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2

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LAWSCAPE

PARADIGM AND PLACE IN AUSTRALIAN PROPERTY LAW

NICOLE GRAHAM

A thesis submitted for the degree of Doctor of Philosophy of the Faculty of Law, University of Sydney, on 7th March, 2003.

Contents

Acknowledgments	v
Abstract	vi
1. INTRODUCTION: PARADIGM, PLACE, PROPERTY	1
1. DIRECTION: PARADIGM AND PLACE	
<i>The Paradigm of Placelessness</i>	
<i>The Castle: concepts of property in Australian law and culture</i>	
2. LOCATION: LITERATURE REVIEW AND METHODOLOGY	
<i>Behavioural Sciences</i>	
<i>Geosciences</i>	
<i>Literary Studies and Art Theory</i>	
<i>Australian Cultural Studies</i>	
<i>Legal Theory and Jurisprudence</i>	
<i>Property Theory</i>	
<i>Environmental Science and Environmental Philosophy</i>	
3. MAP: OUTLINE OF DISSERTATION	
2. THE PARADIGM OF MODERN PROPERTY LAW	35
1. INTRODUCTION: THE SEPARATION OF PEOPLE AND PLACE	
2. THE ETYMOLOGY OF PROPERTY	
3. NATURE / CULTURE	
<i>Masters and Possessors of Nature</i>	
<i>The Eyes of the Manufacturing Period</i>	
<i>Cultivation: The Nexus and Nascence of Nature/Culture</i>	
<i>A Common Origin, Abstract and Sacred</i>	
4. PERSONS / THINGS	
<i>Land as Power</i>	
<i>Land as Capital</i>	
<i>Land as Other</i>	
<i>Nature as Law and the Antilogy of Natural Rights</i>	
5. ORDERING PLACE: ENCLOSURE	
<i>Making Culture</i>	
<i>Making Nature: Landscape</i>	
<i>Property makes Landscape</i>	
<i>Anti-Enclosure Discourse</i>	
<i>Romanticism</i>	
<i>Resistance in the Poetry of John Clare</i>	
6. CONCLUSION	

3. A COLONISING PARADIGM

96

1. INTRODUCTION: BEARERS OF AN ANCIENT PAST?

2. DEFINING AUSTRALIAN PROPERTY LAW AS LOCAL

*The debate and the terms of definition**Attorney-General v Brown**Andrew Buck**Brendan Edgeworth**Valerie Kerruish*

3. DEFINING AUSTRALIAN PROPERTY LAW AS ALIEN

*The Discourse of Terra Nullius**The Idea of Cultural Progress**The Idea of Waste**Improvement Theory and the Cultivation of Australia**Land Grants**Convicts, Labour and the idea of property**The alienability of property and the commercial value of land**Sovereignty and Exclusion**Squatting and Pastoralism*

4. DEFINING AUSTRALIAN PROPERTY LAW AS MALADAPTED

*Recreating a Gentleman's Park**Starvation**Land Degradation*

5. CONCLUSION

4. DEPHYSICALISING PROPERTY IN THEORY

164

1. INTRODUCTION

2. PERSON - PERSON PROPERTY

*Positive Property: Jeremy Bentham**Utilitarian Property: J.S. Mill**Property Rights: Wesley Hohfeld**Political Property: Kenneth Vandeveld and CB Macpherson*

3. THING - THING PROPERTY

*Consuming Property: Hannah Arendt**Property-as-Fetish: Karl Marx**Property as Symbolic Exchange: Jean Baudrillard**Critiquing the Person/Thing Paradigm: Alain Pottage**Instituting Illusion: Kevin Gray*

4. CONCLUSION

5. DEPHYSICALISING PROPERTY IN PRACTICE	198
1. INTRODUCTION	
2. DEPHYSICALISING PROPERTY IN LEGAL PRACTICE	
<i>Victoria Park Racing</i>	
<i>Yanner v Eaton</i>	
<i>Environmental Law and Private Property</i>	
3. DEPHYSICALISING PROPERTY IN CULTURAL PRACTICE	
<i>'Battling the Land' - The National Farmers' Federation</i>	
<i>Adaptive Farming - Bob Purvis</i>	
<i>Custodians - Paddy Roe</i>	
4. DEPHYSICALISING PROPERTY IN PEDAGOGIC PRACTICE	
<i>Black-letter Pedagogy</i>	
(i) <i>Real Property Law is a Hard Subject</i>	
(ii) <i>Real Property is not about things</i>	
(iii) <i>The Function of Native Title in the Course</i>	
<i>Critical Legal Education</i>	
(i) <i>The Problem with Property Law</i>	
(ii) <i>How Legal Education can change Property Law</i>	
(iii) <i>The Function of Native Title in the Critical Property Law Course</i>	
<i>Place in the Pedagogy of Property Law</i>	
(i) <i>An Anthropocentric Focus on Dephysicalised Property</i>	
(ii) <i>The Death of Land Law - teaching the meaninglessness of real property</i>	
(iii) <i>What Property Courses do not teach about native title</i>	
5. CONCLUSION	
6. CONCLUSION: PLACING PROPERTY	249
Appendix 1	256
Appendix 2	261
Appendix 3	263
Bibliography	265

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Abstract

This thesis argues that contemporary concepts and practices of property in Australian legal discourse abstract relationships between people and place. Definitions of property as 'elusive', 'illusory' and 'dephysicalised' are theorised, taught and repeated in Australian courts and made real by forms of land use particular to another time and place. The origins and traditions of Australian land law and land use are recognisably European, and specifically English. The paradigm of modern English property law reflects and prescribes a particular ontological structure of the world, divided into the twin realms of Nature and Culture. In legal discourse this paradigm is paralleled by the framework of 'persons' and 'things'. The modern history of English property law is dominated by the acquisition and privatisation of common property known as enclosure. The principles of private property, sovereignty, exclusion and alienation, conceptually and practically severed relationships between people and place, and translated this into the dichotomy of 'persons' and 'things'. The ideology of private property, the paradigm of Nature/Culture, was transported across the globe through the colonisation of foreign nations. Colonial conditions in Australia meant that the development of Australian land law diverged from English land law in significant, doctrinal ways. Nonetheless, from the earliest days of colonisation, the ideas and experiences of English property law profoundly shaped the regime of property in Australia and its development. As in Britain, the Enlightenment precept of 'cultural progress' was measured in Australia in tangible ways, by the 'improvement' of the land. Agricultural improvement was expected and required by Australian property law. The process of aligning the strange and the known, were considered not in terms of the adaptation of alien, European, people and their practices to local laws and conditions, but rather, in terms of the adaptation of 'new' lands and its people to the European paradigm of people-place relations and its economy. The indelible consequences of this imposition are inscribed not only in Australian history, but in its present materiality. Australian property law cannot be defined as 'local' without regard to the place it claims to govern, and to which, practically, it needs to belong. For this reason, this thesis is interested to ask why questions of materiality, of place, continue to disrupt the operation of Australian property law.

Corrections

<i>Page</i>	<i>Paragraph</i>	<i>Line</i>	
16	2	5	'distopia' should be 'dystopia'.
20	2	6	'practiced' should be 'practised'.
52			Fn 63. 'Ibid' should be 'Fitzpatrick, above n 53, 82'.
53			Fn 64. 'English' should be 'Latin'.
55	3	2	'Saint German' should be 'Saint Germain'
55			Fn 76. 'Saint German' should be 'Saint Germain' and 'Seldon' should be Selden'.
98	1	21	'insist' should be 'insists'.
101	2	6	'it provide' should be 'ability to provide'.
102	2	19	'vast tracks' should be 'vast tracts'.
128	1	11	'practiced' should be 'practised'.
199	1	2	'practiced' should be 'practised'.
200	1	16	'practiced' should be 'practised'.
203	1	2	'practice' should be 'practise'.

INTRODUCTION: PARADIGM, PLACE, PROPERTY

CHAPTER ONE

Chapter One

INTRODUCTION: PARADIGM, PLACE, PROPERTY

Revolutions are inaugurated by a growing sense... that existing institutions have ceased adequately to meet the problems posed by an environment that they have in part created.¹

1. DIRECTION: PARADIGM AND PLACE

We are, whether we like it or not, inheritors of the Enlightenment tradition and the only interesting question is what we make of it and what we do with it.²

The Enlightenment tradition that Harvey refers to is a paradigm, a framework of ideas, values and expectations that both creates and is created by a particular economy. Referring to an economy and its ideological framework in terms of tradition locates the culture of a particular society within the nature of a particular place. Paradigms or traditions, develop over time with successful cultural adaptation to particular conditions and thus describe not only social relationships but also ecological relationships. Paradigms are the result of an accumulation of knowledge that works in its specific time and place. Thus whilst paradigms are not universal truths, they are true, in a given time and place under a set of particular conditions. Traditions become traditions, they succeed as prescriptions of social order and economy, because they are useful and viable as knowledge and practice. As Pierre Bourdieu argued, "the rule is not automatically

¹ Kuhn, Thomas *The Structure of Scientific Revolutions* 3rd ed., (Chicago: Chicago University Press, 1996) 92.

² Harvey, David *Justice, Nature and the Geography of Difference* (Massachusetts: Blackwell, 2000) 149.

effective by itself... it obliges us to ask under what conditions a rule can operate."³ The conditions under which a tradition or paradigm operate are actual as well as abstract. That traditions are grounded in particular realities suggests that they are not simply inherited - they are made. The paradigms that inform our culture today are not only legacies of the past, they explain the practices of today in terms of time and place. The conditions under which a rule, or paradigm can operate are not just historical conditions, they are ecological conditions, as such they are particular not universal, temporary, not eternal.

Thomas Kuhn argues that paradigms enable and inhibit social and intellectual development in certain directions. He acknowledges the role of nature, the physical world, in the development and crisis of any given paradigm,⁴ but his focus is predominantly the intellectual and ideological function of paradigms in science. Kuhn's theory of paradigm shift argues that one paradigm ends and another begins when the prior paradigm becomes dysfunctional. The function of a paradigm is to be meaningful and practical, to describe, explain and prescribe activity. When the usefulness of a paradigm has, for whatever reason, diminished, and another practice or theory seems more useful, the latter may replace the former and become a new paradigm. Again, Kuhn emphasises the role of nature, or the physical world in reaching that moment:

The decision to reject one paradigm is always simultaneously the decision to accept another, and the judgment leading to that decision involves the comparison of both paradigms with nature *and* with each other.⁵

A paradigm shift, the conception and creation of a new economy or relation in or to the world, is supported by that world, by its material, environmental conditions. Kuhn's philosophy of paradigms and paradigm shift is a useful way of thinking about the frameworks that govern legal development and practice, such as property law. In addition to considering the social and intellectual conditions of the paradigm of property law, it is important to consider the physical and environmental conditions of that paradigm. The Enlightenment tradition that we have "inherited" was made and succeeded not just under specific historical conditions but in the specific environmental conditions of a particular place, Europe. The gradual emergence of the modern European tradition of land use and the 'enlightened' modern paradigm of property law were neither solely cultural nor solely natural events, but rather ecological events that

³ Bourdieu, Pierre 'Codification' in *In Other Words* (trans. Adamson, Matthew) (Cambridge: Polity Press, 1990) 76.

⁴ Kuhn, above n 1, 69.

were made possible by particular climactic, geological, biological, social and technological conditions.

The paradigm of modern European property relations is anthropocentric. It is a dichotomous model of the world that separates people from everything else, placing people in an imagined centre, their environment literally surrounds and is peripheral to them. Kuhn's theory of paradigm crisis and paradigm shift allows us to consider the separation of people and place in this anthropocentric model as particular to a specific time and place, developed in and for modern Western science, philosophy, economy and law and so, its truths are not universal, eternal or transcendent but historicised and placed. The feature of any given paradigm that makes it successful as a paradigm, but that inhibits self-critique, is that it makes alternatives unthinkable. The current anthropocentric model of the world insists that people are Culture and everything else, is Nature. It becomes difficult if not impossible to critique this model without recourse to external or alternative models or positions and yet these be explained according to the logic and language they attempt to approach from a position of exteriority.

For several millennia now, the western tradition has been dominated by various human-centred views of the cosmos. Nature has progressively been defined as ever more distant from human culture... (In) spite of... many eloquent statements by American Indians, Aboriginal Australians and others, we have very little idea of what a non-human-centred cosmos looks like and how it can be thought to work.⁶

Nevertheless, the current paradigm, like any other, is inevitably subverted by its own failure to describe and explain a world that it partly created and cannot presently address. "Nature itself must first undermine professional security by making prior achievements seem problematic."⁷ Using Kuhn's theory, and emphasising the significance of physical conditions in the production and crisis of paradigms, this thesis attempts to present the "achievements" of modern property law as "problematic" with regard to the particular nature of Australian places that it fails to acknowledge and address.

⁵ Kuhn, above n 1, 77, emphasis in original.

⁶ Rose, Deborah Bird 'Exploring an Aboriginal Land Ethic' (1988) 2 *Meanjin* 379.

⁷ Kuhn, above n 1, 169.

The Paradigm of Placelessness

If we wish to have a land that is truly Australian restore we must; for we have custody of an extraordinary assemblage of plants and animals. The converse is that otherwise, as a nation, we will be left to identify with a land that is one giant sheep walk, cattle ranch, mining quarry, farm, or tree-felling operation. Such a land can be had anywhere in the world.⁸

It's everything. You just can't pick it up and plonk it down somewhere else.⁹

Place, or the physical, 'natural' world, is predominantly conceived, experienced and articulated anthropocentrically, as something separable and 'other' to human subjectivity. Until recently, this dichotomous paradigm has meant that people are seen either as dominated by nature, chained to the physical world or as dominating and transcending it. "Western discourses regarding the relation to nature have frequently swung on a pendulum between cornucopian optimism and triumphalism at one pole and unrelieved pessimism... at the other pole."¹⁰ Despite these value swings, anthropocentrism is commonly associated with an instrumentalist evaluation of the things in the world, that is, solely in terms of their use within the processes and products of human life.¹¹

Anthropocentrism characterises Australian law according to which place, in itself, is meaningless. Indeed, the foundational history of Australia depended on an anthropocentric philosophy and practice and made possible the introduction of law of property in Australia, which principally operates via the notion of the alienability of places and things. This concept or philosophy of place presents no obstacle to the satisfactory resolution of disputes over property in which the philosophy is shared and uncontested. However, when cultural values or philosophies of place are in dispute, a satisfactory resolution is available only when the law addresses itself to these values with cognisance of its own philosophical and geographic specificity.

⁸ Newsome, Alan 'Vertebrate pests versus wildlife conservation in semi-arid New South Wales: A profound imbalance' in Neumann, Klaus, Thomas, Nicholas and Eriksen, Hilary *Quicksands: Foundational Histories in Australia and Aotearoa New Zealand* (Kensington: University of New South Wales Press, 1999) 160.

⁹ Daryl Kerrigan in *The Castle* (1997) Directed by Rob Sitch. Written by Rob Sitch, Jane Kennedy, Tom Gleisner and Santo Cilauro.

¹⁰ Harvey, above n 2, 149.

¹¹ Smith, Mark *Ecologism: Toward Ecological Citizenship* (Minneapolis: University of Minnesota Press, 1998) 4. For detailed critiques of anthropocentrism see Midgley, Mary *Utopias, Dolphins and Computers: Problems of Philosophical Plumbing* (London: Routledge, 1996); Sterba, James *Justice for Here and Now* (Cambridge: Cambridge University Press, 1998); Garner, Robert 'Ecology and Animal Rights: Is Sovereignty Anthropocentric?' in Brace, Laura and Hoffman, John (eds) *Reclaiming Sovereignty* (London: Pinter, 1997).

The anthropocentric paradigm of Australian property law creates and is created by legal theory, jurisprudence, legal practice and legal pedagogy. Legal theorist and much quoted property expert, Kevin Gray concluded in 1991 that indeed property "does not really exist: it is mere illusion."¹² The Australian High Court considered Gray's conclusion in its own struggle to define property in *Yanner v Eaton* [1999].¹³ Lecturers in Australian law schools fumble to explain in the first week of the course why real property is an oxymoronic expression.¹⁴ Australian legal historians debate whether Australian property law actually exists.¹⁵ Legal practitioners agree with the time-honoured Hohfeldian concept of dephysicalised property that property is not about things but about persons, or rather about relations between persons.¹⁶ This thesis will address in turn each of these aspects – philosophy, jurisprudence, practice, and pedagogy – and argue that the paradigm that underscores each of them evidences the maladaptation of law to land in Australia.

The relationship between people and place, between Australian property law and Australian lands is unthinkable within this paradigm of property. It is important to notice what questions property discourse prevents or excludes. How would Australian native title claimants, for example, respond to Gray's conclusion that property is an illusion? This thesis does not attempt to answer this question, nor is it explicitly concerned with property rights discourse. The concern of this thesis is twofold: to ask how property came to be regarded as 'illusory', and to suggest that this conception indicates that the validity and utility of the dominant paradigm and mythology of property are "manifestly running out."¹⁷ Why does this matter? Because property law is more than a regulation of abstract relations between people and place, property law is a regulation of real and particular uses of land and non-human things.

Whilst the economic significance of property law is well appreciated in terms of commerce, it is less well appreciated in terms of natural resources. In other words,

¹² Gray, Kevin 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252.

¹³ *Yanner v Eaton* (1999) 166 ALR 251.

¹⁴ See Chapter 5.

¹⁵ See especially Buck, Andrew 'Attorney-General v Brown and the Development of Property Law in Australia' (1994) 2 *Australian Property Law Journal* 1, and Edgeworth, Brendan 'Tenure, Allodialism and Indigenous Rights at Common Law' (1994) 23 *Anglo-American Law Review* 407.

¹⁶ See Chapters 4 and 5.

¹⁷ Brady, Veronica 'The Possibilities of Order' in Dugan, Michael (ed.) *Furious Agreement* (Melbourne: Penguin, 1991) 9.

property law is not usually considered a major determinant of the ecological economy.¹⁸ In a broader framework, property law is implicated in the environmental changes it originally presented as the legitimate basis for entitlement to property when the English commons were enclosed and the lands and peoples of foreign countries were appropriated. Thinking and rethinking the paradigm of modern property law in terms of its physical and material application and consequences in Australia is important because it has not been sufficiently undertaken to keep the questions that should be unthinkable from being asked. And, because "'reality' is not in the habit of offering up its meanings already clarified, with a set of instructions for use attached"¹⁹ an effort is required to understand the relationship between law and place, and to better align or adapt the two.

This thesis does not advocate a mere reversal of the hierarchy of the paradigmatic categories Nature/Culture, or a 'harmonious' combination of the twin realms. Rather, the thesis argues, through an analysis of property, that the paradigm is itself the 'illusion' of which Gray speaks. And even, perhaps the delusion under which concepts of land-as-commodity labour to make sense. What is needed is nothing short of a paradigm shift. Precisely such a shift is foreshadowed and required by the land claims of indigenous Australians, environmentalist critiques of property and the postcolonial interests of Australian Republicanism. Is property an illusion? Property is what the law says it is. But as Aboriginal nations, farmers and scientists have learned - the law is also, partly, what the land says it can be. In other words, the particularities of land, of place, define or determine the limits of what is ultimately and sustainably local law and economy.

This thesis considers the inadequacy of the paradigm of Australian property law in terms of adaptation and maladaptation of Australian culture to Australian places. Placing property law, making it responsive to the material conditions of its possibility means critiquing its anthropocentrism both from within that paradigm and with a view to an alternative paradigm. Whilst the idea of biodiversity is not explicitly theorised here, the thesis is advanced in a time of the rise of this idea and is thus imbued with an interest in the possibility of law's connection to place not dichotomously, but as part of

¹⁸ It is interesting to note the shared etymology of the words economy and ecology, having reference respectively to *nomos* and *logos*.

¹⁹ Muecke, Stephen *Textual Spaces: Aboriginality and Cultural Studies* (Kensington: University of New South Wales Press, 1992) 4.

an ecological network. In other words, the thesis assumes that humans and human laws are no more cultural than they are natural, that the relationship between people and place can be rethought in terms of an economy or ecology of more than two realms.

The law's insistence that property is not about things, that property is not really 'real', that property is dephysicalised, render the definition of property lofty and elusive because definitions necessarily draw limits and edges, observe finiteness. The trouble with defining property is not that property is illusory. The trouble with defining property is that property is a materiality - something the law finds deeply problematic. *The dominant value of property in contemporary legal practice and culture is as a commodity. As such, property has an indefinite quality: infinitely tradeable, limited neither spatially nor temporally. The physical things that are traded and owned as property are definable: physically specific, with limits and edges. Land, for example, conceived not as a commodity but as a place, is radical to property law. The limits of land, its qualities and conditions are definable things. Yet, property law insists that place is irrelevant to property law. The unacknowledged foundation of property law is not however the irrelevance of place, it is the absence of place. The universality of law and commodification of property exist only as long as both law and property are general not particular, global not placed. Specifically, the placelessness or atopia of law was the ideological condition of the colonisation of Australia and the imposition of an alien regime of property.*

The absence of place is the condition of the possibility of a universal and universalising law that extended "across the whole globe, like a coinage reducing all things to a common measure."²⁰ In many ways, the problem of defining property can be related to the problem of defining anything universal: being neither particular nor contextual, it lacks bearings. Lacking or refusing the sense of its locality, property would logically prove difficult to find. It makes the very idea of an identifiably Australian property law elusive. It is not convincing however to argue that Australian property law is universal, rather than particular against the unique legal history and social memory of the colonisation of Australian lands and nations.

Australian property law is not universal, but universalising. Revisionist theories that define Australian property law as 'local' identify a relation between nation and empire,

²⁰ Thompson, E.P. *Customs in Common* (London: Merlin Press, 1991) 164.

not a relation between law and place. Describing Australian property law as 'antipodean' rather than 'local' better describes this relation, and simultaneously, highlights the way in which Australian property law is displaced.

To be antipodean is to be constructed into a relationship; the antipodes is not a place, though its image is often projected on a place far away from Europe, like that which we inhabit... The antipodes are not nowhere, they are at the other pole, the other end, connected vitally to the centre because imagined and held by it. Our antipodes, our Australia is not just anywhere invisible 'down there', they are specifically Europe's antipodes.²¹

Because "antipodean means European as well as Australian,"²² thinking about Australian property law as antipodean situates it in relation to English law without conflating it with English law. More importantly, thinking of Australian property law as antipodean avoids confusing its local manifestations for local origins. This is important because if the paradigm of Australian property law is to remain, or rather, become functional, as a paradigm of people-place relations, it needs to acknowledge that its placelessness, its atopic conditions are maladapted to Australian places. To think of Australian property law as antipodean allows a connection to be drawn between the abstractness or meaninglessness of land law and the physical materiality of environmental degradation of Australian lands. The notion that Australian property law is 'local' does not draw this link, because it suggests the law is already grounded and placed, already adapted.

For Australian property law to be meaningful, to sustain people-place relations, it must be cognisant of relations between law and place. Those relations, as they are today, are abstracted by a theory and practice of 'dephysicalisation' that maintains that place is irrelevant to property law and that property is always and already about things without specific and particular value, that are readily alienated, transferred and exchanged between persons. The Australian film *The Castle* is an excellent illustration of this relationship and how notions of place are radical and non-sensical to the paradigm of Australian property law.

The Castle: concepts of property in Australian law and culture

The 1997 film *The Castle* is often cited in Australian law schools, not least with reference to the law of property. It is one of the first things property students learn, to leave any sense of place in property behind. The film was written and produced by television

²¹ Beilharz, Peter *Imagining the Antipodes: culture, theory and the visual in the work of Bernard Smith* (Cambridge: Cambridge University Press, 2002) 97.

²² *Ibid* 183.

comedy veterans who had worked collaboratively for the public national broadcaster the ABC.²³ The team, Working Dog, enjoyed an established reputation in Australian popular culture as political satirists. Their film was a timely and critical commentary on the cultural values of property debated since the controversial recognition of native title in Australian property law in 1992.

"I don't want to be compensated. You can't buy what I've got." retorts Daryl Kerrigan to the Judge of the Administrative Appeals Tribunal in the film *The Castle*.²⁴ Several days earlier, Daryl Kerrigan and his family had been issued "a kick-out notice" in which the Kerrigan family were offered monetary compensation from Airlink for the compulsory acquisition of their property. Airlink, a federal authority, is a consortium of local, state and federal governments and the Airport Commission who together seek to expand the airport as part of a multi-billion dollar investment. The Kerrigans' chances of keeping their home against the power and interests of Airlink are slim. In the words of Dennis Denuto, Daryl's lawyer and a family friend, Airlink "write the rules - they own the game." The film follows the legal battle of the Kerrigan family to keep their home against the interests of Airlink and thus canvasses dominant and marginal ideas of place and property in contemporary Australian law and culture. Produced and screened in Australia at the time of the parliamentary and very public debate of the Native Title Amendment Bill, the rise of the Independent MP Pauline Hanson, and the formation of the One Nation party, the film wove its seductively simple narrative into the fabric of social controversy.²⁵

The debate about the value and meaning of property, stimulated by the native title cases of *Mabo* (1992)²⁶ and *Wik* (1996)²⁷ and subsequent native title legislation²⁸, was not the backdrop for the film's narrative, rather it was its focus. Issues of sovereignty,

²³ The ABC is the national non-commercial television and radio broadcaster in Australia. The television comedy *The Late Show* presented satirical political and social commentary to popular success from 1992-1995.

²⁴ *The Castle* above n 9.

²⁵ For a discussion of the racism expressed in the controversy over native title and the rise of Pauline Hanson see especially Hage, Ghassan *White Nation: Fantasies of White supremacy in a multicultural society* (Annandale: Pluto Press, 1998) and Manne, Robert et al *Two Nations: the Causes and Effects of the Rise of the One Nation Party in Australia* (Melbourne: Bookman Press, 1998). The immersion of the subject matter of *The Castle* in the controversy of the native title debate is evidenced also by a denouncement of the film on account of its "white working-class", "racist" and "fascist" treatment of native title. See MacNeil, Bill "The Common Law Imaginary Down Under - A Jurisprudential Reading of *The Castle*" (unpublished paper delivered at a Workshop at the Faculty of Law, University of Sydney, 2001).

²⁶ *Mabo v Queensland* (1992) 175 CLR 1.

²⁷ *Wik Peoples v Queensland* (1996) 187 CLR 1.

²⁸ *Native Title Act* 1993 (Cth) and *Native Title Amendment Act* 1998 (Cth).

citizenship, dispossession, indigenous land rights, private property rights, classical liberal economy, housing and value conflict are all represented in this film. The structure of the film's narrative follows exactly the legal process of adjudication and appeal from the AAT to the full court of the High Court of Australia. The ideology of dispossession, against which the Kerrigan family find themselves under the jargoned guise of compulsory acquisition, articulates the core principle of private property law administered in Australia. Together, this narrative structure and ideology connect the design of the film to its subject: the value of place in Australian property law.

The Castle presents the dominant value of property in colonial Australian and Anglo-European law and culture - the alienability of property. Indeed, the vocabulary of contemporary Australian property law is peppered with the notion of alienability: alienation, transferability, acquisition, compensation and exchange. This concept of property is articulated in the film by the interests and actions of Airlink. Airlink's notion of property is valued as a tradeable commodity, or object of ownership. The concept of place is absent from the evaluation of property. Thus in Australian law, if place could be said to exist, it is as land, which is deemed a tradeable commodity. Whilst land owners relate to each other via the value of the object of ownership, that value is determined not by the relationship between the owner and the land, rather by its function as a commodity between landowners. Airlink seeks to acquire the property of the Kerrigan family not for its value to the owner, but for its value as a commodity. Therefore, when Daryl disputes the compulsory acquisition of his property he is asked routinely whether monetary compensation for his property-as-commodity is acceptable. An officer at his Local Council tries to explain the elementary principle of Daryl's private property rights: "That's why you'll be duly compensated." The judge at the AAT hearing repeats this apparently basic connection between property and alienability: "Are you disputing the amount of compensation?" If all property is always a commodity, such questions make sense. The question does not make sense however to Daryl and his family. The Kerrigans express a value of inalienable property precisely because their value of property includes a concept of place. Their value exceeds the dominant value of property as expressed by Airlink, the Australian legal system and Australian culture - it is radical.

The Kerrigans regard the compulsory acquisition of their property as theft. Devastated by the idea, Daryl says to the AAT: "You just can't walk in and steal our home." Later,

whilst packing to move out of their home, having lost his appeal to the Federal Court, Daryl says to his wife Sal:

I'm really starting to understand how the Aboriginals feel. This house is like their land, it holds their memories, the land is their story. It's everything. You just can't pick it up and plonk it down somewhere else. This country's gotta stop stealing other people's land.

Daryl's value of property is connected to a concept of place that is fundamentally different to the concept of a commodity. For the Kerrigan family, their property is also their place.

The stunning achievement of *The Castle* is that it credibly represents the paradox of a mainstream family who hold a radical value of property. The film did so (and to great commercial success) despite widespread opposition to the value of inalienable, placed property expressed by native title claimants and owners. The concept of place central to the idea that property is inalienable is made palatable to mainstream Australia precisely because the Kerrigan family is convincingly mainstream. The ultimate 'family-values' family, the Kerrigans are white, Anglo, heterosexual, *Channel 9* viewers²⁹ with a small-business, a suburban home, a holiday house and a few pets. The characterisation of the family as regular 'little Aussie battlers' is careful and thorough, leaving no doubt that they and their values are collectively David against the Goliath of Australian property law. Australian property law and its institutionalised commodity value of property are portrayed as a senseless machine destructive of 'family values'. The law's miscognition of its own value-specificity hinders the Kerrigans. Struggling to be understood in his own terms, Daryl corrects his Local Council officer "No, no you've missed the point - I'm not interested in compensation." The Kerrigan value of property is different to the Law's value and cannot be enveloped by it. Furthermore, Daryl says to the High Court that the Law's value of property-as-commodity excludes their value. Property law is thus characterised as perversely destructive.

