108 (1983). Conversely—though query—the courts refused to enjoin publication of a photograph of a young couple canoodling in an ice cream parlour, on the ground that by their unabashed self-exposure the couple had voluntarily placed their conduct in the public domain and had thus waived any claim of privacy (*Gill* v. *Hearst Publishing Co.*, 253 P.2d 441 (1953)). See also *Neff* v. *Time, Inc.*, 406 F.Supp. 858, 860ff. (1976). The concern of the present paper is not, however, with such questions. Nor is it with the ever expanding case law about investigative television journalists who, accompanied by camera crews, intrude upon the business offices of unsavoury or controversial commercial outfits (see *e.g. Lincoln Hunt Australia Pty. Ltd.* v. *Willesee* (1986) 4 N.S.W.L.R. 457; *Silber* v. *British Columbia Broadcasting System Ltd.* (1986) 25 D.L.R. (4th) 345; *Emcorp Pty. Ltd.* v. *Australian Broadcasting Corporation* [1988] 2 Qd. R. 169).

[75] (1985) 2 N.S.W.L.R. 704.

Council alleged that the defendant homeowner had committed both a nuisance and a breach of zoning regulations by piling up scrap metal in his domestic backyard. The plaintiff sought to tender evidence of the unseemliness of the backyard in the form of still photographs and a video film taken by one of the Council's officers from positions either in the public street outside or in the adjoining backyards of vengeful (and therefore on this occasion helpful) neighbours. Young J. overruled the defendant's objections to this evidence, holding that, no physical entry being involved, the actions of the plaintiff's officer had not amounted to "any trespass, either to land or to airspace".[76] In Young J.'s view, there is "at least in the ordinary case"[77] no tortious conduct in taking a photograph of someone else or of someone else's property without their consent.[78] In this respect Young J. simply echoed, in modern terms, the dictum of A.L. Smith L.J. in 1900 that no trespass to land would arise where a man took a sketch of a house from the highway.[79]

All of which draws us inescapably to the pivotal case of *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor*.[80] Even after more than half a century this decision of the High Court of Australia still holds an uncanny fascination for anyone who confesses an interest in the legal phenomenon of property. The case embodies

[76] (1985) 2 N.S.W.L.R. 704, 706B. See also *Aisenson* v. *American Broadcasting Co., Inc.*, 269 Cal. Rptr. 379, 388 (1990). There is, of course, a clear distinction between this situation and one in which the defendant's visual intrusion into the plaintiff's privacy is achieved by means of unconsented physical entry upon the plaintiff's premises (see *e.g. Souder* v. *Pendleton Detectives, Inc.*, 88 So.2d 716, 718 (1956); but compare *Figured* v. *Paralegal Technical Services, Inc.*, 555 A.2d 663 (1989)). See also "Investigations and Surveillance, Shadowing and Trailing, as Violations of Right of Privacy" 13 A.L.R.3d 1025.

[77] The case of the omnipresent and intrusive *paparazzo* may not, for this purpose, constitute an ordinary case. See *Galella* v. *Onassis* 487 F.2d 986, 998 (1973), where an unusually persistent photographer was restrained from making any approach within a distance of 25 feet of the widow of a former President. The *paparazzo* was likewise prohibited by injunction from blocking her movement in public places or from engaging in any conduct likely to alarm or endanger her, but the court declined otherwise to inhibit his freedom to photograph a celebrity. It is clear that the basis of the complaint in this case related more heavily to assault and invasion of privacy than to any allegation of visual trespass.

[78] The law of the United States does not generally recognise the photographer's immunity in such broad terms, confirming only that it is, in general, no invasion of privacy to take a photograph of a person in a public place (see *Forster* v. *Manchester*, 189 A.2d 147, 150f. (1963)). French law goes even further and provides that it is a criminal violation of a person's privacy (*atteinte à l'intimité de la vie privée*) to photograph that person without his consent while he is in a private place (*dans un lieu privé*) (*Code pénal*, art. 368). See, *e.g.*, the 5,000 franc penalty recently imposed where a complainant alleged that, while standing behind a closed window in his own apartment, he had been involuntarily photographed through a telephoto lens operated from an elevated position in a neighbouring building. (The photographs were subsequently published in *Paris Match*.) See *Cour de Cassation, Chambre Criminelle*, 25 April 1989: No. 86-93.632 (Lexis Transcript). Compare *State* v. *Martin*, 658 P.2d 1024, 1026f. (1983); *Snakenberg* v. *Hartford Casualty Insurance Company, Inc.*, 383 S.E.2d 2, 5ff. (1989).

[79] *Hickman* v. *Maisey* [1900] 1 Q.B. 752, 756. American law likewise seems to acknowledge that "whatever the public may see from a public place cannot be private" (see *Bisbee* v. *John C. Conover Agency, Inc.*, 452 A.2d 689, 691 (1982); *N.O.C., Inc.* v. *Schaefer*, 484 A.2d 729, 732, n.1 (1984)).

[80] (1937) 58 C.L.R. 479.

one of the last great problems of property law and reverberates with a significance which has outlived its particular facts. With justification it may be said that the concept of property cannot be entirely satisfactorily explained without accounting, in some way or other, for the ruling in *Victoria Park Racing*.

As is well known, the plaintiff company in *Victoria Park Racing* owned a racecourse on which it frequently held what Rich J. was to describe as "competitions in the comparative merits of racehorses".[81] The ground was enclosed by a fence and the plaintiff charged members of the public for admission. One of the defendants, Taylor, owned a cottage opposite the racecourse and on his own land he erected a raised wooden platform. From this vantage point he commanded a view of the entire racecourse including, significantly, the boards and semaphores by means of which starting prices were displayed. He was also clearly within earshot of other information announced to members of the race-going public within the ground. Taylor then arranged with another of the defendants, the Commonwealth Broadcasting Corporation, that a commentator should, from a position on Taylor's platform, broadcast live radio reports on the races to listeners in the Sydney area. The instant popularity of these transmissions stimulated an illicit off-course betting industry in Sydney, and there was unchallenged evidence that punters who would otherwise have attended the race meetings in person now preferred to follow those proceedings either from the comfort of their own homes or, even better, from their local hostelry.[82] The plaintiff, perturbed by the catastrophic loss of business, sued for an injunction on the footing of nuisance and breach of copyright. (It was common ground that the mere construction and use of the raised platform constituted no breach of building or zoning regulations or of the betting and gaming legislation or indeed of the regulations governing broadcasting.[83])

By the narrowest of majorities the High Court of Australia decided that the facts disclosed no wrong known to the law.[84] Latham C.J. relied heavily on the 19th century cases on "overlooking" of property, and insisted that "[a]ny person is entitled to look over the plaintiff's fences and to see what goes on in the plaintiff's land". If the plaintiff desired to prevent this, the plaintiff could erect a higher fence; the law would not by means of injunction "in effect erect

[81] (1937) 58 C.L.R. 479, 502.
[82] (1937) 58 C.L.R. 479, 499f. *per* Rich J., 523 *per* McTiernan J.
[83] (1937) 58 C.L.R. 479, 495 *per* Latham C.J.
[84] The Judicial Committee of the Privy Council refused leave to appeal: *The Times*, 21 January 1938 (see G.W. Paton, (1938) 54 L.Q.R. 319). A conclusion similar to that adopted in *Victoria Park Racing* had been reached, again by majority decision, in an earlier American case. See *Detroit Base-ball Club* v. *Deppert* (1886) 61 Mich. 63, 69, 1 Am. St. Rep. 566, 569, 27 N.W. 856. See also *N.O.C., Inc.* v. *Schaefer*, 484 A.2d 729 (1984); 1 *Am.Jur.*2d, *Adjoining Landowners*, §19 (p.704).

fences which the plaintiff is not prepared to provide".[85] In the meantime, and notwithstanding the defendants' activities, the racecourse remained "as suitable as ever it was for use as a racecourse".[86] Latham C.J. also rejected the allegation that broadcasting the numbers of the placings as notified on boards within the ground constituted a breach of copyright. Dixon and McTiernan JJ. entered strong supporting judgments in favour of the Chief Justice's conclusions.

It was left to Rich and Evatt JJ. to argue in the minority that a justiciable wrong had been inflicted upon the plaintiff company and that this wrong was remediable in the law of nuisance. Rich J. thought that the right of view or observation from adjacent land had never been "absolute . . . and exercisable at all hazards notwithstanding its destructive effect upon the enjoyment of the land overlooked".[87] Evatt J. agreed and, seeing the matter as one involving unfair commercial competition by the defendants, was minded to award damages to the plaintiff even though no damages claim had in fact been made.[88]

III. The "Propertiness" of Property

Perhaps the lasting significance of *Victoria Park Racing* lies in the fact that the conflict between the majority and minority views in this case throws up critical clues to the identification of the "propertiness" of property. True it is that much of the discussion in *Victoria Park Racing* was conducted obliquely in terms of the law of nuisance. But the central issue—so central that it lay largely unspoken—was whether the defendants had taken anything that might be regarded as the plaintiff's "property". (We must always be ready to hear the resonance of property in the dialogue of trespass and nuisance.[89])

There can be no doubt—and there was certainly none in the High Court—that in *Victoria Park Racing* the defendants had exploited a competitive commercial opportunity, in circumstances of no great credit to themselves,[90] in order to profit from a market

[85] (1937) 58 C.L.R. 479, 494 *per* Latham C.J. See also 507 *per* Dixon J. ("An occupier of land is at liberty to exclude his neighbour's view by any physical means he can adopt").

[86] (1937) 58 C.L.R. 479, 493. See also 523 *per* McTiernan J.

[87] (1937) 58 C.L.R. 479, 504.

[88] (1937) 58 C.L.R. 479, 522.

[89] In perhaps the most complex of all the *Victoria Park Racing* judgments, Evatt J. described the law of nuisance as "an extension of the idea of trespass into the field that fringes property" ((1937) 58 C.L.R. 479, 513, citing T.A. Street, *Foundations of Legal Liability (Theory and Principles of Tort)*, (Northport, Long Island, N.Y. 1906), vol. 1, p. 211).

[90] In this respect the majority and the minority in the High Court were at one. McTiernan J. was prepared (at 526) to condemn the user of Taylor's land as "quite impudent", while Evatt J. (at 522) considered the defendants guilty of "almost reckless disregard . . . of the ordinary decencies and conventions which must be observed as between neighbours."

of horseracing enthusiasts who would otherwise have paid a lot of money to the plaintiff. In this sense the defendants had clearly taken something from the plaintiff—but had they taken the plaintiff's *property*? Were the defendants guilty, as Dixon J. put it,[91] of "misappropriating or abstracting something which the plaintiff has created and alone is entitled to turn to value"? In answering this question the majority and minority in the High Court were divided by fundamentally differing views of the phenomenon of "property".

The minority judges clearly believed that there had been a misappropriation. Rich J. spoke of each defendant as "appropriating . . . part of the profitable enjoyment of the plaintiff's land to his own commercial ends . . ."[92] In his view the conduct complained of had wrongfully diverted a "legitimate source of profit from [the plaintiff's] business into the pockets of the defendants".[93] Evatt J.'s judgment echoed just as strongly the language of misappropriation. Evatt J. thought it "an extreme application of the English cases to say that because *some* overlooking is permissible, all overlooking is necessarily lawful".[94] Here the overlooking engaged in by the defendants had enabled the broadcasting company "to reap where it had not sown". The defendants stood condemned of an unfair "appropriation" or "borrowing" of the plaintiff's investment of capital and labour.[95] This had in turn enabled the listening public to "appropriate to themselves 'the harvest of those who have sown'".[96]

By contrast the majority judges in *Victoria Park Racing* denied, each in his different way, that the case involved any relevant misappropriation: the plaintiff had suffered no deprivation of any vested legal entitlement. Freedom from view or inspection, said Dixon J., although it may be a natural or acquired physical characteristic of a site, is not a legally protected interest.[97] McTiernan J. stressed that the plaintiff had no legal right to the continued operation of its enterprise in circumstances conducive to profit: the plaintiff "took the risk of a change in those circumstances".[98] Dixon J., citing the famous dissent of Justice Brandeis in *International News Service* v. *Associated Press*,[99] confirmed the absence of

[91] (1937) 58 C.L.R. 479, 509.
[92] (1937) 58 C.L.R. 479, 501.
[93] Evatt J. similarly saw the defendants as having interfered with the plaintiff's "profitable use of its land" in order to "divert a material portion of the profit from those who have earned it to those who have not" ((1937) 58 C.L.R. 479, 518, citing *International News Service* v. *Associated Press*, 248 U.S. 215 (1918), 240, 63 L.ed. 211, 220 *per* Pitney J.)
[94] (1937) 58 C.L.R. 479, 518.
[95] (1937) 58 C.L.R. 479, 514.
[96] (1937) 58 C.L.R. 479, 518.
[97] (1937) 58 C.L.R. 479, 508.
[98] (1937) 58 C.L.R. 479, 525.
[99] 248 U.S. 215, 248ff., 63 L.ed. 211, 221ff (1918). In *International News Service* v. *Associated*

any general cause of action based on allegedly unfair competition.[1]

For property lawyers by far the most interesting feature of *Victoria Park Racing* is the High Court majority's unanimous rejection of the plaintiff's claim that there could be "property" or even "quasi-property" in a spectacle.[2] Latham C.J. declared in his usual acerbic style that he could attach no precise meaning to the phrase "property in a spectacle", and that the phrase functioned if at all only as an extra-legal metaphor. A spectacle, he said, "cannot be 'owned' in any ordinary sense of that word".[3]

At this point, of course, we are again confronted by a stern refusal to propertise a particular resource—always an occasion of some moment in the jurisprudence of property. The enduring significance of *Victoria Park Racing* is that in this decision we are offered a rare opportunity to learn something of the tacit rules which govern the propertisation of resources.

Unpropertised resources remain in the commons, available for use and exploitation by all.[4] The primordial principle which emerges from the majority judgments in *Victoria Park Racing* is that a resource can be propertised only if it is—to use another ugly but effective word—"excludable". A resource is "excludable" only if it is feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent in the resource.[5] A classic example of a non-excludable resource is the

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Press, the Supreme Court of the United States handed down a highly controversial majority ruling that a news gatherer may claim "quasi property" in uncopyrighted news matter (*post*, note 2).

[1] (1937) 58 C.L.R. 479, 509f. The High Court of Australia has more recently expressed its approval of the decision in *Victoria Park Racing* (see *Moorgate Tobacco Co. Ltd.* v. *Philip Morris Ltd.* [No. 2] (1984) 156 C.L.R. 414, 444f. *per* Deane J.).

