

FOREWORD

THE HON JUSTICE JAMES EDELMAN*

For as long as there has been theorising about law, legal writers have explored the scope and boundaries of ‘property’. *The Institutes of Justinian*, following the schema of Gaius, explained that ‘[t]he whole of the law which we observe relates either to persons, or to things, or to actions’.¹ To the Romans, ‘things’ could be corporeal (such as land or gold) or incorporeal (such as inheritances or obligations). Property in this sense really meant anything of value to someone. The Romans, who did not think in terms of rights, would describe the land or the gold as the property (‘that land is my property’) rather than an object of a property right (‘I have a property right to that land’).

By the time that jurists moved towards thinking about property as a branch of law involving the objects of rights, feudalism had led ‘property’ to become almost a metonym for ‘rights to land’. ‘Real’ property, from *res* or thing, was usually an action for possession. A personal action was usually one for damages. Maitland regretted this distinction between real and personal property based as it was upon actions.² But the distinction based upon action has been stubbornly persistent. It was reinforced by an influential American article published in 1972 by Calabresi and Melamed which associated property with rules for primary enforcement (injunction, specific performance) rather than sanctions for breach (damages).³

An alternative conception of property, expressed in terms of rights to things, also involves difficult issues. Which rights will count as property? For instance, it is generally accepted that a right to exclude others from the use of a car is a property right but a contractual licence to use a car is not.⁴ Yet, the existence of a tort of intentional interference with contractual rights has sometimes led to a licence or other contractual rights being characterised as ‘quasi-proprietary’.⁵

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1 Justinian I, *The Institutes of Justinian*, tr JB Moyle (Oxford University Press, 5th ed, 1913) bk 1 title 2, 6 [12].

2 FW Maitland, *Equity: Also the Forms of Action at Common Law* (Cambridge University Press, 2nd ed, 1910) 369.

3 Guido Calabresi and A Douglas Melamed, ‘Property Rules, Liability Rules, and Inalienability: One View of the Cathedral’ (1972) 85(6) *Harvard Law Review* 1089, 1092–3.

4 See *King v David Allen and Sons Billposting Ltd* [1916] 2 AC 54.

5 See, eg, *Zhu v Treasurer (NSW)* (2004) 218 CLR 530, 572–7 [123]–[134] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ), quoting *A-G (NSW) v Perpetual Trustee Co (Ltd)* (1952) 85 CLR 237, 294–7 (Kitto J).

Which things will count as the object of property rights? For instance, tangible things are obviously capable of being the object of property rights, but is there a thing that is independent of the right in 'intellectual property' or other monopoly rights?

Hohfeld sought to avoid the difficulties of associating property rights with actions or with thing-hood by reclassifying rights as 'paucital rights', which are generally rights enforceable against a single person or definite group, or 'multital rights', which are generally a large collection of rights, that is, rights enforceable against a large, indefinite class.⁶ Rights that would today be classified as part of contract, such as a contractual right to payment, would be paucital. But rights that would today be classified as part of the law of torts, such as a right not to be assaulted, would be multital. This division and terminology never gained widespread acceptance. However, what did gain widespread acceptance was Hohfeld's conception that multital rights involved not merely an aggregation of personal or paucital rights, but a bundling of claim-rights, powers, liberties and immunities.⁷ This was the foundation of the 'bundle of rights' view of property.⁸ However, in an influential article, Penner pointed out that the 'bundle of rights' is not an explanatory model of property at all but is 'little more than a slogan' or 'an expression that conjures up an image, but which does not represent any clear thesis or set of propositions'.⁹ Without a theory providing any standard for the application of property, to treat it as a model can encourage 'license to adopt a particular instrumental perspective'.¹⁰ Fundamentally, the bundle of rights conception also encourages conflation of concepts which are fundamentally different in kind, and subject to different rules, such as a liberty to use (as in a contractual licence) and a right to exclude (as in title to land).