They're judging a place by what it looks like, if it doesn't have a pool, a classy front, or a big garden it's not worth saving. But it's not a house, it's a home. People who love each other. Memories. Family. But that doesn't mean as much as a big fucking driveway.

²⁹ *Channel 9* is a national commercial television broadcaster in Australia, the programs and news service of which are consistently top rating according to daily media viewing habit polls published in the *Sydney Morning Herald*.

Daryl's placed-sense of property undermines the abstractness of dephysicalised law. He makes the law seem artificial or fictitious. Thinking like a lawyer requires a suspension of belief in physical reality, a denial of experience. The law encourages its servants to think in terms of symbols and certificates of title, overlapping interests, not pegs, fences, real boundaries, homes and belonging. Property involves a kind of inculcation where the first rule is accepting that the real is unreal. To deny this sensibility, as the Kerrigan family does, is radical.

2. LOCATION: LITERATURE REVIEW AND METHODOLOGY

Studies and theories of place in culture are not recent, although they are predominantly limited to the behavioural sciences, geosciences and literary studies. These disciplines have focused on place as: constitutive of cultural and psychological identity; as natural environments; and as an aesthetic setting for art, literature and music respectively. I will briefly outline the ways in which place *has* been explicitly theorised in these broad disciplinary fields with regard to Australia where possible. The section then discusses the relevance of place in four specific areas of scholarship directly related to this thesis: Australian cultural studies, legal theory, property theory and environmental philosophy. Throughout the review, I have considered theories of place in terms of their relation to the anthropocentric paradigm of Nature/Culture and modern private property law. I have also considered how useful or disruptive values of place are to these theories.

Behavioural Sciences

There is a small but established study of place in terms of the social organisation of gender,³⁰ race³¹ and ethnicity³² in the anthropological, sociological and political sciences. These disciplines focus on place as constitutive of social subjectivities such as the domestic, the fringe, the ghetto, the suburb, the electorate,³³ the diaspora,³⁴ the global

³⁰ McDowell, Linda *Gender, Identity and Place: understanding feminist geographies* (Minneapolis: University of Minnesota Press, 1999).

³¹ Mohanram, Radhika *Black Body: women, colonialism and space* (St. Leonards: Allen & Unwin, 1999).

³² Kristeva, Julia *Strangers to Themselves* (New York: Columbia University Press, 1991) and also McCoy, Damien *From Hotel to Home: Immigration Resettlement and Community: the ethnic Vietnamese in Australia 1975-1995* (unpublished thesis, University of New South Wales, 1997).

³³ Goot, Murray 'Hanson's Heartland: Who's for One Nation and Why?' in Manne, Robert et al, above n 25.

³⁴ Grosz, Elizabeth *Judaism and Exile: the Ethics of Otherness* in Carter, Erica, Donald, James and Squires, Judith *Space and Place: Theories of Identity and Location* (London: Lawrence and Wishart, 1993).

citizen³⁵ and more generally, of the character of modernity itself.³⁶ These studies have also been addressed in theories of architecture and urban planning.³⁷ Significantly, place is abstract and dephysicalised in behavioural science studies of cultural identity. An analysis of *The Castle* along these lines for example might argue that the Kerrigan family and their neighbours could be identified as a disempowered working-class community fighting corporate governance. Their identity is confirmed, rather than produced, by their resistance to the commodification of place into space in the form of a runway for the nearby airport. Anthropological, sociological and political studies emphasise the agency of place, only as a *social* environment, or social setting, in the formation of individual and social identities. Presenting place as a physical or natural environment is subversive to behavioural sciences because it suggests that social identities are determined not only by cultural materialities such as gender, race, ethnicity and class, for example, but also by natural or environmental materialities such as climate, meteorology, epidemic, topography, flora and fauna. My thesis both acknowledges that place, as a *physical* or *natural* environment limits and shapes cultural discourse and activity, and also examines the agency of people, particularly legal discourse and land use in the formation of place.

Geosciences

Physical and human geographies³⁸ and environmental sciences³⁹ including geology and biology,⁴⁰ have until recently, discussed place and the physical natural environment as distinct and separate from human culture and activity, with the significant exception of references to archaeology which appropriates human activity into 'Nature'.⁴¹ Recently, geoscientific discourse has more directly related environmental knowledge to human agency.⁴² These disciplines increasingly employ such terms as 'crisis', 'responsibility',

³⁵ Massey, Doreen and Jess, Pat *A Place in the World?: places, cultures and globalisation* (New York: Oxford University Press, 1995).

³⁶ Cushing, Nancy 'The Pacific Highway and Australian Modernity' in Pons, Xavier (ed) *Departures: How Australia Reinvents Itself* (Carlton: Melbourne University Press, 2002) and Shields, Rob *Places on the Margin: alternative geographies of modernity* (New York: Routledge, 1991).

³⁷ Winikoff, Tamara (ed) *Places not Spaces: place making in Australia* (Sydney: Envirobook, c1995) and Rapoport, Amos (ed) *Australia as Human Setting: Approaches to the designed environment* (Sydney: Angus & Robertson, 1972) and Vidler, Anthony *The Architectural Uncanny* (Minneapolis: University of Minnesota Press, 1992).

³⁸ Holt-Jensen, Arild *Geography: History and Concepts* 3rd edition, (London: Sage, 1999).

³⁹ A conservative textbook for students of environmental science is Young, Ann *Environmental Change in Australia Since 1788* 2nd edition, (Melbourne: Oxford University Press, 2000).

⁴⁰ Dick, Steven *The Biological Universe* (New York: Cambridge University Press, 1996).

⁴¹ A good critical discussion of this aspect of archaeology in geology is McConnochie, Keith 'Desert Departures: Isolation, Innovation and Introversion in Ice-Age Australia' in Pons, above n 38.

⁴² Richter B.D. and Redford K.H. 'Conservation of Biodiversity in a World of Use (1999) 13 *Conservation Biology* 6.

'care' and 'necessity' when speaking of human interaction with the natural environment.⁴³ It is important to note that the logic of this vocabulary constructs the relationship between people and place as unilateral, emphasising the role of human agency in environmental change. As such, it is comparable with the anthropocentric philosophies of literary studies and behavioural sciences. Geoscientific studies would not consider a film a suitable subject of analysis, although interestingly, the journals and correspondence of early cartographers and explorers are increasingly referred to, although in passing rather than as the subject of scrutiny.⁴⁴ However, hypothetically speaking if *The Castle* were to be analysed, the emphasis might fall on the lead fill in the Kerrigan's backyard, the pollution of the lake near their holiday kit home, and the air and noise pollution of the airport. In other words, attention to the relationship between people and place, whilst emphasising its physical aspects, would present the relationship as one of unilateral agency of people over place in terms of environmental change or degradation.⁴⁵

Literary Studies and Art Theory

There is a significant body of research in literary studies and art theory about the iconography of place as landscape, or in other words as metaphor and setting.⁴⁶ These studies concentrate on the visual⁴⁷ and sensual elements of place in human perception. They predominantly relate place to human creativity and metaphysics through detailed analyses of art,⁴⁸ literature⁴⁹ such as (especially) poetry,⁵⁰ tragedy and romance in dramatic art,⁵¹ romanticism in music and painting,⁵² and the 'pastoral' and 'new world'

⁴³ Aplin G, et al. *Global Environmental Crises: An Australian Perspective* 2nd edition (Melbourne: Oxford University Press, 1999).

⁴⁴ See Young, above n 39.

⁴⁵ A good example of this approach is evident in the title of a recent academic textbook for students of environmental studies by Simmons, I.G., *Changing the Face of the Earth: Culture, Environment, History* (New York: Basil Blackwell, 1989).

⁴⁶ Daniels, Stephen and Cosgrove, Denis (eds) *The Iconography of Landscape: Essays on the Symbolic Representation, Design and Use of Past Environments* (Cambridge: Cambridge University Press, 1988) and for an excellent critique of landscape iconography see Barrell, John *The Idea of Landscape and the Sense of Place 1730-1840: an approach to the poetry of John Clare* (London: Cambridge University Press, 1972) and for a critique of landscape iconography in Australian discourse and history see Muecke, above n 19 and also Ryan, Simon *The Cartographic Eye: how explorers saw Australia* (Cambridge: Cambridge University Press, 1996).

⁴⁷ Daniels, Stephen *Fields of Vision: Landscape imagery and national identity in England and the United States* (Princeton: Princeton University Press, c1993).

⁴⁸ Bonyhady, Tim *The Sacred Earth* (Carlton South: Melbourne University Press, 2000).

⁴⁹ Nightingale, Peggy (ed) *A Sense of Place* (St. Lucia: University of Queensland Press, 1986) and George, Rosemary *The Politics of Home* (Cambridge: Cambridge University Press, 1996).

⁵⁰ Turner, James *The Politics of Landscape: Rural Scenery and Society in English Poetry 1630-1660* (Oxford: Basil Blackwell, 1979) and more recently Fitter, Chris *Poetry, Space, Landscape: toward a new theory* (Cambridge: Cambridge University Press, 1995).

⁵¹ Burt, R and Archer, J (eds) *Enclosure Acts: Sexuality, Property and Culture in Early Modern England* (Ithaca: Cornell University Press, 1994).

genres. The 'trans' discipline of Cultural Studies has recently developed theories of place which primarily focus on place as a form of spatiality manifest in aesthetic and political areas. There is a significant body of work in the cultural studies of aesthetics that addresses place and space in art, film, architecture and urban planning. The focus of these studies is the degree and or significance of place as landscape, setting, metaphor, home and identity in individual and social imagination.⁵³ Again, a strongly anthropocentric philosophy provides the basis for such studies. A literary analysis of the film *The Castle* might emphasise the style and techniques of textual production such as the choice of place, as setting for the film's themes, the design of the Kerrigan's home as stereo-typically working class and/or kitsch, the intertextuality of the film's references to other Australian cultural texts, the casting of the performers, the attitude of the script to the film's subject for example. A literary critique of the film would not necessarily address the relationship between people and place expressed in the film. If it were discussed, the relationship between the Kerrigans and their home could be presented in terms of its general social significance, as a representation of a singular, unilateral relationship of homeowners toward their home.⁵⁴

Literary commentator Bill MacNeil presented *The Castle* as a cultural text that "embodies a fantasy politics of One Nation" which he argued "may mark the return of the fascist repressed White Australia."⁵⁵ To reach this conclusion, MacNeil emphasised the social value of place as property. Place is not discussed in his analysis except as a "taste challenged distopia."⁵⁶ Place, as a concept, does not emerge as part of a complex relationship between a specific family and a particular place. Place is merely the setting of a fixed state of social value, a "working class paradise", not an experience of emotional and physical significance. The question of place disrupts this analysis of the film, because the relationship between the Kerrigans and their home can no longer be generalised as an assertion of private property rights or extrapolated to be an expression of a fixed and homogenous social identity, in this case as an expression of white, working class racism. The question of place directs the critic's attention to the emotional relationship the Kerrigans have with their particular home, and it requires an examination of how and why a sense of the inalienability of their home, as a place, is at

⁵² Barrell, John *The political theory of painting from Reynolds to Hazlitt: 'the body of the public'* (New Haven: Yale University Press, 1986).

⁵³ Haynes, Roslynn *Seeking the Centre: the Australian Desert in Literature, Art and Film* (Cambridge: Cambridge University Press, 1998).

⁵⁴ See MacNeil, above n 25, for an example of this abstraction of the significance of place.

⁵⁵ *Ibid.*

odds with the paradigm of private property law. MacNeil's analysis of the film is closed to the radical value of place expressed by the Kerrigans because his focus is on the abstract aspect of a general and uniform social identity rather than on the actual aspects of their specific relationship to a particular place.

Australian Cultural Studies

Histories and theories of Australian culture and its discourses have formed the basis of the discussion of place in Australian law and culture in this thesis. Most cultural studies of place describe the role of place in the formation of national cultural identity.⁵⁷ An interesting and valuable variation of this approach to place is the work of Peter Read. Read is not explicitly interested in the abstract construction of national identity, rather he is interested in the lived experience of cultural subjectivity. In particular, he argues that Australian subjectivities are informed either by a sense of place, or placelessness. His book *Belonging: Australians, Place and Aboriginal Ownership* opens with the question: "How can we non-Indigenous Australians justify our continuous presence and our love for this country while the Indigenous people remain dispossessed and their history unacknowledged?"⁵⁸ Read's approach is notable for the confidence with which he includes attention to emotional attachments to place. His earlier works had specifically considered the sense of grief experienced by Australians who had lost their homes.⁵⁹ Read's work could admit aspects of the Kerrigans' experience of property as placed because he is interested in the inalienable and mutually defining sense of property as belonging rather than the unilaterally defined sense of property as acquisition.

Paul Carter's *The Lie of the Land*⁶⁰ also theorises the relationship between place and subjectivity via a discussion of property and in terms of national identity. Carter focuses on the dichotomy of movement and stasis in the cultural discourse of place in Australian society and history. Whilst he does not address concepts of nature specifically, he does theorise property as a struggle to control or to repress the openness and changeability of

⁵⁶ Ibid.

⁵⁷ See for example, Drew, Philip *The Coast Dwellers* (Ringwood: Penguin, 1994) and Shaffer, Kay 'Landscape Representation and Australian National Identity' (1987) 4 *Australian Journal of Cultural Studies* 47-60 and Hodge, Bob 'White Australia and the Aboriginal Invention of Space' also O'Carroll, John 'Upside-Down and Inside-Out: Notes on the Australian Unconscious' in Barcan, Ruth and Buchanan, Ian (eds) *Imagining Australian Space: Cultural Studies and Spatial Inquiry* (Nedlands: University of Western Australia Press, 1999).

⁵⁸ Read, Peter *Belonging: Australians, Place and Aboriginal Ownership* (Oakleigh, Victoria: Cambridge University Press, 2000) 1.

⁵⁹ Read, Peter *Returning to Nothing: the Meaning of Lost Places* (Cambridge: Cambridge University Press, 1996).

⁶⁰ Carter, Paul *The Lie of the Land* (London: Faber&Faber, 1996).

nature. I am especially interested in his claim that the cultural "preoccupation" with property is symptomatic of a desire to be grounded or placed. His connection of place to national identity is not unconventional, but it is different because it acknowledges that the dominant sense of place in Australian cultural discourse is private and therefore alienable property.

Our homes are tumuli erected over the slaughtered body of the giant ground; only our nervous decoration, our attention to monumental detail, our preoccupation with property, give us away. We build in order to stabilise the ground, to provide ourselves with a secure place where we can stand and watch. But this suggestion that the ground is treacherous, unstable, inclined to give way, is the consequence of our cultural disposition to fly over the earth rather than to walk with it. Is it not odd that ours, the most nomadic and migratory of cultures, should found its polity, its psychology, its ethics and even its poetics on the antithesis of movement: on the rhetoric of foundations, continuity, genealogy, stasis? Is it not odd that a culture intent on global colonisation should persistently associate movement with the unstable, the unreliable, the wanton and the primitive? But perhaps it is inevitable; for a culture that is ungrounded, movement, however integral to its survival, must always constitute a threat.⁶¹

I would add to Carter's theory that private property is an ideal vehicle for the schizoid tension between the desire to be grounded and the cultural imperative of nomadism. It seems that only when property is alienable and exchangeable, a meaningless commodity, that security is purchased. The security that one is free to move again seems the oddity that Carter concludes is inevitable. Carter's theory would acknowledge the Kerrigan's value of place as radical to dominant cultural discourse because he would observe that their refusal to alienate their place, to transform it into a commodifiable property, works against the nomadic and colonising conventions of private property.

Three notable departures from conventional studies of place in Australian cultural studies that are usually framed in terms of national identity are Paul Sinclair's *The Murray*⁶², George Seddon's *Landprints*⁶³, and a recent collection of essays edited by Tim Bonyhady and Tom Griffiths, *Words for Country: landscape and language*.⁶⁴ These different studies approach place as actual, physical places, lands and rivers, rather than as sources or lacunae of cultural and national identity. The subtitle of Sinclair's work 'the river and its people' highlights the difference of approach to place that these theorists present. Sinclair's study of place, of the Murray River is neither a cultural nor a natural or

⁶¹ Ibid 2.

⁶² Sinclair, Paul *The Murray: a river and its people* (Carlton South: Melbourne University Press, 2001).

⁶³ Seddon, George *Landprints: Reflections on Place and Landscape* (Cambridge: Cambridge University Press, 1997).

environmental study of the Murray, but rather, is a radical history of the mutually constructive relationship between people and place. His study discusses the agency of people in the degradation of the river since colonisation and simultaneously situates the history of those people in the life of the river, pointing to the physical limits it imposes on cultural development. The life of the river and the people are linked not unilaterally but mutually. The people do not 'own' or 'possess' the river, they belong to it and are "its people." Seddon, Bonyhady and Griffiths argue that cultural discourse is not abstract, but made real. A weed, for example, describes not the plant itself, but its cultural value. The desirability of plants and animals to people is encoded in language and thus human relationships to plants and animals are governed, in part, by how they are conceived. Thus because a weed is defined as "a plant out of place"⁶⁵ that plant may then be taken from its place and the flora of a given area consequently altered. *Words for Country* links language, phrases and stories of place to values of nature and perceptions of the environment and further, links these to the experience and management of Australian environments. The question of these essays is "How do stories take root in particular places?"⁶⁶ In other words, people and place, are not separated, but are related and are thus mutually and physically constructive. In this way their work undermines the paradigm of placelessness.

Legal Theory and Jurisprudence

Theories of law and justice in modern western philosophy and law despite enormous and diverse variation are predominantly anthropocentric. Legal theory and theories about law are concerned with relations between individuals, between communities, between states and between these elementary groupings themselves. Rarely do modern Western philosophies of law explicitly theorise relations between humans and land, although the separation and hierarchical ordering of the human and non-human worlds constitutes the primary assumption from which most Western legal theory begins. Peter Fitzpatrick, however does not make this assumption in *The Mythology of Modern Law*. Fitzpatrick's analysis of law as myth presents the force and purposiveness of the paradigm of modern law. And whilst he does not theorise place, the tension he describes between property as colonised lands and property as positive, universal law, proves fruitful for an understanding of the necessary absence of place to modern property law.

⁶⁴ Bonyhady, Tim and Griffiths, Tom *Words for Country: landscape and language* (Kensington: University of New South Wales Press, 2002).

⁶⁵ Seddon, above n 63, 16.

⁶⁶ Bonyhady and Griffiths, above n 64, 1.

Fitzpatrick's work shows in one sense, how the physical world was unimportant to a universalising paradigm and yet in another sense, how the success of that paradigm depended precisely on its placelessness. The myth of modern law worked in Australia because it was a placeless paradigm - readily transported both as ideology and literally, as its prisoners.

Legal positivism, like other scientific discourses, describes law and legal relations according to the conventions of the genre of objectivity. The generic conventions of Legal Positivism identify and define aspects of law according to abstract categories, called doctrines, which are considered authoritative rules applicable to each question and dispute requiring legal adjudication. Legal positivism claims that law is a science, devised methodically and practiced clinically. This philosophy of law considers the influence of the social sphere remote, inappropriate and unnecessary to the operation of law, and the influence of the non-human world even more so. Accounts of place, land, and the natural world are irrelevant to legal positivism except as the concealed ground from which law asserts its authority and force. The anthropocentrism of legal positivism is expressed by its refusal to admit material aspects of dispute, both cultural and natural or environmental, except passively, as evidence. By imagining and juxtaposing objective and subjective thought, abstract rules and particular contexts, and then by privileging objectivity and abstraction, legal positivism epitomises anthropocentric logic.

Critical legal studies (CLS) takes the contrary view that law is intimately connected to the social realm and that indeed, law and legal practice are socially significant, socially informed and socially produced. As such, CLS admits materialist analyses to legal philosophy. However, the materialism of CLS is qualified as being an exclusively cultural materialism. Questions of natural, environmental or non-human materialism are usually beyond the human-centred, socio-political framework of CLS. Recently however, CLS has theorised environmental justice.⁶⁷ These accounts are presented in conjunction with critiques of race and class within global geopolitics. Thus whilst increasingly considering the role of law in terms of the regulation of the natural world and its resources, CLS approaches it from the perspective of social justice, and therefore remains an anthropocentric philosophy of law that excludes place, except as a resource for providing social justice.

⁶⁷ See for example Hayward, Tim and O'Neill, John (eds) *Justice, Property and the Environment* (Aldershot: Ashgate Publishing, 1997) and Deimann, Sven and Dyssli, Bernard (eds) *Environmental Rights: Law, Litigation and Access to Justice* (London: Cameron May, 1995).

The closest legal theory has come to non-anthropocentric philosophies of law is the newest comer to the 'Law-and-' fold, Law-and-Geography. The Law-and-Economics and Law-and-Literature movements have unsurprisingly contributed nothing to a theory of the relationship between place and law. They have successfully argued however that law ought to be read against disciplines traditionally regarded external to law. Whilst the underlying premise of 'Law-and-' movements is that law and economics or literature are separate, distinct and thus combinable disciplines, the notion that it is fruitful to approach law from its outside, is useful to this thesis. Desmond Manderson's theory that law is a discourse begins where the 'Law-and-' movements stop: that law can be approached and understood textually, as part of cultural discourse. This philosophy of law (law-as-discourse, not law-and-discourse) is evident in the work of a number of 'legal geographers'.⁶⁸ Law-and-Geography analyses the role of place, space and nature in law. The recently published *Legal Geographies Reader*⁶⁹ presents critiques of a range of doctrinal laws including property, heritage, environmental and planning from the perspective of the lived experience of cultural and geographic materiality. These critiques mostly conduct sociological analyses of law rather than pushing a reconceptualisation of the relation between society and the natural world itself. A Law-and-Geography account of *The Castle* might argue that the Kerrigans are victims of the marriage of public law and private interests in a corporate state that envelops the private property of the Kerrigans to augment the public space of the airport, but which actually protects the private interests of Airlink against the public interests of the Kerrigans and their neighbours. The focus of such an analysis would be the definition and distinction between private and public space.

The analysis of Australian property law in this thesis is from neither the doctrinal 'black letter' perspective nor the socio-political perspective of Critical Legal Studies. The analysis of property law here is materialist in the sense that it asks in what, or rather where, Australian property law is grounded. The thesis does not draw a relationship between land and law in the way that Law-and-Geography might, in terms of the function of space in social justice. Rather, the mutual economy of land and law is considered to place law so that property law is not 'the' or 'a' universal and global

⁶⁸ See for example Blomley, Nicholas *Law, Space, and the Geographies of Power* (New York: Guildford Press, 1994).

⁶⁹ Blomley, Nicholas; Delaney, David and Ford, Richard (eds) *The legal geographies reader: law, power, and space* (Massachusetts: Blackwell, 2001).

abstraction - but local laws of particular places. The thesis argues that despite the claimed irrelevance of land and place to property law, that Australian property law is defined by its placelessness. The absence of place in property law renders indigenous land claims subversive and implicates property law in ongoing and irreversible environmental change. A materialist analysis of law that does not repeat and then reverse the paradigmatic opposition of law, as culture, to nature asks how place, particularly Australian lands, can be understood in different ways. This thesis does not advance an essentialism about land, but rather a change in the paradigm that would then replace the absence of place in property law with a relationship of people and place in property. I do not consider or propose a more 'truthful' form of law, rather I ask what a particular model of cultural understanding of place leads to.

Property Theory

Theories of property are predominantly anthropocentric, being advanced variously in terms of politics, economics, ethics, law, and morality. Judgments about property, about who should get what in the distribution of the goods of life,⁷⁰ are value judgments that describe a vision of human nature, meaning, the past, and the future.⁷¹ Theories of property usually present an understanding of law, if only implicitly, because they describe what 'should be'. Descriptions of what 'should be' are no longer discussing what is possible, but what possibilities are to be allowed.

What is allowable in the world can no longer be determined against a single shared background or conception of historical experience. Nor can it be determined against an imagined uniformity and stability of natural environments. For these reasons, this thesis has treated pedagogical commentary on property law as theoretical material. Narratives of property law offered by most property textbooks present a unified community in possession of accepted truths, rights and lawful relations. These textbooks also present an absent or at the very least, an assumed homogeneity of natural environments across its jurisdictions. The inadequacy of this narrative is especially evident in native title claims and environmental critiques of property law. The basic but influential textbook accounts of property law in Australia, such as Peter Butt's *Land Law*⁷² and Sackville and Neave's *Property Law Cases and Materials*⁷³ contribute theories of property, albeit latently,

⁷⁰ Kerruish, Valerie *Property Law and Equity* (unpublished lectures, Macquarie University, 1999).

⁷¹ Bowrey, Kathy (ed) *Law of Property: Book One* (Course Materials, Macquarie University Law School, 1993).

⁷² Butt, Peter *Land Law* 4th Edition (North Ryde: Law Book Company, 2001).

⁷³ Sackville and Neave *Property Law Cases and Materials* 5th Edition (Sydney: Butterworths, 1994).

because the predominant value of dephysicalised property in Australian jurisprudence is repeated rather than explained or situated historically and culturally.

Historical sources of the dominant value of dephysicalised property in English common law such as John Locke's *Two Treatises of Government* (1689)⁷⁴ and William Blackstone's *The Commentaries on the Laws of England, Books 1 & 2* (1765-1766)⁷⁵ are important to the thesis as active authorities of Australian law and culture. Their works legitimate the claims of Airlink over the Kerrigan's property and would defend the Kerrigan's resistance only in terms of private property rights that are readily compensated. The Kerrigan's refusal to be compensated for the alienation of their property would not be accommodated in Locke and Blackstone's theories of property and would be instances of civil disobedience, or at best irrationality. Significantly, Locke and Blackstone's theories of property are also the foundational narratives of imperial sovereignty and colonial property law. Their theories of property therefore, explicitly speak to the placelessness and transportability of the paradigm of modern law.

More recent theorists that repeat and clarify the dephysicalised value of property in their respective times are Wesley Hohfeld (1913 and 1918)⁷⁶ and Kevin Gray (1991).⁷⁷ Both these theorists' work have become authoritative sources of values and definitions of property in law. They are legal theories of property and thus abstract analyses of legal developments rather than legal interactions and impressions in physical places. Their only account of the relation between property and the material, physical world is that it does not exist in law. Their theories of property would be closed to the concept of place in the Kerrigan's value of property, except to conclude that it is uneducated and fantastic, expressing only an unfortunate 'lay' understanding of property law. The Kerrigans, Hohfeld and Gray might say, make the work of law both harder and sophisticated, and therefore right.

Property theory in Australia orbits around the question of the degree to which property law in Australia is identifiably Australian. This question is often another way of asking whether property law in Australia is English. The two leading theorists in this field,

⁷⁴ Locke, John *Two Treatises of Government* [1689] Laslett, Peter (ed) (Cambridge: Cambridge University Press, 1970).

⁷⁵ Blackstone, John *The Commentaries on the Laws of England, Books 1 & 2* (1765-1766) (Oxford: Reprinted by Dawson, 1966).

⁷⁶ Hohfeld, W.N. 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' (1913) 23 *Yale Law Journal* 16.

Andrew Buck and Brendan Edgeworth, scrutinise the socio-historical conditions that produced important precedents and principles in Australian law. Whilst their analyses critique social, political and economic conditions of the development of property law, their cultural materialist approach is anthropocentric. Questions of place are relevant to Australian property theory in so far as it describes an antipodean relation, which links back again to an abstract relationship between empire and nationhood.

English property theorist Alain Pottage both continues and questions the anthropocentric tradition of property theory. "The question of property is, of course, an eminently 'socio-political' one."⁷⁸ His essay "Instituting Property"⁷⁹ traverses similar terrain covered by Kevin Gray from which the latter impatiently concluded that property did not exist. Unlike Gray, Pottage does not ask or answer whether property exists. He concludes that the representation of property is problematic and abstract, not property itself.

The problem for property theory is not simply that nature has been socialised... rather, it is that the process of social evolution has so decisively overtaken the conditions in which property categories were formed, that the category of property has little or no explanatory value. In law, the vocabulary of property is animated by operations which cannot be described in terms of that vocabulary.⁸⁰

Pottage links the representation of property to its material operation, thus suggesting a way out of Gray's magic spinning wheel. Yet Pottage's preliminary claim that nature has been socialised is unambiguously anthropocentric in that it both maintains the categories of Nature/Culture, locating nature outside culture, conservatively positioning law as the active centre. My thesis argues that it is the paradigm itself, and not the abstract envelopment of nature, that renders the vocabulary of contemporary property law inadequate. The crisis of the paradigm is apparent by its increasing dysfunction but it is in part caused by physical or 'natural' limits that it claimed to have transcended. A more profound critique of the paradigm of modern property law is offered by his attention to its cultural specificity.⁸¹ This study both historically situates and geographically locates property law in European thought and place. The difference of approach here could admit alternative cultural values of property, expressed for example by the Kerrigan family in *The Castle*, because it embeds property in the

⁷⁷ Gray, above n 12.

⁷⁸ Pottage, Alain 'Property: Re-appropriating Hegel' (1990) 53 *Modern Law Review* 259.

⁷⁹ Pottage, Alain 'Instituting Property' (1998) 18 *Oxford Journal of Legal Studies* 331-344.

⁸⁰ *Ibid* 344.

⁸¹ Pottage, Alain 'Persons and things: an ethnographic analogy' (2001) 30 *Economy & Society* 112.

specificity of time and the particularity of place. As such, Pottage's theory is helpful to a critique of the paradigm of modern property law.