[2] The plaintiff had argued strongly that a "valuable proprietary right" was constituted by the plaintiff's "power to exclude the public generally from the right to see whatever may be produced on [the plaintiff's] land by way of spectacle" ((1937) 58 C.L.R. 479, 483). The plaintiff's assertion of "property" or "quasi-property" in the relevant spectacle drew much of its intellectual support from the majority decision of the United States Supreme Court in *International News Service* v. *Associated Press*, 248 U.S. 215, 236ff., 63 L.ed. 211, 219ff. (1918).

[3] (1937) 58 C.L.R. 479, 496f. For a wider view of "property" in this context, see D.F. Libling, "The Concept of Property: Property in Intangibles" (1978) 94 L.Q.R. 103, 106ff.

[4] The present paper uses the term "commons" as inclusive of all unpropertised resources, although it is not inconsistent that some parts of the "commons" may be subjected to varying degrees of public (as distinct from private) regulation. There may legitimately be some debate about the precise terminology used to describe the residuum of resources which are not subjected to the regime of private property. For the purpose of this paper, however, it matters not whether unpropertised resources are said to remain in the "commons" or to constitute "public goods", "inherent public goods", "collective goods", or "communal goods". Such variants of language may reflect the fact that certain unpropertised resources (*e.g.* air traffic routes or tidal waterways) can still be subject to some form of regulatory regime directed towards the public interest (see *e.g.* C.M. Rose, "The Comedy of the Commons: Custom, Commerce, and Inherently Public Property" 53 U. Chi. L. Rev. 711 (1986); T.J. Bonyhady, *The Law of the Countryside* (Abingdon 1987), p.253ff.). Some degree of public administration is not incompatible with a "commons" classification (and may even in some cases be considered as creating a "public property" vested in the state). The majority of unpropertised resources in the commons remain, however, entirely free of any form of regulation.

[5] The terminology of "excludability" delimits the scope of "property" in a somewhat different way

beam of light thrown out by a lighthouse.[6] To be sure, the lighthouse-keeper may control access to the benefits of the light by the simple action or inaction of never switching on the light. But if the light is allowed to operate at all, it is necessarily on terms that its benefits are distributed indiscriminately. The light cannot be artificially confined to a subset of the seafarers within its broad sweep. In this sense the beam of light—if it exists at all—is non-excludable, and non-excludable resources are retained in the commons. Somebody may have "property" in the lighthouse, but nobody can have "property" in light.

The notion of excludability thus imports a hidden structure of rules which critically define the legal phenomenon of private property. Excludability is, however, a more complex idea than is indicated by the example of the lighthouse. A resource may remain non-excludable for reasons which go far beyond the essentially factual and distributional contingencies which govern a beam of light. It is here that *Victoria Park Racing* comes into its own, for quietly but persistently the majority judgments press home the message that a resource may be non-excludable for any or all of three different sorts of reason. These three bases may broadly be described as physical, legal and moral. A resource cannot be propertised if, on any of these grounds, it lacks the quality of excludability. Non-excludable resources thus lie outside the field of private property; they remain in the commons.

A. Physically Non-excludable Resources

Physical non-excludability arises where it is not possible or reasonably practicable to exclude strangers from access to the benefits of a particular resource in its existing form. The lighthouse example provides quite a good illustration. Likewise for purely physical reasons it was simply unrealistic in *Victoria Park Racing* to attempt a comprehensive exclusion of unauthorised strangers from the benefits of the spectacle provided on the plaintiff's land. The plaintiff could, of course, have sought to regulate or frustrate external visual access by raising its boundary fences.[7] But, as even Evatt J. conceded,[8] the probable response of the defendants would

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from the results achieved by reference to a notion of "commodification" (see *e.g.* M.J. Radin, "Market-Inalienability" 100 Harv. L. Rev. 1849, 1855ff. (1986–87)). The distinction between "commodifiable" and "non-commodifiable" goods seems to be intrinsically related to capacity for sale in the market place, whereas the distinction between "excludable" and "non-excludable" resources, by placing an emphasis upon wider aspects of resource control, comes closer to constituting a test of "property".

[6] See Jeremy Waldron, "Can communal goods be human rights?" (1987) 28 Arch. Europ. Sociol. 296, 304ff.

[7] (1937) 58 C.L.R. 479, 494 *per* Latham C.J.

[8] (1937) 58 C.L.R. 479, 522.

have been "to disfigure further the Taylor bungalow by increasing the height of the broadcasting tower". In this way, "reprisals might go on indefinitely".

Latham C.J. noted, moreover, that the plaintiff's complaint would have been the same in all material particulars if the offending broadcasts had been made from the upper floor of a neighbouring two-storey house or indeed if the racecourse had been visible "by a man standing on high land of which he was not the owner or the occupier".[9] Of course, the thrust of this reasoning can extend almost limitlessly along a continuum of graded fact. The owners of Lords Cricket Ground or Cardiff Arms Park can hardly complain of a misappropriation of property merely because the inhabitants of top-floor flats in adjacent high-rise developments have free visual access to the sporting spectacles provided in their grounds. Ultimately the risk of non-excludable benefit must rest with the plaintiff, and if the plaintiff fails, by such physical means as are at his disposal, to prevent unconsented visual intrusion into his land, the particular resource at stake—the "spectacle"—must be deemed non-excludable.[10] No one can claim "property" in a resource in relation to which it is physically unrealistic to control, consistently over prolonged periods, the access of strangers.[11]

[9] (1937) 58 C.L.R. 479, 495.

[10] There are, of course, other contexts in which the proprietary status of a right is said to depend vitally on the steps taken to exclude third parties from unconsented access. See 63A *Am. Jur.* 2d, *Property*, §5 (p. 234) ("A secret unpatented preparation, formula or process may be the subject of property . . . so long as the inventor or discoverer himself protects it"). Pursuant to section 1(4)(ii) of the Uniform Trade Secrets Act, for instance, a "trade secret" may be protected against misappropriation only if and to the extent that it comprises "information . . . that . . . is the subject of efforts that are reasonable under the circumstances to maintain its secrecy" (14 U.L.A., *Civil Procedural and Remedial Laws* (St Paul, Minn. 1990), p. 438f.). See also *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1002, 81 L.Ed.2d 815, 832 (1984). The relevance of control over the access of strangers is even more intensely evident in Colorado's Uniform Trade Secrets Act (1986, c.63), which provides that "[t]o be a trade secret the owner thereof must have taken measures to prevent the secret from becoming available to persons other than those selected by the owner to have access thereto for limited purposes" (C.R.S. 7–74–102(4)). The Uniform Act provisions have the consequence that the American courts have denied trade secret protection in respect of manufacturing processes where the claimant manufacturer has practised lax security at its plant. See *Electro-Craft Corporation* v. *Controlled Motion, Inc.*, 332 N.W.2d 890, 901f. (1983) (plant had seven unlocked entrances; employees were not required to wear security badges; documents and designs were not kept in central or locked location). See also *Gordon Employment, Inc.* v. *Jewell*, 356 N.W.2d 738, 741 (1984) (client lists kept in unlocked files).

[11] This means that I can still claim "property" in a motor car even though I live in a neighbourhood with a high incidence of car theft. Nor do I lose "property" in the car simply by leaving it momentarily open with the key in the ignition. Neither circumstance in itself indicates that it has become physically unrealistic to exercise long-term control over the access of strangers to the benefits of the resource. (I normally leave the car locked, with the brake on, and perhaps even with the added security of some anti-theft device.) The test of physical excludability is nevertheless one of degree. If I lived in a neighbourhood in which, despite all my efforts, the taking away of cars was not a mere statistical possibility but a virtual inevitability (*i.e.*, to park the car is almost certainly to lose it), the claim to have "property" in a car would soon cease to be meaningful. Physical and moral non-excludability interact, and in such circumstances car "theft" would cease to attract moral censure. The practice of taking cars would come to be

Another illustration of physical non-excludability occurs in an English case which was heavily relied upon in *Victoria Park Racing* by both Dixon and McTiernan JJ.[12] and in *International News Service* v. *Associated Press*[13] by the dissenting Justice Brandeis. *Sports and General Press Agency Ltd.* v. *"Our Dogs" Publishing Co. Ltd*[14] concerned a dog show promoted by a worthy concern, the Ladies' Kennel Association. In effect the Association sold to the plaintiff Press Agency a supposedly exclusive right to photograph events at the dog show. Unhappily, an individual by the apparently fortuitous name of Baskerville bought an admission ticket to the same show and took photographs which he proceeded to publish in the defendant's weekly illustrated journal, "*Our Dogs*". There was no doubt that Baskerville had taken his photographs in stark defiance of advice from the dog show promoters that exclusive photographic rights had already been assigned to the plaintiff. It was clear, however, that whatever view one takes of Baskerville, his conduct constituted on his part no breach of contract with anyone. The plaintiff nevertheless sued for an injunction restraining further publication, only to be denied by Horridge J. and by the Court of Appeal.

In the absence of any contractual breach by Baskerville, the crucial issue was whether, as Horridge J. said, the plaintiff had any "right of property" which the defendant had knowingly infringed. (The promoters themselves were no doubt contractually liable to the plaintiff.) Horridge J. was absolutely clear, however, that the exclusive right of photography which the promoters had purported to assign to the plaintiff was not a "right of property". According to Horridge J., the right could have been a "right of property" in the plaintiff's hands only if, prior to the assignment, it constituted a "right of property" in the hands of the promoters—and this it did not. Why not? Amongst Horridge J.'s reasons (to which we shall shortly return) was the interesting, and for him conclusive, consideration that, whatever rights the promoters had within the venue of the dog show, they could not have impeded a stranger who attempted, "for example from the top of a house, to photograph the show from outside it".[15] The promoters simply did

viewed as neither more nor less remarkable than the benevolent system of communally shared bicycles which, according to legend, used to operate within some ancient university towns. Under this scheme the bicycles (themselves of unknown provenance) were simply used at will and then abandoned at the terminus of such use, ready for the next user. The users were thus merely participants in a regime of shared resources in which private property no longer had any meaning.

[12] (1937) 58 C.L.R. 479, 509f. *per* Dixon J., 527 *per* McTiernan J.

[13] 248 U.S. 215 (1918), 255f., 63 L.ed. 211, 227.

[14] [1916] 2 K.B. 880 (Horridge J.), [1917] 2 K.B. 125 (C.A.).

[15] [1916] 2 K.B. 880, 884.

not have "the sole right to photograph anything inside the show", and thus could not grant exclusive rights of photography "as property".

Horridge J. would doubtless have shuddered at such language, but *we* may say (and *he* almost did) that the spectacle of the dog show failed the test of excludability. It is just unrealistic to imagine that any one of us can definitively or effectively preclude photographic invasion (if we could, from what distance? from satellites in outer space . . . ?). We could all, like Greta Garbo, creep around wrapped up in high-collared coats and low-brimmed hats, but, as Horridge J. himself put it, "no one possesses a right of preventing another person photographing him any more than he has a right of preventing another person giving a description of him, provided the description is not libellous or otherwise wrongful. These rights," he said, "do not exist."

It is important to observe that the test of physical excludability requires careful application. A physically non-excludable resource presents itself only where it is not reasonably practicable to exclude strangers from access to the benefits of that resource *in its existing form*. Ultimately most resources *can* be physically insulated from access by strangers—if only through vast expenditures of money or imagination. It can be argued, for instance, that the plaintiff in *Victoria Park Racing* (as, indeed, the owner of any other open-air venue) might have protected the resource of the sporting spectacle from unconsented visual intrusion through the simple, albeit costly, expedient of constructing a roof or dome over the entire arena.[16]

The limiting factor is, however, that the very process of insulating the resource from access may fundamentally alter the nature of the resource itself. Overhead protection for Victoria

[16] One possible response to such a suggestion places emphasis on the test of *reasonable practicability*. This test plays an important role, for instance, in the protection of trade secrets under the Uniform Trade Secrets Act (*ante*, note 10). Whether the claimant of a trade secret has exercised due diligence in preserving the secrecy of information may turn on the amount of time, expense, effort and risk involved in keeping the relevant information secret (see R.A. Klitzke, "The Uniform Trade Secrets Act" 64 Marquette L. Rev. 277, 279 (1980–81)). American courts have tended to hold that excessive protective measures are not required in defence of a trade secret. In *E.I. duPont deNemours & Co., Inc.* v. *Christopher*, 431 F.2d 1012 (1970), cert. denied 400 U.S. 1024, 27 L.Ed.2d 637 (1971), reh. denied 401 U.S. 976, 28 L.Ed.2d 250 (1971), it was held that aerial photography of the plaintiff's partially built chemical plant had constituted an improper means of discovering the plaintiff's trade secrets. Judge Goldberg ruled (431 F.2d 1012, 1016f.) that "[p]erhaps ordinary fences and roofs must be built to shut out incursive eyes, but we need not require the discoverer of a trade secret to guard against the unanticipated, the undetectable, or the unpreventable methods of espionage now available . . . To require DuPont to put a roof over the unfinished plant to guard its secret would impose an enormous expense to prevent nothing more than a school boy's trick. We introduce here no new or radical ethic since our ethos has never given moral sanction to piracy . . . Reasonable precautions against predatory eyes we may require, but an impenetrable fortress is an unreasonable requirement . . . " (Significantly, the court did not hold that there had been any taking of "property" or that "all information obtained through every optical extension is forbidden", but merely that the improper means of discovery in itself generated a cause of action under Texas law.)

Park was, of course, possible—but only at the cost of converting the disputed resource from an open-air spectacle into an entertainment of a different character. The same point can be put a different way. Given that you want to hold a race meeting under the open sky, it is unquestionably true (but actually irrelevant) that prying eyes can be shut out by holding the event otherwise than under the open sky (*e.g.* under a closed roof). In *Victoria Park Racing* the plaintiff company had probably noticed that its racecourse lacked a roof or astrodome. The plaintiff was doubtless entitled to choose the nature of the resource to be exploited (*i.e.* whether an open-air spectacle or an indoor entertainment), but having made its choice it was no longer entitled to complain about possible, and indeed quite foreseeable, physical consequences contingent on that choice.[17] If you hold a race meeting in an arena surrounded by a low fence, it ought to be perfectly obvious that, given suitable elevation, sighted persons will be able to see over the fence. It is even inferable that the observers will then describe to others what they have seen.[18]

B. Legally Non-excludable Resources

A second species of non-excludability takes the form of *legal non-excludability*. It is frequently the case that a resource is protectible against strangers by legal means, such measures often taking the form of binding contractual stipulation or the adoption of a particular regime of intellectual property. If, however, the plaintiff fails to use such means, where available,[19] to regulate the access

[17] As has been said in the United States in the context of a rather different kind of claim to visual privacy, the claimant "accepts a limited risk of observation as a consequence of the limitations of the physical structure". See *State* v. *Holt*, 630 P.2d 854, 857 (1981).