One difficulty with the entire enterprise of defining 'property' may be the natural desire of the systemiser to unify different categories that have both similar and different characteristics. The more grand the theory, and the more it attempts to encompass, the more likely it may be that the theory will be expressed at such a level of abstraction that it is, at best, generally inutile and, at worst, productive of confusion and error. Ultimately, the utility of any theory of property in any particular context may depend upon the consequences that are said to attach to the conclusion that a right is proprietary, and how well adapted that theory is to the particular context.

At the other extreme from an attempt at unification based upon intrinsic features of particular rights is the instrumental approach of American critical legal theory. This approach treats 'property' as a flexible and relational concept that depends upon the context and manner in which the rights operate. In one sense,

6 Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) *Yale Law Journal* 710, 716, 720.

7 Ibid 716, 734, 746, 756, see also at 766.

8 AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107.

9 JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43(3) *UCLA Law Review* 711, 714.

10 Ibid 772.

this is a sweeping theory that relies upon social relations to apply or disapply the label ‘property’ with the various consequences that come with that description.

One of the most comprehensive articles in this edition of the *Journal*, written in the tradition of American critical legal theory, is the wide-reaching analysis of Babie and Nikias. They espouse the instrumental conception of property as ‘a construct emerging from social relations among people’.¹¹ They pay tribute to Murphy J, the early champion of this ‘progressive’ property theory, which they support in preference to the ‘bundle of rights’ approach. Their case study is the decision in *Northern Territory v Griffiths (Ngaliwurru and Nungali Peoples) (‘Griffiths’)*.¹² The appeals in that case were conducted upon the premise, supported by the parliamentary debates and the decision of the High Court of Australia in *Western Australia v Commonwealth (Native Title Act Case)*,¹³ that section 223 of the *Native Title Act 1993* (Cth) requires analogies to be drawn between native title and Western conceptions of title. Whatever content is to be given to the ‘bundle of rights’ approach, it might be doubted whether the High Court did adopt that approach in *Griffiths*. In my reasons in that case, I emphasised one problem with the ‘bundle of rights’ thesis: the differences between a liberty to use and a right to control, which could both be regarded as aspects of ‘native title rights’ but could not be treated as merely a difference of degree between two sticks in a bundle of rights.¹⁴ Nevertheless, from their progressive property perspective Babie and Nikias also demonstrate the inadequacies of the ‘bundle of rights’ approach as a theory of property.

Young’s article explores native title from a different perspective but one which also illustrates the problems of a ‘bundle of rights’ conception of property. In the context of a deep historical and theoretical analysis of the approach to extinguishment of native title law since the decision of *Mabo v Queensland [No 2]*,¹⁵ he considers the decision of the High Court of Australia in *Akiba v Commonwealth*¹⁶ and its aftermath. One of his insightful observations is that the new dynamic of a division between the existence of a right and the exercise of the right offers a more robust conceptualisation of native title, and one less vulnerable to extinguishment, than the more fragile ‘bundle of rights’ approach. It may be that another way to express the same point would be to say that the ‘bundle of rights’ approach encourages the conflation of a liberty to use property with a right to exclude others, both of which might be regulated without being extinguished.

The relationship between regulation and existing doctrines of real property law is the focus of the article by Johnston and France-Hudson. They challenge the near-absolutist ‘island’ conception of private ownership,¹⁷ which sees rights of ownership as limited only by the rights and liberties of others and is commonly

11 Paul Babie and Kyriaco Nikias, ‘The Renewal of the Old: Lionel Murphy’s Progressive-Relational Conception of Property’ (2019) 42(3) *University of New South Wales Law Journal* 790, 793.

12 (2019) 364 ALR 208.

13 (1995) 183 CLR 373 at 483.

14 *Griffiths* (2019) 364 ALR 208, 277 [256].

15 (1992) 175 CLR 1.

16 (2013) 250 CLR 209.

17 See, eg, Charles A Reich, ‘The New Property’ (1964) 73(5) *Yale Law Journal* 733, 733, 771, 774.

associated with the ‘bundle of rights’ conception of property. They see the obligations that accompany property ownership as part of the ‘contours of the owner’s property right’ rather than some externally imposed duties.¹⁸ Within this framework they examine the challenges presented for existing real property law by laws concerned with environmental protection and biodiversity conservation and particularly the *Carbon Credits (Carbon Farming Initiative) Act 2011* (Cth).