Environmentalist critiques of property may initially seem the exception to the anthropocentric tradition of property theory. They do successfully challenge the dominant, instrumentalist value of nature but they do not challenge the dominant model of the oppositional separation of Nature/Culture and therefore maintain an anthropocentric approach to property relations. The importance of these critiques is that they interrogate the cultural specificity of the dominant instrumentalist value of nature and thus point to the way in which it is a discursive construction rather than a truth across time and place. Christopher Stone's radical environmentalist critique of property law (1972) is based in the idea that property rights should be attributed to things in the non-human world, such as trees.⁸² Stone's critique of property reinforces rather than reconceptualises the dichotomous paradigm of Nature/Culture, and particularly the dominance of rights discourse in the modern paradigm of property. Stone's mix of anthropocentric logic and ecocentric values would make the dispute in *The Castle* irrelevant because his interest is not in attributing property rights to cultural things, like houses, but to natural things like trees. Importantly, his property theory is not interested in relationships between people and place, but in place as separate from people. Donald Large critiques property in terms of the dispossession of indigenous North Americans, but by referring only to compensation as a human and cultural right, does not directly challenge the dominant or colonial cultural value of property itself.⁸³ His essay does discuss non-European values of property and different relationships between people and place, but for him, they are culturally rather than naturally or environmentally specific relationships. The compulsory acquisition of the Kerrigan home would interest Large if their value were culturally reinforced and ethnically and racially marginal. I am not convinced that Large's theory could accommodate their value of place and its connection to their sense of property unless it was defined in terms of cultural identity, rather than an emotional attachment to particular, tangible place.

Two notable exceptions to the anthropocentric/ecocentric tradition of property theory are found outside the conventions of property theory proper. Joy Williams published an

⁸² See for example Stone, Christopher 'Should Trees Have Standing?: Toward Legal Rights for Natural Objects' (1972) *Southern Californian Law Review* 450-501.

⁸³ Large, Donald 'This Land is Whose Land? Changing Concepts of Land as Property' (1973) 4 *Wisconsin Law Review* 1039.

article in Harper's Magazine entitled "One Acre: On devaluing real estate to keep land priceless" that chronicles the development of a lagoon in Florida, USA where Williams owned an acre of land. The area, once beyond urbanity and without access to open water became, over a twenty-year period, a luxury retreat of large houses and condominiums.

The condos are investments, mostly, not homes. Like the lands they've consumed, they're cold commodities. When land is developed it ceases being land. It becomes covered, sealed, its own grave.⁸⁴

Williams likens the ownership of her land to stewardship, but juxtaposes this notion to the legal reality of the land as private property "the wildlife didn't know that their world existed only because I owned it."⁸⁵ Compelled to leave her home, Williams sells the land, but simultaneously radically refuses the core principle of private property - the freedom of enjoyment and the exclusion of others. Like Daryl Kerrigan, who claimed he was not interested in compensation for the compulsory acquisition of his property, Williams says "I wanted more than money for my land." Williams makes the sale of her property conditional on the conservation of its natural habitat.

It took eight months to find the right buyer. Leopold's philosophers were in short supply in the world of Florida real estate. But the ideal new owners eventually appeared, and they had no problem with the contract between themselves and the land... I had found people with a land ethic too. Their duties as stewards were not onerous to them. They did not consider the additional legal documents they were obliged to sign an insult to their personal freedom.⁸⁶

William's value and critique of property contains a concept of place that, like the placed value of property expressed by the Kerrigan family in *The Castle*, disrupts the dominant discourse of private property because it refuses the notion that property is a commodity, always and already exchangeable. Interestingly, Williams does not resist the law from a position of exteriority, rather she manipulates the legal framework and the land market to reach a compromise, however satisfying that may be.

David Harvey's *Justice, Nature and the Geography of Difference* (1996)⁸⁷ whilst not an elaborate theory of property, critiques the dominant value of property by challenging the ongoing validity of the paradigm of Nature/Culture that ideologically sustains the production and economy of global capitalism. Following Marx and Engels, Harvey

⁸⁴ Williams, Joy 'One Acre: Devaluing real estate to keep land priceless' (2001) *Harpers Magazine*, February, 60.

⁸⁵ Ibid 63.

⁸⁶ Ibid 65.

attempts to collapse the boundary between Culture and Nature, or between humans and the natural environment by revising the role of nature in the development of the modern Western economy. Harvey "recognises that 'the antithesis between nature and history is created' only when 'the relation of man to nature is excluded from history.'"⁸⁸ Concepts and practices of property are vital to his analysis of social and environmental justice. Significantly, Harvey offers the only non-anthropocentric critique of property that is not also an ecocentric critique. His model of the world does not privilege the natural environment because it does not separate humans from the world and excludes the hierarchical dynamic. Harvey offers a social theory that deconstructs the 'otherness' of nature that sustains both anthropocentric and ecocentric models of the world. In this way, his postmodern theory of property is intellectually reconcilable with notions of biodiversity in theories of physical sciences, notably, ecological studies. Environmental change is neither natural nor anthropogenic in Harvey's geography and thus it establishes the possibility of convincingly incorporating theories of biodiversity within property theory.

Environmental Science and Environmental Philosophy

Interest in the ownership and use of land and natural resources, particularly the cause and response to environmental change, shared by both environmental science and environmental philosophy has contributed significantly to the debate about modern Western concepts of place. However, as would be expected, environmental philosophy concerns itself mostly with ontological questions of Western metaphysics without relating those to the pragmatic or physical questions of Western land use and land ownership. The philosophy of a movement now called deep ecology insists that nature is intrinsically valuable and provides consistent critiques of anthropocentrism.⁸⁹ The value of deep ecology to a theory of place is limited however because it generally replaces anthropocentrism with either environmentally qualified articulations of anthropocentrism or ecocentric models of life. Ecocentrism offers nothing more than an inversion of the hierarchical value or position of the paradigmatic categories Nature/Culture and thus does not so much depart from anthropocentrism as mirror it through opposition. Ecocentrism disallows the notions of possession and ownership at the basis of most theories of property if it attends to the question at all. Nevertheless,

⁸⁷ Harvey, above n 2.

⁸⁸ Harvey, quoting Marx, *ibid* 184.

⁸⁹ Sessions, George (ed) *Deep Ecology for the 21st Century: Readings on the Philosophy and Practice of the New Environmentalism* (Boston: Shambhala, 1995).

ecocentrism is critiqued by environmental philosopher Fritjof Capra whose theory more closely resembles poststructural philosophy than the deep ecology of Arne Naess and George Sessions in that it describes networks rather than centres of being.

Deep ecology does not separate humans from the natural environment, nor does it separate anything else from it. It does not see the world as a collection of isolated objects but rather as a network of phenomena that are fundamentally interconnected and interdependent.⁹⁰

Capra's claim that the philosophy of deep ecology sees the world as a "network" of "interconnected and interdependent" things is arguable, but the notion of network and interconnection would be open to questions of place and specifically to the notion of inalienable relationships between people and place. The idea that relationships are interdependent and multilinear works against the idea that relationships are oppositional within the dichotomous Nature/Culture paradigm of anthropocentrism.

Luc Ferry is a French political philosopher whose work unambiguously rejects deep ecology, most other environmental philosophers and the major findings of environmental scientists.⁹¹ Ferry defends anthropocentrism, or in his words 'humanism', on two grounds: that anthropogenic environmental change is 'natural' and therefore good, and that environmental change is overstated anyway. *The New Ecological Order* describes ecology as the new fascism. Ferry rejects the philosophy of structuralism and poststructuralism preferring an instrumental view of nature. His opinions about the freedom of humanity are consistent with the principle of private property: that citizens are property owners who are free to own, alienate and enjoy property exclusively and without limitation. Ferry's critique of deep ecology is thus neither a critique of ecocentrism nor of the paradigm of Nature/Culture that supports it. *The New Ecological Order* does however better illustrate the impasse of that paradigm than deep ecology because it approaches the paradigm with reverence rather than thoughtfulness - arguing that cultural progress is eternal in the face of ongoing natural or environmental decline.

Michel Serres makes an important contribution to the debate about the relationship between place and property in *The Natural Contract*.⁹² Serres presents two "fundamental" relationships between what he calls Nature and Culture: "war and property."⁹³ Serres's

⁹⁰ Capra, Fritjof 'Deep Ecology: A New Paradigm' in Sessions, *ibid* 20.

⁹¹ Ferry, Luc *The New Ecological Order* (trans. Carol Volk) (Chicago: University of Chicago Press, 1995).

⁹² Serres, Michel *The Natural Contract* (trans. Elizabeth MacArthur and William Paulson) (University of Michigan Press, 1995).

⁹³ *Ibid* 32.

theory of property is that property is a means by which nature is mastered and possessed. Serres argues that the human and non-human worlds are now in a state of "war" and that this relationship should change into a contractual relation. His philosophy upholds anthropocentrism because it maintains the separation of Nature and Culture as distinct realms. Serres's radicalism however, is his point that the relationship between Nature and Culture is the original relationship from which all other relations developed. The notion that Nature/Culture is the precondition of all other forms and relationships (even if presented as realities rather than intellectual categories) highlights the leading role that this dialectic relationship played in the foundational history of modern Western law and culture. In this way, Serres's philosophy could prove a fruitful introduction to a discussion about the paradigmatic role of Nature/Culture and its material consequences.

The popular and controversial book *The Future Eaters*⁹⁴ by Australian biologist Tim Flannery highlights the tension between two important points about the relationship between science and law. The controversy about the validity of Flannery's findings was driven by two rules of positivism that apply equally to law and science: that truth is found and guaranteed only by the genre of objectivity and that objectivity is always and necessarily apolitical. The political implications of *The Future Eaters* were claimed to invalidate the objectivity of his work - and because it was deemed unscientific, it was deemed untrue. Claims of truth and untruth derail the debate to which Flannery's work contributes a great deal. Regardless of the objective merits (or otherwise) of *The Future Eaters*, the ideas themselves are deeply subversive of the dominant paradigm of Nature/Culture and the discourse of anthropocentrism. In this light, it is unsurprising that the book met with hostility from lawyers and scientists alike. Flannery's research traced a history, a 'deep' history of environmental change in Australia and theorised the role of humans within those changes. His conclusion is that anthropogenic environmental change in Australia has not been exclusively conducted by European invaders and their issue, and that Aboriginal Australians, like Polynesians, caused the extinction of significant numbers of flora and fauna, notably megafauna. This suggestion disrupts the notion that Aboriginal Australians are intuitively well-adapted to, or simply an extension of, Australian 'nature'. It refuses the idea that some cultures are more 'natural' than others. It debunks the imagined scale of cultural progress from

⁹⁴ Flannery, Tim *The Future Eaters: An Ecological History of Australasian Lands and People* (Kew, Victoria: Reed, 1994).

primitivism to civilisation. Flannery's suggestion also disrupts the notion that Australia was a *terra nullius* because it indicates the shared trans-cultural history of human agency in (as exploitation of) nature. Published amid the debate about land and property stimulated by the recognition of native title in Australian law two years earlier, Flannery's work offended both supporters and opponents of native title.

What is lost or excluded by reading anthropogenic environmental change in terms of race is the idea of adaptation. The interpretation of anthropogenic environmental change in terms of adaptation deconstructs the paradigm of Nature/Culture because unlike the notion of human agency, it is both and neither natural and cultural. Flannery's work leaves the category of Culture and the ideal and measure of 'progress' behind in his thesis that humans are a species, which like any other, must adapt to live. The notion that humans are a species is not new or radical - what is valuable about Flannery's work is that it situates the human species neither at the top or the bottom of an ontological hierarchy but within a 'network' of 'interconnected' physical activity. This is not to say that Flannery is neutral and uncritical about human adaptation, indeed his arguably anthropocentric concern is the possibility of human survival. Nevertheless, shifting the ground from a discussion of race or cultural agency in environmental change to human agency, or adaptation is fruitful to a critique of the Nature/Culture paradigm and perhaps as a solution to its crisis. In terms of property law, Flannery's work shows that although adaptation may be anthropocentrically conceived as a 'cultural' response to a 'natural' situation, it implies a connection with material environmental conditions that property law disavows. The question is not whether property relations are 'natural' or 'cultural' or if alternative property relations are more 'natural'. The point is that property relations are lived through traditions or paradigms that are at once natural and cultural and that are particular to the times and places in which they take root. In this way, thinking of property law in terms of adaptation links it to land use and creates a different relationship between people and place.

3. MAP: OUTLINE OF DISSERTATION

The question my thesis asks is how the materiality of property came to be so challenging to its operation. Contemporary definitions of property as elusive and dephysicalised are theorised, taught, repeated in Australian courts and then made real by a land use developed in and for an alien but colonising social economy. The origins and traditions

of private property law and land use are recognisably European. The ontological paradigm of European property relations conceived the world as dual but oppositional categories - Nature/Culture. This paradigm is apparent in the parallel framework of Persons/Things in property law. The enclosure, or privatisation of the English commons and the appropriation and colonisation of foreign countries practiced and made real the ideological relations between people and place expressed in the paradigm of Nature/Culture. Colonial conditions in Australia meant that the development of Australian land law diverged substantially from English land law in important, mostly doctrinal, ways. Nonetheless, Australian property law evidences an alien, European ontological paradigm manifest in theories and practices of land use that property law enabled and encouraged. The identification of Australian property law is best considered against the materiality of its operation, by which I mean both its application and consequences. This analysis demonstrates not only that the dominant values and practices of property law were alien to the country, but that they were maladapted.

Despite the lessons history may offer, contemporary property law exhibits a strong attachment to the theory of dephysicalised property. The trajectory of this theory from a person/thing to a person/person relationship demonstrates the decreasing relevance of the particularities of things, as objects of property relations to society. Australian courts and law schools reinforce the dominance of this theory in determining what property is and can be in Australian culture. In this process, Australian legal discourse is both closed to questions of place in disputes over property and disrupted by claims that place matters, in native title claims for example. The inadequacy of property law is increasingly evidenced not only by its insistent retreat from native title but also by problems encountered by farmers in meeting social and economic expectations of agricultural production despite increased environmental regulation and degradation of their properties. Conservative factions call on property law to protect the private rights of farmers against the irreconcilable demands of economy and ecology. Other farmers condemn property law for creating those demands and for degrading the land. Thus whilst property law disavows the question of its place and of place generally, proprietors and custodians speak the lie to law's logic that separated people from place.

The historical development of property in modern Anglo-European culture

Chapter 2 argues that the paradigm of modern property law is not fixed or universal, rather it emerged within particular material conditions. The function of the chapter is to

provide an understanding of the intellectual basis and heritage of contemporary property law. It begins with an analysis of the dichotomous meta-concept Nature/Culture that describes the world divided into human and non-human realms. The separation and opposition of Nature/Culture is structured hierarchically, positioning people as the "masters and possessors of nature." The domination and possession of nature and the elevation of humanity are then linked to the rise of private property. Historically, private property transformed common property into enclosed privately owned land, which itself became increasingly valued as an alienable commodity in the context of market economy. The ideological justification of enclosure, based on the idea of improvement and cultivation, was as important to the ubiquity of private property as the creation of physical boundaries themselves. It changed land use and the economy of natural resources. Resistance to the dispossession and alienation of people from place in the process of enclosure demonstrates however, the existence and strength of prior experiences and values of property relations. The peasant and poet John Clare articulated a different value of place in his concept of property, a concept arguably shared by the illiterate, peasant and later working class to which he belonged. Clare's work consistently laments the marginalisation of a mutual relation between people and place, possession without ownership. His critique of a unilateral relation of dominance over nature is a rare and detailed record of a land ethic in Anglo culture that preceded and was irreconcilable with the principles and practice of private property.

The historical development of property in colonial Australia

Chapter 3 argues that the European paradigm of Nature/Culture was transported to Australia and with it, particular values, laws and ideas of land use such as agriculture and pastoralism. The ideas of improvement and progress in Enlightenment philosophy that justified enclosure also justified the colonisation of Australia and the imposition of private property law in the British colony. The function of the chapter is to demonstrate the link between the European paradigm and the historical development of Australian property law. Like the peasant commoners in England, indigenous Australians were dispossessed by the enactment of ideas of cultural progress and improvement that were contingent on a paradigm that separated people and place. The principle that property and land are alienable and tradeable was not derived locally but imported from England. The viability of that alien and alienating law has increasingly diminished because it has excluded any consideration of its practicability within the limits of the land itself. In this way, property law in Australia may be regarded as maladapted.

Contemporary western theories of property and the commodity economy

Chapter 4 argues that modern property theory excludes place because it excludes materiality, pronouncing itself a theory of 'dephysicalisation'. The opposition of Nature to Law is articulated in property theory in terms of transcendence, abstraction, alienation, commodification and fetish. The function of the chapter is to present dephysicalisation as an elaborate and established theory of property that has become and continues to be, the basis upon which the separation of people and place is regulated by legal practice. Beginning with a discussion of utilitarian philosophers Jeremy Bentham and J.S. Mill the chapter considers how property was conceived as a legal relationship between persons rather than between persons and things. The chapter traces the development of this person-person, or dephysicalised theory of property through the work of Wesley Hohfeld, Kenneth Vandavelde and C.B. Macpherson according to different ideals of law and society. The critiques of dephysicalised property advanced by Karl Marx, Hannah Arendt and Jean Baudrillard reconceived the paradigm of modern property law as a relation between things. Their critique of property contends that property is part of a capitalist, symbolic economy. The chapter concludes with a discussion of contemporary theorists, Kevin Gray and Alain Pottage. Gray and Pottage both observe the elusiveness of property, but whilst Gray celebrates the elusiveness of property law, Pottage asks why and how this is.

Contemporary practice and pedagogy of property

Chapter 5 argues that the theory of dephysicalisation is practiced, making real the separation of people and place in Australian property relations. Having established the theory of dephysicalisation in the previous chapter, chapter 5 examines how theory creates and is created by practice. Specifically, how the theory of dephysicalisation is practiced judicially, how it is taught in law schools and how that feeds and is fed by broader cultural discourses of property. The function of the chapter is to show how paradigms are practices as much as theories, and how the current paradigm of placelessness affects and abstracts relations between people and place in Australia. In legal practice, property is a discourse of rights. Rights discourse is so dominant in understandings of people-place relations that environmental regulation of private property is regarded as inappropriate interference with rights. The chapter links legal expressions of property to cultural discourses of property and land use, particularly farming and custodianship as expressed by the National Farmers' Federation (NFF),

Aboriginal custodians and native title claimants. The final section of the chapter discusses the prevalence of dephysicalised concept of property in the pedagogy of property in Australian law schools. The chapter concludes that the legal, cultural and pedagogic practice of property law creates and is created by a concept of dephysicalised property.

The point that Daryl Kerrigan made in his claim that place is "everything," that it can't be alienated, exchanged or compensated, is that places are particular not general, local not universal. The paradigm of modern property law that 'things' are irrelevant, that they can be readily "picked up and plonked down somewhere else" is a paradigm of displacement. The thesis is interested to ask where this seemingly placeless paradigm originated and whether it can sustain people-place relations in Australia.

THE PARADIGM OF MODERN PROPERTY LAW

CHAPTER TWO

Chapter Two

THE PARADIGM OF MODERN PROPERTY LAW

Does a field make progress because it is a science, or is it a science because it makes progress?¹

1. INTRODUCTION: THE SEPARATION OF PEOPLE AND PLACE

The separation of nature from culture in the foundational history of contemporary social, legal, geographical and geopolitical order breathes logic into the uncanny practices of current laws and crises about land. This chapter explores the origins and power of this theoretical framework and its importance in the development of contemporary law, and specifically how it came to dominate a particular understanding of property. In this continuing history, law constructs itself as a metaphysical discourse that simultaneously constitutes and is constituted by the absence of the physical. In property law, the dephysicalisation of the world was initially conceived in terms of persons and things. The passive function of 'things' within the property equation means that values of nature are not irrelevant to property law – they are vital to it. The ongoing practice of property law depends upon a particular, instrumentalist value of nature that grounds the authority of law and the legitimacy of current modes of production and consumption.

The chapter begins by examining the language and discourse of property. James Boyd White, in his essay on language and law, suggests a view of people as creators of their world rather than mere players in it. Language is not merely a mode of communication in that world, it is a technology: it makes things.

¹ Kuhn, Thomas *The Structure of Scientific Revolutions* 3rd ed., (Chicago: University of Chicago Press, 1996) 162.

Language can not be seen as transparent or neutral but as a real force of its own. Language does much to shape both who we are – our very selves – and the ways in which we observe and construe the world.²

This chapter examines precisely how language shapes “our very selves,” our psychic world, and extends this idea to examine how language shapes the physical world, not only our ‘selves’, but also our ‘others’. Despite the metaphysical and physical contentiousness of remarking that humans bear an enduring or at least serious impact on the natural environment, “there is increasing public acceptance of the idea that much of what we call “natural,” at least as far as the surface ecology of the globe and its atmosphere is concerned, has been significantly modified by human action.”³ To accept the connection of people and place proposed by critiques of environmental (mis)management is to recall a relationship of identification that confounds the schismatic logic of Nature/Culture. It is a relationship articulated in the etymology of property.

The second section explores the etymology of property – the strange inversion of which is apparent in the contemporary pedagogy and practice of property law. Originally, what was ‘proper to’ a person were the physical qualities or things so closely associated with the person that he or she could be identified by them. In contemporary usage, this definition of property is the primary meaning of the word only in the physical sciences, e.g. ‘what are the properties of hydrogen?’ The dominant meaning of property today pertains to ownership and possession, which according to law are abstract relations rather than physical things. The mitosis of what was once the singular meaning of ‘property’: identity, into two modern unrelated meanings of the word reveals a separation of the world into physical and cultural realms. The two definitions of property however are not different or progressive points on an evolutionary line of cultural development, but are antithetical. Today the defining principle of the dominant usage and meaning of ‘property’ is alienability - the inverse of the original defining principle, identity. In relation to land, the use of the word ‘property’ originally indicated the identification of, or defining connection between people and place. The legal priority of the category ‘real property’ articulated a relationship to the physical or real that mattered more than other forms of property. In contemporary usage however, the use of the word ‘property’ in relation to land indicates the alienability and disconnectedness of people from place. Today, jurists and legal scholars debate the extent to which the

² Boyd White, *Justice as Translation: An Essay in Cultural and Legal Criticism* (Chicago: University of Chicago Press, 1990) xi.

category 'real property' is relevant. The language and history of property evidence neither an inevitable nor enduring philosophy and economy of nature and culture as separate spheres, but rather prove that property is fixed only in time and place.

The third section of the chapter extends the discussion of language and property to consider nature and culture as discursive constructions that convey not different concepts, but positive and negative values of the same meta-concept. Values of nature are values of culture. After examining the discursive separation of people and place, the following section argues that the Nature/Culture paradigm works as a condition as well as a parallel to the legal coupling of Persons/Things. The two sections in combination contend that the epistemology and taxonomies Nature/Culture and Persons/Things are primarily ways of ordering the world. The notion of order is useful to the chapter and to the thesis as a whole because it connotes both classification and force, suggesting that property law is a particular practice of structuring people and place as separable and separate.

The dynamic of separation, referred to in post-structural theory as *othering*, is the apparatus and effect of the law of property. The final section of the chapter discusses the primary example of *othering* place: enclosure. Enclosure is the name given to the process of enclosing and appropriating land hitherto worked and owned by a peasant community in common, usually with a hedge, fence or other physical boundary. Enclosed land is privately owned land; it excludes the interests and access of all but the individual owner. The land itself, and its fruits, are legally alienable, that is tradeable by the owner at his or her discretion. Privately owned land carries no obligation or responsibility to anyone for anything. Enclosure is also the name given to a protracted but revolutionary period in English history in which a substantial portion of English lands were transferred from common, inalienable landholdings to private, alienable property. Although lands were being enclosed intermittently for years before the 18th century, from 1750-1820, almost 21% of English lands were enclosed by Acts of Parliament. Enclosure was contested and resisted, usually locally, but also generally and ideologically because it dispossessed entire communities or parishes, whose populations often became hire labour on the now privately owned land or else migrated to urban centres. "The stranglehold of enclosure, by which means the open fields and commons where smallholders grazed their animals were legally stolen in the interest of the large

³ Harvey, David Justice, *Nature and the Geography of Difference* (Massachusetts: Blackwell, 2000) 119.

landowners."⁴ This pivotal event in the foundational history of contemporary property law consistently deployed the notions of improvement and progress. The paradox of improvement discourse is that its logic marries people to place whilst its counteractive practice physically separates and severs this relationship. The rationale of enclosure (and colonisation) is that cultural progress can be measured only by the improvement of nature. The condition of any given culture therefore is known via its relationship to, and precisely by its distance from, nature. In improvement theory, there is necessarily an immediate proximity of nature and culture. Conversely, in practice, both enclosure and colonisation physically remove people from their indigenous places through eviction, transportation and dispossession. These events de-place and displace both people and its own mythology in the same way. The irreconcilable logic and practice of improvement however, does not belong only to the annals of a supposedly defunct British Empire. It is found on the shelves of lawyers and economists: demonstrating the continuing relevance, both enabling and inhibiting, of the scientific and legal paradigms of Nature/Culture and Persons/Things. Whilst today the idea of absolute private property is contested in legal theory by the relativity of property rights and the weight of equity, the conceptual foundation of absolute private property, alienation, remains powerful and prevalent. We are not so long departed from the 'New World' and its mythology of property as order.

2. THE ETYMOLOGY OF PROPERTY

Until recently, the word 'property' dominated if not constituted the entire legal vocabulary of place. Many inquiries and studies into property law begin by asking 'what is property?' The attempt to identify and define property in its normative sense, as a social institution, is ambitious and difficult and is usually acknowledged as such by theorist and lecturer alike (see Chapter 5). Defining property in its semiotic sense however is no less difficult. The most common remark made in pedagogical and theoretical definitions of real property is that "the term 'real' is oxymoronic."⁵ So misleading is the word 'real' in the law of property today, that students and 'lay people' are warned from 'assuming' its 'simplistic' and 'everyday' sense – reality, the tangible and physical.⁶ To the contrary, the 'real' in property law, the 'thing' is unreal – it is an

⁴ Reeves, James quoted in Barrell, John *The Idea of Landscape and the Sense of Place 1730-1840* (Cambridge: Cambridge University Press, 1972) 190.

⁵ Carney, Terry *Real Property* (unpublished lectures, Faculty of Law, University of Sydney, 2001).

⁶ It is interesting to note that the modern English word 'real' derives from the Latin *res* meaning 'thing'.

abstract 'right' to a thing and not the thing itself (see Chapter 4). The 'right' to property exists only in law.

The history of the English word 'property' indicates the way in which modern European and Anglo-Saxon relationships between people and place have changed. The English word 'property' comes via the Old French *proprete*, which comes from the Latin word *proprietas* meaning "proper to, one's own, or special character."⁷ The French word 'propre' meaning clean, and suitable, originally indicated the sense of something 'close or near' and 'in place'. These Old French and Latin meanings of the word derive from the Greek word *idiotes*. *Idiotes* refers to the peculiar nature, or specific character of something. The *idiotes* of something is the quality that makes it distinctive and distinguishable from other things – and it was the means by which ownership could be claimed – the proximity of the thing to the person was considered so close that it would be associated with that person. Thus to say that 'this is my own' would suggest that it is connected to my identity, that it forms part of who I am. The immediate connection here conveyed between 'persons' and 'things' at the origin of the Western concept suggests that property and identity were mutually formative.

The original definition of property is today the secondary definition of the word. In its modern usage, the primary meaning of the word 'property' divorces property from identity, indeed, it denotes the alienability rather than the identity of owner and owned. 'Property', in today's usage, refers to an object or thing whose only relationship to the owner is that it is owned. 'Property' means 1. "that which one owns; the possessions of a particular owner" and 2. "an essential or distinctive attribute or quality of a thing".⁸ The transition from the mutually defining relationship of ownership and identity to a unilateral relationship indicates a shift in the ideology and practice of human values of place and physicality. Subjectivity is defined not via identification with and belonging to place but via alienation from it. According to the original sense of 'property', the thing possesses me, I belong to it and am identified by it, but according to the modern sense of 'property', I possess the thing, it belongs to me. Where place once characterised and identified a person, now place and person are disconnected. The particular and physical qualities of place have been erased from property relations that became defined by social relationships.

⁷ *Chambers Dictionary of Etymology* (Edinburgh: Chambers Harrap Publishers, 2000). All etymological references are to this dictionary.

⁸ *Macquarie Dictionary* 2nd ed., (Macquarie Library, 1992).

3. NATURE / CULTURE

The paradigm of Nature/Culture operates via the dichotomous logic of anthropocentrism. Anthropocentrism works by the double movement of conceiving the world as divided into two categories: human beings, and 'the rest', and then placing humans at an imaginary and finite centre of the world.

Man, if we look to final causes, may be regarded as the centre of the world; in so much that if man were taken away from the world, the rest would seem to be all astray, without aim or purpose... and leading to nothing. For the whole world works together in the service of man; and there is nothing from which he does not derive use and fruit... insomuch that all things seem to be going about man's business and not their own.⁹

According to this model, people are not humans in the sense of a biologically determined species - rather they are distinguished culturally. Cultural practice exists on a linear scale of development regarded as evolutionary. The evolutionary line stretches from nature at one end to culture at the other end. Nature and culture are thought to be as different as it is possible to be. They are opposite. This section will examine nature and culture not as two distinct concepts however, but as two poles of the same concept, a meta-concept, Nature/Culture that holds together the Order of Things¹⁰ in modern discourse. Modern discourse classifies things according to their location on a grid of arbitrarily determined qualities and properties that they either lack or possess in relation to other things. This grid is imposed onto a view of the world that sees things not in themselves but according to the logic of its own structure. "By virtue of structure, the great proliferation of beings occupying the surface of the globe is able to enter both into the sequence of a descriptive language and into the field of a *mathesis* that would also be a general science of order."¹¹ Natural things are classified as natural "not in their organic unity" but because they conform to a pattern or list of properties. "They are paws and hoofs, flowers and fruits, before being respiratory systems or internal liquids."¹² Nature and Culture are not different concepts or different realms, they are mutually exclusive and mutually defining categories of being. Natural things could be classified as much by the cultural qualities they lacked as much as by the natural qualities they possessed. Similarly, Culture could be known as the absence of Nature and the loss of natural

⁹ Bacon, Francis cited in Marshall, Peter *Nature's Web: Rethinking Our Place on Earth* (New York: Paragon, 1994) 184.