[18] A remarkably similar approach has been held to be determinative in a different context. Courts in the United States have frequently been required to rule upon whether, in constitutional terms, a criminal suspect has a "reasonable expectation of privacy" in respect of activities or artefacts within his home which are observable by law enforcement officers from a position outside that home. The courts have upheld the constitutional propriety of observation *ab extra* where the defendant could easily have frustrated visual inspection by drawing curtains over windows, but in the event neglected to take such protective action. In *Commonwealth* v. *Hernley*, 263 A.2d 904, 907 (1970), Jacobs J. emphasised that in such situations "it was incumbent on the suspect to preserve his privacy from visual observation. To do that the appellees had only to curtain the windows . . . The law will not shield criminal activity from visual observation where the actor shows such little regard for his privacy." See also *People* v. *Becker*, 533 P.2d 494, 495f. (1975); *Commonwealth* v. *Williams*, 396 A.2d 1286, 1291 (1978); *Commonwealth* v. *Oglialoro*, 579 A.2d 1288, 1291f. (1990).

[19] If I park my car in the street and you steal it, the resource represented by the car does not cease to be propertised merely because I adopted no legal means to make it excludable. The resource does not become a non-excludable resource, and I did not cease to have "property" in it, simply because I took no legal measures to control the access of strangers to the benefits of the car. In all likelihood there *were* no legal measures which I could have taken in the circumstances. (I could, of course, have sought to control access to the car by booby-trapping it while it stood in the parking-place—but this would not have been, in any sense, a *legal* means of protecting my resource against strangers.) It is, of course, otherwise if your possession of the car is underpinned by some legal device of loan or bailment. Conversely if, by gifting the car to

of strangers to the benefits of a resource, then the resource must be deemed non-excludable in relation to those strangers who actually succeed in gaining access. Just as in the instance of physically non-excludable resources, the risk of legal non-excludability rests with the plaintiff who seeks to propertise a particular resource. The plaintiff who neglects to utilise relevant legal protection has failed, so to speak, to raise around the disputed resource the legal fences which were plainly available to him. He has failed to stake out his claim; he has failed in effect to propertise the resource.[20]

1. Contractual protection

None of the foregoing should cause us much surprise. In the case, for instance, of contractual protection of a resource, the benefit of a contractual undertaking has long been termed a *chose in action*. This curiously proprietary turn of phrase carries in itself a clue to the ambivalence of the contractual relationship. The basic proprietary feature of the chose in action is that it performs the exclusory and regulatory functions which comprise the primary hallmark of "property".[21] If accompanied by a curial willingness to grant specific performance, contract may even confer some form of equitable title. At all events it can be said that contract provides an extremely familiar means of controlling the access of strangers to resources in scarce supply. To omit to ringfence a resource appropriately by contract is simply to fail to propertise that resource through one peculiarly effective means provided by law. To eschew, where otherwise available,[22] the contractual protection of a chose in action is but one way to disclaim "property" in a contested resource.

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you, I deliberately put it out of my power to control the access of strangers, I have chosen perhaps the oldest and simplest means of disclaiming "property" in a resource.

[20] There is at this point a danger of circularity, *i.e.*, that references to legal excludability may simply derive tautologous legal consequences from a legal premise. The danger is avoided, however, so long as it is appreciated that the real focus of questions of legal excludability is not the inquiry whether a particular claim is legally protected but the rather different and more refined inquiry whether a particular claimant is asserting "property" in the resource which is the subject of dispute.

[21] Thus, on one view, the law of contract "creates a property in expectations. One who breaches deprives the promisee in a sense no less real than the thief" (see D. Kennedy, "Form and Substance in Private Law Adjudication" 89 Harv. L. Rev. 1685, 1714 (1975–76)).

[22] The possibility of contractual protection is not, of course, always present. There are many circumstances in which contractual protection of a particular resource is not feasible, precisely because the world consists of a myriad of strangers with whom individual contractual relations are simply not practicable. Obviously I cannot (and therefore need not) assert "property" in a motor car by concluding millions of contracts with cohorts of strangers. Contract becomes a meaningful protective device only in those situations where a resource-claimant enjoys a nexus with a stranger which is sufficiently close (i) to present that stranger with an opportunity of unconsented access to the resource, and (ii) to offer a practicable possibility of contractual regulation of that stranger's access.

Clear indications of this perspective are again to be found in the majority ruling in *Victoria Park Racing*, although here the point emerges perhaps more plainly in relation to the second of the plaintiff's complaints—that the defendants had breached copyright in broadcasting the numbers of placed horses. This complaint effectively raised the issue whether knowledge could be propertised, or (which is the same thing) whether the plaintiff had an exclusive right to broadcast or otherwise disseminate information lacking in any intrinsic quality of confidentiality. (The issue, once expressed in this form, points to an instant and obvious analogy with "*Our Dogs*".) If, for instance, the plaintiff in *Victoria Park Racing* had ever formed any incipient desire to suppress dissemination of information gained at the racecourse, a clear contractual means for doing so was always available. As McTiernan J. observed, it was "competent for the plaintiff to impose a condition on the right it granted to any patron to enter the racecourse that he would not communicate to anyone outside the racecourse the knowledge about racing which he got inside".[23] Control over access to the resource could have been asserted—but in the event was not—by means of direct contractual stipulation. The plaintiff could have—but in fact had not—created for itself a chose in action in relation to the supposed exclusiveness of the resource of the spectacle. By contractual means it could have conferred upon itself a "property" in that resource, but, in the words of McTiernan J., "the element of exclusiveness is missing from the plaintiff's right in the knowledge which the defendants participate in broadcasting".[24] It followed that any claim founded on misappropriation of knowledge must fail.

Some 20 years earlier it was, significantly, this criterion of legal excludability which had helped to confirm both Horridge J. and the English Court of Appeal in the decision reached in the "*Our Dogs*" case. Horridge J. adverted to the fact that the Ladies' Kennel Association "could, if they had chosen, have made it a condition that no person except [the official photographer] should have the right to enter the premises except on condition that he agreed not to photograph. But the association did not do that."[25] The Court of Appeal agreed, laying even greater stress on the fact that the dog show promoters had failed to take advantage of the "right of laying down conditions binding on the parties admitted".[26]

[23] (1937) 58 C.L.R. 479, 526f.
[24] (1937) 58 C.L.R. 479, 526. The decision in *Detroit Base-ball Club* v. *Deppert* (1886) 61 Mich. 63, 1 Am. St. Rep. 566 (*ante*, note 84) was similarly based, at least in part, on the absence of any exclusiveness in the rights claimed by the aggrieved owner of an overlooked sporting venue.
[25] [1916] 2 K.B. 880, 883.
[26] [1917] 2 K.B. 125, 128 *per* Swinfen Eady L.J.

Lush J. dismissed the alleged "right of property" in the spectacle of the dog show, pointing out that the promoters could and should have made it "a matter of contract".[27]

2. Intellectual property protection

As both *Victoria Park Racing* and "*Our Dogs*" demonstrate, a resource which fails the test of legal excludability stays in the commons. It remains unpropertised and therefore available for use and exploitation by all. But contract may not be the only legal means for regulating access to the benefits of a resource. There are other ways in which a resource may fail the test of legal excludability. In *Kellogg Co.* v. *National Biscuit Co.*,[28] for example, the plaintiff sued unsuccessfully to restrain the Kellogg Company from using the term "shredded wheat" in relation to biscuits. In delivering the majority opinion of the US Supreme Court, Justice Brandeis recognised that the Kellogg Company was "undoubtedly sharing in the goodwill of the article known as 'Shredded Wheat'". It was thus sharing in a market which had been both created by the "skill and judgment" of the plaintiff's predecessor and widely extended by the plaintiff's persistent investment in advertising. However, in the absence of any recourse by the plaintiff to intellectual property protection, the Supreme Court refused to condemn the defendant as having engaged in unfair competition. In the words of Justice Brandeis,[29] "[s]haring in the goodwill of an article unprotected by patent or trade-mark is the exercise of a right possessed by all—and in the free exercise of which the consuming public is deeply interested".

3. Implications for fiduciary law

It is not without interest that the criterion of legal excludability throws some light upon the classic problems of fiduciary law. For instance, in *Hospital Products Ltd.* v. *United States Surgical Corporation*[30] it appeared that under cover of an informal distributorship agreement with the plaintiff company ("USSC") one of the defendants, Blackman, had dishonestly sought to appropriate for his own company ("HPI") the whole or part of the Australian market in the products manufactured by the plaintiff. The High Court of Australia held unanimously that Blackman's actions constituted a breach of the distributorship agreement, but only a

[27] [1917] 2 K.B. 125, 128.
[28] 305 U.S. 111 (1938); 83 L.ed. 73.
[29] 305 U.S. 111, 122; 83 L.ed. 73, 80.
[30] (1984) 156 C.L.R. 41.

minority in the Court was prepared to find that there had been a fiduciary relationship between the parties.

The instinctive question of the property lawyer is, of course, whether the advantage which Blackman unfairly sought to utilise was, in some relevant sense, the "property" of the plaintiff company, USSC, and as such entrusted to Blackman. It may not be insignificant that the two judges who constituted the minority on the fiduciary point came close to reifying or "propertising" the opportunity improperly seized upon by Blackman.[31] In the view of Mason J., there was a "strong case" for saying that Blackman's company, HPI, was "a fiduciary in protecting and promoting USSC's Australian product goodwill".[32] USSC had effectively constituted HPI "the custodian of its product goodwill".[33] Mason J. was even prepared "in a general way" to liken HPI's position as custodian of USSC's product goodwill to that of "a bailee whose duty it is to protect and preserve a chattel bailed to him". HPI's responsibilities under the distributorship agreement were regarded by Mason J. as having "armed HPI with a power and discretion to affect USSC's product goodwill". HPI had acquired a "special opportunity of acting to the detriment of USSC which was, accordingly, vulnerable to abuse by HPI of its position".[34]

This language is not, of course, far distant from the language of excludability, and Mason J.'s judgment can be seen as lending implicit support to the idea of "property" in the resource of local product goodwill. The distributorship agreement in *Hospital Products* transmitted to Blackman a regulatory control over access to the benefits of this resource—a "power and discretion" which he was later to abuse by diverting these benefits dishonestly to himself. Under the agreement Blackman and his company could be seen as having acquired a "property" in the plaintiff's resource and, given Mason J.'s fiduciary characterisation, should have retained it effectively as a trustee for the plaintiff.[35] On this view product goodwill was propertisable precisely because access to its benefits was clearly capable of differential allocation—as for

[31] Deane J., for instance, seemed prepared to contemplate that a fiduciary relationship might be generated in respect of a matter such as local product goodwill ((1984) 156 C.L.R. 41, 123), although he preferred to respond to the plaintiff's claim with a much more extensive application of the doctrine of constructive trusts ((1984) 156 C.L.R. 41, 124f.).

[32] (1984) 156 C.L.R. 41, 100.

[33] (1984) 156 C.L.R. 41, 101.

[34] (1984) 156 C.L.R. 41, 101.

[35] Such an approach had been anticipated in the statement of McLelland J. at first instance ([1982] 2 N.S.W.L.R. 766, 811B) that HPI was "for the duration of the distributorship entrusted by USSC with the development and servicing of the market for USSC . . . products in Australia". The New South Wales Court of Appeal, although it adverted briefly to the argument that McLelland J. appeared to have regarded USSC's product goodwill "as a species of property", took the matter no further ([1983] 2 N.S.W.L.R. 157, 199A).

example through the defendants' wrongful dealing. From such beginnings it is possible to envisage the purposive use of a new terminology of "fiduciary property"—a development which might do much to energise the law of fiduciary relationships and to enrich our understanding of the nexus between trusts, property and the jurisdiction of equity.

Against this background it is interesting to observe the technique adopted by other members of the High Court in rebuttal of the minority view. Gibbs C.J. thought it unnecessary to discuss the question "whether product goodwill can be regarded as property capable of assignment by itself",[36] but Dawson J. was by contrast quite voluble on the subject. Dawson J. strenuously resisted the suggestion that HPI could, even in some limited sense, be said to have occupied a fiduciary position in relation to USSC's product goodwill. He explicitly declared that he found it "artificial in the extreme to regard USSC as having entrusted Blackman with the reputation of its products in Australia in the same way as one person might entrust another with property of a tangible kind to deal with it on his behalf".[37]

Why then this uncompromising refusal to propertise the resource of product goodwill? Amongst the reasons given by the High Court majority there emerges a recurring emphasis on the circumstance that USSC had not availed itself of the means of legal excludability. "Clearly", said Dawson J.,[38] "if it had wished to do so, there were various ways in which USSC could have protected the market which it had in Australia or which it anticipated it would have as a result of Blackman's distributorship". Dawson J. proceeded to point to the fact that USSC could have patented its products or registered its trade mark. And, if one single feature painfully emerged from the protracted litigation in *Hospital Products*, it was ultimately that USSC had lamentably failed to protect its interests by straightforward contractual means. It had never entered into a formal, detailed written agreement with Blackman. As Dawson J. recognised, USSC "could have required" Blackman to enter into a proper covenant in restraint of trade so as to restrict his activities during and after termination of the distributorship agreement.[39] Negotiations had been of a commercial nature, at arm's length, and conducted by "persons on both sides who were experienced in the market place".[40] Nevertheless there had been a

[36] (1984) 156 C.L.R. 41, 70.
[37] (1984) 156 C.L.R. 41, 145.
[38] (1984) 156 C.L.R. 41, 140f.
[39] (1984) 156 C.L.R. 41, 141. See also p. 72 *per* Gibbs C.J. ("It was open to USSC to include in its contract whatever terms it thought necessary to protect its position").
[40] (1984) 156 C.L.R. 41, 146.

"conscious choice to proceed in the absence of a formal agreement" and, in the stern view taken by Dawson J.,[41] there was "no basis without more for the imposition of fiduciary obligations in order to overcome the shortcomings in the arrangement" between the parties. The critical resource, in other words, remained unpropertised as between these parties precisely because the plaintiff had substantially omitted to adopt those protective legal measures which would have made it feasible for it to control access to the resource in question.