An instrumental conception of property is offered by Falconer in an encyclopaedic study of the case law concerning property rights to human biological material. Nearly two thousand years ago, Roman jurists argued about the ownership of toenails clipped from a person. The Roman legal tools, many of which remain embedded in Australian law, required classification of a scenario in categories including: *occupatio* (first possession), *specificatio* (creator of a new thing, sometimes by work and skill), *accessio* (accession). Falconer advocates a different approach, namely a guided discretion that does not differentiate between those rights that arise pre-mortem and those that arise post-mortem. Falconer’s thesis also eschews traditional conceptions of property law for the difficult questions of ownership of human biological material. The ownership of a bicycle or other chattels would rarely be suggested to be a matter of guided judicial discretion, but the special case of human biological material is to be treated differently on this approach. Issues, particularly those of the work and skill considered by the High Court in *Doodeward v Spence*,¹⁹ then fall to be considered ‘in light of the practical needs of the court and the litigants’.²⁰

Pappalardo and Meese adopt a different model of property law. In their article on tolerated use in copyright law, Pappalardo and Meese follow the outcome-focused conception of property law advocated by Calabresi and Melamed. They argue that copyright law should shift so that it aligns more closely with social norms of practice concerned with ‘respectful re-use’.²¹ They argue for a shift in the treatment of non-substitutive uses by a property rule including injunctions, to a liability rule with only nominal damages, where the work has been attributed and treated with integrity and where the use has not caused economic harm to the owner.

Finally, the articles by Fitzpatrick, Compton and Foukona and by Ritchie and Grigg do not develop particular models of property law. The focus of both articles is a negative one, assessing problems with traditional conceptions of property law in particular areas. Fitzpatrick, Compton and Foukona concentrate upon what they describe as the marginalising effects of positivist property law in the system of Torrens title. They point to how informal land markets are resistant to legal change involving the introduction of bright line rules based on land registration systems.

18 Vanessa Johnston and Ben France-Hudson, ‘Implications of Climate Change for Western Concepts of Ownership: Australian Case Study’ (2019) 42(3) *University of New South Wales Law Journal* 869, 876. (1908) 6 CLR 406.

19 Kate Falconer, ‘Dismantling *Doodeward*: Guided Discretion as the Superior Basis for Property Rights in Human Biological Material’ (2019) 42(3) *University of New South Wales Law Journal* 899, 926.

21 Kylie Pappalardo and James Meese, ‘In Support of Tolerated Use: Rethinking Harms, Moral Rights and Remedies in Australian Copyright Law’ (2019) 42(3) *University of New South Wales Law Journal* 928, 941.

After an examination of the adoptions of systems of Torrens title in foreign jurisdictions, including Cambodia, Kenya, the Philippines, the Solomon Islands, the authors argue that the assumptions of simplicity and certainty within the Torrens system may not reflect the reality, particularly in instances of weak state authority. Ritchie and Grigg turn to the challenges presented for real property law by the sharing economy. After a close examination of a framework of sharing, they argue that the sharing economy prioritises access to land ahead of ownership of it. However, they observe the effect of the application of traditional concepts of property law in decisions such as *Swan v Uecker*,²² which treated the entry into an agreement by tenants to ‘rent’ an apartment on Airbnb as a prohibited sublease. Ultimately, they conclude that there is ‘no present need for reform to property law’ in this area.²³

In summary, in the life of the law there has never been a settled understanding of the nature of property law that has commanded widespread support over the long term. Perhaps there never will be. But this edition of the *Journal* is a remarkable cornucopia, containing many and varied, and sometimes courageous, challenges to dominant strands of thinking. The authors of all articles, and the editors of this edition, are to be congratulated on their fine contributions to the development of knowledge and understanding.

22 [2016] VCAT 483; (2016) 50 VR 74.

23 Callum Ritchie and Brendan Grigg, ‘No Longer Unregulated, but Still Controversial: Home Sharing and the Sharing Economy’ (2019) 42(3) *University of New South Wales Law Journal* 981, 1017.