¹⁰ Foucault, Michel *The Order of Things: an Archaeology of the Human Sciences* (New York: Vintage, 1973).

¹¹ *Ibid* 136-137.

¹² *Ibid* 137.

qualities. Together, through their mutual opposition, Nature and Culture made sense of the system of knowledge that classified them. The dynamic of opposition is central to the process of classification.

An animal or a plant is not what is indicated - or betrayed - by the stigma that is to be found upon it; it is what the others are not; it exists in itself only in so far as it is bounded by what is distinguishable from it.¹³

In the scientific revolution of the 16th and 17th centuries, the idea of civilisation became a hinge in human self-perspective. Human distinctiveness was expressed not in terms of perceptible differentiation from the world but in terms of the uniqueness and status of human development as Culture. Humans were thought to be without equal, a species so complete that it became a kind of measure or standard by which everything else could be evaluated and known.¹⁴ Understanding the world was not based on what it was, but on how it compared to "Man, the measure of all things."¹⁵ 'Everything else' was everything not-human which, according to the conceptual model of humanity as the centre of the world, became simply 'the environment' – meaning "the aggregate of surrounding things."¹⁶ The model "assumes that humans are at the very centre of a system of nature."¹⁷ The centre of the model is differentiated from its periphery by mutually exclusive qualities. The relationship between humans and 'their' environment is expressed as an opposition between culture and nature. It is a structure fundamental to the discourse of the human sciences and it is "congenital to philosophy."¹⁸

*Masters and Possessors of Nature*¹⁹

The key word in 17th century epistemology was method. Method constituted the modern genres of science, philosophy and law. These modern 'disciplines' deployed the discourse of method in their development of a bifurcated body of knowledge: reason/emotion, proof/faith. The conceptual division of nature and culture is vital to the discourse of method, and is therefore vital to a knowledge of the world. Francis

¹³ Ibid 144-145.

¹⁴ It is important to note that although humans were considered a species without equal, the same paradigm constructed discourses of gender, race and disability (for example) that constantly transgressed the notion of a human species or rather qualified it as a white male able-bodied species.

¹⁵ Attributed to Protagoras.

¹⁶ *Macquarie Dictionary*, above n8.

¹⁷ Serres, Michel *The Natural Contract* (trans. Elizabeth MacArthur and William Paulson) (Michigan: University of Michigan Press, 1995) 33.

¹⁸ Derrida, Jacques 'Structure, Sign and Play in the Discourse of the Human Sciences' in *Writing and Difference* (trans. Alan Bass, Chicago: University of Chicago Press, 1978) 282-283.

¹⁹ Descartes, Rene *Discourse on Method and the Meditations* (Harmondsworth: Penguin, 1978) 78.

Bacon's epistemology posits "a violent shift in perspective"²⁰: rejecting knowledge 'received' through faith in favour of 'active' scientific inquiry. He argues in *The New Atlantis* (1626) that the purpose of philosophy and more broadly of human society is the acquisition of "the Knowledge of Causes, and Secrett Motions of Things; and the Enlarging of the bounds of the Humane Empire, to the Effecting of all Things possible."²¹ Significantly, the idea of knowledge-as-science advanced by Bacon is based on the specific concept of nature-as-object. Humans are conceived as separate, outside and above the category of nature. The idea of knowledge-as-science nominates humans as subjects: the conductors of inquiry. The objects of scientific investigation are the 'things' of nature. It is not possible to be both subject and object in the ontology of science: something is of culture or of nature, human or not human, the inquirer or the object of inquiry. The scientific study of people (as groups and as individuals) thus immediately renders them objects (e.g. women, non-Caucasians, cadavers) and thus situates them in the periphery of nature as a biological species. What separates subjects and objects, culture and nature, humans and 'everything else' is not something intrinsic to those things, but something externally measurable and describable, method. The force of modern reason, of science finds its power to divide, sever, alienate and possess nature in the discourse of method. Set out by Bacon and Descartes, it

delimits in the totality of experience a field of knowledge, defines the mode of being of the objects that appear in that field, provides man's everyday perception with theoretical powers, and defines conditions in which he can sustain a discourse about things that is recognised to be true.²²

Carolyn Merchant's excellent history of science *The Death of Nature* (1980) finds that Bacon's model of *subject* and *object* in scientific method and knowledge works via the deployment of metaphor,²³ itself an indication of the process of objectification. Nature is personified as Woman:²⁴

Nature must be 'bound into service' and 'made a slave', put 'in constraint' and 'molded' by the mechanical arts. The 'searchers and spies of nature' are to discover her plots and secrets. This method, so readily applicable when nature is denoted by the female gender, degraded and made possible the exploitation

²⁰ Berman, Morris *The Reenchantment of the World* (Cornell University Press: Ithaca, 1981) 29 cited in Hay, Peter *Main Currents in Western Environmental Thought* (Sydney: University of NSW Press, 2002) 123.

²¹ Bacon, Francis *The New Atlantis* (first published 1626, Cambridge: Cambridge University Press, 1990) 34-35.

²² Foucault, above n 10, 158.

²³ Merchant, Carolyn *The Death of Nature: Women, Ecology, and the Scientific Revolution* (San Francisco: Harper & Row, 1980).

²⁴ The word Woman refers not to women or to a particular woman but to a concept of persons knowable as a category: whose behaviour and qualities are consistent and finite. I use the word to indicate the distinction between a stereotype and actual women.

of the natural environment. As woman's womb had symbolically yielded to the forceps, so nature's womb harboured secrets that through technology could be wrested from her grasp.²⁵

The use of the metaphor of Woman to define nature renders the project of science more accessible, less radical, because it taps into a "pre-existing logical order."²⁶ As feminist philosopher, Helene Cixous demonstrated in her seminal essay "Sorties" – that prior order of Man/Woman "transports us... through centuries of representation."²⁷ The success of the metaphor is thus available only "within a community whose members had previously assimilated their literal use."²⁸ Bacon's concept of nature rapidly crystallises with the moment of this metaphor. Yet whilst metaphor renders Bacon's specific concept of nature more readily understandable, it simultaneously undermines its viability as a scientific category. The epistemological authority of science and law is contingent upon the purity of knowledge: absolute truths "found" by objective method. The marriage of Woman and Nature through metaphor contaminates the scientific category of Nature by conflating it with a cultural value. David Harvey concludes, "we find that the values supposedly inherent in nature are properties of the metaphors, of the human imaginary internalising and working on the multiple effects of other moments in the social processes, mostly conspicuously those of material social practices."²⁹

The material production and operation of science via metaphor indicates that we cannot "speak about nature without, at the same time, speaking about ourselves."³⁰ Bacon's concept of nature binds itself to his concept of culture and in the process advances ontological as well as epistemological claims. The separation of the world into the conceptual categories, nature and culture, was not therefore exclusively a matter of discourse and knowledge. It was a way of being. Descartes's *Sixth Discourse on Method* (1637) speaks of method not only philosophically but also in terms of experience and experimentation. The imagined mind/body separation associated with Cartesian philosophy is performed via the examination of animals (for example) as objects. Descartes argues that "coercing, torturing, operating upon the body of Nature... is not

²⁵ Merchant, above n 23, 169.

²⁶ Ricoeur, Paul *The Rule of the Metaphor* (trans. Czerny) (Toronto: University of Toronto Press, 1977) 17.

²⁷ Cixous, Helene *The Newly Born Woman* (trans. Betsy Wing) (Minneapolis: University of Minnesota Press 1986) 63.

²⁸ Kuhn, Thomas 'The possible worlds in the history of science' (1988) quoted in Harvey, above n 3, 164.

²⁹ Harvey, above n 3, 164.

³⁰ Capra, Fritjof *The Tao of Physics: An Exploration of the Parallels between Modern Physics and Eastern Mysticism* (London: Flamingo, 1992) quoted in Harvey above n 3, 164.

torture" because "Nature's body is an unfeeling, soulless mechanism."³¹ Descartes advanced a relationship of power through a specific ontological behaviour, or in Foucauldian terms, a practice of knowledge, separating or *othering* nature from culture.

It is important to note that the practised separation muddled the distinction between the physical and the metaphysical that it intended to draw. To say the separation was both abstract and real, metaphysical and physical maintains the tidy fiction of their mutual exclusion.³² The situation of human as self and nature as other operated via the simultaneous coupling and severance of mind and body: the idea of knowledge was indistinguishable from the blood of dissection. This violent severance and coupling of the physical and metaphysical at the core of the emerging Nature/Culture paradigm indicates the hierarchical order of the terms. The separation of nature and culture mattered only to the extent that it produced a measure of esteem. Human subjectivity was defined not merely in opposition to its physical 'environment', but by its superiority to it, by being the "masters and possessors of nature."³³

The purpose of method in philosophy and science is therefore more than the acquisition of knowledge in and for itself, it is principally to use nature for the elevation and meaningfulness of humanity. Harvey argues that the reification of nature as a thing – a purely external other – entirely separate from the world of thought deprives nature of having meaning in itself.³⁴ The thingness of nature indicated the absence of any defining quality. A thing is a thing because it is meaningless. "Deprived of any autonomous life force, nature was open to be manipulated without restraint according to the human will. Nature became, as Heidegger later complained, 'one vast gasoline station' for human exploitation."³⁵ More than an epistemological revolution, the age of Science carried with it a new ontological order and practice.

*The Eyes of the Manufacturing Period*³⁶

The condition under which the idea Nature/Culture operated and proliferated as paradigm, was the capitalist market economy and the industrial revolution. The

³¹ Descartes, quoted in Hay above n 20, 125.

³² Recent studies of consciousness for example argue that it is impossible to understand the mind in Cartesian terms as either/both physical and metaphysical and that the categories in themselves inhibit knowledge of mental process. See for example Greenfield, Susan *The Private Life of the Brain* (London: Penguin 2000) 55-57.

³³ Descartes, above n 18.

³⁴ Harvey, above n 3, 134.

³⁵ *Ibid.*

Enlightenment had provided the revolution, and classical political economy, with the conception of nature as a 'mechanism'. "The Cartesian division allowed scientists to treat matter as dead and completely separate from themselves, and to see the material world as a multitude of different objects assembled into a huge machine."³⁷ Marx argued that Bacon and Descartes "saw with the eyes of the manufacturing period"³⁸ in their development of an instrumental, capitalistic value of nature. Descartes's notion that animal behaviour was determinate in the same way as a clock, for example, not only separated human culture from animal nature, it advanced the idea that nature was meaningless and thus inferior. His *machina anima* was the precursor to seeing nature only as an economic resource – a capital asset. Harvey argues however that the Nature/Culture paradigm and its subsequent domination of nature

never deliberately embraced the destruction and despoliation of the natural world... If destruction and depletion could be found, then it was a sign of such immense abundance that it did not matter. When it mattered, the price system would adjust to indicate a condition of scarcity that required attention.³⁹

Cultivation: The Nexus and Nascence of Nature / Culture

Culture is a positive concept of activity. Raymond Williams notes that the word 'culture' "in all its early uses was a noun of process: the tending of something, basically crops or animals."⁴⁰ Culture was not a state of being, but a state of doing. It was not originally separate from the idea of nature, but related to it. Indeed, nature was the physical and logical condition of this idea of culture. Importantly, in the early 16th century

the tending of natural growth was extended to a process of human development, and this alongside the original meaning in husbandry, was the main sense until the late eighteenth century and early 19th century.⁴¹

Williams demonstrates how the extended usage of the word 'culture' distinguishes biology from social development. Bacon's phrase "the culture and manurance of minds"⁴² clearly refers not to the agricultural tending of human brains but is a metaphor for the increased social worth and value of abstract human development. The idea of

³⁶ Marx, quoted in Harvey, above n 3, 121.

³⁷ Capra, above n 30, 27.

³⁸ Marx, quoted in Harvey, above n 3, 121.

³⁹ Harvey, above n 3, 125.

⁴⁰ Williams, Raymond *Keywords* (Glasgow: Fontana, 1976) 77.

⁴¹ *Ibid.*

⁴² Bacon, Francis quoted in Williams, *ibid.*

social status could thus be conceived not only in terms of birth and blood, but also in terms of knowledge.

The metaphoric extension of the word 'culture' thus foreshadows the subsequent shift in meaning from physical improvement to metaphysical improvement. In his study of English husbandry manuals and the representation of agriculture, Andrew McRae finds that in the 16th and 17th centuries, the term 'improvement' was undergoing similar transformation. From agrarian improvement "propelled by a sense of moral duty to exploit more efficiently the riches of the natural world" to "a more explicitly pecuniary sense"⁴³ improvement, like culture, was becoming a dephysicalised, denatured concept.

The 17th century discourses of improvement and progress, abundant in husbandry, enclosure and colonisation literature, thus indicate the development of a metaphysical sense of the word 'culture', profoundly abstracted from its physical sense. The improvement of nature was increasingly conceived as the improvement of human society, which paradoxically was conceived also as distance from nature. Improvement discourse, whilst based on a physical relationship between humans and 'their environment', strove to (re)constitute the metaphysical life of human subjectivity. Improvement discourse put into everyday language and practice the ideological separation of nature and culture. Its focus on the purpose of activity also redirected the existing ontology of feudal theology. In her excellent study of the socio-economic discourse of this period, Laura Brace found that improvement was "a contested concept" hinging on the objectification of nature

which regarded land as having the potential for investment, sustainable productivity and a re-establishment of people's *original* dominion over nature. To exploit this potential and to be improved, land required labour and careful husbandry.⁴⁴

Debate about improvement therefore revealed a dispute about both the concept of nature and the concept of culture. Resistance to the extension of the notion of culture-as-cultivation of nature to culture-as-transcendence of nature undermined the epistemological and ontological claims of the nascent Nature/Culture paradigm.

⁴³ McRae, Andrew 'Husbandry Manuals and the Language of Agrarian Improvement' in Leslie, M and Raylor, T (eds) *Culture and Cultivation in Early Modern England: Writing and the Land* (London: Leicester University Press, 1992) 36-37.

The heavy reliance of improvement discourse on religious concepts (especially The Creation) and language worked strategically. The appeal to the pre-existing epistemology and ontology of Christian theology was a means to articulate and validate values of nature that continued, rather than departed, from those norms. In the *Book of Genesis*, Culture precedes Nature. It is the 'Word' of God that creates, orders and names the world. Improvement discourse defined Culture metaphysically by locating it prior to Nature, thus relating it to an act of creation. The claim that husbandry and colonisation were part of God's will made the physicality of these activities less significant than the metaphysicality of Divine providence.

The story of the Creation is repeatedly cited in justifications for husbandry, enclosure and colonisation. These cultivating processes were considered "fundamental to God's intentions for the Earth and for mankind."⁴⁵ Man improves and orders nature either as a repentant act of repair, or as a dutiful act of (re)creation depending on particular readings of the Fall. Francis Bacon argues that Man's Fall damaged both Himself and nature, yet is reversible:

For man by the Fall fell at the same time from his state of innocency and from his dominion over creation. Both of these losses however can even in this life be in some part repaired; the former by religion and faith, the latter by arts and sciences.⁴⁶

According to this idea of Man, Culture is the active realm: transforming a dormant Nature from something useless and menacing into something fruitful and known. Cultivating the land meant, "converting the desolate wastes into fruitful fields, and the wilderness into comfortable habitations."⁴⁷ Bacon's commentary suggests that without human intervention, nature alone is "regarded 'like a deformed Chaos' which brought discredit to the Commonwealth."⁴⁸ The characterisation of Nature as a deformed chaos however cannot convey an idea of nature without an idea of culture abstracted from it. Nature signifies abnormality, imperfection, disorder and anarchy only because it functions as referent to its opposite, positive term Culture. The concepts of nature and culture in this emergent sense are meaningful only through opposition to each other. The idea of culture as a general process relating to abstract human development, rather

⁴⁴ Brace, Laura 'Husbanding the Earth and Hedging out the Poor' in Buck A, McLaren, J and Wright, N (eds) *Land and Freedom: Law, Property Rights and the English Diaspora* (Aldershot: Ashgate, 2001) 5 (my emphasis).

⁴⁵ Brace, Laura *The idea of property in seventeenth century England* (Manchester: Manchester University Press, 1998) 68.

⁴⁶ Bacon, Francis 'Novum Organum' quoted in Brace, *ibid*, 69.

⁴⁷ Brace, *ibid*, 68.

⁴⁸ Anon *The Waste Land's Improvement* (1653), quoted in Brace, 2001, above n 44, 6.

than a particular process of physical husbandry, in this example indicates also that 'culture' is intimately bound to the ideas of civilisation and order, as transcendence.

The anthropocentric concept of Nature complements ontological principles in Christian theology such as Man's place in the divine universe. But as Brace notes in husbandry literature for example the idea of Man as the "Vice-Regent and Deputy of Almighty God"⁴⁹ suggests that the Creation was incomplete. Improvement discourse thus does not simply follow Christian theology - it reworks it. God appears as the

great or mystical husbandman who created the pattern for all subsequent improvement of chaos. He made all creatures, plants, fruits, trees and herbs serviceable to mankind who was expressly created to 'husbandize the fruits of the earth.' All other callings were supplementary. Husbandry had a special status because it was ordained by God.⁵⁰

Accordingly, nature depends on Man to deliver it from meaninglessness to meaning, fulfilling God's plans and restore the world from chaos to paradise. Husbandry binds culture to nature both conceptually and physically. The theme of the worthlessness of nature prior to Man's intervention via culture and cultivation of land also recurs in theories and criticisms of enclosure. Common fields were considered spoiled and wasted by defenders of enclosure.

This to them constituted the sin of wasting God's workmanship. Nature provided a valuable treasury, but people would not be able to reverse the Fall unless they were prepared to labour and improve. Paradise was made paradise through dressing and keeping, and gardens were only perfect so long as they were cultivated.⁵¹

Finally, the project of colonisation further demonstrates the prevalence of theology, especially narratives of Creation, in the coupling of Nature and Culture as a meta-concept of the world. Peter Fitzpatrick's work *The Mythology of Modern Law* (1992) demonstrates that colonisation was contingent on the physical and metaphysical splitting of the world into the cultural and the natural. He argues that the dispossession of Indigenous peoples from their land concords with the notion of savagery that "constantly receded in proportion to the inexorable advance of progress."⁵² Colonisation, dispossession and 'settlement' are "equivalent to an act of Creation."⁵³ These 'creative' acts put into practice and are then thought to evidence what was hitherto only abstract knowledge of the world: that culture is separate and superior to nature.

⁴⁹ Hale, Matthew *The Primitive Origination of Man* (1677) quoted in Marshall, above n 9, 180.

⁵⁰ Blith, W *The English Improver: or, A New Survey of Husbandry* (1649) quoted in Brace, 2001, above n 44, 6.

⁵¹ Brace, 1998, above n 45, 77-78.

⁵² Pottage, Alain 'Review of *The Mythology of Modern Law*' (1993) 56 *The Modern Law Review* 4, 615.

⁵³ Fitzpatrick, Peter *The Mythology of Modern Law* (London: Routledge, 1992) 82.

*A Common Origin, Abstract and Sacred*⁵⁴

Fitzpatrick argues that the Nature/Culture paradigm constitutes and sustains what he calls the mythology of modernity. Method, the ideological and practical basis of science and law, Fitzpatrick argues, is actually part of this mythology. The selective interpretation and strategic deployment of theological narratives and values in the literature of husbandry, enclosure and colonisation evidence such mytho-logic. The development of law in the seventeenth and eighteenth centuries made extensive use of such mytho-logic and indeed, wrote itself into the Enlightened version of the Creation story. So successful was the use of metaphor and religious narrative that Fitzpatrick contends that the dominant myth of Science and Law in this period was not simply the belief in itself as a post-mythic epistemology, but in its claim to have exceeded the specificity of epistemology altogether. Law and science are truth. Michel Serres also observes something mythical about the idea of Culture in *The Natural Contract* (1995). "Law precedes science and perhaps engenders it; or rather, a common origin, abstract and sacred, joins them."⁵⁵ The idea of origin is central to both theorists' critique of Nature/Culture, because it brings into focus the transcendental claims of the paradigm. Fitzpatrick and Serres argue that the contradiction of Reason founded on metaphor and religious narrative, like a loose thread, puts a run up the smooth stocking of method. What is underneath however is nothing actual or real, there is no origin or ground. What is underneath is abstract and sacred. Science and law may seem transparent, even real, but they are not. The masquerade of Reason is that it is without myth: that it is real and true. The world is split not only into the categories: nature/culture, activity/passivity, but into real/abstract, practice/thought. The notion of Reason and positive method polices the boundary between these dichotomies, and in so doing, is the agent of its own legitimacy.

Yet both Fitzpatrick and Serres, whilst concerned with the materiality of Reason (in colonialism and environmental crises respectively) argue from the position of 'thought' and deploy 'reason', "leaving our reason strangely unperturbed - unchallenged and intact."⁵⁶ Fitzpatrick and Serres do not challenge the paradigm Nature/Culture itself, only its practical administration and effect, its materiality - as though somehow, thought and practice are indeed separate. Fitzpatrick is concerned especially with the conflation

⁵⁴ Serres, above n 17, 53.

⁵⁵ *Ibid.*

of indigenous peoples and nature via the idea of savagery,⁵⁷ as though the problem with the idea of savagery is the abuse of categories Nature/Culture rather than their paradigmatic existence. Fitzpatrick notes the necessary opposition of Nature and Culture in the mythology of modern law. His critique of the notion of savagery for example points out that the negative qualities of Nature define, through juxtaposition, the positive qualities of Culture. But it is the separation, and not simply the hierarchical opposition of Nature/Culture that underwrites modern law. Similarly, Serres leaves as true the separation of the world into the pure oppositional categories of nature and culture. His work is concerned with the relationship between nature and culture and what he sees to be the modern degeneration of that enduring relationship. He particularly targets the disrespect shown to nature by human society and questions the moral and physical sustainability of this dynamic. His contention that environmental degradation may be arrested through the development of a contractual relationship between nature and culture certainly attributes agency to both 'realms', but simultaneously upholds the terms as two real and separate entities, maintaining the idea of humans outside nature.

Karl Marx observed that the human economy exists only as a mixture of the person/thing categories via production and consumption: "as long as men exist, the history of nature and the history of men are mutually conditioned."⁵⁸ The mixture may be so fluid that whilst it may be possible to think of nature and culture as separate categories it is impossible to live as such. Raymond Williams defines 'nature' as "the most complex word in the language because it contains, though often unnoticed, an extraordinary amount of human history... both complicated and changing, as other ideas and experiences change."⁵⁹ The same complexity could be said also of 'culture' in Williams' socio-historic *Keywords*. The inextricability of the terms 'nature' and 'culture' may in fact not be symptomatic of their complex relationship, but rather indicate that they are referents to the same concept. The paradigmatic ubiquity of Nature/Culture reveals the terms are positive and negative values of the same thing rather than things of difference. Derrida refers to this incidence as the law of genre.

Genres should not intermix. And if it should happen that they do intermix, by accident or through transgression, by mistake or through lapse, then this

⁵⁶ Pottage, above n52, 618.

⁵⁷ Fitzpatrick, above n 53, see especially Chapter 3.

⁵⁸ Marx, quoted in Harvey, above n 3, 26.

⁵⁹ Williams, Raymond *Problems with Materialism and Culture* (1980) quoted in Harvey, above n3, 26.

should confirm, since after all, we are speaking of 'mixing', the essential purity of their identity.⁶⁰

The following section argues that the role of law is central to the development of the conceptual separation of nature and culture into an actualised, policed and enduring paradigm as Persons/Things.

4. PERSONS / THINGS

Before there was original sin there was law and a legislator.⁶¹

The practice of Reason through science established the human subject as the agent of knowledge and master of the studied object. Similarly, the law of property established the human person as agent of dominion and possessor of the thing. Law, like science, is both idea and practice. Where the dynamic of the subject/object relationship in science is knowledge or mastery, the dynamic of the person/thing relationship is possession. In combination, these *epistemes* perform the renaissance ideal of humanity articulated by Descartes: "masters and possessors of nature."

The anthropocentric division of the world into nature and culture formed the basis of the modern idea of property in law. Indeed, through acts of judgment, property law fortified and actualised the paradigm of Nature/Culture. Evaluations of non-European societies were articulated in terms of their laws, particularly their economic regulation with regard to land as a resource or thing. The Cultural development of any given society was measured by its "sufficient removal 'from the common state Nature placed it in.'"⁶² The relations of people to place were translated into systems of property as though these systems were culturally non-specific. The conceptual separation of the world into the categories Nature and Culture in modern Europe was regarded as universally true and legitimate. The actual separation and alienation of people from place was imagined to be possible, beneficial and desirable. People - place relations then, articulated as systems of property, formed the "basis of law. In the state of nature, Austin confirmed:

⁶⁰ Derrida, Jacques 'The Law of Genre' in Attridge, David (ed) *Acts of Literature* (New York: Routledge, 1992) 225.

⁶¹ Serres, above n 17, 57.

⁶² Locke, John quoted in Fitzpatrick, above n 53, 82.

'men... have no legal rights.'⁶³ In the state of nature, people are possessed by place rather than in possession of things.

The power of Culture over Nature articulated by Bacon and Descartes's instrumentalist value of nature is expressed in Law as the power of Persons over Things, to alienate and enjoy things without restraint. The modern legal right that guarantees property (and sovereignty) expresses possession as the primary mode of ownership. The owner of the property right possesses the right to, and over, a thing. The idea of ownership as possession indicates not simply an economic relationship between humans and their environment, but also a power relationship.⁶⁴ For example, to speak of the dispossession of indigenous land 'rights' suggests that what has been taken is the 'right', not the land, and so power has been taken through the vehicle of land. It reinforces an anthropocentric understanding of the world.

Land as Power

Land gives so much more than the rent. It gives position and influence and political power, to say nothing of the game.⁶⁵

The idea of land as power was arguably stronger than the idea of land as capital in England in the 17th and 18th centuries. The power to enjoy land freely, without restraint or responsibility and its direct connection to political participation were more important at that time than pecuniary gain or advantage. The developments of the property law creations of primogeniture, the strict family settlement and the equity of redemption for example indicate that, despite the increasing importance of land as wealth according to the growing economy of capital, the dominant value of land was socio-political. In feudal England, property was the possession of rights to revenue "rather than a right to any specific material thing."⁶⁶ Revenue conveyed not simply economic gain, but more importantly, political gain. The distinction of revenue from mere access to the goods of

⁶³ Ibid.

⁶⁴ The word *possess* derives from the Latin 'potis' meaning 'able, having power' and combines with the English verb *sidere* meaning 'sit down' to form the verb 'possidere' meaning literally 'sit down as the person in control', hence by extension 'take possession of' and ultimately 'have, own.' Ayto, John *Dictionary of Word Origins* (New York: Arcade Publishing, 1991) 406.

⁶⁵ Trollope's Archdeacon Grantly, quoted in Sugarman, David and Warrington, Ronnie 'Land law, citizenship, and the invention of 'Englishness': the strange world of the equity of redemption' in Brewer, J and Staves, S *Early Modern Conceptions of Property* (London: Routledge, 1995) 121.

⁶⁶ Macpherson, C B 'Capitalism and the Changing Concept of Property' in Kamenka, E. and Neale, R.S. (eds) *Feudalism, Capitalism and Beyond* (London: Edward Arnold, 1975) 110.

life can be grasped by an explanation of the precise forms of power consisting in property rights. Macpherson qualifies this:

In the first place, the great bulk of property was then property in land, and a man's property in a piece of land was generally limited to certain uses of it and was not freely disposable... A substantial segment of property consisted of those rights to a revenue, which were provided by such things as corporate charters, monopolies granted by the state, tax farming rights, and the incumbency of various political and ecclesiastical offices.⁶⁷

Land, as the thing of property, was to the person or owner, what nature was to culture - an instrumental prop. More than a parallel however, the instrumental value of nature within the Nature/Culture paradigm is the condition of the possibility of this particular property equation. Until land was alienable, land exceeded economic value. Possessing land meant holding power. David Sugarman and Ronnie Warrington argue however, that in England, even the alienability of land did not diminish its value as power. The emergent capital-based economy did not see an immediate and corresponding shift in the value of property in land.

In the strange, half-timeless world of the traditional English landed estate, feudal concepts blissfully lingered long after their semi-feudal relations had been eradicated. Land was not just the most valuable form of property; both to its owners and to non-owners it was a socio-political nexus, a way of life.⁶⁸

The "lingering" attachment of power to land is well evidenced by the creation and development of the equity of redemption in the 17th and 18th centuries. This rule "minimised the possibility that landowners would lose their land when they mortgaged it in order to raise cash, or use it for security for the debts they incurred."⁶⁹ The important result of this preserved, if not increased, the power of the landholder against all others, including the mortgagee or lender. At common law, the date of repayment agreed to at the time of the loan, or mortgage would see one of two outcomes: either repayment in full and reconveyance of the property to the mortgagor or delay in payment and forfeiture of the property to the mortgagee. The courts of equity challenged this common law rule by contending that the true object of the loan agreement or transaction was the security symbolised by the land and not the land itself. The terms of the loan agreement, such as duration and foreclosure were deemed irrelevant by the Court of Chancery. "The rights of the landed were thus entrenched as against the lenders, even though this might involve rewriting the transactions between

⁶⁷ Ibid.