The refusal of the majority of the Australian High Court to find a fiduciary relationship in *Hospital Products* had the effect of relegating the plaintiff to contractual damages rather than a more substantial recovery based on constructive trust. However, the divergence of approach evident in the High Court may itself point to certain elective affinities which operate significantly in claims for the recovery of a resource allegedly misappropriated from the plaintiff. While the restitution lawyer asks instinctively: "Is the defendant entitled to keep it?", the property lawyer asks instead: "What, if anything, disentitled the defendant from taking it?" The key question in the law of unjust enrichment is whether there is any "juristic reason for the enrichment" of the defendant.[42] The key question for the property lawyer is whether there is any juristic reason for believing that the plaintiff has suffered a relevant "deprivation". Those who lean towards restitutionary solutions founded on conscience ask ultimately: "Does the defendant have any right to retain 'property' in this resource?" Those who resist the general application of restitutionary formulae tend to pose a more basic question: "Did the plaintiff have any 'property' in the resource in the first place?"

The distinct emphases of these questions conceal subtle, but important, philosophical differences over the legitimacy of takings and the permissible scope of aggressive competition for the goods of life. These contrasting ideological premises relate to fundamentally divergent opinions about the proper relation between self-reliance, self-determination and community regulation; about the social and economic balance between individualism and paternalism; about the tension between individual and collective responsibility for actions which, in truth, are never quite free-willed but which are

[41] (1984) 156 C.L.R. 41, 146f.

[42] See *Rathwell* v. *Rathwell* (1978) 83 D.L.R. (3d) 289, 306, where Dickson J. made his now classic statement that "for the principle of unjust enrichment to succeed, the facts must display an enrichment, a corresponding deprivation, and the absence of any juristic reason—such as a contract or disposition of law—for the enrichment". See also *Pettkus* v. *Becker* (1981) 117 D.L.R. (3d) 257, 273f. *per* Dickson J; *Sorochan* v. *Sorochan* (1986) 16 D.L.R. (4th) 1, 5 *per* Dickson C.J.C.

never quite deterministic either. The various philosophical stances are, of course, interactive rather than absolute. By virtue of its flexibility the restitutionary formula may on occasion favour the go-getting commercial buccaneer at the expense of the less quick-witted. Conversely, while restitutionary solutions may seem to reinforce an Atkinian sense of moral "neighbourhood",[43] quite often the largest favour I can do my neighbour is to assume responsibility for my own actions.

It is such differences in perspective which underlie much of the current controversy over the proper function of the law of restitution. The plaintiff says: "It's mine and he took it!"; the defendant says: "I took it, but it wasn't truly his". The precise angle from which disputes of this kind are tackled can, of course, be critical in determining the outcome: property-minded lawyers may end up saying "fair game", while restitution-minded lawyers cry "foul". Such an analysis may not be terribly far removed from the inner dynamic of *Victoria Park Racing* or even of *Hospital Products*. The language of excludability may not resolve the tension, but it certainly highlights the difference between the two perspectives on the dispute and points unequivocally towards the utility of the property lawyer's instinctive question.

C. Morally Non-excludable Resources

A third and final ground on which a resource may be left outside the threshold of property arises in cases of *moral non-excludability*. Here the term "moral" refers more relevantly to matters of public morality than of private morality. That is to say that the test of moral excludability is much more closely concerned with those social conventions or *mores* which promote integrative social existence than with any normative judgment about individual human conduct.

The notion of moral non-excludability derives from the fact that there are certain resources which are simply perceived to be so central or intrinsic to constructive human coexistence that it would be severely anti-social that these resources should be removed from the commons. To propertise resources of such social vitality is *contra bonos mores*: the resources in question are non-excludable because it is widely recognised that undesirable or intolerable consequences would flow from allowing any one person

[43] For a commentary on the way in which much modern Australian commercial law has tended to adopt "the moral ethos of the neighbourhood principle", see P.D. Finn, "Commerce, the Common Law and Morality" (1989) 17 Melbourne U.L.R. 87, 96ff.

or group of persons to control access to the benefits which they confer. Following such appropriation, there would not, in Locke's well known phrase, be "enough, and as good left in common for others".[44] Consequently the courts, by differentiating between excludable and non-excludable resources, engage constantly in a range of latent policy decisions which shape the contours of the property concept. In setting the moral limits of "property", the courts effectively recognise that there is some serial ranking of legally protected values and interests: claims of "property" may sometimes be overridden by the need to attain or further more highly rated social goals. As we shall see, it is no accident that the goals to which "property" defers often relate to fundamental human freedoms. It is in the definition of moral non-excludables that the law of property most closely approaches the law of human rights.[45]

The predominating emphasis expressed in the notion of moral non-excludability is the need to afford especial protection to those values which promote human communication and social intercourse.[46] Moral non-excludables are essentially concerned with the furtherance of constructive interaction, purposive dialogue and decent (or "moral") communal living. Nowhere are these values more actively advocated than in the judgments delivered by the majority of the High Court of Australia in *Victoria Park Racing*. At the centre of *Victoria Park Racing* lay the issue whether the plaintiff, by claiming "property" in certain knowledge or information, could prevent its unauthorised dissemination by the defendants. The majority of the High Court vehemently repudiated the assertion that information (unmarked by confidentiality) might thus be sterilised by arbitrary fiat of the plaintiff. In the view of Latham C.J., there was, apart from the constraints of defamation, contract and confidence, no principle "which prevents people . . .

[44] See John Locke, *Two Treatises of Government*, 2nd critical ed. by P. Laslett (Cambridge 1967), *The Second Treatise*, s.27 (p. 306). There is a view that the Lockean proviso "enough and as good" has been wholly misconstrued and was not originally intended to be restrictive of appropriation. See J. Waldron, "Enough And As Good Left For Others" 29 *Philosophical Quarterly* 319, 320 (1979). For a more general assault on the Lockean theory of appropriation, see J.P. Day, "Locke on Property" 16 *Philosophical Quarterly* 207 (1966).

[45] See *Lynch* v. *Household Finance Corp.*, 405 U.S. 538, 552, 31 L.Ed.2d 424, 434f. (1972), where Justice Stewart observed that "the dichotomy between personal liberties and property rights is a false one".

[46] When asked to discern "one central indisputable principle of what may be called substantive natural law—Natural Law with capital letters", the late Lon Fuller found it, significantly, in "the injunction: Open up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire". It was Fuller's firm belief that "if we were forced to select the principle that supports and infuses all human aspiration we would find it in the objective of maintaining communication with our fellows . . . Communication is something more than a means of staying alive. It is a way of being alive." See L.L. Fuller, *The Morality of Law* (New Haven and London 1964), p. 185f.

from opening their eyes and seeing something and then describing what they see".[47] No law could prevent "a man from describing anything which he sees anywhere", and in circumstances such as those of *Victoria Park Racing* the defendant "does no wrong to the plaintiff by describing to other persons, to as wide an audience as he can obtain, what takes place on the plaintiff's ground".[48] For this purpose it mattered not "whether the description is communicated to many persons by broadcasting or by a newspaper report, or to only a few persons in conversation or correspondence".[49]

The vice to which the High Court majority took such objection was precisely the constricting effect which the plaintiff's claims would have had upon the usual channels of communication by which everyday information is socially distributed. The majority refused to inhibit such communication by court order. Said Latham C.J., "if a person chooses to organise an entertainment or to do anything else which other persons are able to see", there is no right to obtain a court order "that they shall not describe to anybody what they see".[50] He might have added parenthetically that it is at this point that claims of "property" defer to a more fundamental right—that of freedom of speech.

In *Victoria Park Racing* the majority's refusal to propertise purely communicative language or symbols was expressed even more clearly in the Court's forthright rejection of the plaintiff's copyright claim. The plaintiff had, of course, alleged that the defendants had breached copyright by broadcasting the numbers of the top-placed horses, which numbers were either contained in the race book for the relevant meeting or visible to the commentator outside the ground on the face of display boards positioned within the ground. The Court's response was entirely consistent with the generally recognised principle that copyright protects not information *per se* but rather the form of expression in which such information is contained.[51] Latham C.J. rejected, for instance, any suggestion that the identifying numbers of the first three horses in a particular race (*e.g.* "3, 12, 4") could constitute a literary work deserving of copyright protection. Given that copyright protection usually subsists for fifty years after the death of the author, the

[47] (1937) 58 C.L.R. 479, 496.
[48] (1937) 58 C.L.R. 479, 494.
[49] (1937) 58 C.L.R. 479, 496. According to McTiernan J., the plaintiff in *Victoria Park Racing* had not averred wrongfulness by the defendants "any more than if the plaintiff were to allege that the defendants saw the spectacle and described it to a gathering of bystanders" ((1937) 58 C.L.R. 479, 524).
[50] (1937) 58 C.L.R. 479, 496.
[51] (1937) 58 C.L.R. 479, 511 *per* Dixon J.

Chief Justice declared himself unconvinced that "because the plaintiff caused those numbers to be exhibited for a few minutes upon a notice board, everybody in Australia was thereafter for a term of fifty years from somebody's death precluded from reproducing them in any material form".[52] Moreover, said Latham C.J., the law of copyright "does not operate to give any person an exclusive right to state or to describe particular facts. A person cannot by first announcing that a man fell off a bus or that a particular horse won a race prevent other people from stating those facts".[53]

In *Victoria Park Racing* the High Court of Australia thus refused to sterilise by curial order the raw material of human communication. It would, of course, be absurd and intolerable if particular units of descriptive exchange were vulnerable to pre-emptive proprietary strikes by isolated individuals or groups. The political implications of such takings are altogether too unpleasant to contemplate. It is fundamental to constructive social interaction that nobody "owns" words or numbers. True it is that countervailing social and economic concerns may sometimes justify the propertisation of literary, connotative or instrumental language (as in the law of copyright, trade marks and patents). But it is clear that the basic units of linguistic and numerical formulation must remain firmly in the commons, available for use and adaptation by all mankind. Accordingly, in *Victoria Park Racing*, the High Court recognised that to place a judicial embargo on the future use of certain descriptive verbal or numerical formulae would be to propertise resources which are far too precious to be removed from the commons. The communicative potency of the raw elements of language and numbers cannot be allowed to be hijacked by some private exercise of eminent domain.

The omission of moral non-excludables from the field of "property" effectively recognises that certain human or civic rights are superior to claims of "property". It is no accident that the higher values to which the property concept defers relate frequently to certain freedoms of speech, belief, association, assembly and movement. Here emerges again the important point that property rights are merely prima facie rights which may be abridged or overridden by other moral concerns.[54]

[52] (1937) 58 C.L.R. 479, 498.

[53] (1937) 58 C.L.R. 479, 498. It was, of course, Latham C.J. who insisted some years later that "knowledge is neither real nor personal property" and that a "man with a richly stored mind is not for that reason a man of property" (*Federal Commissioner of Taxation* v. *United Aircraft Corporation* (1943) 68 C.L.R. 525, 534). See also *Smith Kline & French Laboratories (Australia) Ltd.* v. *Secretary, Department of Community Services and Health* (1990) 95 A.L.R. 87, 135 *per* Gummow J. ("knowledge *per se* is not proprietary in character").

[54] See *e.g.* F. Snare, "The Concept of Property" (1972) 9 Am. Phil. Qly. 200, 203.

1. Linguistic exclusion

A further exploration of the phenomenon of morally non-excludable resources occurred recently in *Davis* v. *Commonwealth of Australia*.[55] Here a public authority, which had been incorporated in order to plan and implement the Australian bicentennial celebrations in 1988, had been intended to enjoy exclusive rights to exploit certain words and expressions supposedly connected with these celebrations. Commonwealth legislation purported to make it a criminal offence for any person in Australia to use, without the authority's consent, any one or more of a number of prescribed expressions in connection with a business or trade or the supply or use of goods. The prescribed expressions included any reference to "Bicentenary", "Bicentennial", "200 years", "Australia", "Sydney", "Melbourne", "Founding", "First Settlement", "Exposition", "Expo", "World Fair", or "World's Fair", where such phrases were used in conjunction with "1788", "1988" or "88".[56] The list of prescribed expressions was open to discretionary extension through subordinate legislation, and statutory regulations had already added the phrases, "Australian Bicentenary", "The Australian Achievement", "Australia 200", "Sail", "Sail Australia", "Opsail", "Operation Sail", "Tall Ships", and "Tall Ships Australia". All articles or goods involved in the commission of any statutory offence under the Commonwealth legislation were, by a further provision, liable to forfeiture to the Commonwealth.

The plaintiffs were Aboriginals who had been refused permission to manufacture and sell T-shirts bearing certain legends. They accordingly sought a declaration that the legislative measures were beyond the power of the Commonwealth Parliament. In *Davis* the controversial legend was one which, in explicit conjunction with the dates 1788 and 1988, spoke uncompromisingly of "200 YEARS OF SUPPRESSION AND DEPRESSION". The plaintiffs objected that the Commonwealth was not competent to confer on anyone a monopolistic power throughout Australia over the use of the English language.

The High Court of Australia ruled in favour of the plaintiffs on the narrow issue whether the Commonwealth had constitutional power to criminalise the use of the phrase "200 YEARS". However, several members of the Court took the opportunity to condemn in much broader terms the "attempt to establish a Commonwealth licensing system for common words in the English language".[57]

[55] (1988) 166 C.L.R. 79.
[56] Australian Bicentennial Authority Act 1980 (Cth), s.22(1), (6).
[57] The phrase was that used in argument by K. Mason Q.C. ((1988) 166 C.L.R. 79, 83).

The Commonwealth had claimed constitutional competence under a number of heads including the powers relating to copyright, designs and trade marks, but all such claims were rejected forthrightly by the Court. In their joint judgment Mason C.J., Deane and Gaudron JJ. observed that many of the prescribed expressions were "commonly used by all sections of the community, particularly in this the Bicentennial year".[58] The joint judgment went on to excoriate in tones of scarcely disguised outrage the Commonwealth's "extraordinary intrusion into freedom of expression".[59] The legislation under challenge had sought to confer on the Bicentennial Authority an "extraordinary power to regulate the use of expressions in everyday use in this country . . . [an] extraordinary power . . . which is grossly disproportionate to the need to protect the commemoration and the Authority".[60] From the terms used by Mason C.J., Deane and Gaudron JJ. it emerges tolerably clearly that they viewed with distaste the way in which the Commonwealth's legislation sought to impinge on freedom of speech by creating a statutory monopoly over expressions of common usage and by making unauthorised use of such common language a criminal offence.