⁶⁸ Sugarman and Warrington, above n 65, 111.

the parties."⁷⁰ This revision of the mortgage holds that the property right of the landed was superior to the property right of the lender. Lord Nottingham states in *Thornborough v Baker* (1675) that "in natural justice and equity the principal right to the land is only as a security for the money."⁷¹ The law actively restrains the alienation of land through this rule and thereby distinguishes land from capital. "The property, that is, the land, really belonged to the borrower; the lender was only entitled to the money."⁷²

The significance of the equity of redemption was that it had become synonymous with an estate in real property, and demonstrated the degree to which property was valued as power. The possession of land in law, like the mastery of nature in science, claimed to produce human subjectivity esteemed not by physical or material reality (biology or force) but by metaphysical transcendence. Yet as the critiques of 17th century scientific discourse contend (see above), the creation of the paradigm left indelible, material traces. The Court's rationale in applying the equity of redemption was that land should be returned "to its rightful (often meaning historical or traditional) owner." Despite accusations of the unfairness of the rule, for example, the equitable creation was defended abstractly: "it was as if it was inconceivable that an English gentleman would give up his land."⁷³ In their critique of the rule and the historical reporting of its rationale, Sugarman and Warrington find significant the deployment of terms such as "fair", "rational", "noble", and "ideal". The principle is significantly compared to the transcendental wisdom of mathematics, inciting the critics to remark wryly "here was a doctrine that could indeed perform miracles."⁷⁴ But there is nothing miraculous about property law and its equation of land with power when it is noted that

from 1621 to 1844 the kingdom's supreme judges were not professional lawyers of King's Bench or Chancery but England's nobility assembled in Parliament. Although the law remained the law of the Crown, the largest owners of property became the highest judges of the law of property.⁷⁵

Having land meant having power. It was not power delivered by justice, but power delivered by judges. As St.German had argued in the Reformation, "property was not a divine institution and thus property rights were firmly vested in the temporal sphere of jurisdiction, where they were subject to regulation by the law of man."⁷⁶ The relationship

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid 117.

⁷² Ibid.

⁷³ Ibid 120.

⁷⁴ Ibid 120.

⁷⁵ Ibid 122.

⁷⁶ Guy, J.A. *Christopher St.German on Chancery and Statute* (London: Seldon Society, 1985).

between person and place here is governed by the dynamic of the possessive ownership according to which, land is an unmediated referent to political status and thus to the transcendence of human subjectivity. The seeming paradox of this idea of property is that the inalienability of land suggests an identity between person and place whilst the land itself rarely rates a mention. In fact there is no paradox: the law upholds not the inalienability of land, but rather, the inalienability of power.

Land as Capital

In an economical point of view, the best system of landed property is that in which land is most completely an object of commerce; passing readily from hand to hand, when a buyer can be found to whom it is worthwhile to offer a greater sum of money for the land, than the value of the income drawn from it by its existing possessor.⁷⁷

As the idea of property changed from power to thing, and the justification of the law grew more elaborate and abstract, the anthropocentric model of people and place became increasingly explicit. Land was no longer considered to provide power but to be vulnerable to it, as object. The scientific revolution was matched by the legal revolution of the 16th and 17th centuries following the secularisation of land in the reformation⁷⁸ and the growth of the capitalist market economy. The idea of nature was fundamental to the discourse of science. Similarly, the idea of real property in land was fundamental to the discourse of law.⁷⁹ But did the changed ideas of property and law indicate a changed idea of land itself? Yes and no. Certainly, land gradually became thought of as capital rather than as power, but it maintained its function as metaphor, a vehicle of representation rather than a materiality. Via the dominance of capital, land was eventually and explicitly understood to be a resource, and combined with the prevalence of the discourse of improvement and the justification of property as labour, it emerged not as the implicit condition of human economy, but as the hidden condition of law.

The shifting function of land in law, from metaphysical foundation to physical utility subverted the authority of law because law's legitimacy was vested in metaphysics. Law, in other words, whilst both and necessarily metaphysical and physical, having

⁷⁷ Mill, John Stuart *Principles of Political Economy* (Harmondsworth: Penguin, 1985) 255-256.

⁷⁸ Between 1536 and 1603, a quarter of the land of England changed hands as a consequence of the program of dissolution. Elton G R *The Tudor Constitution: Documents and Commentary* (Cambridge: Cambridge University Press, 1982) 378-394.

⁷⁹ Buck, A R 'The Politics of Land Law in Tudor England 1529-1540' (1990) 11 *Journal of Legal History* 2:200.

concealed its historicity and materiality had to distance or hide its connection to land as the value of land became increasingly materialistic. The very idea of a resource connoted interdependence, not just economically, but legally. The authority of law however was independent and more importantly, original. It was no longer possible to regard power as being derived from the possession of land because power, or more properly, authority, ideally transcended the physical realm. The connection between land and power was covered over by the idea of land as a thing or object precisely during the time that the significance of the physical yield of the land's fruits as property increased. In other words, the more specifically valuable land became as a marketable physical resource the further law distanced its authority from the realities of the market economy. Accordingly, property law became increasingly abstract and the idea of property as thing developed, at least in legal theory.

Whereas precapitalist property consisted in rights to things, property was never conceived as the thing itself. Paradoxically however, or rather against law's insistent abstraction, in the broader community, "as rights in land became more absolute, and parcels of land became more freely marketable commodities, it became natural to think of the land itself as property."⁸⁰ The saleability of absolute rights to things, like land, meant that there seemed little differentiation between the right and the thing. Furthermore, the legal protection of the right "could be so much taken for granted that one did not have to look behind the thing to the right. The thing itself became, in common parlance, the property."⁸¹ Yet despite this common conflation, Bentham noted in 1789 that property was still, at least to the learned minority, an object or thing:

It is to be observed, that in common speech, in the phrase *the object of a man's property*, the words *the object of* are 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.⁸²

But what exactly was the thing of property? It didn't matter. Bentham's point is that property was not the land, it was the right. He defends this by replacing land with object or thing to indicate the irrelevance of the qualitative nature of the thing. Things matter in property because persons own them. The quality of thingness, is that it has no quality. Definitions of the word *thing* number twenty-nine in the Macquarie Dictionary, which in

⁸⁰ Macpherson, above n 66, 111.

⁸¹ *Ibid.*

⁸² *Ibid.*, emphasis in original.

itself alone, if not in combination with the first two definitions, well illustrates this point: "1. A material object without life or consciousness; an inanimate object. 2. Some entity object, or creature which is not or cannot be specifically designated or precisely defined."⁸³ The significance of the partner term to 'thing' in the private property relationship, 'person', denotes the singular of people. The idea of the person in property corresponds with the values of the model of private property. Possessive individualism was increasingly prevalent in the growing economy of capital. Its unilateral dynamics paralleled the diminishing relevance of communities and their multilateral dynamics. Individualism and separation from place are manifestly situations of alienation. Writing four years before Bentham's remarks above, the gentleman agriculturist Thomas Coke (1752-1842) whilst resonating the feudal connection of property to sovereignty, articulates modern property as alienation from community. He foreshadows the late modern usage of the word 'alienation' (by Hegel, Marx and Freud) as the effect or character of the estrangement of humanity from nature through civilisation.⁸⁴

It is a melancholy thing to stand alone in one's own country. I look round; not a house to be seen but mine. I am the giant of the giant-castle, and have eaten up all my neighbours.⁸⁵

Coke's remark indicates that alienation is not simply a cultural condition, a feeling of estrangement from other people. Coke, as an individual and private proprietor living on enclosed land is estranged from the land itself. His home is not 'his' country, but his 'giant-castle'. For Coke, property is not the land, but the ownership of it. Coke lives neither with nor of the land, but on his property. His lament does not regard the land at all. His only relation to the land around him is his alienable possession of it. The property relation articulated here is of power, objectifying, abstracting and then absenting land. Alienation is an effect both of estrangement from land or nature and from other people. Indeed, it would not be too much of an exaggeration to say that this sense of alienation is contemporaneous with the paradigmatic splitting of the world into Nature/Culture.

Land as Other

Only after land is conceived as capital, a non-qualitative object of property, when property is commerce, can it be alienated "readily from hand to hand."⁸⁶ The theoretical

⁸³ Macquarie Dictionary, above n 8.

⁸⁴ See Williams, above n 40, 31-32.

⁸⁵ Coke, Thomas quoted in McLeod, Bruce *The Geography of Empire in English Literature 1580-1745* (Cambridge: Cambridge University Press, 1999) 164.

⁸⁶ See Mill, above n 70.

and material structure of people-place relations as persons and things affected alienation at three levels: of land as property with the fluidity of capital; of people from place with enclosure, colonisation and emigration; of persons from people with urbanisation and individualism. Alienation denotes neither agency nor passivity; rather it describes a relationship. Derived from the Latin *alius* - other, and *alienus* - of or belonging to another person or place, 'alienation' is used in English to describe the state of estrangement or the act of estranging.⁸⁷ Williams notes the changed uses of the word from the 14th century, when it referred to the severance of relations between an individual and God, or between an individual or group and the State, to the 15th century when it referred to the transfer of rights, estates or money. The transfer however was not conceived as voluntary or intentional and thus positive, rather, *alienation* was used during this time to describe transfer in the negative sense of loss, force or impropriety.⁸⁸ Alienation was imbued with positive meaning (and was positivised) in the 17th and 18th centuries with the increased prevalence of absolute private property.⁸⁹ Whilst alienation is well understood as a founding principle of modern property law, it is barely acknowledged that alienation is a relationship or dynamic referring not to one thing but two: the person and thing are alienated from each other. Modern property discourse erases the bilateral aspect of alienation, because it constructs alienation as agency and will: the person is the active, alienating subject, and the land is the passive, alienated object. In this sense, property constructs land as Culture's *other*. The notion of unilateral alienation renders the modern paradigm of property placeless.

Private property instantiated the greatest physical alienation of people from place in the history of English land law and yet theoretically it coupled people and place via the justification of private property as labour. Locke's justification of property in labour was the legal parallel to Bacon and Descartes's justification of science as cultural improvement and elevation. (Labour theory is so similar to the improvement discourse discussed above in husbandry manuals as to be indistinguishable, see Section 5: Enclosure). It carries the same logical holes and manoeuvres. It also carries the same influence in contemporary people-place relations. Although the rules of absolute private property were modified by an emphatic relative rights-based discourse (see Chapter 4), Locke's justification of private property, published anonymously in the 17th century,

⁸⁷ Williams, above n 40, 29.

⁸⁸ *Ibid.*

⁸⁹ Contemporary usage of the word *alienation* attributes both the positive and negative meanings to the relationship as freedom and loss (see also Chapter 4).

carries immense influence in contemporary legal and political order. His work has long been considered a defence of enclosure law (which had previously been decried and lamented) and since the 1990s is regarded also as a justification and defence of British colonialism.⁹⁰ Yet his argument not only justifies private property and colonialism as socio-political institutions (and the condition of inequality of landholding). Locke's lingering but understated contribution to modernity is his uncanny rationalisation of the physical severance of people and place in terms of their metaphysical union. Locke understood land not as something active or as an agent of power, as it had been understood in feudal times, but as something passive and vulnerable to power. To Locke, land was literally, powerless. The anthropocentric model of Person/Thing at the centre of his theory of property relations was that the person is or has the power whilst the thing, the land, is powerless.

Locke's justification of private property rests on three premises. First, that "every Man has a *Property* in his own *Person*...(and)...the *Labour* of his *Body*... are properly his."⁹¹ Second, that mixing or joining one's labour with the earth (like the doctrine of fixtures), annexes that person's labour to that land, creating exclusive title to the land and its produce. Third, that "men had agreed, that a little piece of yellow Metal, which would keep without wasting or decay"⁹² enables uneven distribution and unlimited accumulation of property somehow "without injury to anyone."⁹³ Locke defines persons and things in his labour theory of property as part of a process of improvement and production. He relates people and place to each other only via the mediation of wealth. The premises of his theory present people as persons, constructing an individualism at odds with the shared economy of open field or common agriculture. He presents nature as things valued only through labour and ownership, constructing an idea of nature in itself (lacking cultivation) as waste.⁹⁴

Yet whilst metaphysically coupling persons and things through the process of labour, the actual and physical foundation of Locke's logic is their alienation. For if it were not possible to remove commoners from the commons, indigenous communities from their

⁹⁰ Kerruish, Valerie *Property and Equity* (unpublished lectures, School of Law, Macquarie University, 1999).

⁹¹ Locke, John *Two Treatises on Government* [1689] Laslett, Peter (ed) (Cambridge: Cambridge University Press, 1970) 328.

⁹² Ibid 335.

⁹³ Ibid 344.

⁹⁴ Ibid 342-344.

nations, and alienate land through "conquest or commerce,"⁹⁵ Locke's economy of property could not succeed. Though he makes labour the centre of his justification of private property, he fails to acknowledge the contentiousness of the particular form of labour he advocates. Locke has a specific idea of labour as it relates to land that is different to the labour of the commoners on the commons pre-enclosure. He begins with gathering acorns and apples from "the Trees in the Wood", and shifts this as his description on enclosures develops.⁹⁶

Locke speaks almost exclusively, in the Second Treatise, of labour in terms of crop growing, agrarian activity rather than mining, grazing, manufacturing, or other forms of industry which could theoretically provide an equal claim to proprietorship through labour.⁹⁷

Locke's justification of property is based not only on the agency or alienability of land, but on the agency and alienability of a particular form of labour. This shift in agency decisively alienates people from place, prioritising Culture and cultivation over Nature in the modern paradigm of property. Locke did not suppose that landowners would labour their land alone. The degree of industriousness advanced by Locke necessitates wage labour and/or slavery. As Macpherson points out, the justification of private property through labour "was only needed when and because a moral case had to be made for putting every individual on his own in a market society."⁹⁸ In Locke's theory, the landholding customs of people closest to the land, had the least claim to title to it.

Enclosure and cultivation (as distinct from herding, extracting, communal production) became the kind of labour that justified title to land because cultivation increased the value of land more than any other use.⁹⁹

For Locke, the primary relationship between people and place is the labour of the land. His theory of property as alienation thus plays out in a "state of nature."¹⁰⁰ Absolute private property rights he argues, are natural rights.

Nature as Law and the Antilogy of Natural Rights

By the late 17th century, when Locke was writing his justification of enclosure and colonisation, the medieval concept of property that was merged with status and obligation and that was appointed by God, was thoroughly challenged by the ideas of

⁹⁵ Locke, John 'Some Considerations' quoted in Arneil, Barbara 'Trade, Plantations and Property: John Locke and the Economic Defence of Colonialism' (1994) 55 *Journal of the History of Ideas* 591, 605.

⁹⁶ Kerruish, above n 90.

⁹⁷ Arneil, above n 95, 603.

⁹⁸ Macpherson, C B *The Political Theory of Possessive Individualism* (Oxford: Oxford University Press 1962) 204.

⁹⁹ Kerruish, above n91.

commonwealth, contract and capital. Epistemological faith in theological doctrine was being supplanted by faith in scientific method, the order and certainty of which provided protection from chaos. But the question of the legitimacy of law, still vested in its origin, proved problematic for Locke's theory of property. Though he stressed the rectitude of the 'law of Reason', the cult of origin proved harder to dislodge.

In the 16th and 17th centuries landowners had asserted their titles in land against the prerogative of the king, and copyholders had asserted their titles and customs against their lords. They therefore discarded theories of the origin to title in divine right. Yet if they fell back upon Hobbesian violence or on the right of conquest, how could they reply to the telling counter-argument of the Norman Yoke? When Locke sat down to offer an answer, all this was stewing around in his mind.¹⁰¹

Locke's justification of private property asserted natural rights and the wisdom of the market against divine rights and the wisdom of Kings. His appeal to nature worked as an escape route via which he could maintain the idea of origin as the guarantor of law's legitimacy whilst displacing the conventional connection of origin to force. In its place, Locke constructs an idea of nature as order, balance and design. Nature is the provider of both subsistence and reason.¹⁰² Locke anticipated a concept of nature as abundance, gradation and eternity that seemed counter to Bacon and Descartes's concept of nature. It was epitomised in the early 18th century poetry of Alexander Pope (1688-1744).

First follow Nature, and your judgment frame
By her just standard, which is still the same:
Unerring NATURE, still divinely bright,
One clear, unchang'd, and Universal Light,
Life, Force, and Beauty, must to all impart,
At once the source, and End, and Test of Art.¹⁰³

This poem was published within twenty-two years of Locke's *Two Treatises on Government*. The divisibility of nature and culture here conceived seems to depart from the Nature/Culture paradigm, but in fact simply inverts the hierarchy of the terms. Where science had subordinated nature as the object of knowledge, Pope now elevates nature as the provider of knowledge. But Man or now Culture, is still the centre of the universe and the division of the world and its simultaneous severance and coupling of nature and culture remain. The relationship Pope ascribes to nature and culture repeats the relationship of God and Man that science had replaced. Nature is eternal and omniscient in the same way that God had been. Science had discovered the workings

¹⁰⁰ Locke describes in Chapter V: *Of Property* and in Chapter IX: *Of the Ends of Political Society and Government* man in the 'state of nature' and the laws of nature as true and eternal, above n 92.

¹⁰¹ Thompson, E P *Customs in Common* (London: Merlin Press, 1991) 159-160.

¹⁰² Locke, above n 91, 327-328.

and eternal laws of nature. Similarly, Locke's justification of property constructed an idea of law that married reason and eternity. The laws of nature were synonymous with the laws of reason, which as with science and philosophy, provided law with authority vested neither in God nor in force. The idea of natural law or law in nature was not the subordination of culture to nature. Rather nature is cultured, slipped upstairs to replace God. The role of nature here remains utterly as the legitimation of Culture and thus does not disrupt the Nature/Culture paradigm. The paradigm continues to deploy Nature ideologically, but with a new rhetorical purpose - to legitimise Culture and conceal its agency. The process of naturalisation removes the question of agency so that what protects or authorises the new world order is not force, but something transcendental, beyond question. The paradigm seems 'natural' in that it is represented as true, inevitable and universal.

The idea that the legitimacy of law and culture is vested in nature contradicts the idea that nature is subordinate to culture advanced by the improvement discourse that Locke deployed to advance his specific idea of labour. One sense of nature refers to the passive, meaningless object of law and science, connoting everything that Man is not, and another sense of nature refers to the prior condition of that paradigmatic structure, connoting the authority of an origin. The contradiction or double meaning is an incidence of antilogy that Jacques Derrida calls the scandal of play in the discourse of the human sciences.¹⁰⁴ For Derrida, unlike Foucault, nature and culture are not separated by the force of modern reason. The opposition between nature and culture

is congenital to philosophy. It is even older than Plato... it has been relayed to us by means of a whole historical chain which opposes nature to law, to education, to art, to technics - but also to liberty, to the arbitrary, to history, to society, to the mind, and so on.¹⁰⁵

Derrida explains that because nature and culture do not exist outside the logical frame of the paradigm that constructs them, incidences or things that arise which cannot easily or convincingly be categorised as either natural or cultural, disrupt the ability of the paradigm to make sense. He draws his example from Levi-Strauss who noted that the incest prohibition does not fit neatly or obviously within the nature/culture opposition. It is something that "*simultaneously* seems to require the predicates of nature and of

¹⁰³ Pope, Alexander 'An Essay on Criticism' [1711] in *Poems* Grant, Douglas (ed) (Harmondsworth: Penguin, 1950) 16.

¹⁰⁴ Derrida, above n 17, 283.

¹⁰⁵ *Ibid* 282-283.

culture."¹⁰⁶ The incest prohibition "is universal; in this sense one could call it natural. But it is also a prohibition, a system of norms and interdicts; in this sense one could call it cultural."¹⁰⁷ The scandal of the incest prohibition is that it makes the categories of nature and culture meaningless, thus threatening the validity of the paradigm itself. However, the scandal of meaninglessness occurs not only because nature and culture are discursive constructs, but also because meaning is possible only through mutual exclusion and opposition. In other words, it is precisely because law and nature are defined in opposition to each other that the play or disruption occurs. The incest prohibition, like anything else must be either natural or cultural, but not both or neither. Precisely because it is not exclusively natural or cultural, questions of its origins arise. Similarly, the idea of natural rights, the right of culture from nature, asks questions of origins. Questions of origins undermine the atopic and ahistoric claims of the Nature/Culture paradigm.

The tension in Locke's theory of property that nature is the source of a law that insists culture improve and appropriate the meaninglessness and chaos of nature, presents a scandal or lacuna in anthropocentric discourse. The origin of law, its authority or right, is both and neither natural and cultural. An origin, a place and a time, "escapes these concepts and certainly precedes them - probably as the condition of their possibility."¹⁰⁸ Locke's idea of property is both natural and cultural. His defence of enclosure and colonisation do not reveal inevitable or enduring principles of property or necessary relationships between people and place. Rather Locke's theory of property relates the modern paradigm of Nature/Culture to the legal paradigm of Persons/Things. The new world order of enclosure and colonisation advanced by Locke was not brought to being by method and reason, but by violence and force. The material dimensions and carriage of Locke's idea of property from theory to law further disrupt its claim that Nature/Culture is true and transcendental because it is based in the contested and the physical. The following section will elaborate this point with reference to the discourse and process of enclosing the commons in England and the resistance that it met.

¹⁰⁶ Ibid 283. Emphasis in original.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid.

5. ORDERING PLACE: ENCLOSURE

The story of enclosure is an ecological story. Enclosure changed the relationship between people and place. Yet it has most often been conceived and recorded not in terms of that relationship but according to the Nature/Culture paradigm as either (traditionally) a social history, or (more recently) a natural history. More precisely, enclosure is usually a history of either social causes or natural effects. This section draws together these separated histories to highlight and critique their distinction as particular to the paradigmatic splitting of people and place in English modernity.

Enclosure demonstrates the agency of law in transforming the paradigm of Nature/Culture from theory to practice through property relations. Locke's concept of property in labour, consistent with his contemporary improvement theorists, argued that cultivation and husbandry would deliver Man from sacrilegious idleness and restore him to the rightful and active domination of nature. But Locke's ideas of property extended far beyond theoretical musing and debate. He linked improvement theory to the practices of enclosure and colonisation. In marrying idea to practice and relating them to rights in property, Locke legitimised the appropriation of common property and the exclusion of communal rights held by custom.

Rather than regarding enclosure as creating a new form of ownership which was a prerequisite for improvement, Locke regarded appropriative and improving labour as creating the new property. In so doing, he brought together improvement and enclosure, labour and property, to create a coherent theory which went beyond the tentative and often elliptical statements of the improvers. Enclosure, labour and the subjection of the earth were all part of the same process. This provided the basis for his justification of property in the earth itself. To reiterate: "As much Land as a Man tills, plants, improves, cultivates and can use the Product of so much is his Property. He by his labour does, as it were, inclose it from the common."¹⁰⁹

By presenting private property as reasonable and natural under the arch-discourse of scientific rationality and its appeal to the paradigm of Nature/Culture, Locke provided a new story of law. Lawyers, judges and scholars reiterated his justification of private property for years to come because it reconceived the myriad of diverse and complex people-place relationships as rational and finite relationships in law. Whilst legal categories were fixed and knowable, law's authority, though historically abstract and sacred, could be vested in the inevitable rectitude of method. This discourse was used to justify both the enclosure of the common property and the colonisation of foreign property, an actual displacement and dispossession that materialised the mythic

¹⁰⁹ Locke quoted in Brace, 1998, above n 45, 161-162.

division of the world into Persons and Things. E.P. Thompson argued that the role of law was pivotal to the construction of that mythic world which not only reordered itself, but also its *other*. "It was law (or 'superstructure') which became the instrument of reorganising (or disorganising) alien agrarian modes of production and, on occasion, for revolutionising the material base."¹¹⁰

The gradual and widespread splitting of open fields, woodland and marshes into enclosed, mapped and discrete parcels of cultivated and horticultured land profoundly changed the economy of English society and ecology. Enclosure did many things, it changed a practice at once cultural and natural: land use. Above all, it transformed culture into the ontological category, Culture.

Making Culture

The change from open field agriculture to enclosure indicated radically changed farming practice, from subsistence to enterprise via science. Human relationships to place were increasingly articulated as unilateral consumer and producer relationships within the developing economy of capital. The contribution of the scientific revolution to that economy and to the enclosure movement cannot be understated. Jethro Tull (1674-1741) and Charles Townshend (1674-1738) for example reconceived farming as a science. Their aim however was not to change the epistemology of farming, but its economy. Their work advocated improvement through increasing the quantity of the goods yielded rather than by the quality or access to the goods. Progress was conceived in a market economy.

Farmers began to concentrate on particular agricultural products rather than producing a wide range of commodities to satisfy the needs of the local community. They chose the crop or animal to which their land was most suited, taking account of climate, the soil, and location, and they produced that crop or animal for sale on the national market. Thus regions developed which were devoted to a single type of agriculture.¹¹¹

Tull invented the mechanical, horse-drawn seed drill and Townshend discovered the rotation system of planting. But neither 'invention' nor 'discovery' was valued as knowledge in itself, rather they were valued as utilities of economic development. "Tull serves to underline the important fact that the ongoing agricultural revolution was the necessary precursor and partner of the better known Industrial Revolution."¹¹² Science

¹¹⁰ Thompson, above n 101, 164.

¹¹¹ Bellamy, Liz and Williamson, Tom *Property and Landscape: A Social History of Land Ownership and the English Countryside* (London: George Phillip, 1987) 96.

¹¹² Davies, Norman *The Isles: A History* (London: Papermac, 2000) 636.

and the new economy worked hand in glove. The economic function of science in the development of agriculture is indicated also by the class of farmers responsible for producing the burgeoning improvement and husbandry literature. Their literacy and independent wealth distinguished them as gentlemen and professionals: Charles 'Turnip' Townshend, was known also as Lord Townshend.¹¹³ Indeed, the Board of Agriculture formed in 1793 consisted of thirty-one founder members, fourteen of whom were titled.¹¹⁴ As John Barrell notes, the great proprietors were concerned mainly

with the revenue they derived from their estates: with ways to increase rents and to save costs in more efficient management; and precisely how these aims were achieved were of secondary importance.¹¹⁵

The members of the board who did not represent the peerage were agricultural experimentalists because they were "bigger tenant-farmers and the more substantial owner-occupiers."¹¹⁶ The growing landholding of the rural professional class was related directly to the wealth of that middle class. The new bourgeoisie of the countryside "were responsible for virtually all the agricultural literature produced between about 1750 and 1820."¹¹⁷ Land ownership was tied to land use: changes to one practice were changes to both.

Farming gradually became a capitalist industry based on a sophisticated market economy, but this development was only possible because of the evolution of the concept of absolute ownership, and the emergence of a few wealthy landowners and large farmers in place of the multiplicity of peasant proprietors.¹¹⁸

The agricultural revolution and its marriage to the advancement of private property demonstrate that cultivation was the nexus of the modern discourses of individualism and economic efficiency. The use and value of nature as things, that were separate from culture, was and remains the basis of both science and law. The institutionalisation of private property is the practical coincidence of these discourses. The alienation of humans from 'everything else' (and everyone else) imagined in science and law was enacted by enclosure.

Culture was made by changing property law. Enclosing open fields held in common for hundreds of years meant shifting the conventions of possession and ownership. The economic objectives of private property were incompatible with common property: open

¹¹³ For an interesting discussion of class, farming, literature and agrarian capitalism see Thirsk, Joan 'Making a fresh start: sixteenth century agriculture and the classical inspiration' in Leslie and Raylor, above n43.

¹¹⁴ Barrell, above n 4, 65.

¹¹⁵ Ibid 66.

¹¹⁶ Ibid.

¹¹⁷ Ibid.

field agriculture was an obstacle to agricultural productivity and profitability. The connection of custom and tradition to law in feudal society was similarly incommensurate with private property because the alienability of land, that the latter required, drew from the scientific discourse of positivism and a-historicism. The antithetical values and uses of land within feudal and capital economies thus fundamentally challenged the role of law. Whereas law and property had been about responsibility and obligation in feudal custom, it was increasingly conceived in terms of private rights and power. Furthermore, property was more significant to a law designed to serve an economy of capital than it was to the law of feudal society. "The central concept of feudal custom was not that of property but of reciprocal obligations."¹¹⁹ The new, private form of property severed the connection of law to custom, because capital operated not via obligation and responsibility but via alienation and exclusivity. Positive private property law required the alienability of property in terms of relationships that were universal and dichotomous, rather than particular and pluralistic. Customs expressed specific relations in particular cultures, law however prescribed general relations for a universal Culture.

As with the 'pioneers' of new farming practice, the agents of property law reform represented and protected the interests of one class, the same class who claimed absolute and exclusive (private) property rights. This class personified Culture, it was the class of landowners and the new order of professional farmers or 'Improvers'. Entrepreneurial 'gentleman' farmers, members of the parliament and judiciary belonged to the same class: the ruling class. This fact is overlooked in a recent account of enclosure by a landscape historian who presents legal and agricultural change as separable.

Considerable changes in the rural landscape of Britain were brought about either by changes in the legal framework of man's relationship with the soil, or else with by changes in his agricultural practices, and quite frequently by changes in both.¹²⁰

Changing the landscape can only be read as 'either' or 'both' agricultural and legal when the framework of class that supports their activity is omitted. Parliamentarians, judges, lawyers and enclosure commissioners, who were not precluded from being 'gentleman' farmers and landowners, ensured the successful carriage of enclosure. Their attention or the attention of law, to gleaming, for example, attempts to guarantee the exclusivity of property by reducing or 'translating' customary rights over common property into

¹¹⁸ Bellamy and Williamson, above n 111, 95.

¹¹⁹ Thompson, above n 101, 127.

permitted usage of private property.¹²¹ Gleaning by women and children of straw and grain from wheat and corn fields after harvest was common practice, and was regarded as a legitimate custom until 1788 when the common law ruled that it was not a property right.¹²² Customs in common were diminished and simplified into rights in common. Customs were newly categorised for example as the right to pasture (common of pasture), right to cut peat or turf for fuel (common of turbarry) and to collect firewood and repair wood (common of estovers).¹²³ "In reality, on the ground, the range of common produce was magnificently broad, the uses to which it was put were minutely varied, and the defence of local practice was determined and often successful."¹²⁴ But formally, at common law, common right was the right to share the produce of land, not the ownership of the soil. Peasants became trespassers on land they did not own but to which they felt they belonged. Alienation redefined law and property; it also redefined legitimate relationships to place.

The elimination of obligation and responsibility from law was articulated under capitalism as a reconceptualisation of people-place relationships. But as E.P. Thompson argues, enclosure was not only an important element in the transition from feudalism to capitalism in England, it was an essential element in the transition from community to nation and from nation to empire. Enclosure demonstrated changed values and uses of land, the accelerated pace of which corresponded with the universalising movement of the legal discourse of alienable and exclusive property. In the 15th and 16th centuries enclosure evidenced gradual and localised incidents of economic change, but by the 18th century enclosure was so widespread that it evidenced the basis of a national and imperial economic program.

The concept of exclusive property in land, as a norm to which other practices must be adjusted, was now extending across the whole globe, like a coinage reducing all things to a common measure.¹²⁵

The metaphoric description of property as a coin points to the way in which the rise of capital made law a function of its quantitative rather than qualitative economy. Law no longer protected the diverse rights and obligations of custom; instead, it protected the

¹²⁰ Reed, Michael *The Landscape of Britain: from the beginnings to 1914* (London: Routledge, 1990) 205.

¹²¹ Thompson, above n 101, 163.

¹²² Neeson, J.M. *Commoners: Common Right, Enclosure and Social Change in England, 1700-1820* (Cambridge: Cambridge University Press, 1993) 313.

¹²³ Hailsham (ed) *Halsbury's Laws of England IV 1932* p531, s.983 quoted in Neeson, *ibid*.

¹²⁴ *Ibid*.

¹²⁵ Thompson, above n 101, 164.

standardised rights and wealth of the private realm. Writing the *Commentaries of the Laws of England* in 1765, William Blackstone, following Locke, expressed absolute private property as a positive form of ownership negating all other forms of property relationships to land. Both the property right and the control of the physical space of land were exclusive and unqualified.¹²⁶ Property is "that sole and 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."¹²⁷ In this way, private property law homogenised the plurality of local cultures and various relations to place into a market of land and labour. But as private property recast human subjectivity, it changed the scenery too. The law inscribed itself into land. If it can be said that enclosure made Culture, it must also be said that enclosure made Nature. What does that mean? It means enclosure changed the non-human world of 'everything else' from diverse, particular networks of things, ecologies, into the contained and framed setting, background and stage of Culture, the landscape. The following section discusses the ways in which enclosure and the privatisation of property transformed English lands into the English landscape.

Making Nature: Landscape

Scrutiny of historical change is the condition for comprehension of human landscape perception.¹²⁸

The vision of Man¹²⁹ in the 18th century as *homo faber* extends beyond the realm of culture to nature, through the fabrication of landscape. The idea of landscape, originally meaning the visual perception and representation of country in painting in the 17th century, became a broader referent to the appearance of country in the 18th century. Importantly, the knowledge and appreciation of country became a mark of cultural distinction. Culture was measured in the language of nature. "During the eighteenth century the contemplation of landscape - in nature, or as represented in literature and the visual arts - became an important interest of the cultivated."¹³⁰ Landscape was fashionable in two senses: it indicated a modal aesthetic of land, and, in addition to the land market itself, became a commodity. "Landscape very quickly became the most popular genre of painting, and in the private collections of the very rich it was the newly

¹²⁶ Ibid, 162.

¹²⁷ Blackstone, William quoted in Thompson, *ibid*.

¹²⁸ Fitter, Chris *Poetry, Space, Landscape: toward a new theory* (Cambridge: Cambridge University Press, 1995) 8.

¹²⁹ The male pronoun is used and capitalised to underline the sexism of the paradigm of Nature/Culture.

¹³⁰ Barrell, above n 4, 3.

acquired Claudes and Salvators that were most admired."¹³¹ Indeed, the demand for landscape art "exceeded the sources of legitimate supply, and the trade in imitations, copies, and forgeries was considerable."¹³² The representation of country as landscape was executed according to particular aesthetic values that consisted of distinctive

principles of composition that had to be learned, and were indeed learned so thoroughly that in the later eighteenth century it became impossible for anyone with an aesthetic interest in landscape to look at the countryside without applying them.¹³³

The application of this aesthetic value constructed a landscape. Art, as a Cultural form, constructed Nature as external to it and in so doing expressed an aesthetic of alienation. Aesthetic values are not divorced from the paradigm of people-place relationships of any given society. Whilst not necessarily prescriptive, the aesthetics of landscape are imbued with values of nature and correspond to values of land use. This is well demonstrated by the later usage of the word 'landscape' as a verb: referring to the professional and large-scale activity of gardening, landscaping. The experience of "seeing the world as a landscape"¹³⁴ therefore did not preclude *making* the world as landscape. Nature was cultured and Culture was naturalised. The division of the world into natural and cultural realms that defined modern Anglo-Saxon subjectivity was made real. Landscape no longer referred only to a specialised genre of visual art - it referred to the actuality of topography and farming and gardening practice.

W.G. Hoskins was an economic historian whose famous study *The Making of The English Landscape* (1955) became a popular television series *Landscapes of England*. He is credited with having inaugurated a new branch of history with his investigation of the relationship between human social change and changing topography.¹³⁵ In his study, which spans the Western farmsteads of the pre-Roman landscape to the power stations of Oxfordshire in the 1970s, the largest chapter is: *Parliamentary Enclosure and the Landscape*. Hoskins observed that the practice of transforming land from common and open fields (including moorland and mountain) to enclosure

had been going on intermittently and at a varying pace in every century. But from the 1750s onwards, enclosure by private act of parliament... was the

¹³¹ *Ibid.*, 4.

¹³² *Ibid.*

¹³³ *Ibid.*, 6.

¹³⁴ Turner, James *The Politics of Landscape* (Oxford: Basil Blackwell, 1979) 8.

¹³⁵ Taylor, Christopher 'Introduction' in Hoskins W.G. *The Making of the English Landscape* (London: Hodder & Stoughton, 1988) 7-9.

great instrument of change. From then onwards, the transformation of the English landscape went on at a revolutionary pace.¹³⁶

Hoskins continues to provide figures and dates of the extent of enclosure acts: the most notable of which is the contrasting pace of enclosing open arable fields prior and subsequent to the sixty year rule of George III. Under the rules of George I (1714-1727) and George II (1727-1760) there were eighteen and 229 acts respectively enclosing an area not exceeding 400,000 acres. Yet between 1761 and 1801 under George III 1,479 acts were passed enclosing over 2.5 million acres. Between 1760 and 1801, 750,000 acres of 'wasteland' were also enclosed.¹³⁷ In total, between 1755 and 1815 over four thousand acts enclosed over five million acres of English land.¹³⁸ In the reign of one King almost 13% of England was enclosed contrasted to 1% in the reigns of the two preceding Kings. Jeanette Neeson figures that between 1750 and 1820, 20.9% of England was enclosed by Act of Parliament, or 6.8 million acres.¹³⁹ Enclosure is mostly recorded as a cultural process of social and political upheaval: evicting, relocating and destroying peasant communities. It has seemed less significant as a natural and ecological process of burning, felling, draining, dividing and fencing villages, woodland, marshes and open fields. Enclosure was an early form of what is now called planning. It was in every sense the fabrication, the making of landscape. The change to land wrought by enclosure was rapid and radical.

Social historians generally agree about the contribution of class interests to the rise of private property and enclosed lands.¹⁴⁰ The significance of class in the process of enclosure is not explained by the size of the class, but by the size of their landholding. The "revolutionary pace" of enclosure from 1750 rapidly consolidated large areas of land into the ownership of a few. The power-base of owners of enclosed land was different to the power-base of feudal landowners. Enclosed land was owned exclusively, without obligation or responsibility to local communities. The labour and produce of enclosed land were alienable, marketable commodities not supplies: they were sold at a price greater than their production rather than on a basis of exchange or mutual obligation. Private and exclusive land ownership transformed land into a market resource. But in the same way that corporate responsibility is today considered an important parallel if not vital contributor to remedial social and ecological work, the same landowning class

¹³⁶ Hoskins, *ibid* 144-145.

¹³⁷ *Ibid* 151.

¹³⁸ Davies, above n 112, 637.

¹³⁹ Neeson, above n 122, 329.

whose power grew through enclosure seemed also to carry responsibilities or at least hold interests in addressing some of the environmental damage wrought by the agricultural and industrial revolutions.

The depletion of forest and woodland was so substantial that an essay on improvement in 1728 by Batty Langley urged cautious felling and the replanting of trees in order to avoid the complete loss of timber, as a resource, in England.

Indeed at this juncture we have very little building timber in our woods and forests to boast of and are already much obliged to foreigners for great quantities of our civil uses. But should we ever happen (which God forbid) to be obliged to purchase some of their timber for our Shipping (by want thereof at home) 'tis to be feared that this glorious nation that governs the Seas, must submit to every invasion that's made, for want of its wooden walls of defence.¹⁴¹

Concern had become so grave by the 1760s that re-growth and mass planting programs were established as competitions for proprietors and aristocrats to sow the most acorns, chestnuts, elms and firs. "Acres of ducal property were immediately studded with acorns, and fir saplings by the hundreds of thousands began to sprout across the country... William Mellish (won a prize) for 101,600 spruce and 475,000 larch on his estates at Blyth, Nottinghamshire."¹⁴² Yet the program was related to the welfare of the nation in terms of defence and particularly shipbuilding for the navy. The efforts to restore the natural realm via tree growing were not natural heritage or conservation efforts, rather they were conceived as timber production facilitating the economics of patriotism. Schama later compares English efforts to their French counterparts on the eve of the French Revolution observing that both were fighting a "triangular (and unequal) contest for precious timber."¹⁴³ The timber triangle he suggests consisted of merchants, contractors, stewards and tenant farmers at one corner who "looked at the trees as standing capital, to be realised or reinvested as the market dictated." The landless poor were at the other corner "whose survival depended on the defence, violent if necessary, of traditional rights to gleaning, gathering, and cropping." At the apex were of course the state officials and large landowners "increasingly desperate about the

¹⁴⁰ See for example: Neeson, above n 122; Turner above n 134; Thompson, above n 101; Davies above 112; Brace, above n 45.

¹⁴¹ Langley, *Batty Sure Method of Improving Estates by Plantations of Oak* [1728] quoted in Schama, *Simon Landscape and Memory* (London: Fontana, 1995) 165.

¹⁴² *Ibid* 168.

¹⁴³ *Ibid* 179.

shortage of ship timber and suffering from nightmares of the last pine and the last oak snatched by the Other Side."¹⁴⁴

The values of nature and land use indicated by mass tree growing competitions were identical with the values of nature and land use that rationalised the larger projects they supported: enclosure and global colonisation. Private enclosed land was the condition of the property regime required for ducal tree plantation of such magnitude. It was also the condition of the dispossession and appropriation of alien property regimes. The histories of enclosure and colonisation are ecological histories. Both their conceptual program and their materiality corresponded with dominant social and aesthetic values of nature and land use in England in the seventeenth and eighteenth centuries. Just as the poet Alexander Pope had equated beauty and utility,¹⁴⁵ similarly when agriculturists contrast open and enclosed country, they "are most willing to identify a beautiful landscape with one which is well-farmed."¹⁴⁶ The pleasure derived from cultivated landscape was complemented by the fear and hostility that characterised the agriculturists' relationship to wild or natural places such as marshes and woodlands. The negative perception of uncultivated nature could be elaborated in terms of fear and hostility generally. In particular, the attachment of negative sentiment to nature was continuous with negativity concerning foreigners and foreignness. Sir John Sinclair, President of the Board of Agriculture, so loathed nature that he likened it to foreign enemies with whom the cultivated Englishman was at war.

We have begun another campaign against the foreign enemies of the country... Why should we not attempt a campaign also against our great domestic foe, I mean the hitherto unconquered sterility of so large a proportion of the surface of the kingdom? ... let us not be satisfied with the liberation of Egypt, or the subjugation of Malta, but let us subdue Finchley Common; let us conquer Hounslow Heath; let us compel Epping Forest to submit to the yoke of improvement.¹⁴⁷

The idea of nature as *other* is highly pronounced. Improvement was synonymous with enclosure, landscape gardening and colonisation in that the condition of each of these programs was the objectification of place as *other* to English selfhood. Improvers, enclosers, gardeners, legislators and colonisers preferred the pre-ordained structure of space, derived ideologically and abstractly, to place. The idea of space cultured place by bringing it within knowledge and control. Standardised, universal and measurable

¹⁴⁴ Ibid 179-180.

¹⁴⁵ See for example: 'Epistle IV to Richard Boyle, Earl of Burlington Of the Use of Riches' [1735], above n 103, 170.

¹⁴⁶ Barrell, above, n 4, 75.

¹⁴⁷ Sinclair, John [1803] quoted in Neeson, above n 122, 31.

space could be grafted over place so that the physicality and particularity of places became irrelevant. The irrelevance and absence of place underwrote the legitimacy of enclosure and colonialism because

If it were admitted that different cultures produce different spaces, then negotiating these would be difficult, if not impossible. Constructing a monolithic space, on the other hand, allows imperialism to hierarchise the use of space to its own advantage. In imperial ideology the Aborigines do not have a different space to that of the explorers; rather, they underutilise the space imperialism understands as absolute.¹⁴⁸

As Ryan notes, spatialising place made the appropriation of lands seem a rational and improving process of discovery and exploration rather than a political and destructive process of dispossession. This discursive movement was important to the epistemological and ecological revolution of enclosure.

The process of enclosure replaced the chaos of the open fields and common lands with a neat patchwork of hedged fields and securely held as private property by virtuous, improving individuals.¹⁴⁹

The notion of space absented place as nature from Culture. The concept of space and spatial technologies, such as cartography, were instrumental to enclosure and the ordering of place both conceptually and actually. "One might ask whether the role of maps in organising and exploiting land and labour did not in fact begin to impose a 'linear' or 'rational' perspective upon the landscape."¹⁵⁰ Changes to law and property relations indicating changed perceptions of land were physically expressed through the regulation of enclosure by changes to the land itself.

To enclose an open field parish means in the first place to think of the details of its topography as quite erased from the map. The hostile and mysterious road system was tamed and made unmysterious by being destroyed; the minute and intricate divisions between lands, strips, furlongs and fields simply ceased to exist: the quantity of each proprietor's holding was recorded, but not among what furlongs it had distributed.¹⁵¹

Property makes Landscape

The intimate, mutually defining relationship between culture and nature that animated the development of property law during the period of enclosure conveys a fact of

¹⁴⁸ Ryan, Simon *The Cartographic Eye: How Explorers Saw Australia* (Cambridge: Cambridge University Press, 1996) 4.

¹⁴⁹ Brace, 2001 above n 44, 9.

¹⁵⁰ Pottage, Alain 'The Measure of the Land' (1994) 57 *The Modern Law Review* 3: 361, 370.

¹⁵¹ Barrell, above n 4, 94.

immense significance. The idea and representation of land as place in human culture is intimately bound to the materiality of land. Law determines, in part, how land is seen aesthetically and how landscape is made materially. As the law of private property and enclosure objectified or *othered* land as landscape, the law erased place from its discourse. Recent historical accounts of enclosure maintain this erasure. Norman Davies, writing a brief history of the British Isles in 2000 records the history of enclosure in predominantly cultural or social terms.

The enclosure of communally held open land had long been the occasion both for agricultural progress and social distress. Farmers gained control of large closed fields suitable for the production of cash crops and surpluses, whilst local peasants and humble tenants lost their means of subsistence.¹⁵²

The political control of land Davies correctly notes served an economic purpose with social effects. The sense of 'land' to which he refers is the anthropocentric sense of land as resource: the control of which is really the control of its products and access to them. What Davies does not note is that the *Isles* of which he writes (and their creatures) were themselves controlled and effected as Nature. He separates and privileges the social history of enclosure from the natural history, or more precisely, from the history of the effects of enclosure on nature.¹⁵³ Landscape historian W.G. Hoskins on the other hand records enclosure and the rise of private property as affecting major change to the topography and landscape of England. Hoskins history highlights rather than assumes the way in which law makes, or physically determines the landscape via enclosure. In 1764, he notes, Lancelot (Capability) Brown dammed the River Glyme to make a lake at Blenheim Palace. In 1775, Brown made a lake at Burghley "nearly a mile long and moved trees of the most enormous bulk from place to place, to suit the prospect of the landscape."¹⁵⁴ Hoskins links these landscaping events to the notion of cultural control of nature. Furthermore, this control is noted in terms other than socio-economic. Contemporaneous praise of Brown's 'control of land' did not conceive the land in terms of its economic value, nor even entirely as a source of aesthetic pleasure. Rather, Brown was hailed as being a creative genius, recalling Locke's concept of colonial settlement as the "equivalent to an act of creation."¹⁵⁵ The control of land in this sense of (re)creation conceives land as the means by which culture is transcendental.

It was the genius of Lancelot Brown, which brooding over the shapeless mass, eduuced out of a seeming wilderness, all the order and delicious harmony

¹⁵² Davies, above n 112, 637.

¹⁵³ The natural history of enclosure is a history of natural effects rather than a history of natural causes and thus cannot be separated from the social history of enclosure.

¹⁵⁴ Hoskins, above n 135, 137-138.

¹⁵⁵ Fitzpatrick, above n 53, 82.

which now prevail. Like the great Captain of the Israelites, he led forth his troop of sturdy plants into a seeming barren land; where he displayed strange magic, and surprised them with miracle after miracle.¹⁵⁶

Landscape historians Bellamy and Williamson only record the social impact of enclosure and private property indirectly or as consequences of primarily geological and biological change. For them, the physical and biological 'control of land' is central to the program of enclosure. The idea of nature as instrument is significant to this history only insofar as it is enacted and performed physically. Their account of enclosure draws attention to major and permanent alterations to nature as physical matter rather than as ideology. Private property and agricultural experimentation altered the direction and flow of rivers and thus affected the physical qualities of the soil, most deliberately, its fertility. Channels and sluices were constructed from rivers to flood meadows, enriching grasses and soil for the concentrated production of a single lucrative crop that could maximise returns on capital.¹⁵⁷ New crops such as root vegetables, carrot, parsnip and turnip for example, were grown to feed livestock now kept in stables and stalls rather than grazing on fields, and this increased the quantity of livestock. "This highly efficient system of arable farming facilitated tremendous improvements in animal husbandry."¹⁵⁸ The techniques of rotation farming and cross-seasonal growing required intensive use of land throughout the year. The increased availability of feed for livestock changed the quantity *and quality* of animals. "Not only were more animals kept, but individual beasts were healthier and much larger. From the seventeenth century, great improvements in stock had been made by selective breeding. Agricultural shows and awards acted as a further stimulus in the eighteenth century."¹⁵⁹ Bellamy and Williamson argue that "these innovations directly encouraged the enclosure of the landscape, but they also served as an indirect stimulus, since they accelerated the decline of the small owner-occupier."¹⁶⁰ The reverse might also seem plausible - that the freedom to confine grazing livestock to stalls and stables and to flood rivers and harvest crops year-round was a consequence of the modern concept of alienable and exclusive property designed for enterprise and commerce rather than subsistence. The causality of enclosures may not exist, even if it could be known, but the mutual relationship of nature and culture in the making of enclosed landscape is clear.

¹⁵⁶ *Guide to Burghley House* [1797] quoted in Hoskins above n 135, 138.

¹⁵⁷ Bellamy and Williamson, above n 111, 96.

¹⁵⁸ *Ibid* 100.

¹⁵⁹ *Ibid* 100.

Nature is the condition and ground of agricultural change and accompanying property reform in the same way that culture is the condition and structure of the enclosed *landscape*. Things of nature are cultivated and attributed with inherently cultural values. Similarly, things of culture are naturalised and attributed with inherently natural value. "Landed wealth is transformed into the 'natural' wealth of landscape. The behaviour of those who possess it is correspondingly naturalised, and all sense of arrogance and violence is removed."¹⁶¹ Praise for the work of Capability Brown at Burghley House for example presents the cultured garden as so natural that it is impossible to distinguish between nature and culture.

Though the beauties with which we are here struck, are more peculiarly the rural beauties of Mr Brown, than those of Dame Nature, she seems to wear them with so simple and unaffected grace, that it is not even the man of taste who can, at a superficial glance, discover the difference.¹⁶²

The slippage of the terms between their realms seems to further legitimate rather than challenge the paradigm of Nature/Culture. But not everyone was convinced.

Anti-Enclosure Discourse

Opposition to enclosure was widespread and long-standing, but it was also overcome. It is important nonetheless to consider and to value that resistance as a means to understand the roots or parallel of ongoing resistance to contemporary property law and practice. An understanding of various forms of resistance to the dominant values embedded in property relations is vital to recognising their placed specificity without which universalising claims flourish. As Edward Said wrote against the universalising claims of imperialism in *Culture and Imperialism* (1994): "there was *always* some form of active resistance."¹⁶³

Against the universalising claims of improvement theory and enclosure law, anti-enclosure discourse suggests that culture, law and landscape are as impermanent and variable as 'nature' itself, because there is no centre/periphery, no internal/external reality. Resistance to enclosure demonstrates the historic and geographic specificity of property law. By refusing the universalising claims of improvement theory and the Nature/Culture paradigm, anti-enclosure protest and discourse locates property law, making it particular and placed. Foucault wrote that resistance emerges within the

¹⁶⁰ Ibid 100.

¹⁶¹ Turner, above n 134, 141.

¹⁶² *Guide to Burghley House* [1797] quoted in Hoskins above n 135, 138.

discourses it opposes. "Where there is power, there is resistance, and yet, or rather consequently, this resistance is never in a position of exteriority in relation to power."¹⁶⁴ Resistance to enclosure did not "succeed in halting it"¹⁶⁵ and the paradigm of Nature/Culture and the discourse of private property flourished. However, the fact that there was resistance to enclosure and that this resistance is still debated today, works, in Derrida's words, as indelible traces or *errinerungsspur*¹⁶⁶ of difference within what is otherwise an homogenising discourse of universal relations to place. Anti-enclosure discourse critiques enclosure from various perspectives, mostly economic, political and moral. All of these critiques evidence anthropocentric values of nature in so far as they are concerned with the distribution of, and access to land in terms of its economic resourcefulness, and the social meanings and consequences of that distribution. I will outline these briefly below. One particular critique found in the writing of peasant and poet John Clare, resists enclosure in a different way. Clare's writing evidences a non-anthropocentric relation to place and his passionate struggle against enclosure is unambiguously a struggle against the relationship between people and place prescribed by the Nature/Culture, Person/Thing paradigms developing at the time.

Resistance to enclosure was strongest until and including the 17th century after which time enclosure became increasingly publicly defensible. When Locke published his justification of private property anonymously at the end of the 17th century, much enclosing had already taken place through 'private agreement'. Prior to 1730, when the period of parliamentary enclosure began:

Commentary on enclosure, whether derived from the testimony of the people in court or through petition, or from the official proceedings and polemic of those making assertions in their behalf, is overwhelmingly negative - and remarkably consistent.¹⁶⁷

After this time, anti-enclosure discourse did not diminish, rather it was countered by pro-enclosure discourse. Siemon relates the rise of pro-enclosure discourse to the "emergent values of nascent capitalism"¹⁶⁸ and to which I would add the emergent class of capitalists who held them. John Barrell argues that the increased size and influence of

¹⁶³ Said, E.W. *Culture and Imperialism* (London: Vintage, 1994) xii quoted in Brace, 2001, above n 44, 17 (emphasis in original).

¹⁶⁴ Foucault, Michel *The History of Sexuality Volume 1* (New York: Vintage, 1990) 95.

¹⁶⁵ Siemon, James "Landlord Not King: Agrarian Change and Interarticulation" in Burt, Richard and Archer, John (eds) *Enclosure Acts: Sexuality, Property, and Culture in Early Modern England* (Ithaca: Cornell University Press, 1994) 22.

¹⁶⁶ Derrida, Jacques "Freud and the Scene of Writing" in *Writing and Difference* (London: Routledge & Kegan Paul, 1978) 216.

¹⁶⁷ Siemon, above n 165, 21.

¹⁶⁸ *Ibid* 22.

the rural professional class was directly related to the growth of the pro-enclosure movement. He points out that the success of parliamentary enclosure required:

the services of lawyers to draw up the enclosure-bill; of paid enclosure-commissioners, to supervise the whole business of putting the act into execution and redistributing the land; of solicitors to draw up the claims of those whose land was to be enclosed, and who could afford the services of a solicitor; of quantity-surveyors, to mark out the course of new roads, and to measure out new allotments of land; and to auditors, to check through the commissioners' accounts of the expenses of the enclosure.¹⁶⁹

The establishment of the professional class or bourgeoisie was linked to and supported by Parliament. This small group of decision-makers, who created law, consisted predominantly of landowners who significantly "were the only gainers of the agricultural revolution: real rents increased sevenfold from the middle of the fifteenth century to the middle of the nineteenth."¹⁷⁰ The juncture of land ownership and parliamentary power indicates a second reason for the rise of pro-enclosure discourse after 1730: when an Enclosure Bill became enacted, it also made opposition to it illegal. Resistance to enclosure thus became resistance to law. Disagreement about concepts and values of property became conflicts before the law. In this way, anti-enclosure discourse was translated into criminality.

Legal forms of opposition were available, but expensive, and usually unsuccessful. Parliament "turned a deaf ear to legal protest"¹⁷¹ and so opponents to enclosure resisted through physical actions. Newly created and enforced laws designed to protect private property discouraged such resistance by imposing seven-year transportation penalties. "Under 9 Geo. III c.29 (1769) anyone convicted of willfully and maliciously damaging or destroying any enclosure fence was guilty of felony."¹⁷² Those transported for resisting enclosure in England became the very agents of colonial enclosure in Australia. Transportation turned resistance into colonisation.

Despite the protection of law, "enclosers' farms were plainly vulnerable."¹⁷³ Resistance varied from parish to parish and in some villages there were traditions of protest "that looked back to earlier resistance to enclosure, one that owed much to the habits of

¹⁶⁹ Barrell, above n 4, 70-71.

¹⁷⁰ Allen, Robert *Enclosure and the Yeoman* (Oxford: Clarendon Press, 1992) 285.

¹⁷¹ Neeson, above n 122, 260.

¹⁷² *Ibid* 280.

¹⁷³ *Ibid*.

communal agriculture.¹⁷⁴ Brace cites instances of "local opposition" expressed by "stubborn non-compliance, foot-dragging and mischief" such as:

1. burning of trees, fences, hedges, gates and summerhouses;
2. anonymous threats in letters and the forms of poems;
3. theft of newly completed enclosure books and plans;
4. blockading fence construction fences until forcibly removed at the enclosers' cost;
5. rumours, newspaper advertisements and letters regarding enclosers' motivations;
6. digging up sand and soil onto the road;
7. felling young trees planted immediately after enclosure.¹⁷⁵

Affecting over 3000 parishes,¹⁷⁶ enclosure met with widespread and ongoing (though localised) resistance, over a 200-year period. Williamson and Bellamy cite similar examples:

In 1639 the men of Corby in Northamptonshire marched to Thackley Green and spent three days pulling down the hedges of the enclosing landlord Sir Christopher Hatton... As late as 1870 the stakes and railings dividing the common at Fakenham in Norfolk were pulled up and burnt.¹⁷⁷

The authors attribute this resistance to the economic effects of dispossession on the lives of commoners, small farmers and cottagers. "In many places and in many sections of society there were those who deeply and bitterly resented the enclosure of the landscape... (because) it meant the ends of a subsistence that was a valuable safeguard against unemployment and economic hardship."¹⁷⁸ It is important here to relate some anti-enclosure activities such as the felling of trees, hedgewood stealing and fence breaking to resistance not only in its symbolic and political sense, but also in the literal or physical sense of resisting hardship. When the commons were enclosed, commoners lost vitally important waste and pasture, including especially the necessities of wood.¹⁷⁹ The value of waste was lost to the enclosers (and to colonists¹⁸⁰), who consistently contrasted waste to improvement and cultivation.

Economic changes contributed substantially to the anti-enclosure movement. Economic historians record the increased hardship of consumers, labourers and farmers with the dramatic fall of real wages¹⁸¹ and the long-term rise of real product prices.¹⁸² In 1862 John

¹⁷⁴ Ibid 263.

¹⁷⁵ Ibid 259-293.

¹⁷⁶ Hoskins, above n 135, 145.

¹⁷⁷ Williamson and Bellamy, above n 111, 115.

¹⁷⁸ Ibid 114.

¹⁷⁹ See Neeson above n122, 280, and also Dawson, P, Robinson, E and Powell, D(eds) *John Clare: A Champion for the Poor* (Manchester: Carcanet Press, 2000) pxxvii.

¹⁸⁰ Tully, James quoted in Brace, 2001, above n 44, 16.

¹⁸¹ Allen, above n 170, 285.