In his separate judgment Brennan J. expressed even more trenchant criticism of the legislation. Brennan J. castigated as "absurd prohibition" the attempt to criminalise the use of "ordinary words, place names and figures" and to "inhibit communication about the Bicentenary".[61] He remarked wryly that "freedom of speech can hardly be an incidental casualty of an activity undertaken by the Executive Government to advance a nation which boasts of its freedom".[62] Recognising that it is "of the essence of a free and mature nation that minorities are entitled to equality in the enjoyment of human rights", Brennan J. proceeded to articulate the nature and importance of the link between human rights and uncurtailed freedom in the "peaceful expression of dissident views". In the present case the plaintiffs had wished to raise a voice of protest against the celebratory commemoration of the Bicentenary, only to be confronted by a wholly improper contention that the Commonwealth's legislative power was "effective to muffle the intended protest".[63]

[58] (1988) 166 C.L.R. 79, 99. As the joint judgment pointed out, even wholly unconnected and innocuous commercial ventures, such as advertising of the "Family Law Conference Melbourne 1988", apparently fell foul of the legislation.
[59] (1988) 166 C.L.R. 79, 100.
[60] (1988) 166 C.L.R. 79, 99f.
[61] (1988) 166 C.L.R. 79, 115.
[62] (1988) 166 C.L.R. 79, 116.
[63] (1988) 166 C.L.R. 79, 116.

The stance adopted by the High Court of Australia in *Davis* provides an impressive illustration of the non-excludable character of certain human resources such as language. Free trade in language is a vital concomitant of a free life in a community of equals. It was, oddly enough, Justice Brandeis who spoke in 1927 of the organic integrity of the "freedom to think as you will and to speak as you think".[64] The indivisible quality of this freedom is such that we deem it in general to be socially and politically undesirable to propertise language. We limit linguistic monopolies because ultimately we value the freedom to communicate above the freedom to own: the language of liberty is seldom heard where liberty of language has been removed from the commons.

2. *Territorial exclusion*

It would be a mistake to suppose that the notion of moral non-excludability is peculiarly or predominantly relevant to resources which are elusive or incorporeal in character. It is clear that moral limits are sometimes placed on the "property" which may be claimed in resources much more tangible than mere ideas or language. For instance, the moral limits of "property" can affect even land, which by tradition constitutes the most readily excludable resource known to man.[65]

The conventional legal position is of course that, absent some overriding power of entry conferred by common law or statute, the private owner may arbitrarily exclude any stranger from physical entry upon his land.[66] It is said to be part of the prerogative of "property" that the owner has an absolute right to determine

[64] *Whitney* v. *California*, 274 U.S. 357, 375, 71 L.ed. 1095, 1105 (1927). Justice Brandeis pointed out that the founding fathers of American independence had plainly believed that such freedoms are "means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty". Justice Brandeis went on (at 375f., 1106) to say that, precisely because they believed in "the power of reason as applied through public discussion", those who had won independence had "eschewed silence coerced by law—the argument of force in its worst form".

[65] Only rarely can land be regarded as *physically* non-excludable. Much of the law of adverse possession of realty rests on the contrary assumption. It is, however, worth observing that there may be extreme circumstances in which the sheer size of a particular land holding (and its consequent indefensibility) may begin to impact upon the degree to which that land can be "propertised". See, for instance, the extremely interesting suggestion of Deane J. in *Hackshaw* v. *Shaw* (1984) 155 C.L.R. 614, 659, that conventional notions of trespass may not be strictly applicable to isolated stations situated within the vast expanses of the Australian outback.

[66] "No man can set his foot upon my ground without my licence" (*Entick* v. *Carrington* (1765) 19 Howell's State Trials 1029, 1066 *per* Lord Camden C.J. See generally Kevin Gray, *Elements of Land Law* (London 1987), p. 538.) See also *Forbes* v. *New South Wales Trotting Club* (1979) 143 C.L.R. 242, 249, 259 *per* Barwick C.J., 281 *per* Aickin J.; *Comité pour la République du Canada—Committee for the Commonwealth of Canada* v. *The Queen in Right of Canada* (1987) 36 D.L.R. (4th) 501, 508 *per* Pratte J. (dissenting); *Russo* v. *Ontario Jockey Club* (1988) 46 D.L.R. (4th) 359, 361.

who may enter or remain on his land. In the orthodox view the landowner is subject to no doctrine of reasonableness in the grant of selective access.[67] Nor is there any legal necessity that in the exercise of his discretion he should comply with rules of natural justice.[68] The private owner's paramount right emerged in perhaps its most extreme historical form in *Wood* v. *Leadbitter*.[69] Here Alderson B. held that a contractual licence conferred on a stranger could be effectively revoked by the landowner at any time, notwithstanding that the revocation constituted a breach of contract.[70] Such revocation of course gave the licensee a right to sue for contractual damages, but it was accepted as clear law in *Wood* v. *Leadbitter* that breach of a contractual licence could not give rise to any further liability (whether in tort or otherwise) if, following the revocation, the licensee were forcibly ejected or barred from the land. The landowner had quite simply an unchallengeable discretion to withhold or withdraw permission to enter.

Nowadays, however, courts in a number of jurisdictions are slowly beginning to recognise that the scope of the owner's "property" even in such resources as land is inherently curtailed by limitations of a broadly "moral" character. The point arose dramatically, for example, in the Australian High Court's consideration of *Gerhardy* v. *Brown*.[71] This case concerned state land rights legislation which, on behalf of the Pitjantjatjara people of South Australia, had vested title to an extensive tract of land in a statutorily created non-government body corporate (Anangu Pitjantjatjaraku).[72] The land affected by the legislation covered over 100,000 square kilometres, comprising altogether more than ten per cent. of the total land area of South Australia. The object of the legislation, as Brennan J. recognised in the High Court, was to guarantee the collective ability of the Pitjantjatjara people to "'take up' or 'rebuild' their traditional relationship with their country".[73] The statutory intention was to "restore to the Pitjantjatjaras the 'hearth, home, the source and locus of life, and

[67] See *e.g. Russo* v. *Ontario Jockey Club* (1988) 46 D.L.R. (4th) 359, 364; *Austin* v. *Rescon Construction (1984) Ltd.* (1989) 57 D.L.R. (4th) 591, 593.

[68] *Heatley* v. *Tasmanian Racing and Gaming Commission* (1977) 14 A.L.R. 519, 538; *Russo* v. *Ontario Jockey Club* (1988) 46 D.L.R. (4th) 359, 362.

[69] (1845) 13 M. & W. 838, 855, 153 E.R. 351, 359.

[70] For acceptance of the *Wood* v. *Leadbitter* doctrine in the United States, see *Minnesota Valley Gun Club* v. *Northline Corp.* 290 N.W. 222, 224 (1940); *Nemmer Furniture Co.* v. *Select Furniture Co.*, 208 N.Y.S.2d 51, 56 (1960); *Feldt* v. *Marriott Corp*, 322 A.2d 913, 916 (1974); *Van Camp* v. *Menominee Enterprises, Inc.*, 228 N.W.2d 664, 670 (1975); *Union Travel Associates, Inc.* v. *International Associates Inc.*, 401 A.2d 105, 107f. (1979); *Bickett* v. *Buffalo Bills, Inc.*, 472 N.Y.S.2d 245, 247 (1983). See generally J.W. Bruce and J.W. Ely, *The Law of Easements and Licences in Land* (Boston 1988), §10.06[1].

[71] (1985) 159 C.L.R. 70.

[72] Pitjantjatjara Land Rights Act 1981, s.15.

[73] (1985) 159 C.L.R. 70, 117.

everlastingness of spirit'" enjoyed by those people in earlier and happier times—to "buttress a sense of spiritual, cultural and social identity".[74]

In order to achieve this purpose the legislation provided for the allocation not merely of rights of ownership but also of rights of entry in relation to the statutorily defined area. The legislation granted all Pitjantjatjara people an unrestricted right of access and egress in respect of this land,[75] but otherwise made it a criminal offence for any non-Pitjantjatjara to enter the area without special written permission granted by Anangu Pitjantjatjaraku.[76] The actual issue in *Gerhardy* v. *Brown* involved alleged criminal entry upon the land by an Aboriginal who was not a Pitjantjatjara. The immediate question before the High Court was whether the differential rights of access granted by the legislation constituted an unlawful form of racial discrimination under Commonwealth legislation.[77] The latter legislation incorporates protection for the exercise of "any human right or fundamental freedom", referring inter alia in this context to the specific "right to freedom of movement and residence".[78]

A majority in the High Court accepted that the state legislation under challenge prima facie detracted from the rights guaranteed by the Commonwealth,[79] but the Court nevertheless concluded—albeit hesitantly—that the Land Rights Act was sustainable as a "special measure"[80] required to protect the traditional cultural, social and religious interests of the Pitjantjatjara.[81] In making more broad-ranging observations about the supposed right of arbitrary exclusion vested in Anangu Pitjantjatjaraku, several members of the High Court demonstrated a clear willingness to recognise the existence of moral qualifications on "property" in

[74] (1985) 159 C.L.R. 70, 136.
[75] Pitjantjatjara Land Rights Act 1981, s.18.
[76] Pitjantjatjara Land Rights Act 1981, s.19(1).
[77] See Racial Discrimination Act 1975 (Cth), ss.9, 10.
[78] See International Convention on the Elimination of All Forms of Racial Discrimination, Art.5(d)(ii).
[79] (1985) 159 C.L.R. 70, 104 *per* Mason J., 110f. *per* Wilson J., 127f., 132 *per* Brennan J.,145ff. *per* Deane J.
[80] Racial Discrimination Act 1975 (Cth), s. 8(1); International Convention on the Elimination of All Forms of Racial Discrimination, Art. 1(4).
[81] It is significant that foremost amongst these interests was the need to preserve a number of sacred sites inviolate from visual intrusion by unauthorised persons. Brennan J. recognised, for instance, that the apparent impairment of individual rights imposed by the legislation could be justified by the "need to retain close control on entry at times of Aboriginal ceremonies" ((1985) 159 C.L.R. 70, 134). For reference to the importance in aboriginal cultures of preserving the integrity of sacred or ceremonial locations—particularly from the eyes of the uninitiated, see R.M. Berndt and C.H. Berndt, *The World of the First Australians*, 5th ed. (Canberra 1988), p. 344; R.M. Berndt, "Traditional Concepts of Aboriginal Land" in R.M. Berndt (ed.), *Aboriginal Sites, Rights and Resource Development* (Perth 1982), p. 7; D. Biernoff, "Safe and Dangerous Places" in L.R. Hiatt (ed.), *Australian Aboriginal Concepts* (Canberra 1978), p. 93ff.

land. Although accepting that the right to exclude strangers is ordinarily an incident of ownership of land,[82] the Court was able to contemplate circumstances in which this right of exclusion might be abridged by more highly valued social objectives. In thus delineating the limits of "property", the High Court significantly emphasised the need to promote those moral or political standards which enrich life and constructive social interaction within a community of equals.

Mason J. pointed out, for instance, that it was only "generally" true that "freedom of movement, considered as a human right or fundamental freedom" confers no right of access to privately owned lands. Mason J. could envisage "exceptional circumstances" where the freedom of movement guaranteed by Commonwealth legislation might indeed include unconsented access to the lands of private owners. Such derogation from the landowner's right of arbitrary exclusion would be justified if, for example, "the purpose and effect of vesting extensive tracts of land in private ownership and denying a right of access to non-owners was to impede or defeat the individual's freedom of movement across a State or, more relevantly, to exclude persons of a particular race from exercising their freedom of movement across a State".[83]

Further concern was expressed by Deane J., who indicated that the supposedly protectionist objective of the South Australian land rights scheme might well be inimical not merely to the interests of non-Pitjantjatjaras but also to those of the Pitjantjatjara people themselves. In Deane J.'s view the "rigid formalities" surrounding the grant of access to non-Pitjantjatjaras seemed "likely to create an over-isolated enclave within South Australia entrenched behind what amounts to a type of passport system".[84] It remained unclear how the restrictions on the access of strangers would affect facilities for such needs as education and health, and it appeared that these restrictions even precluded a Pitjantjatjara from unilaterally inviting a non-Pitjantjatjara, "be he Aboriginal or not", upon the land.[85] Deane J. could only "speculate about the danger that, particularly for the female and the weak, the difference between separate development and segregation might become more theoretical than real".[86]

[82] (1985) 159 C.L.R. 70, 150 *per* Deane J.
[83] (1985) 159 C.L.R. 70, 103f.
[84] (1985) 159 C.L.R. 70, 152.
[85] Brennan J. likewise observed that the legislation precluded "perhaps harshly" an individual Pitjantjatjara from inviting a non-Pitjantjatjara on to the land ((1985) 159 C.L.R. 70, 117), but thought this a case where individual rights could legitimately be foregone in favour of group rights ((1985) 159 C.L.R. 70, 133f.).
[86] (1985) 159 C.L.R. 70, 152. A similar sense of disquiet was expressed by Gibbs C.J., who recognised that if the vesting of ownership of lands in a corporation were enough to justify the

The issues canvassed in *Gerhardy* v. *Brown* again illustrate how rights traditionally considered to be incidents of private ownership have to be read subject to the constraints imposed by prevailing public morality. In this sense no right of property is ever truly private: all property rights have a distinct public law character. Thus, even though the permit system in *Gerhardy* v. *Brown* had been placed under the control of a supposedly private non-government corporation, Murphy J. accepted that "the power to exclude from lands which are about one-tenth of the land area of South Australia is an exercise of public power". The selective exclusion of strangers from these lands could not be said to occur within "a private zone".[87] As Murphy J. had said earlier in his dissent in *Forbes* v. *New South Wales Trotting Club Ltd.*,[88] "[w]hen rights are so aggregated that their exercise affects members of the public to a significant degree, they may often be described as public rights and their exercise as that of public power. Such public power must be exercised bona fide . . . and with due regard to the persons affected by its exercise". As Murphy J. confirmed in *Gerhardy* v. *Brown*,[89] the "distinction between public power and private power is not clear-cut and one may shade into the other".

This blurring of the divide between public and private has been taken further in the treatment of "property" in other jurisdictions. There is now considerable force behind the assertion that powers of arbitrary exclusion are no longer an inevitable or necessary incident of "property" in privately held land.[90] This development in the law is particularly marked in relation to land to which the public has a general or unrestricted invitation. Admittedly in *Harrison* v. *Carswell*[91] the Supreme Court of Canada upheld the alleged right of the owner of a shopping mall to remove a peacefully protesting picket from the precincts of the mall, but the strong dissenting judgment of Laskin C.J.C. was destined to open up a debate over the limits of "property" in quasi-public premises.[92] In

exclusion of persons from those lands on the ground of race, "it would be easy to introduce a system of apartheid" ((1985) 159 C.L.R. 70, 86).

[87] See also (1985) 159 C.L.R. 70, 86 *per* Gibbs C.J.

[88] (1979) 143 C.L.R. 242, 275. See B. Edgeworth, "Post Property? A Postmodern Conception of Private Property" (1988) 11 U.N.S.W.L.J. 87, 95f.