Aubrey, nostalgic for the days of feudalism remarks that England was enclosed "for the private, not the public good" and now was "swarming with poore people."¹⁸³ The appearance of increased poverty relates in part to the decreasing number of landowners. "When the manor of Feckenham was surveyed in 1591, sixty-three different owners held some 2900 acres. By 1900 there were only six owners, who held all this and another 3000 acres besides."¹⁸⁴ It also relates to the fact that enclosure concentrated poverty into fixed locations and was thus simply more visible. Commoners were dispossessed of property in an abstract sense of rights, but they were also dispossessed physically of homes and subsistence leading them to urban centres if they had not already been forcibly 'relocated'. Hoskins notes that private property heralded "the age of territorial aristocracy" in which village cornlands vanished inside park walls: "whole villages were destroyed and built elsewhere when they were found to stand in the way of a 'prospect' or some grand scheme of landscape design."¹⁸⁵ The first Earl of Dorchester for example bought the entire site of the town Milton Abbas

which had stood for many centuries at the gates of the Benedictine monastery at Milton. He decided to build a great family mansion where the ruins of the abbey stood. The little town stood in the way and was demolished. In 1786-7 a model village was built on a new site a mile away.¹⁸⁶

But other, non-economic factors also account for the bitterness and strength of the anti-enclosure movement. Historian Robert Allen relates resistance to enclosure to what he calls the accompanying "narrowing of the mental life of the rural population."¹⁸⁷ The cooperative management of open field or common agriculture meant that farmers were responsible for decision making and participated in public life.¹⁸⁸

They deliberated the rules within the framework of the manorial court and provided necessary public officials to manage the system. Leveller demands for national democracy were an extension of village democracy rather than a whole new departure. As the open fields were enclosed, this political forum vanished. Furthermore, as the yeoman lost their copyholds and beneficial leases, they ceased to be ratepayers and so lost the public responsibilities that followed from that obligation.¹⁸⁹

¹⁸² Ibid 284.

¹⁸³ Aubrey *Wiltshire: The Topographical Collections* quoted in Siemon, above n 165, 21.

¹⁸⁴ Hoskins, above n 135, 166.

¹⁸⁵ Ibid 134.

¹⁸⁶ Ibid.

¹⁸⁷ Allen, above n 170, 289.

¹⁸⁸ Ibid 290.

¹⁸⁹ Ibid 289.

Anti-enclosure discourse is usually discussed in terms of resistance to the development of private property and the modern social organisation it supports. Historians such as Neeson and Hoskins are also interested in anti-enclosure discourse because it reveals ontic and epistemic dimensions of life pre-enclosure, particularly relationships between people and place. They are interested in enclosure not only as a social or environmental event evidenced by riots and petitions, and transformed landscape and topography - but also as an event that fundamentally changed ecological subjectivity. The pre-enclosure relationship between people and place, articulated especially by commoners, Neeson calls "possession without ownership."¹⁹⁰ This form of property held by commoners pre-enclosure was not alienable and not exclusive: the significance of which is not entirely economic. Neeson's definition of 'possession without ownership' suggests a property relationship closer to the ancient or original sense of the word 'property' referring to identification with and from place, rather than ownership over it. This relationship creates subjectivity from place as well as with their time within it: it is neither atopic nor ahistoric.

Commoners were not labourers. They were peasants. The value of the name is that it emphasises a continuity with the past, a continuity based on the occupancy of land and the rights in the common-field system... they are descendants of other English peasantries, not a rootless eighteenth century phenomenon.¹⁹¹

Commoners, Neeson contends, recognised their mutual dependence on the shared economy of open field agriculture¹⁹² and their mutual relationship with the land.¹⁹³ The violent resistance to enclosures and the poetry of John Clare (1793-1864) are renowned examples of the vitality of this mutual relationship. The following discussion examines Clare's poetry with regard to his articulation of relations between people and place, or an ecological subjectivity. Clare's resistance to enclosure, as poetry, is substantially different from the forms of resistance outlined above. However, it is also different from the literary tradition of his contemporaries. Whilst other writers did not speak directly or consistently to enclosure in the way Clare did, it is important to differentiate Clare's anti-enclosure discourse the environmental idealism of Romanticism and the tradition of the pastoral genre.

¹⁹⁰ Neeson, above n 122, 3.

¹⁹¹ Ibid 297-298.

¹⁹² Ibid 321.

¹⁹³ Ibid 3-5.

Romanticism

Romanticism was reactionary. "It is easier to articulate what romanticism was against than what it stood for."¹⁹⁴ The Romantics reacted against the ideas and aesthetic forms of the Age of Enlightenment. They wrote against Reason and replaced it with an epistemology of the imagination. Nonetheless, Romanticism was an intellectual project. Its focus was overcoming the intellectual legacy of Enlightenment.

The Negation is the Spectre, the Reasoning Power in Man...
To come in Self-annihilation & the grandeur of Inspiration,
To cast off Rational Demonstration by faith in the Saviour,
To cast off the rotten rags of memory by Inspiration,
To cast off Bacon, Locke, & Newton from Albion's covering,
To take off his filthy garments & clothes him with
Imagination.¹⁹⁵

Romanticism revered Nature as the genesis of wisdom and locus of inspiration. Nature was not a metaphor for what civilisation ought to be, in the way that it was for Pope and the Augustans - it was its antithesis. The Romantics were critical of civilisation and modernity; they defined their project as an escape from the trappings of Culture and a retreat to Nature. Thus Romanticism did not subvert the Nature/Culture paradigm, it just polarised the terms differently. Romantics were ecocentric rather than anthropocentric. Though the Romantics juxtaposed nature and culture (as civilisation) their ideal of nature remains cultured, as a garden, rather than a wilderness. Clare however valued waste and wildness, nature was not to him a garden or paradise¹⁹⁶ but a loved one. "Yer flat swampy vallies unholosome may be / Still refuse of nature wi out her adorings / Yere as dear as this heart in my bosom to me."¹⁹⁷ The Romantics' relationship with nature was mediated through an elaboration of idealised culture that ultimately elevated the human spirit. The Romantics "appropriated the natural as a delicate interior notation."¹⁹⁸ Romantic representations of nature are highly specular and stylised. Ideals of nature were central to the Romantic critique of civilisation. The pastoral genre was therefore central to the Romantics' reaction against the institutions of Culture because it articulates a value and ideal of nature most explicitly.

Jonathan Bate wrote that the work of the Romantics is part of a broader environmentalist tradition. "What are the politics of our relationship with nature? For a poet, the pastoral

¹⁹⁴ Hay, above n 20, 5.

¹⁹⁵ Blake, William *Complete Writings* Geoffrey Keynes (ed) (Oxford: Oxford University Press, 1972) 818.

¹⁹⁶ Bate, Jonathan *Romantic Ecology: Wordsworth and the Environmental Tradition* (London: Routledge, 1991) 34.

¹⁹⁷ Clare 'Song' [1812-1823] in Robinson, Eric and Powell, David (eds) *John Clare* (Oxford: Oxford University Press, 1984) 46-47.

¹⁹⁸ Fitter, above n 128, 277.

is the traditional mode in which that relationship is explored."¹⁹⁹ Stephen Muecke describes the pastoral genre as one characterised by a relationship of alienation between viewer or artist and land.

There is not landscape without a sense of otherness; landscape has to be seen or experienced, in the way a tourist does. So for the indigenous person, there is really no such thing as the landscape. Perceptions of landscape depend on difference, therefore and on displacement.²⁰⁰

Muecke argues that Australian Aboriginal narratives of place are noticeable for the absence of a specular perspective of the landscape. This degree of proximity with place changes the relationship from one which would use the word 'to' to one which would use the word 'from'. Clare's poetry comes *from* the land, because his relationship is not 'to' place, but 'from' it. The depth of feeling and knowledge that consists in such an indigenous relationship with place suggests that the commoners' resistance to enclosure is based on the dispossession of both their ecological relationships and their material economy.

Resistance in the Poetry of John Clare: Possession without Ownership

The conventions of the Pastoral genre situate nature as a background to a story about a shepherd or alternatively as scenery appreciated visually. The pastoral landscape is perceived from a position of exteriority, suspended above the nature it describes comprehensively. Clare however, perceives himself within, and as part of the landscape. Natural elements in Clare's poetry are better likened to characters than to landscapes: they have a subjective quality, contrary to the objectification of place as scenery within the pastoral tradition. Indeed the subject/object boundaries between people and place are altogether strange to Clare and he introduces and associates these boundaries with the process of enclosure. In *The Lament of Swordy Well*²⁰¹ (Appendix 1) for example, Clare writes of land in the first person, that is, the land itself is the narrative voice of the poem. The land narrating the poem is not land in general, nor lands arbitrarily chosen as example. Rather, the land is a particular land, a placed land, Swordy Well. This song or poem expresses the geographical, biological and social changes of enclosure. The enclosed land has become barren and dull with the relocation of stones, felling of trees and bushes and the transformation of springs into an irrigation system. Soil properties have changed with these topographical changes and with multiple-season harvesting. The fauna inhabitants of the land have also been affected by 'improvement', leaving it

¹⁹⁹ Bate, above n 196, 19.

²⁰⁰ Muecke, Stephen *Textual Spaces* (Kensington: University of New South Wales Press, 1992) 166.

for more supportive feeding and nesting places. Human society is newly fractured into greedy and rapacious enclosers and the labouring poor related only through the "strife to buy and sell". Clare combines these three different aspects of enclosure, or rather, he does not distinguish between them.

Swordy Well was known to Clare in his childhood and was greatly changed by agricultural improvement. The narrating land, Swordy Well, says

And me they turned inside out
For sand and grit and stones
And turned my old green hills about
And pickt my very bones.

Swordy Well laments that agricultural changes have transformed it from land into a landscape. Swordy Well is no longer a particular place but a construction of a human ideal that seems indiscriminate, without design or meaning, 'whatever'.

No now not een a stone can lie
Im just what eer they like

What drives the transformation of land to landscape, Swordy Well claims, is not an idea or understanding of the land itself, but a unilateral relation to the land's resources. Swordy Well claims to have adequately participated, as a resource, in a different kind of people-place economy now past. According to Swordy Well's account of the pre-enclosure economy, neither people nor place was disempowered. By contrast, 'improvement' rendered both the land and the labourers, *slaves* of enclosure.

There was a time my bit of ground
Made freeman of the slave
The ass no pindard dare to pound
When I his supper gave
The gipseys camp was not afraid
I made his dwelling free
Till vile enclosure came and made
A parish slave of me

The changed economy, Swordy Well says, requires more than the land already offers. Pecuniary gain objectifies land, denying its agency and particularity. Swordy Well appears not as itself, but as any or every enclosed land, in the dressing or "dull suit" of limitless commercial resource.

²⁰¹ Robinson and Powell, above n 197, 147-152.

Yet worried with a greedy pack
 They rend and delve and tear
 The very grass from off my back
 I've scarce a rag to wear
 Gain takes my freedom all away
 Since its dull suit I wore
 And yet scorn vows I never pay
 And hurts me more and more

In addition to describing the motivation, process and appearance of enclosure, Swordy Well relates the change from land to landscape to the departure of non-human species from it. The bees, rabbits and butterflies find themselves alienated from Swordy Well because of its transformation via the "hasty plough". Clare's critique of enclosure records noticeable changes to Swordy Well not as landscape, but as a place that is home and habitat to a network of things (including people).

The bees flye round in feeble rings
 And find no blossom bye
 Then thrum their almost weary wings
 Upon the moss and die
 Rabbits hat find my hills turned oer
 Forsake my poor abode
 They dread a workhouse like the poor
 And nibble on the road

If with clover bottle now
 Spring dares to lift her head
 The next day brings the hasty plough
 And makes me miserys bed
 The butterflyes may wir and come
 I cannot keep em now
 Nor can they bear my parish home
 That withers on my brow

This aspect of Clare's writing clearly sets his resistance to enclosure apart from the socio-political protests described earlier and from the intellectual goals of Romanticism. Interestingly, Swordy Well refers to the people who have enclosed and improved it as "These things that claim my own as theirs." For Clare, enclosure does indeed make persons and things of people and place, but the undifferentiated partner or Thing of the property couple is not land, but the owning Persons.

The final lines of the poem anticipate what Hoskins, Neeson, Robinson and Powell lament, that history, written as maps and events, loses or erases almost everything of place following enclosure. What remains of Swordy Well is its name, its abstract, cultural form.

And save his Lordships woods that past
 The day of danger dwell
 Of all the fields I am the last
 That own my face can tell
 Yet what with stone pits delving holes
 And strife to buy and sell
 My name will quickly be the whole
 Thats left of swordy well

Clare's point was taken by John Barrell in his study of the landscape of agricultural improvement, he argued that enclosure erased completely the physical particularity and diversity of places. His comment is long, but worth reading in full.

Everything about the place, in fact, which made it precisely this place, and not that one, was forgotten; the map was drawn blank, except for the village itself, the parish boundary, and perhaps woodland too extensive or too valuable to be cleared, and streams too large to be diverted. The enclosure commissioner would then mark in the new roads he was to cause to have made to the neighbouring villages, running as straight as the contours of the land would allow. In this way the map was redrawn, and the new topography would begin to be realised on the actual landscape.²⁰²

Barrell's history of enclosure, like Clare's poetic record, links the transformation of place into space to the erasure and homogenisation of a network of natural things into the cultured and abstracted paradigmatic category, Nature. Both Clare and Barrell emphasise the role of law in the imposition of the "grid of property upon the land."²⁰³ That grid is an imagined line that invents and separates nature from culture, from which relationships to place become simply the possession of (improved) landscape. Michel de Certeau connects the abstraction of place directly back to Descartes's notion of Man as "masters and possessors of nature."

A Cartesian attitude... is a mastery of places through sight. The division of space makes possible a panoptic practice proceeding from place whence the eye can transform foreign forces into objects that can be observed and measured, and thus control and 'include' them within its scope of vision.²⁰⁴

The panoptic vision of and over place is strikingly missing from Clare's anti-enclosure poetry. The universalising claims and practices of a Cartesian vision of place are antithetical to his insistent attention to the local and particular.

²⁰² Barrell, above n 4, 95.

²⁰³ Guillory, John 'Literary Capital: Gray and Barbauld' in Brewer and Staves (eds) *Early Modern Conceptions of Property* (London: Routledge, 1995) 392.

Unlike Romantic literature about place, Clare's writing is not simply reactionary. Whilst he writes against enclosure and against the Enlightenment paradigms of Nature/Culture, his writing records and pleads for an intimate relationship between people and place that is not an ideal of future but a memory of lived experience. Clare is nostalgic rather than intellectually reactive, his writing is an expression of feeling rather than a presentation of ideas regarding the Enlightenment. Clare's treatment of nature as subject, rather than object, enables him to express an emotional or spiritual relationship between people and place and indeed discards their separation. His writing is a rare instance and important articulation of relationship with nature that preceded the logic of enclosure and thus resists the erasure of place from the property discourse of Persons/Things. His value of property contains a concept of, or relation with place that is radical to contemporary property law. Clare's writing is important because it locates the origins and conditions of private property.

Hoskins points out that although there are numerous condemnations of enclosures on economic and political grounds, condemnations otherwise are lacking. He laments that the nature of the commoners' relationship with the land was all but lost in history because this class of people was illiterate.

Perhaps it is not remarkable, after all, that no poet should have described this world to us before it expired, described it in language that would bring home to us what kind of world it actually was and how its inhabitants looked upon it, for it was above all a peasant world and the peasant was inarticulate.²⁰⁵

John Clare was exceptional in his literacy and were he not, further evidence of the type his poetry provides might remain. The use of poetry and literature generally for historical and political study occasions debate in aesthetic philosophy, which I cannot address adequately here. Suffice to say that the writing of John Clare is valuable both aesthetically and politically, perhaps even more valuable than those of his contemporaries, because Clare was not a professional poet or intellectual - he was a commoner. This point is relevant for two reasons. First, commoners were the last of the English peasantry and their relationship to place is all but lost to their modern descendants. Second, whilst there are histories of peasantry from outside that community, there are very few records of peasantry from within it. "Clare saw the change from where commoners stood: he looked with them not at them."²⁰⁶

²⁰⁴ De Certeau, Michel *On the Practice of Everyday Life* (trans. Steven Rendall, Berkeley: University of California Press, 1984) 36 quoted in Ryan, above n 148, 6.

²⁰⁵ Hoskins, above n 135, 157.

²⁰⁶ Neeson, above n 122, 12.

To deny that much of his poetry reflects upon the social conditions of his time or is valuable source-material for historical study is perversion. It must be recalled that his is one of the very few voices of the rural poor of his age still to be heard.²⁰⁷

The geographical and social specificity of Clare's life as commoner is not transcended but is part of his very particular aesthetic form and style. Indeed, contemporary critics argue that Clare's work is uniquely valuable precisely because of its local and particular language, rhythm and content.

Clare's place in the tradition of English literature cannot be established by simple chronology or solely by reference to the leading writers of his age... in all his writing he achieves a voice that is unmistakably his own. A song by Clare published under an assumed name in a Victorian miscellany, cannot be confused with any other writer's work.²⁰⁸

Clare describes identification rather than alienation as the basis of people-place relationships. Many of his poems present this through intense sentiments of affection for place and lament of its transformation. His writing does not express a purely aesthetic appreciation of place. Raymond Williams juxtaposed the aesthetic and material realities of landscape poetry by remarking that Sidney's *Arcadia* "was written in a park which had been made by enclosing a whole village and evicting the tenants."²⁰⁹ Clare's own subjectivity seems drawn from or grounded in place as an ecological as well as economic or social materiality.

Although often discussed in reference to anti-enclosure discourse, Clare did not direct his work to the broader social politics of anti-enclosure discourse, rather he strongly opposed the enclosure of his local area and the means by which it proceeded. John Barrell argues that enclosure was not Clare's intellectual preoccupation, but part of his personal life about which he felt passionately.²¹⁰ Having said this, Barrell maintains that especially political poems such as *The Mores* (see Appendix 2) can only be understood in the context of enclosure.²¹¹ In this poem, Clare identifies freedom with open fields and identifies fences with control and discipline. "Unbounded freedom ruled the wandering scene / Nor fence of ownership crept in between." And later:

Fence now meets fence in owners little bounds
Of field and meadow large as garden grounds
In little parcels little minds to please
With men and flocks imprisoned ill at ease²¹²

²⁰⁷ Robinson and Powell, above n 197, xciii.

²⁰⁸ Ibid xv.

²⁰⁹ Quoted in Bate, above n 196, 18.

²¹⁰ See Barrell above n 4, 196 and also Robinson and Powell, above n 197, pxxii.

²¹¹ Barrell, above n 4, 143.

²¹² Robinson and Powell, above n 197, 167-169.

In the new order of enclosure, private landowners control the freedom of people and place:

Each little tyrants with his little sign
Shows where man claims earth glows no more divine
But paths to freedom and to childhood dear
A board sticks up to notice 'no road here'
And on the tree with ivy overhung
The hated sign by vulgar taste is hung
As tho the very birds should learn to know
When they go there they must no further go
This with the poor scared freedom bade goodbye
And much they feel it in the smothered sigh
And birds and trees and flowers without a name
All sighed when lawless laws enclosure came²¹³

Dawson, Robinson and Powell, in their Introduction to *A Champion for the Poor: Political Verse and Prose* insist that despite the prominence of Clare's attention to enclosure in his writing, his protest was neither abstract nor doctrinaire.

Clare's experience of these events is essentially local. What mattered to him was not so much the general problem of enclosure but the local enclosure of the fens; not the Game laws so much as the fate of local men caught poaching.²¹⁴

Barrell also observes that the intensely local focus of Clare's work is related to its characteristic sense of profound personal loss with regard to enclosure. Clare does not write of place generally or intellectually, rather he writes of Helpston "not as it is typical of other places, but as it is individual; and individual not because it is different, but because it was the only place he knew."²¹⁵ Knowing place is significant to Clare: his epistemology is very different to the categorical imperatives of the scientific and agricultural revolutions. His understanding of nature does not universalise nature into taxonomies, nor does it behold or appreciate place as a spectacle. Rather his is a knowledge *in* place. John Barrell notices in Clare's autobiography a description of the young Clare walking out of his parish and getting lost for which he uses the phrase "out of my knowledge." After a comparative study, Barrell argues that Clare's use of the phrase is different to the meaning in the *Oxford English Dictionary* that signifies being out of the place one knows. Clare uses the phrase to say that he was out of everything he knew, not just the physical area. Interestingly in the same passage, he presents knowledge as mutual between place and people rather than the exclusive domain of people: 'the flowers seemed to forget me'. The agency and subjectivity of place is

²¹³ From 'The Mores', *ibid.*

²¹⁴ Dawson, Robinson and Powell (eds) above n 179, xxviii.

strikingly different to its passivity and objectivity in the representations and philosophies of his contemporary, but better educated poets.

The localness of Clare's poetry was expressed also in his language.²¹⁶ Clare did not write in standardised English but in the local or regional accent of his home, Helpston Green. His concentration on place as local and particular was directly "opposed to the ideology of enclosure, which sought to de-localise, to take away the individuality of a place."²¹⁷ In the poem *Helpston Green*, Clare describes place with a familiarity that distinguishes it and perhaps disqualifies it from the conventions of the pastoral genre. It is emotional rather than rational, felt rather than reasoned. It is a personal, local account of the ancient common of his home. Clare's tone and use of metaphor when writing about enclosure sometimes express anger and disorientation. This poem however expresses sadness and loss in the language of grief and mourning. "Long after enclosure created compact farms, and renting an allotment had become almost impossible, labourers still felt a longing for land."²¹⁸ This description of land is not aesthetically descriptive, expressing an outsider's perspective, this description is personally descriptive, written with or from place. *Helpston Green* does not present a landscape - it presents a particular and loved local environment with which the narrator is connected. The poem seems closer to love poetry than to nature poetry. *Helpston Green* is a sick and dying loved one.

Helpston Green, like Swordy Well, was a place changed dramatically by enclosure and agricultural 'improvement'. Clare describes the fields as "injured" by the "tyrant's hand" who wields the "uplifted ax" that has, without "mercy" or "compassion" struck "a fatal blow" to "every tree" so that "Whole Woods beneath them bow'd." In addition to extensive tree felling, the improvers "stopt the winding runlets course / And flowery pastures ploughed" so that the topography of the land has completely altered. Clare remembers it vividly nonetheless.

²¹⁵ Barrell, above n 4, 120.

²¹⁶ See Harvey, A.D. *English Poetry in a Changing Society, 1780-1825* (London: Allison & Busby, 1980) who includes Clare in his account of Romantic poetry as an example of 'dialect forms'.

²¹⁷ Barrell, above n 4, 120.

²¹⁸ Neeson, above n 122, 329.

Where ere I muse along the plain
 And mark where once they grew
 Remembrance wakes her busy train
 And brings past scenes to view
 The well known brook the favourite tree
 In fancys eye appear
 And next that pleasant green I see
 That green forever dear

Despite his memory, Clare is nostalgic (literally, aching or longing for home) and dreads a time when memory itself diminishes and the place is permanently lost, or erased by agriculture. Significantly Clare's nostalgia does not disassociate the land of Helpston Green pre-enclosure from the placedness of people in that land. He laments the passing not of a scenery, or background to human activity, but the passing of a relationship between people and place.

Both milkmaids shouts and herdsman's call
 Have vanish'd with the green
 The king kups yellow shades and all
 Shall never more be seen
 For all that cropping that does grow
 Will so efface the scene
 That after many times will hardly know
 It ever was a green

Clare concludes the poem with his feeling of helplessness to arrest what seems to him the passing of Helpston Green. He invests in his writing his only hope of enduring resistance to enclosure and the paradigm of Nature/Culture.

Farwell delightful spot farwell
 Since every efforts vain
 All I can do is still to tell
 Of thy delightful plain
 But that proves short - increasing years
 That did my youth presage
 When every new years day appears
 Will mellow into age²¹⁹

Enclosure for John Clare was not the end of ownership of place but the end of mutual possession that brought personal loss as well as economic loss. His identification with place demonstrates a meaning of the word 'property' that resonates the original Greek meaning of the connection of the possession and the possessor as a relationship not of ownership but of identification. Clare "gained his identity through his bond with his native landscape and lost it in madness when he was displaced from that land."²²⁰ The value of Clare's writing is that it evidences not only a history of land pre-enclosure, but

²¹⁹ Clare, John 'Helpston Green' [c.1812] in Robinson, and Powell, above n 197, 62-64.

also a history of a relationship to the land not as-landscape. Clare describes land not as space but as place. His value of placed property remains radical to the paradigm emerging around him that dominates the contemporary discourse of property.

6. CONCLUSION

Displacement was the objective and effect of enclosure. An understanding of the immense geosocial significance of enclosure in the history of modern Anglo-Saxon culture sheds light on the ongoing necessity and cost of the separation of people and place in dominant forms of contemporary property law. The erection of boundaries and fences through hedges, the construction of roads between properties, altered the landscape physically. The exclusion of commoners from land, from which they previously obtained their means to life, altered the landscape politically. Finding themselves and their children landless, their villages moved and reorganised meant that rural and regional populations declined as urban populations increased. The direct dependence of human culture and income on land substantially diminished through the changes wrought by enclosure and by the 19th century less than half the English population derived income from land and farming. With more people living in urban centres and with rising poverty and crime, more people went to the new world and took their values and land use ideas with them. The reorganisation and disorganisation of agrarian modes of production was part of the same idea of place that brought colonisation.²²¹

Whence people and place were understood to be separable, rather than connected, in property relations, it was possible to "allow, encourage and force"²²² those dispossessed common populations, who lost their means of subsistence at home with enclosure to go to the colonies.²²³ Because the relationship to place was already severed, the expression of 'will' through labour was an expression *over* place rather than *from* it. The concept of possession had transformed from a possession without ownership *in place* to possession with ownership *over place*. This transformation has an unmediated effect on the land. Enclosure and colonisation are more than social events, they are ecological events. The paradigm constructed not only legal and social subjectivities, but also ecological

²²⁰ Bate, above n 196, 54.

²²¹ Thompson, above n 101, 164.

²²² Butlin, N.G. *Economics and the Dreamtime* (Cambridge: Cambridge University Press, 1993) 195.

²²³ Kerruish, above n 90.

subjectivities. The paradigm of modern property law was based on the alienability of quantified parcels of land rather than on its inalienable and specific qualities. Without place, this atopic idea of property was readily transported by its own process of transporting British populations across the world, imposing the paradigm here described onto other nations and into other lands and ecological worlds. The following chapter examines the imposition of the modern paradigm of property law onto Australian lands and nations with regard to the histories and subjectivities that it inscribed.

A COLONISING PARADIGM

CHAPTER THREE

Chapter Three

A COLONISING PARADIGM

The antipodes was all that the English made it out to be: the other, the subordinate, the bodily and vulgar; below the equator was below the belt. Europe was like the proverbial satyr, mind in England or on the continent, body and bodily functions elsewhere.¹

Since land formed the most valuable natural resource of a colony, the way in which the government permitted the public estate to be acquired and exploited by individuals materially influenced every aspect of economic and social development.²

1. INTRODUCTION: *BEARERS OF AN ANCIENT PAST?*

Until recently, conventional textbook definitions of Australian property law maintained that the importation of British law into Australian colonial jurisprudence, significantly the doctrines of tenures and estates in the case *Attorney-General v Brown*, evidenced the essentially British and feudal character of Australian property law. In the 1990s, economic and legal historians convincingly argued for the revision of this traditional narrative of Australian law that from the earliest days of colonisation, Australian property law was not only distinct from its imperial antecedent, but that "local land law had departed much further from its feudal origins than English land law had at that time."³ English land law had a complex and distinctive historical development that Australia never had. The historical development of colonial Australian land law was completely different to the development of English land law in that its system of

¹ Beilharz, Peter *Imagining the Antipodes: Culture, Theory and the Visual in the work of Bernard Smith* (Melbourne: Cambridge University Press, 1997) 40.

² Burroughs, Peter *Britain and Australia 1831-1855* (Oxford: Clarendon Press, 1967) 1.

³ Edgeworth, Brendan 'Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law Compared After *Mabo v. Queensland*' (1994) 23 *Anglo-American Law Review* 397: 403 quoted in Kerruish *Property and Equity* (unpublished lectures, Law School, Macquarie University, 1999).

property was developed predominantly by acts of (imperial and therefore foreign) government. Furthermore, the difference between the economic value of land of the two countries distinguished one from the other. The debate about the identity and definition of Australian property law asks "questions of nation and empire"⁴ with regard to the social relations and legal subjectivities that it constructs. I would like to extend the scope of that debate to include questions of material relations and ecological subjectivities, by which I mean questions of the adaptation and habitus of property law within the 'natural' or physical Australian environments. The extension of this debate is important because legal and cultural values of property are lived in a material sense, specifically through land use.

The usefulness of land was and remains a dominant value in the discourse of private property. The departure of Australian property law from English land law may well be understood in terms of the material difference between Australian land and English land and the way those differences were translated into the discourse of utility and resourcefulness. Such an elementary economic analysis of comparative land laws was articulated by Australian colonists in the eighteenth and nineteenth centuries, and is acknowledged by the revisionist historians. The difference between the lands of Australia and England seems clear, and it is easy enough to make the connection between this fact and the difference between the land laws of the two countries. But such an argument interprets local variations in agricultural practice and the legal instruments regulating those variations, as radically different land uses and land laws. On the contrary, the economy and discourse of property in colonial Australia turned on the same hinges that supported the economy and discourse of property in imperial England. The economy and discourse of private property, in which the land is infinitely exploited and its resources are accessed via the principles of sovereignty, exclusive possession and alienability, are common to both English and Australian land use and land law. Enclosed and cultivated land supporting agriculture and pastoralism are common to both countries. This particular form of land use requires particular land laws and encodes particular, instrumentalist values of land. It is true that these laws took a different form under the very different material conditions that distinguished Australia, but the chapter insists that the underlying philosophy and assumptions that led to these laws were the same.