[89] (1985) 159 C.L.R. 70, 107.

[90] Thus the rigour of the doctrine in *Wood* v. *Leadbitter* has now been tempered significantly in many jurisdictions across the common law world. The doctrine has, for instance, been modified in England by the availability of equitable intervention to restrain breaches of contract (see Kevin Gray, *Elements of Land Law* (London 1987), p. 545ff.). A similar development has occurred in some jurisdictions in the United States (see *e.g. Ethan's Glen Community Association* v. *Kearney*, 667 S.W.2d 287, 290f. (1984)). Other courts in the United States have simply accepted that *Wood* v. *Leadbitter* is now a curiosity of legal history, having been overtaken by the steady evolution of the common law (see *e.g. Uston* v. *Resorts International Hotels Inc.*, 445 A.2d 370 (1982), 374 *per* Pashman J.).

[91] (1976) 62 D.L.R. (3d) 68, 73f.

[92] The issue has not been uncontroversial (see *e.g. Hudgens v. N.L.R.B.*, 424 U.S. 507, 47

Uston v. *Resorts International Hotels Inc*,[93] for instance, the Supreme Court of New Jersey confirmed that access to such premises is nowadays controlled by a doctrine of reasonableness.[94] Pashman J. held that "when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner towards persons who come on their premises."[95]

Significantly the present debate has tended to raise the issue of "property" yet again in the context of supposed threats to freedoms of speech and belief.[96] In *State* v. *Schmid*,[97] for example, the Supreme Court of New Jersey held that Princeton University had violated the defendant's state constitutional rights by evicting him from university premises and by securing his arrest for distributing political literature on its campus.[98] In the view of the majority, "the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property".[99] The Court recognised that the owner of private property is "entitled to fashion

L.Ed.2d 196 (1976)). However, a number of courts in the United States have now upheld the right of reasonable access to privately owned premises (such as shopping centres) for purposes of peaceful political communication and solicitation. See *Robins* v. *Pruneyard Shopping Center*, 592 P.2d 341 (1979), affd. *sub. nom. Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74, 64 L.Ed.2d 741 (1980); *Batchelder* v. *Allied Stores International, Inc.*, 445 N.E.2d 590 (1983); *Lloyd Corpn. Ltd.* v. *Whiffen*, 750 P.2d 1157 (1988).

[93] 445 A.2d 370 (1982).

[94] The premises in *Uston* comprised a casino. Compare *Russo* v. *Ontario Jockey Club* (1988) 46 D.L.R. (4th) 359.

[95] 445 A.2d 370, 375 (1982). See also *Marsh* v. *Alabama*, 326 U.S. 501, 90 L.ed. 265 (1946). Here the US Supreme Court ruled that the residents of a municipality were not to be denied freedom of press and religion simply because a private company held legal title to the entire town. In the words of Justice Black, "[t]he more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it" (at 506, 268). Accordingly a Jehovah's Witness who distributed religious literature on the "public" sidewalk against the private owner's wishes could not be convicted of a criminal trespass. See also *Mosher* v. *Cook United, Inc.*, 405 N.E.2d 720 (1980), 722 *per* Hofstetter J. (dissenting).

[96] Exactly the same issue may arise in relation to premises owned by the government, thereby blurring yet further the distinction between public and private. For example, in *Comité pour la République du Canada—Committee for the Commonwealth of Canada* v. *The Queen in Right of Canada* (1986) 25 D.L.R. (4th) 460, 466, the plaintiffs had been prevented from disseminating their political ideas by carrying placards and distributing pamphlets in the public terminal concourse of an airport. They successfully sued for a declaration that their fundamental freedoms under the Canadian Charter of Rights and Freedoms had been infringed. At first instance Dubé J. thought it "plain and obvious" that public terminal concourses were "indeed 'modern crossroads' for the intercourse of the travelling public", and that freedom of expression and communication ought not in principle to be abridged in such public forums. The Federal Court of Appeal upheld the substance of Dubé J.'s ruling ((1987) 36 D.L.R. (4th) 501), albeit in less extensive and rhetorical terms. Hugessen J. emphasised ((1987) 36 D.L.R. (4th) 501, 509f.) that the government owns its property "not for its own benefit but for that of the citizen" and that the government therefore has an obligation to "devote certain property for certain purposes and to manage 'its' property for the public good".

[97] 423 A.2d 615 (1980).

[98] See also *Commonwealth* v. *Tate*, 432 A.2d 1382 (1981).

[99] 423 A.2d 615, 629.

reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights upon his property".[1] Here, however, the university's rules had been "devoid of reasonable standards" designed to protect both the legitimate interests of the university as an institution of higher education and the individual exercise of expressional freedom. In the total absence of any such "reasonable regulatory scheme", the university was at fault for having ejected a defendant whose actions had themselves been "noninjurious and reasonable".[2]

IV. "Property" as Control over Access

And so continues our search for the inner mystery of "property". Let us look back and see how far we have got since we started. There is no real likelihood that we have arrived at our destination, for the quest for the essential nature of "property" has beguiled thinkers for many centuries. The essence of "property" is indeed elusive. That is why, in a sense, we have tried to catch the concept by surprise by asking not "What is property?" but rather "What is not property?" We have started from the other end of the earth—both geographically and conceptually—and we have deliberately come by the direction which seemed least probable. But along the way we may have discovered something of value. We may have discovered the irreducible conditions which underlie any claim of "property".

The classic common law criteria of "property" have tended to rest a twin emphasis on the assignability of the benefits inherent in a resource and on the relative permanence of those benefits if unassigned. Before a right can be admitted within the category of "property" it must, according to Lord Wilberforce in *National Provincial Bank Ltd.* v. *Ainsworth*,[3] be "definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability".[4] This preoccupa-

[1] 423 A.2d 615, 630.

[2] 423 A.2d 615, 632f. That the availability of private access may be coloured by public purpose is also evident, for instance, in more recent suggestions that a police officer, if acting "out of caprice or malice", may not be able effectively to terminate the licence which a member of the public enjoys to enter a police station for the purpose of lawful enquiry or business. As Nathan J. observed in *Bethune* v. *Heffernan* [1986] V.R. 417, 423f., "public policy requires unfettered access to public places especially police stations and the authority of police persons to exclude must be exercised with that policy in mind". See also *Comité pour la République du Canada—Committee for the Commonwealth of Canada* v. *The Queen in Right of Canada* (1987) 36 D.L.R. (4th) 501, 510 *per* Hugessen J.

[3] [1965] A.C. 1175, 1247G-1248A.

[4] This proposition has been adopted and applied in the High Court of Australia (*R.* v. *Toohey, ex parte Meneling Station Pty. Ltd.* (1982) 158 C.L.R. 327, 342f. *per* Mason J.) See also *Sonenco (No 77) Pty. Ltd. v. Silvia* (1989) 89 A.L.R. 437, 457 *per* Ryan and Gummow JJ.

tion with assignability of benefit and enforceability of burden doubtless owes much to the fact that the formative phases of the common law concept of property coincided with a remarkable culture of bargain and exchange. Non-transferable rights or rights which failed on transfer were simply not "property". Within the crucible of transfer lawyers affected to demarcate rights of "property" from rights founded in contract and tort or, for that matter, from human rights and civil liberties. Only brief reflection is required in order to perceive the horrible circularity of such hallmarks of "property".[5] If naively we ask which rights are proprietary, we are told that they are those rights which are assignable to and enforceable against third parties. When we then ask which rights these may be, we are told that they comprise, of course, the rights which are traditionally identified as "proprietary".[6] "Property" is "property" because it is "property": property status and proprietary consequence confuse each other in a deadening embrace of cause and effect.

Nor have the philosophers given significantly greater assistance in explaining the phenomenon of "property". Perhaps inevitably lawyers have concentrated their attention on locating the *ownership* of "property", this task of identification assuming vital significance in a legal culture dominated by transfer and conveyance. By contrast philosophers have directed their efforts principally towards rationalising the *institution* of "property". While lawyers discuss who owns what, philosophers ask why anyone can legitimately claim to own anything. Justificatory theories of "property" range diversely from appeals to the investment of labour or the existence of a social contract to arguments based upon first occupancy, utility or personhood. A pervasive influence in all philosophical thinking on "property" is still the brooding omnipresence of John Locke. But Locke's concentration on original acquisition ill suits legal discourse in a modern world which is based on derivative acquisition and in which original acquisition (except perhaps in the area of intellectual property) is now virtually impossible. Even Locke himself cannot have believed that in late 17th century England the "Commons" still contained many unappropriated acorns yet to be "pickt up under an Oak" or apples to be "gathered from the Trees

[5] See Kevin Gray, *Elements of Land Law* (London 1987), p. 555ff. In so far as proprietary character is made to depend upon some supposed quality of "permanence" or "stability", the definition of "property" is rendered patently self-fulfilling. Quite often—as for instance in *National Provincial Bank Ltd.* v. *Ainsworth* [1965] A.C. 1175—the reason for asking whether a particular right is *proprietary* is precisely in order to determine whether the right is capable of binding third parties and thereby attaining just such a quality of "permanence" and "stability". It is radical and obscurantist nonsense to formulate a test of proprietary character in this way.

[6] For criticism of this kind of "circuity", see *Colbeam Palmer Ltd.* v. *Stock Affiliates Pty. Ltd.* (1968) 122 C.L.R. 25, 34 *per* Windeyer J.

in the Wood", even if he did think that "property" in such things was "fixed" by the labour invested in their "first gathering".[7] As Walton Hamilton noted much later,[8] Locke's natural state is "a curious affair, peopled with the Indians of North America and run by the scientific principles of his friend Sir Isaac Newton".

In their respective preoccupations with resource allocation and institutional justification, lawyers and philosophers alike have largely failed to identify the characteristic hallmark of the common law notion of "property". If our own travels in search of "property" have indicated one thing, it is that the criterion of "excludability" gets us much closer to the core of "property" than does the conventional legal emphasis on the assignability or enforceability of benefits.[9] For "property" resides not in consumption of benefits but in control over benefits. "Property" is not about *enjoyment of access* but about *control over access*. "Property" is the power-relation constituted by the state's endorsement of private claims to regulate the access of strangers to the benefits of particular resources. If, in respect of a given claimant and a given resource, the exercise of such regulatory control is physically impracticable or legally abortive or morally or socially undesirable, we say that such a claimant can assert no "property" in that resource and for that matter can lose no "property" in it either. Herein lies an important key to the "propertiness" of property.

Here too lies the key to the divergent approaches evident in *Victoria Park Racing and Recreation Grounds Co. Ltd.* v. *Taylor*. The minority in the High Court of Australia found a misappropriation of "property" in the sheer fact that the defendants had diminished the plaintiff's *access* to the benefits of certain resources. By contrast the majority found that there had been no taking of "property", precisely because the defendants' conduct could never in any event have deprived the plaintiff of *control over access* to those resources. For a variety of reasons the resources in dispute had remained at all times inherently non-excludable. The plaintiff might have enjoyed *access* to the benefits of the contested resources, but it never had a *control over access* which could be prejudiced by the actions of the

[7] See *Two Treatises of Government*, 2nd critical ed. by P. Laslett (Cambridge 1967), *The Second Treatise*, s.28 (p. 306).

[8] "Property—According to Locke" 41 Yale L.J. 864, 871 (1932).

[9] Blackstone himself came close (but was still not quite on target) when he described the "right of property" as "that sole or despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (*Bl. Comm.*, vol. II, p. 2). In similar vein the Supreme Court of the United States has observed that the right to exclude is "universally held to be a fundamental element of the property right" (*Kaiser Aetna* v. *United States*, 444 U.S. 164, 179f., 62 L.Ed.2d 332, 346 (1979) *per* Rehnquist J.). See also *International News Service* v. *Associated Press*, 248 U.S. 215 (1918), 250, 63 L.ed. 211, 225 *per* Brandeis J.

defendants. The resources in issue could never have sustained any claim of "property" by the plaintiff and could not now therefore support any allegation of loss or misappropriation. Whatever it was the defendants took—and they undeniably took something—they took none of the plaintiff's "property".

The concept of excludability thus takes us some way towards discovering a rationally defensible content in the term "property". The differentiation of excludable and non-excludable resources points up the irreducible elements which lie at the core of the "property" notion. But these irreducibles, once isolated and identified, leave little if anything of value to be gathered from the traditional indicia of "property". The concept of excludability does not, of course, resolve entirely the issue of justice in holdings; it merely demarcates the categories of resource in which it is possible to claim "property". It sets outer limits on claims of "property", but provides no criteria for justifying such claims on behalf of particular individuals—except to the extent that we accept the initially unpalatable (but historically attested) proposition that the sustained assertion of effective control over access to the benefits of a resource tends ultimately to be constitutive of "property" in that resource. The precise allocation of "property" in excludable resources is left to be determined—is indeed constantly formulated and reformulated—by various kinds of social and moral consensus over legitimate modes of acquisition and the relative priority of competing claims. This consensus is reinforced by a machinery of legal recognition and enforcement which thus adds or withholds the legitimacy of state sanction in relation to individual assertions of "property".[10]

V. Conclusions

If "property" is a power-relation constituted by legally sanctioned control over access to the benefits of excludable resources, certain conclusions follow.

A. "Property" is a Relative Concept

Since the physical, legal and moral conditions of excludability may vary according to time and circumstance, it becomes clear that the notion of "property" in a resource is not absolute, but relative. The

[10] Thus, according to Felix Cohen, "[p]rivate property is a relationship among human beings such that the so-called owner can exclude others from certain activities or permit others to engage in those activities and in either case secure the assistance of the law in carrying out his decision". Cohen also defined private property in terms of "exclusions which individuals can impose or withdraw with state backing against the rest of society". See F.S. Cohen, "Dialogue on Private Property" 9 Rutgers L. Rev. 357, 373, 378 (1954-55).

concept of "property" is not static, but dynamic.[11] I may have "property" in a resource today, but not tomorrow.[12] I may have "property" in a resource for one purpose but not for another. I may have "property" in a resource as against X but not necessarily as against Y or Z. It may be that P and Q can both claim "property" in the same resource although their respective interests are mutually opposed.[12] It is not even inevitable that there should be a quantum step between having "property" in a resource and not having "property" in it. Propertiness is represented by a continuum along which varying kinds of "property" status may shade finely into each other.[14]

[11] The relativity of "property" is not merely a matter of relativity to time and place. The range of resources in respect of which "property" may be asserted is variable with the advance of modern technology. It can be questioned, for instance, whether the technology of weather modification has the effect of propertising clouds and rainfall. See "Who Owns the Clouds?" 1 Stanford L. Rev. 43 (1948); W.H. Fischer, "Weather Modification and the Right of Capture" *8 Natural Resources Lawyer* 639 (1975).

[12] Such is the case, for example, with certain types of intellectual property (*e.g.* patents and copyrights), which in most jurisdictions are subject to some form of sunset clause (see J. Hughes, "The Philosophy of Intellectual Property" 77 Georgetown L.J. 287, 323ff. (1988-89). However, the mere fact that "property" in a resource may be relative over time is not inconsistent with the proposition that "property" implies some element of permanence in the sense of irrevocability. X cannot claim to have "property" in a particular resource if his rights are subject to immediate, arbitrary and unconsented termination by Y (see *e.g. R* v. *Toohey, ex parte Meneling Station Pty. Ltd.* (1982) 158 C.L.R. 327). On the contrary, in such circumstances, it is Y who has "property" in the resource by virtue of his ability to control the access of X to the relevant benefits.

[13] The propositions advanced in this paragraph are, of course, most classically demonstrated in the law of adverse possession of land (see Gray, *op. cit.*, pp. 741f., 751). At common law, partly in view of some perception that ultimately land is a morally non-excludable resource, it is always said that title to land is relative (see *Asher* v. *Whitlock* (1865) L.R. 1 Q.B. 1, 5). Suppose that A, who holds the documentary (or "paper") title to land in fee simple, is wrongfully dispossessed by B. After four years of adverse possession B is himself dispossessed by C. Failing a successful action for recovery, A retains "property" in the land—but only until the expiration of 12 years from the date of A's dispossession by B (Limitation Act 1980, s. 15(1)). At this point A's paper title is statutorily "extinguished" (Limitation Act 1980, s. 17), and C has a "property" in the land which is opposable against A but not, of course, as against B, who still has four more years before *his* right of recovery from C becomes statute-barred. Even during the relevant adverse possession period each squatter has a "property" in the land in the form of a tortious fee simple (see *Wheeler* v. *Baldwin* (1934) 52 C.L.R. 609, 632 *per* Dixon C.J.; *Newington* v. *Windeyer* (1985) 3 N.S.W.L.R. 555, 563E). It thus becomes entirely possible that a number of persons may accurately assert independent claims to have "property" simultaneously in the same resource.

[14] Along this continuum there is often, for instance, a subtle gradation between "absolute property" and "qualified property" in a disputed resource. This distinction between "absolute" and "qualified" property has long been recognised at common law in relation to such resources as wild animals (see *Bl. Comm.*, vol. II, pp. 391, 395 (*ante*, note 26)). Even the landowner's "qualified property" in wild animals persists only so long as he "can keep them in sight" and has "power to pursue them" (see Gray, *op. cit.*, p. 34). See also *Pierson* v. *Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), cited by C.M. Rose, "Possession as the Origin of Property" 52 U. Chi. L. Rev. 73, 76ff. (1985–86). The notion of "qualified property" may have a contemporary—and wholly unforeseen—application to that modern equivalent of the fugitive swarm of bees, the disputed commercial or corporate opportunity.

B. "Property" has Moral Limits

The essential relativity of "property" emerges perhaps most clearly in the proposition, discussed earlier in this paper, that claims of "property" may be abridged in order to further more highly rated social objectives. "Property" is not a value-neutral phenomenon. "Property" in a resource stops where the infringement of more basic human rights and freedoms begins. There are distinct moral limits to the concept of "property". As the Supreme Court of New Jersey observed in *State* v. *Shack*,[15] "[p]roperty rights serve human values. They are recognised to that end, and are limited by it."[16] The same Court confirmed that "an owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies".[17]

Quite profound—although as yet barely acknowledged—consequences flow from this recognition of the moral limits of "property". The moral qualification has, of course, a major significance for those who endorse the rhetoric of stewardship[18] and the communitarian theory that the earth's resources are effectively held on trust for a number of social and environmental interests. Thin air, for instance, may not be made thick with pollutants. Land in particular takes on the character of a social commodity[19]—a realisation which impacts just as keenly on patterns of land use and development as it now does on the increasingly contentious issue of recreational access to wild country.[20]

In some deeper and broader sense it is the collectively defined moral baselines of the property concept which alone secure the

[15] 277 A.2d 369, 372 (1971).

[16] In *State* v. *Shack* the Supreme Court of New Jersey reversed the trespass convictions of an attorney and a social services worker who, in defiance of the wishes of the landowner, had entered his property in order to visit migrant farmworkers residing there. Weintraub C.J. led the Supreme Court in holding that "the employer may not deny the worker his privacy or interfere with his opportunity to live with dignity and to enjoy associations customary among our citizens. These rights are too fundamental to be denied on the basis of an interest in real property and too fragile to be left to the unequal bargaining strength of the parties" (277 A.2d 369, 374).

[17] 277 A.2d 369, 373. Weintraub C.J. went on to cite Professor Powell in support of the proposition that "[a]s one looks back along the historic road traversed by the law of land in England and America, one sees a change from the viewpoint that he who owns may do as he pleases with what he owns, to a position which hesitatingly embodies an ingredient of stewardship; which grudgingly, but steadily, broadens the recognised scope of social interests in the utilisation of things" (*5 Powell, Real Property* (Rohan 1970), §746, p. 494).

[18] See V.J. Yannacone, "Property and Stewardship—Private Property plus Social Interest equals Social Property" 23 S. Dak. L. Rev. 71 (1978).

[19] See R.F. Babcock and D.A. Feurer, "Land as a Commodity 'affected with a Public Interest'" 52 Wash. L. Rev. 289 (1976–77).

[20] See *e.g.* R. McOwan, "Access in Scotland" *Climber and Hill Walker*, vol. XXIX, no. 6 (June 1990), p. 46; W. Wright, "Access: The Credibility Question" *Climber and Hill Walker*, vol. XXIX, no. 7 (July 1990), p. 40; "Worries over moorland access", 91 *High Magazine* (June 1990), p. 13.

foundations for cultural development, personal fulfilment and the enjoyment of a civilised and dignified way of life. Vast areas of human resource and human capacity are excluded from the reach of private property, and are indeed excluded so effectively that we rarely pause to reflect either that it might have been otherwise or, more ominously, that some day it may yet be.

In most societies, for instance, there is a general consensus that no attempt should be made to propertise certain ranges of humane, intellectual or sensory experience. There is no "property" in the right to listen to Chopin nocturnes; or to play the saxophone; or to engage in sexual intercourse; or to reproduce children. Nobody can assert that he (or some restrictively defined group of "owners") has an exclusive right to determine who may read novels or paint pictures or go to the theatre or climb mountains. There is no such phenomenon as "property" in the game of golf or in the right to play chess. (Even William Webb Ellis, who in 1823 first lifted the ball and ran with it, claimed no "property" in the resulting game of rugby football.) For the most part no one "owns" the right to consume certain kinds of food or drink.[21] Nowadays at least there is no "property" in the right to vote or to be eligible for public office, and every democratic society is ultimately underpinned by the denial that there can be any "property" in political thought. But it is salutary to reflect that none of this need be so.

The current range of the world's propertised resources is indeed much more limited than we might imagine. Only a relatively small part of the total field of economic facility and human capacity is at present permitted to be the subject of private claims of "property". Amongst the challenges of the 21st century will be the question whether such "property" claims are to be allowed in relation to a wider group of assets and resources. The ambit of eligibles will include resources which range variously from human body parts and cells[22] to fecundity, reproductive capacity and live babies; from the

[21] That rights of consumption can, in rare instances, be the subject of "property" appears clearly from the fact that even today the Crown retains a prerogative right in respect of royal fish (whale and sturgeon) and wild unmarked white swans swimming in open and common rivers (see *Case of Swans* (1592) 7 Co. Rep. 15b, 16a, 77 E.R. 435, 436). Rights of consumption are confined to the Crown and to those to whom the Crown has granted permission, whether by way of franchise, swan mark or otherwise (see *Halsbury's Laws of England*, 4th ed., vol. 8, pp. 904f. (paras. 1519f.)).

[22] See *e.g. Moore* v. *Regents of University of California*, 249 Cal. Rptr. 494, 504ff. (1988). Here a medical research team had removed the plaintiff's diseased spleen and had, without his knowledge or consent, developed from it a cell-line which was capable of generating pharmaceutical products of enormous therapeutic and commercial value. (The market potential of the products derived from the disputed cell-line was estimated to amount to U.S. $3 billion by 1990.) A Californian Court of Appeal held that the plaintiff had a sufficient property right in "his" body tissue to enable him to maintain a successful action in conversion. See also "Toward a Right of Commerciality: Recognizing Property Rights in the Commercial Value of Human Tissue" 34 U.C.L.A. L. Rev. 207 (1986–87); J. Lavoie, "Ownership of Human Tissue" 75 Virginia L.

exploitable aspects of the human persona to the asset of commercial product goodwill; from leisure options to the eventual cure for AIDS and cancer; from Antarctica to outer space. It is at this point that we will really test the proposition that there are moral limits to the notion of "property".

C. "Property" is a Term of Wide Signification

Leaving aside for a moment the issue of moral limitation, it is clear that the perspective of excludability has an otherwise liberating impact on the identification of "property". An extensive frame of reference is created by the notion that "property" consists primarily in control over access. Much of our false thinking about property stems from the residual perception that "property" is itself a thing or resource rather than a legally endorsed concentration of power over things and resources.[23] If "property" is not a thing but a power-relationship, the range of resources in which "property" can be claimed is significantly larger than is usually conceded by orthodox legal doctrine. (This is indeed the source of both the greatest challenge and the greatest danger confronting the law of property in the 21st century.) The limits on "property" are fixed, not by the "thinglikeness"[24] of particular resources but by the physical, legal and moral criteria of excludability. By lending the support of the state to the assertion of control over access to the benefits of particular resources, the courts have it in their power to create "property". But of critical importance in this definitional process is obviously the care with which the courts determine which resources are recognisably non-excludable.

1. "Property" in labour-power

The scope of "property" is potentially far-reaching. There is, for example, no monstrous implausibility in the idea that a person may have a "property" in the resource of his labour-power. Indeed the recognition of "excludability" as a key component of "property" makes heightened sense of much of the law relating to employment. To the extent that he propertises this resource through the contract

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Rev. 1363 (1989); N.E. Field, "Evolving Conceptualizations of Property: A Proposal to De-Commercialize the Value of Fetal Tissue" 99 Yale L.J. 169 (1989–90).

[23] Jeremy Bentham recognised this long ago. Bentham pointed out that "in common speech in the phrase 'the object of a man's property', the words 'the object of' are commonly left out; and by an ellipsis, which, violent as it is, is now become more familiar than the phrase at length, they have made that part of it which consists of the words 'a man's property' perform the office of the whole". See *An Introduction to the Principles of Morals and Legislation*, ed. by W. Harrison (Oxford 1948), p. 337, note 1 (Chapter XVI, section 26).

[24] The phrase was originally used by Pollock and Maitland, *The History of English Law*, 2nd ed. (London 1968), vol. 2, p. 125. See also F.W. Maitland, *Collected Papers*, ed. by H.A.L. Fisher (Cambridge, 1911), vol. III, p. 343.

of employment, the employee has a "property" in his labour-power and arguably, therefore, in his job. The contract certainly underlines the employee's control over the access which strangers may have to the benefits of his labour-power. For precisely the same reason the contract of employment, being bilateral in character, confers also on the employer a "property" in the employee's labour-power.[25] There are, however, clear moral limits on the "property" which either employer or employee may claim in the resource of labour-power. The employee is no longer competent to contract away his labour-power for life or in conditions of bondage or slavery.[26] Likewise the rules on restraint of trade significantly limit the employer's right to constrain the employee's exploitation of his labour-power during or after termination of the employment nexus. Both the rules on slavery and the rules on restraint of trade effectively recognise that there are moral (and perhaps even physical) limits on the degree to which a person's labour-power can ever be the subject of control by another.

2. *"Property" in confidential information*

Further evidence of the utility of the "control over access" explanation of "property" can be seen elsewhere. If there is one area of the law which places a premium on the assertion of control over the access of strangers to the benefits of a particular resource, it is the legal protection of confidential information. It ought on this basis to be possible to claim "property" in confidential information. Until recently, however, such a conclusion has tended to be countered with reference to Justice Holmes's famous aphorism that the word "property" as applied in the field of intellectual property is merely "an unanalysed expression of certain secondary consequences of the primary fact that the law makes some rudimentary requirements of good faith".[27]

It is significant that in his recent decision in *Smith Kline & French Laboratories (Australia) Ltd.* v. *Secretary, Department of Community Services and Health*[28] Gummow J. of the Federal Court of Australia found Justice Holmes's dictum of little assistance in illuminating the modern development of the equitable jurisdiction to grant relief against actual or threatened abuses of confidential information.[29] In

[25] The employment context demonstrates that two persons can both claim "property" in the same resource: here the resource of labour-power generates two sets of choses in action.

[26] See *Somerset* v. *Stewart* (1772) Lofft. 1, 19, 98 E.R. 499, 510 *per* Lord Mansfield ("The state of slavery is of such a nature, that it is incapable of being introduced on any reasons, moral or political . . . it's so odious, that nothing can be suffered to support it . . . therefore the black must be discharged").

[27] *E.I. duPont de Nemours Powder Co.* v. *Masland*, 244 U.S. 100, 102, 61 L.ed. 1016, 1019 (1917).

[28] (1990) 95 A.L.R. 87.

[29] Even the American courts have now distanced themselves from Justice Holmes's apparent denial of the "property" rationale underlying the legal protection of trade marks and trade secrets (*Van Products Co.* v. *General Welding & Fabricating Co.*, 213 A.2d 769, 780 (1965);

Gummow J.'s view, "[t]he degree of protection afforded by equitable doctrines and remedies to what equity considers confidential information makes it appropriate to describe it as having a proprietary character".[30] This conclusion followed, not because property is the basis upon which that protection is given,[31] but "because of the effect of that protection".[32] The result in *Smith Kline & French* was that Gummow J. was prepared to hold that the reception and use of confidential information by a governmental agency comprised an "acquisition of property" for the purpose of the constitutional protection against unjust takings.[33] Indeed the existence of eminent domain powers and "just takings" clauses provides in general an excellent reason for the exercise of care in ensuring a suitably comprehensive definition of the concept of "property".

D. "Property" is Definable Otherwise than in Terms of Proprietary Consequence

The adoption of excludability as the constitutive criterion of "property" brings about the further result that the legal concept of "property" need no longer be defined tautologously in terms of legal consequence. Whether X has or has not "property" in a given resource should not depend on whether his rights are assignable to Y or are binding upon Z, any more than the transferability or enforceability of X's rights should turn on some obscure characterisation of those rights as "property". Both formulae exhibit a similar infirmity in so far as each tends to link property status incestuously with proprietary consequence.

The attribution of property status is instantly rescued from such circularity of argument if "property" is defined, not by reference to the traditional indicia of assignability and enforceability, but rather by independent reference to the free-standing criterion of excludability.[34]

Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986, 1004, 81 L.Ed.2d 815, 833, n.9 (1984)). See S.J. Soltysinski, "Are Trade Secrets Property?" (1986) 17 I.I.C. 331, 335ff.

[30] (1990) 95 A.L.R. 87, 135. See also S. Ricketson, "Confidential Information—A New Proprietary Interest?" (1977–78) 11 Melbourne U.L.R. 223, 289.

[31] See *e.g. Moorgate Tobacco Co. Ltd.* v. *Philip Morris Ltd.* [No. 2] (1984) 156 C.L.R. 414, 438 *per* Deane J.

[32] (1990) 95 A.L.R. 87, 136. This approach is consistent with the view, frequently expressed long ago in the High Court of Australia by Isaacs J., that "equitable property is commensurate with equitable relief" (*Hoystead* v. *Federal Commissioner of Taxation* (1920) 27 C.L.R. 400, 423). See also *Glenn* v. *Federal Commissioner of Land Tax* (1915) 20 C.L.R. 490, 503; *Trustees, Executors and Agency Co. Ltd.* v. *Acting Federal Commissioner of Taxation* (1917) 23 C.L.R. 576, 583.

[33] (1990) 95 A.L.R. 87, 136. See Constitution of the Commonwealth of Australia, s. 51(xxxi). Compare *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 81 L.Ed.2d 815 (1984).

[34] The only point at which attribution of property status to X's rights in a resource becomes legally significant arises where the operation of some legal rule is restrictively limited by reference to "property". Whether X's rights constitute "property" may help to determine, for example, whether a given resource is properly the subject of security, attachment or taxation, or can be the *res* of a trust, or can be misappropriated or pass to a trustee in bankruptcy or be divided as

This substitution is easily defensible on the ground that the notion of excludability offers an immeasurably more convincing explanation of the legal phenomena of assignability of benefit and enforceability of burden. Assignment (whether voluntary or involuntary) constitutes the ultimate release or abnegation of control over the access of strangers to the benefits of an excludable resource. In the absence of such assignment, "property" in an excludable resource can be vindicated against third parties precisely because the resource is *excludable*.

E. "Property" is Assimilable within Consensual Theory

In conventional legal doctrine much energy is devoted to patrolling the frontier between property and contract. Property lawyers keep especially vigilant watch for those fugitive varieties of contractual right which threaten to cross the frontier and settle in property territory. Much fuss is made whenever the conceptual border is realigned and rights of "contract" are brought within the province of "property". Thus, for instance, the decision in *Tulk* v. *Moxhay*[35] is generally considered to have elevated the restrictive covenant from contractual to proprietary status. Three centuries earlier—with the more sophisticated development of the action of ejectment—the lease of land had likewise crossed the boundary from contract to property.[36] It may well be that exactly the same transition is occurring in the context of the modern contractual licence.[37]

The test of excludability throws into severe doubt the validity of any sharp dichotomy between contract and property. The ambivalent quality, for example, of the contractual chose in action provides a constant reminder of the fluid nature of such classifications. It may be, however, that instead of straining to see which contractual rights can be forced upwards on to the plane of property, we should instead have been observing that there are remarkably few rights of so-called "property" which cannot be assimilated or rationalised within some form of consensual theory. Every gift, lease, trust and security has its origins in some arrangement of consent or assent. Behind every conveyance of land in fee simple lies the historic shadow of innum-

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a matrimonial asset in the event of divorce. In resolving such questions it profits little to ask whether X's rights are the sort of rights which characteristically have the legal consequence in issue, but it is enormously beneficial to direct attention to the criterion of excludability. Nowhere is the utility of this perspective more readily demonstrated than in relation to the protection of trade secrets. Increasingly the courts declare that in this area "the starting point . . . is not whether there was a confidential relationship, but whether, in fact, there was a trade secret to be misappropriated" (see *Van Products Co.* v. *General Welding & Fabricating Co.*, 213 A.2d 769, 780 (1965)).

[35] (1848) 2 Ph. 774, 41 E.R. 1143.

[36] See A.W.B. Simpson, *A History of the Land Law*, 2nd ed. (Oxford 1986), p. 74ff.

[37] See Kevin Gray, *Elements of Land Law* (London 1987), p. 550ff.

erable contracts or assents which provide the chain of title. Behind every title in property (real or personal) there lies ultimately a social contract, under which we each accept the historic distribution of holdings—usually for no better reason than the awesome degree of social conflict and disorder which would otherwise ensue.

Such realisations should lead us towards a radical redefinition of the relationship between property and contract. If this paper conveys any message at all for conventional property lawyers, it is that "property" is not all it is cracked up to be.[38] By now it should be becoming obvious that the notion of "property" readily collapses back into contract or, more broadly, into a number of arrangements based on assent.[39] No quantum step differentiates contract from "property", for "property" has no clear threshold. There exists instead a spectrum of "propertiness" in which obligations which derive their moral force from discrete acts of affirmative consent shade gradually and almost imperceptibly into obligations whose social persuasiveness rests upon the collective acceptance of sustained acts of assertive control.

This is an age when major categories of private law seem to be tending towards coalescence—contract with tort, tort with trust, trust with contract. These are days in which it is possible to suggest, apparently seriously, that the constructive trust is available as a remedy for breach of contract[40] and even for the commission of torts.[41] The time may also have come for a recognition that the "property" notion should be read down and assimilated within a more general heading of civil remedy. It is no accident that the case which, in so many ways, provides the focus of the present paper is one which raises, in almost inseparable conjunction, issues which relate variously to real property, intellectual property, tort, contract, privacy, unfair competition, and (last but not least) the principle of restitution.

F. "Property" is Never Truly Private

There is another, perhaps even more far-reaching, implication of the relativity of "property". We have described "property" as turning on a criterion of excludability which is defined, in part, in social and

[38] For the view that property is "'dead' as a result of having been worked to death in indiscriminate legal application", see R. Cotterrell, "The Law of Property and Legal Theory", in W. Twining (ed.), *Legal Theory and Common Law* (Oxford 1986), p. 87.

[39] See *e.g.* J. Effron, "The Contractualisation of the Law of Leasehold: Pitfalls and Opportunities" (1988) 14 Monash U.L.R. 83. On the ambiguous status of the lease, see further *Progressive Mailing House Pty. Ltd.* v. *Tabali Pty. Ltd.* (1985) 157 C.L.R. 17, 51f. *per* Deane J.

[40] See *e.g. Hospital Products Ltd.* v. *United States Surgical Corporation* (1984) 156 C.L.R. 41, 125 *per* Deane J.

[41] See *e.g. LAC Minerals Ltd.* v. *International Corona Resources Ltd.* (1989) 61 D.L.R. (4th) 14, 17 *per* Wilson J.

moral terms. There is therefore in every property drama a third actor in addition to the plaintiff and the defendant. This third actor—much overlooked in the traditional common law accounts of private property—is, of course, the state, expressing its collective judgment through the voice of the courts. In this sense the state takes on a critical, and so far little explored, role in defining the concept of "property". The state itself becomes a vital factor in the "property" equation: all "property" has a public law character.[42] Private "property" is never truly private. The control function of "property" is delegated sovereignty,[43] and in underpinning the law of "property" the state indirectly adjudicates an exceedingly broad range of the power-relations permitted within society.

Yet even in the playing out of this arbitral function, the state's role suddenly appears to mirror the role of the property concept itself. In determining the limits of "property", the collective voice has already begun to assert that sort of control over access to resources which is the characteristic component of the right of "property". Behind the "owner" of "private property" stands the guardian of "public property" and the "commons"; and behind this guardian lie centuries of social thought about the ways in which the earth's resources should be shared and distributed. Viewed thus, the concept of "property" conforms to a kind of chaos theory which steadily reveals pictures of ever intensifying complexity receding infinitely into the distance.

G. "Property" is the Gateway to Access

The concept of "property" is a gateway and, like most gateways, is just as important for what it keeps out as for what it lets in. The courts stand as the guardians at the gate, looking both ways. As gatekeepers, the courts regulate traffic backwards and forwards between a city-state ruled by the regime of private property and the largely unregulated commons which lies outside its walls.[44] Thus it is that the withholding of property status from certain crucial human

[42] See Michael Crommelin, "Economic analysis of property", in D.J. Galligan (ed.), *Essays in Legal Theory* (Melbourne 1984), p. 78.

[43] See *e.g.* M.R. Cohen, "Property and Sovereignty" 13 Cornell L.Q. 8 (1927).

[44] There may in the present context be more than purely figurative significance in this harnessing of a political metaphor. If there is one political phenomenon which mirrors the elusive and ultimately insubstantial quality of the individual claim to rights in private property, it is the (equally individual) claim to rightful authority in public government. The concept and meaning of government are vulnerable to exactly the same deep scepticism—often phrased in eerily similar terms—which may be directed at the institution of private property. Most of the conclusions drawn in this paper as to the nature of private property are applicable, with minimal amendments, to its public sector analogue, the institution of government. (To acknowledge the linkage and the conceptual fragility of these two notions is, sadly, no guarantee of impeccable anarchist credentials. Both "property" and "government"—however spectral their deep meaning—have a functional utility which is vital to the everyday ordering of the world in which we live.)

resources gives a new and invigorated content to the assertion that property jurisprudence is ultimately concerned with claims of access to social goods. This understanding of property may help to resolve C.B. Macpherson's famous tension between property as a right to exclude and property as a right of access. In Macpherson's view property consists not so much in the right to exclude strangers from privately owned resources, as in the assertion of public rights to share in a number of socially valued resources which enable us to lead fulfilled and dignified lives.[45] Maybe the essential truth in the Macpherson thesis is that the role of property is not simply to guarantee the private ownership of certain goods, but also to stop others more powerful than ourselves from propertising all the goods of life and thereby precluding general access. In this way "property" is a bivalent concept, operating just as significantly (if more silently) to assure us of our continuing vested rights in the social goods which remain in the commons.

H. "Property" is a Category of Illusory Reference

In the exercise of this dual role the notion of "property" serves both to concretise individual material needs and aspirations and to protect a shared base for constructive human interactions. Indeed, in a subtle mimicry of our thoughts and emotions, the language of "property" catches in a peculiarly acute form many of our reactions to the experience of living. The present paper has sought, however, to articulate a deep scepticism about the meaning and terminology of property. "Property" is a term of curiously limited content; as a phrase it is consistently the subject of naive and unthinking use. "Property" comprises, in large part, a category of illusory reference: it forms a conceptual mirage which slips elusively from sight just when it seems most attainably three-dimensional. Perhaps more accurately than any other legal notion it was "property" which deserved the Benthamite epithet, "rhetorical nonsense—nonsense upon stilts".[46]

"Property" remains ultimately an emotive phrase in search of a meaning. The value-laden mystique generated by appeals to "property" exerts a powerful and yet wholly spurious moral leverage. At the beginning of all taking was not a right but a wrong. The first takers were not, however, guilty of theft; they were guilty of believing the deception of the serpent. This deception consisted in the

[45] See C.B. Macpherson, "Capitalism and the Changing Concept of Property", in E. Kamenka and R.S. Neale (eds.), *Feudalism, Capitalism and Beyond* (Canberra 1975), p. 116ff.

[46] See J. Bentham, *Anarchical Fallacies; being an Examination of the Declarations of Rights issued during the French Revolution*, in *The Collected Works of Jeremy Bentham*, ed. by J. Bowring (Edinburgh 1843), vol. II, p. 501.

assumption that the fruit of *every* tree in the Garden is necessarily a fit subject of private taking; that there can be "property" in *all* of the goods of life; that human value in its *totality* is apprehensible through the private exercise of eminent domain.[47] In the allegory of the Garden it is significant that the symbolic act of sin consisted of a usurpation of *control over access* to an especially desirable resource. When Eve seized and ate the fruit of the tree of wisdom—the tree of the knowledge of good and evil—"and gave also unto her husband with her",[48] her act was one not of altruism but of beneficial control. It affirmed for ever the primal—the visceral—impulse of *meum* and *tuum*. Out of this act of arrogation was born the global pretence of comprehensively individualised rights of "property".

It is this hidden dynamic of "property"—the deep resonance of *meum* and *tuum*—which pervades so much of our private law thinking today. It is this inner dynamic which silently imparts critical baselines to the law relating to torts, trusts, commercial competition, the fiduciary principle, restitution, unjust enrichment, privacy, the preservation of confidence, and the reward of industrial and intellectual effort. Irrespective of the precise language chosen to serve as the doctrinal vehicle, the major inarticulate premise in each of these areas is generated by some underlying half-conscious perception of "property".

There can indeed be little doubt that property thinking is deeply embedded in the human psyche. But despite its insinuating omnipresence in private law, the meaning of "property" remains strictly limited. It may be that the only positive content truly comprised within the "property" notion is that which delimits the range of resources in respect of which society will tolerate the claims of *meum* and *tuum*.[49] Beyond the irreducible constraints imposed by the idea of excludability, "property" terminology is merely talk without substance—a filling of empty space with empty words. When subjected to close analysis the concept of "property" vanishes into thin air just as surely and elusively as the desired phantom with which we began. Claims of *meum* and *tuum* do not protect rights of any sacrosanct or *a priori* nature, but merely purport with varying degrees

[47] In searching out the roots of property jurisprudence there is, of course, a venerable precedent for recourse to the opening chapters of the *Book of Genesis*. Compare Blackstone's location of the origins of property in the creation story (*Bl. Comm.*, vol. II, p. 2). See also L.M.G. Clark, "Women and John Locke; or, Who Owns the Apples in the Garden of Eden?" (1977) 7 *Canadian Journal of Philosophy* 699.

[48] *Genesis*, iii: 6.

[49] Regardless of conceptual content, reference to "property" confers of course a certain mechanical utility in facilitating the operation of those legal rules which are premised on the presence or availability of "property" (*ante*, note 34). The usefulness of the "property" reference—more or less as a form of legal shorthand—does not, however, promote any clearer understanding of the concept itself.

of sophistication to add moral legitimacy to the assertion of self-interest in the beneficial control of valued resources. In the end the "property" notion, in all its conceptual fragility, is but a shadow of the individual and collective human response to a world of limited resources and attenuated altruism.