⁴ Kerruish, above n 3.

Why has an analysis of the uncanny similarity of Australian and English land law never been written in terms of land use? How has it been elided in both conventional and revisionist accounts of the origins and development of Australian property law? I propose two reasons. First, the way in which Australian property law is said to be local is the degree to which it is different to English property law. In the context of this argument, the term 'local' is taken to be synonymous with 'not-English'. Thus, legal historians Andrew Buck, Brendan Edgeworth and Bruce Kercher describe the 'localness' of Australian property law in the context of an abstract legal identity. This version of Australian property law situates land within the political relationship between imperial sovereignty and colonial nationhood. Land is the metaphoric glue between law and national identity. The convincing arguments advanced by these theorists focus on the adaptation of colonial authorities to local circumstances, by which they mean the socio-political situations and conditions unique to the processes of colonisation such as government monopolies, pastoralism, 'lawlessness' and the 'nostalgic lure of British ghosts and shadows' in colonial jurisprudence. Their analyses conclude that Australian property law is local because they conceive land law as a species of law, not as a species of land, that is, as a Cultural rather than a Natural relation. Law is aligned with Culture, rather than Nature within the paradigm of Nature/Culture.⁵ Consequently, land law is presented as 'local' exclusively in cultural, or social terms. The relation between Australian property law and English property law determines the identity of Australian property law for both conventional and revisionist theorists. The revisionist theory that defines Australian property law as 'local' describes an antipodean relation, not a place.⁶ The antipodes, though commonly regarded as the British antipodes, Australasia, also describes a relation of opposition between two poles, or points.⁷ Buck, Edgeworth and Kercher define Australian property law in terms of a relation between two countries. Their analyses indicate the very abstractness of 'local' property law - the similarities of thought that in fact structured and gave rise to its specific differences.

Buck, Edgeworth and Kercher detach Australian property law from both the material conditions of its possibility and the bifurcated economy of Nature/Culture, that it protects because they focus their analyses on the varied aspects of the political identity of law. In this way, their account of a 'local' Australian property law obscures the

⁵ See a discussion of this paradigm in Chapter 2.

⁶ Beilharz, above n 1, 187.

⁷ *Macquarie Dictionary* 2nd ed., (McMahons Point, NSW: Macquarie Library, 1992).

remarkably non-local character of colonial concepts of property and land, and alien use and economy of natural resources. The concepts of property and of nature held by colonists were distinctly European, and specifically related to the English-speaking Enlightenment. To detach Australian property law from the economy and philosophy of the British Empire separates the regime of property from ongoing physical environmental change. This is problematic given that it was precisely such environmental change, conceived as 'improvement' that was rationalised as providing the legitimating basis of the claim of British sovereignty and full beneficial ownership of Australia against the existing Aboriginal nations in the first place. The claim that Australian property law is 'local' based solely on the socio-political context of colonialism repeats the idea that law is Cultural and land is Natural without acknowledging (i) the historical specificity of this dichotomous paradigm and (ii) its irreconcilability with the legal framework and regime of property of indigenous Australians.

The second reason that the origins of Australian property law have been described in abstract terms is because analyses are predominantly undertaken according to the paradigm of Nature/Culture according to which law is Cultural and therefore abstract, not material. The link between these realms, as discussed in the previous chapter, is the idea that human or Cultural agency in Nature creates entitlement to property. Recent revisions of the discourse of *terra nullius* and the recognition of native title in Australian law challenge both the connection of human agency to entitlement to property and more powerfully, the definition of human agency itself. Yet the paradigm of Nature/Culture remains unchallenged. It is a paradigm so fundamental to socio-economic values of property in the development of Australian property law that a materialist analysis of it undermines its ongoing legitimacy. The incorporation of the relationship between human agency and environmental change within an analysis of the development of Australian property law disrupts the discourse that supports it. *Terra nullius*, for example, is not a discourse of occupation. *Terra nullius* is a discourse of activity. The idea of *terra nullius* pivots on the relationship between two words: place and people. Whilst *Mabo* formally rejected the argument that indigenous Australians were *nullius*, the High Court did not reject the idea that entitlement to property is based on (a particular) relationship between people and place, indeed it "recognised" this very relationship as the exceptional basis of native title.

Australian property law is not feudal, but that does not mean it is local. Australian property law is better described as alien and maladapted. From the earliest days of colonisation, there was an incongruity between the ideology of property and its practicability in the material environment. In this sense, Australian property law could not be considered responsive or adaptive to the local environment. In another sense however, as local conditions rendered the imposition of an alien regime of property difficult or impossible, property law did affect changes to surmount these difficulties. The changes, however, were seen by some even then and increasingly today, as unsustainable changes. Property law in Australia changed the land more than it changed law. It is important to measure the adaptation or local change of Australian property law not only according to other laws, but also in relation to the place of which it is said to be local.

In biological terms, actual or successful adaptation is the "alteration in the structure or function of organisms which enables them to survive and multiply in a changed environment."⁸ Within the Nature/Culture paradigm it is nonsense to speak of law adapting to its environment because being cultured, Law transcends material condition and constraint. Kuhn would say however that any paradigm works only on the basis that it is functional. The paradigm of property law depends on its ability it provide a viable and meaningful regulation of the economy of humans and the 'natural world'.⁹ Law, like science functions "so long as the tools a paradigm supplies continue to prove capable of solving the problems it defines, science moves fastest and penetrates most deeply through confidence employment of those tools."¹⁰ The ability of Australian property law to "solve the problems it defines" (disputes defined according to the principles of private property) however is increasingly challenged by disputes that question the validity and limits of the definition of property itself such as native title claims, and by the increasing environmental critique and restriction of private property. The inability of Australian property law to resolve the local and particular disputes and problems that it, in part created, and can no longer contain, evidence the maladaptation of colonial property law to the Australian lands and nations it 'possesses.' As Kuhn

⁸ Ibid.

⁹ I use the expression 'natural world' reductively to underline the point that the human economy is conceived anthropocentrically, reducing all non-human things to a single category of 'nature'.

¹⁰ Kuhn, Thomas *The Structure of Scientific Revolutions* 3rd ed., (Chicago: Chicago University Press, 1996) 76.

argued, "the significance of crises is the indication they provide that an occasion for retooling has arrived."¹¹

The philosophy of the English Enlightenment and the political economy of the British Empire were transported to Australia in the eighteenth century. The ideas and experiences of private property in seventeenth and eighteenth century Britain (described in the previous chapter) profoundly shaped the regime of property in Australia and its regulation. "As in Britain of the eighteenth and early nineteenth century, the most tangible manifestation of progress was what that age terms 'improvement' of the land."¹² The marriage of private property rights to the enlightenment ideals of progress and improvement in the development of Australian property law was demonstrably alien. Agriculture and the attendant practices of land clearing, tree felling, ring barking, and later irrigation evidenced the colonists' perception of the inadequacy of existing resources, and of the availability of those resources for appropriation within their imported economy. European colonisers did not adapt to a land believed to be hitherto a wasteland, rather they imposed their economy onto it. Colonial literature about land juxtaposes the ideas of improvement and waste according to English experiences of private property and its fruits. Theories of improvement and waste were central to the proposal and carriage of important legislation affecting land regulating sovereignty, land grants, and pastoral squatting. British sovereignty was asserted on the basis that the indigenous peoples had not improved the land and were therefore despite occupancy, undeserving of proprietorship. Land was granted in vast tracks to individuals on the condition that it be improved. Finally the legitimacy of squatting leasehold was debated in terms of the economic benefit they brought to the empire and to the colony in the same vocabulary of improvement and progress.

The manifestations of these ideals encoded in Australian land law certainly assumed a specific local character but that does not mean that they were derived from specific and local adaptations to the land and to the law of the lands' owners. Environmental changes in Australia wrought by colonial land-usage evidence the successful importation of an alien regime of property. These maladapted practices functioned within an imported economy in which the cultural value of property was the protection of individual wealth and liberty delivered by the principles of exclusive possession and alienation. Were the

¹¹ Ibid.

¹² Gascoigne, John *The Enlightenment and the Origins of European Australia* (Cambridge: Cambridge University Press, 2002) 69.

colonisers "bearers of an ancient past"¹³ or makers of a new world order? This chapter considers the origins of Australian property relations with regard to questions of empire and nation as well as to the dichotomous paradigm of Nature/Culture central to the development of private property in seventeenth century Britain. The logic described in the previous chapter that separates the world into the distinct categories of Nature and Culture was the particular and indeed dominant paradigm of the colonisers of Australia, not of its indigenous peoples. Its attendant themes of Christianity, scientific rationalism and discovery, agriculture and improvement accompanied the Europeans on their voyage to Australia. The dispossession and diaspora of what became to Australian history a convict labour force meant that from the outset, English men and women carried across the world the knowledge and cultural behaviours of English property law and the political economy it served. Many convicts sent to Australia were transported as convicted thieves, for crimes against property. Their lives, as criminals, were determined by English property law. Their experience of private and exclusive ownership and the cultural value of property within a market economy of capital were gained by their transgression of property laws. The conceptual apparatus of private property within Australian property law is implicated in historically remarkable and ongoing environmental change. Questions of the definition of Australian property law are "questions of foundations and origins, which, like traditions, are constructed in ideologies, mythologies and various other discourses."¹⁴ Answering these questions helps us understand the relationship between land law and land use and perhaps suggest ways in which property law can be rethought to contribute to a better-adapted land ethic.

This chapter is structured into three sections. *Section 2: Defining Australian Property Law as Local* presents and agrees with the arguments of revisionist legal historians that Australian property law is not feudal or English, but stops short of linking this argument to the conclusion that Australian property law is 'local'. In doing so, the section highlights the ways in which their arguments focus on the abstract and political aspects of property law in the context of an antipodean relation. The section begins by setting out the debate about the definition of Australian property law and the terms of definition, it then discusses the much-theorised case *Attorney-General v Brown*, before

¹³ Edgeworth, above n 3, 407.

¹⁴ Kerruish, above n 3.

working through the arguments of three different property theorists, Buck, Edgeworth and Kerruish.

Section 3: Defining Australian Property Law as Alien argues that the historical development of Australian property law was an alien paradigm of people-place relations. The key events in colonial land law, land grants and pastoral squatting, required the acceptance and deployment of the ideologies of empire and enlightenment as well as adherence to the core principles of private property. The section thus weaves its discussion of land grants and pastoral squatting through an analysis of the inter-related concepts of *terra nullius*, progress, waste, improvement, labour, alienability, sovereignty, and exclusive possession.

Having established the central importance of foundational ideologies to the historical development of property law in Australia, *Section 4: Defining Australian Property Law as Maladapted* concludes the chapter with a discussion of the material application and consequences of these alien concepts and ideology to Australian lands. The attitudes of application and the physical consequences indicate that the colonists did not perceive themselves as newcomers or strangers to the land, rather they perceived the land as strange. The process of aligning the known and the strange, were considered not in terms of cultural adaptation, but natural adaptation. In other words, the colonists attempted to make the land, as nature, adapt to them, rather than adapt their culture to the land. Instances of starvation, the importation of vital supplies and extensive degradation of land and waterways and the extinction of native flora and fauna suggest that the European colonists and the paradigm of their land law were alien and strange. The failure of colonists to successfully adapt to the land leads to the conclusion that the regime of property in colonial Australia cannot be regarded as local or even as Australian, in any physical, placed sense.

2. DEFINING AUSTRALIAN PROPERTY LAW AS LOCAL

Real property is in New South Wales the most illusory of all possessions.¹⁵

The debate and the terms of definition

The scholarly debate about the definition and identity of Australian property law as 'local' traditionally hinges on the "question of the extent to which it is historically defensible to claim that 'at the birth of the colony the ghost of feudalism hovered over the scene.'"¹⁶ The idea that from the earliest days of colonisation Australian property law was feudal in nature connects it to English property law, and therefore the debate about the definition of Australian property law is also a debate about legal identity in the context of nation and empire. The degree to which colonial property law related to English law was, from the earliest contests over land to the most recent scholarship about Australian property law, a critical question. Jurists and theorists alike have devoted substantial research and reflection to this question over a long time.

In 1847, this question merited almost the entire attention of the Supreme Court of NSW in the case *Attorney-General v Brown*.¹⁷ The case established that as a matter of law the feudal doctrine of tenure applied in Australia which meant that "when the British Crown acquired sovereignty over Australia it also acquired full beneficial ownership - title and possession - of the entire land mass."¹⁸ The principle of *Attorney-General v Brown* was upheld in 1913,¹⁹ 1959²⁰, and 1971.²¹ In 1894, property law textbook writers claimed that "the law of real property in this colony is the English law of real property with certain omissions, additions and variations."²² Yet then in 1905 the same authors wrote that "the law of real property now in force here, and the law on the same subject in force

¹⁵ *The Atlas*, 22 March, 1845. Quoted in Buck, Andrew 'Torrens Title, Intestate Estates and the Origins of Australian Property Law' (1996) 4 *Australian Property Law Journal* 97.

¹⁶ Kerruish, quoting Hargreaves, A D and Helmore, B A *An Introduction to the Principles of Land Law* (Sydney: The Law Book Company, 1963) 18, quoted in Buck, Andrew 'Attorney-General v Brown and the Development of Property Law in Australia' (1994) 2 *Australian Property Law Journal* 128. It is interesting to note that this exact line is repeated, without acknowledgment, in the popular property law textbook by Peter Butt *Land Law* 2nd ed., (Sydney: Law Book Company, 1988) 43.

¹⁷ 1 Legge 313.

¹⁸ Kerruish, above n 3.

¹⁹ *Williams v Attorney-General (NSW)* (1913) 16 CLR 404 at 439.

²⁰ *Randwick Municipal Council v Rutledge* (1959) 102 CLR 54 at 71.

²¹ *Milirrupum v Nabalco Pty Ltd* (1971) 17 FLR 141 at 245-247.

²² Millard, G W *An Appendix to William's Law of Real Property for the use of students in New South Wales* 1894 quoted in Buck, 1996, above n 15, 90.

in England, present more numerous and more striking differences and divergences than are found in any other branch of equal importance."²³ Nevertheless, the question of the relation of Australian property law to English property law remained and in 1937 the High Court considered as "relevant binding principles" the law of the courts of equity in British jurisdictions²⁴ in the landmark *Victoria Park Racing Case*.²⁵ Edgeworth argues that this is especially remarkable given that the case involved "Australian parties in dispute over rights to an Australian spectacle before the highest Australian court."²⁶ He concludes that the case showed "how Australian courts saw themselves overwhelmingly as bearers of a tradition forged elsewhere. In this way Australian jurists defined their legal subjectivity and nationality as essentially English."²⁷ In tandem with these definitive cases, conventional Australian property law textbooks continued this representation of the Englishness of Australian land law. In 1984 the authors of the textbook book entitled *Understanding Land Law* wrote, "the existing law of real property is feudal."²⁸ In the bicentenary of NSW Peter Butt, author of *Land Law*, wrote:

It may confidently be predicted that, although no longer bound to do so, Australian courts will continue to pay a healthy respect to relevant decisions of English courts, including decisions in the area of land law, thus preserving to a considerable degree uniformity between the land law of the two countries.²⁹

In 1991 this approach was rejected by Bradbrook, MacCallum and Moore in their property law textbook arguing that "the most obvious objection to this proposition is that most land in Australia is held under the Torrens system and that system is unique to the country."³⁰ Their thesis that Australian property law was more Australian than English in nature however is not based on the irrelevance of the feudal doctrine of tenures and estates. Their semi-critical claim that Australian property law is identifiably Australian may be attributed to oversight because, as Michael Stuckey argued, until the High Court explicitly addressed the significance of the feudal doctrines in *Mabo* they were "long thought to be little more than historical driftwood."³¹

²³ Millard and Millard, *The Law of Real Property in New South Wales* (Sydney: Law Book Company, 1905) quoted in Edgeworth, above n 3, 397.

²⁴ Edgeworth, above n 3, 423.

²⁵ *Victoria Park Racing and Recreation Grounds Co. Ltd v Taylor* (1937) 58 CLR 479.

²⁶ *Ibid.*

²⁷ Edgeworth, above n 3, 424.

²⁸ Oxley-Oxland, J and Stein, R *Understanding Land Law* (Sydney: Law Book Co. Ltd, 1984) quoted in Buck, 1996, above n 15, 90.

²⁹ Butt, above n 16, 6.

³⁰ Bradbrook, AJ, MacCallum SV and Moore, AP *Australian Real Property Law* (Sydney: Law Book Co Ltd, 1991) quoted in Buck, 1996, above n 15, 90.

³¹ Stuckey, Michael and Kelly, Gerard *Property Law* (Sydney: Butterworths, 2000) 2.

In 1992, the High Court revisited the question of the legal identity of Australian property law from the perspective of native title in *Mabo v Queensland (No.2)*³² directly via the relevance of feudal doctrine to contemporary Australian property law. Despite overturning the principle established in *Attorney-General v Brown* and the cases that upheld it for 150 years subsequently, the Court refused to "go one step further and unequivocally reject the doctrine of tenure."³³ Brennan J (with whom Mason, CJ and McHugh, J concurred) claimed that the doctrine of tenure was so fundamental to Australian property law that "it could not be overturned without fracturing the skeleton which gives our land law its shape and consistency."³⁴ Indeed, Brennan's argument in defence of native title is pointedly based on an interpretation of the principles of feudal estates applicable in Australia.

In 1994 property theorists Brendan Edgeworth and Andrew Buck individually published articles specifically addressing the prevalence and relevance of feudal doctrine to the development of property law in Australia. Their rigorous and revisionist scholarship argues against the conventional view that Australian property law was feudal and therefore English from the earliest days of colonisation. They present, in different ways, the "specificity"³⁵ of Australian property law and conclude that this specificity "had departed much further than its English origins had at that time."³⁶ These theorists considered the distinction between English and Australian property law not only in terms of their distinctive legal histories, as had been partially acknowledged by several commentators on account of the Australian systems of land grants, leases, selection and title registration. This "younger, revisionist generation"³⁷ of legal scholars considered also the distinction between English and Australian legal identities in terms of the rationale for importing the feudal doctrine into Australian property law in the first place. For Buck, the rationale for adopting the doctrines could be understood in terms of the vastly different political and economic values of land in Australia and England, particularly with regard to the importance of the pastoral and mining industries to the colonial regulation of land and land use. "'Property' in English law, was associated with property in land. But 'property' in New South Wales, in the context of

³² *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

³³ Edgeworth, above n 3, 418.

³⁴ *Mabo* (Brennan J) above, n 32.

³⁵ Kerruish, above n 3.

³⁶ Edgeworth, above n 3, 403.

³⁷ Kerruish, above n 3.

law, began to be seen in terms other than, or as well as, land."³⁸ For Edgeworth, the rationale for adopting the feudal doctrines could be understood as part of the particular attempt of Australian judges and jurists to "emphasise their continuity and homology" with English property law. "They saw themselves as bearers of an ancient past rather than creators of a new present."³⁹ Indeed, he argues

only an understanding of the sense of self-identity of Australian judges and jurists can explain why the centrality of the traditionally-defined doctrine of tenure has been, at least until the *Mabo* decision, the prevailing orthodoxy in Australian jurisdictions.⁴⁰

By 1996 in *Wik Peoples v State of Queensland*⁴¹, the majority of the High Court came to a conclusion that sustained Edgeworth's thesis that:

the foundational concept of tenure as understood and defined in English land law was inappropriate and inadequate to describe the legal nature of landholding in all Australian jurisdictions from the earliest days of settlement.⁴²

The majority in this case claimed that land tenure in Australia is determined more by statute law than by English common law, yet they did not disavow the importance of the doctrine altogether. The minority insisted that the doctrine of tenures and estates is fundamental to Australian property law. In 1998, the question of the significance of the doctrine of tenures to Australian property law again dominated debate in the High Court case *Fejo (on behalf of the Larrakia People) v Northern Territory of Australia*.⁴³

In 1999, legal theorists questioned the extent to which *Mabo* had actually distanced Australian property law from feudalism, claiming that feudalism was indeed reimposed by the *Mabo* decision.⁴⁴ In 2001 Andrew Buck repeated his earlier suggestion that the definition of Australian property law be undertaken by an examination of "the law and concepts of property in relation to the transition from feudalism to capitalism."⁴⁵ Such examination he argues should conduct a comparative assessment of "related disputes

³⁸ Buck, 1994, above n 16, 136.

³⁹ Edgeworth, above n 3, 407.

⁴⁰ Edgeworth, above n 3, 399.

⁴¹ (1996) 187 CLR 1.

⁴² Edgeworth, above n 3, 398.

⁴³ (1998) 156 ALR 721.

⁴⁴ Grattan, S and McNamara L 'The Common Law Construct of Native Title: A 'refeudalisation' of Australian Land Law' (1999) 8 *Griffith Law Review* 50-85.

⁴⁵ First discussed in Buck, Andrew 'Property Law and the Origins of Australian Egalitarianism' (1995) 1 *Australian Journal of Legal History* 148-151, and revisited in Buck, Andrew "Strangers in their own land": Capitalism, Dispossession and the Law' in Buck, McLaren and Wright (eds) *Land and Freedom: Law, Property Rights and the British Diaspora* (Aldershot: Ashgate, 2001) 42.

over property occurring at the same time" i.e. a comparison of English case law with the authoritative Australian case, *Attorney-General v Brown*.

Attorney-General v Brown

In September 1844, James Brown leased sixty acres of land near Newcastle from Arthur Dumaresq who was granted the land by the Crown in 1840. Brown mined coal from the land as his own property. The Crown brought an action against Brown for intrusion on the basis that the working of coalmines was contrary to the terms of the original land grant. The writ issued by the Attorney-General to Brown in 1845 informed him that "the coalmines and veins of coal were in the hands and possession of Our Said Lady the Queen in right of her Crown" and that his mining activity was "contriving and fraudulently intending the disinherision of Our Said Lady the Queen."⁴⁶

The counsel for Brown, Richard Windeyer argued that sovereignty (dominium) and property (possession) were separate concepts, which was a legally correct argument in both England and Australia at the time.⁴⁷ Thus whilst "the Queen might come in and take coal whenever she saw fit" the law of property and the terms of the land grant "did not prevent the grantee" (or in this case the lessee) "from taking it also."⁴⁸ Windeyer's second argument was that

the Australian Agricultural Company were evidently the instigators of this proceeding, and had been the means of setting the law's officers of the Crown in motion, with the view of getting rid of a rival in the coal trade and thus supporting a monopoly.⁴⁹

In his directions to the jury of four, Justice Dickinson argued against Windeyer's first argument, and stated that "an act of intrusion has been committed."⁵⁰ Against Windeyer's second argument, Dickinson J remarked that

however repugnant monopolies might be to that of liberty, they had nothing to do with this inquiry... the sole question for determination was whether or

⁴⁶ Quoted in Buck 1994, n 16, 129-130.

⁴⁷ Kerruish argues that sovereignty and property were separate concepts in England at this time but that this legally correct argument failed for two reasons. The first reason, explicit and technical, was that property in New South Wales was different to property in England, being directly granted by the Crown. The second reason, implicit and political was that property law was used to "underwrite the power of the government to control the economy of the colony." Edgeworth also attributes the failure of Brown's counsel's argument to the Court's "enlarged formulation of the doctrine" and remarks that the judgment was "inappropriate and inadequate" when measured against the law of the time. Above n 3, 398, 407, 410-411.

⁴⁸ Windeyer quoted in Buck, 1994, above n 16, 130.

⁴⁹ Quoted in Buck, *ibid* 132.

⁵⁰ *Ibid* 130.

*not there had been an intrusion by the defendant upon the property of Her Majesty.*⁵¹

Windeyer's arguments failed and Brown lost.

Brown appealed to the Supreme Court of New South Wales, consisting of three judges including Dickinson J, on the grounds that "His Honour the Judge misdirected the jury by telling them that on the arrival of the first fleet in the colony the Crown of England had seisin of the whole of the island."⁵² In February 1847, the Supreme Court decided against Brown and upheld the Crown's conjoined sovereignty and possession of the land in question. Chief Justice Stephen stated that:

We are of the opinion that the waste lands of this colony are, and ever have been, from the time of its first settlement in 1788, in the Crown; that they are, and ever have been, from that date, without office found, in the Sovereign's possession.⁵³

The issue of title in this case was resolved by recourse to the idea of sovereignty and specifically the feudal theory that all land is vested in the Crown. The idea of property the case expresses is feudal tenure: that private citizens are related to the Crown by their land holding and that their land holding is whatever the Sovereign says it is. Feudal tenure is remote from modern ideas of property and prescribes not a relation to land, but a social relation of hierarchy. In this way, feudal tenure is also remote from the ideas of communal property and land stewardship that local or indigenous Australian law maintained.

Conventional theorists have used the applicability of the doctrines to identify Australian property law as essentially English. Revisionist theorists have insisted that it was not until 1847, when the case handed down its judgment that this feudal 'ghost' was imported into Australia and then only "for very non-feudal reasons."⁵⁴ They conclude that Australian property law was and remains essentially local.

Andrew Buck

Breaking with traditional scholarship and jurisprudence, Buck presents *Attorney-General v Brown* as a case about the power of the government to control the economy of the

⁵¹ Ibid 132.

⁵² Ibid 133.

⁵³ Ibid 135.

colony rather than as a case about feudal doctrines. In 1994, he argued that the case evidenced the issue of monopoly rather than the issue of intrusion or trespass. He concluded that the significance of the case is not that the Court observed the existing applicability of feudal doctrine of tenures and estates, but that the Court introduced the feudal doctrine. The reason for the introduction of the 'feudal ghost' he suggests was the socio-political context specific to colonial New South Wales in the 1840s. Buck's point is that the feudal doctrines and the legacy of English law in the development of real property law in Australia are overstated.⁵⁵ In addition to a detailed account of the case, its factual background and central legal arguments, Buck situates the entire dispute (whether Brown is entitled to mine on the land he leased) within the context of related legal instruments and social debate. Important property legislation such as the *Liens on Wool Act* and contemporaneous debate about the value of property offer insights into what Buck calls "the relationship between land and law at the time."⁵⁶ In particular, he stresses that "the social, economic context of colonial New South Wales was substantively different from its metropolitan parent." The value of land, he then argues, is thus also and necessarily substantively different between the two countries. His emphasis is on the departure of colonial Australian property law from English land law and his conclusion is that despite appearances, Australian property law was from the outset a local creature responsive to local contexts.

In 1996, Buck approaches the identity of Australian property law from another perspective: "Torrens Title, Intestate Estates and the Origins of Australian Property Law."⁵⁷ He asks his readers "does Australian property law exist?" The article agrees with Millard and Hogg that Australian law is different to English law by virtue of its distinctive legislative framework: *Real Estate of Intestates Distribution Act* of 1862 (Lang's Act) and the *Real Property Act* 1862 that introduced the Torrens system of title registration. Indeed, he acknowledges that

it is tempting to conclude, therefore, as the writers of many legal texts have done, that the extent to which property law in Australia exhibits characteristics which are recognisably Australian post-dates the introduction of the registration of title.⁵⁸

⁵⁴ Kerruish, above n 3.

⁵⁵ Ibid 129.

⁵⁶ Ibid 129.

⁵⁷ Buck, 1996, above n 15, 89.

⁵⁸ Ibid 98.

However, Buck argues, the differences emerged much earlier than 1862. He demonstrates that these legislative changes "did not occur in a vacuum, but rather in a context of prior legal developments and shifting attitudes regarding the applicability of English law to Australian conditions."⁵⁹ The answer to his original question - does a recognisably Australian property law exist - is yes and that its origins are "older than has been supposed."⁶⁰ This article extends Buck's point in 1994 that Australian property law is not English by applying the argument he made about case law to statute law, and by suggesting that the socio-historical context of the development of the legislation warrants local identification.

Significantly, the argument that Australian property law is local is diminished by the consideration of the property law and property rights of indigenous Australians. Indeed, Buck's most recent contribution to the debate about the definition and identity of Australian property law retreats from the idea of its localness precisely because this previously excluded consideration is introduced. After a comparative analysis of the property regimes of the colonists and the indigenous Australians, Buck suggests that Australian property law is not local because it made the local or indigenous peoples "strangers in their own land."⁶¹ This re-revised position situates *Attorney-General v Brown* in the context of contemporaneous case law in England, particular the famous gleaning case *Steel v Houghton* (1788).⁶² Reversing his previous positions, Buck asks the reader "what do these two cases have in common?"⁶³ He argues that both cases articulate an idea of property as a commodity, evidencing an economy of capital.⁶⁴ Both cases worked against the concept of communal property demonstrated by the indigenous landowners of Australia and the gleaners in England. *Attorney-General v Brown* he says was not a case between competing concepts of property but between competing interests in property within the colonial society. "Within colonial society, disputes over property were, to a large extent, disputes over access held by competing parties now totally committed to capitalistic definitions of property."⁶⁵ Buck does not explicitly suggest that Australian property law is non-local, nor does he retract his previous position on the question. Yet by "draw[ing] an analogy between the process of dispossession of the aboriginal inhabitants of Australia... and the dispossession of the peasantry of

⁵⁹ Ibid 98.

⁶⁰ Ibid 98.

⁶¹ Buck, 2001, above n 45.

⁶² 1 BH. H. 51, 126 ER 32.

⁶³ Buck, 2001, above n 45, 42.

⁶⁴ Ibid, 42 and 50-53.

England"⁶⁶ in *Attorney-General v Brown and Steel v Houghton* respectively, he effectively points to the way in which Australian property law, from the outset, was alien. Rather than situate this analogy within the context of difference between the Aboriginal Nations and the British Empire, thus challenging both the sovereignty and the national identity of Australian property law, Buck elides the entire question by situating the analogy within the context of difference between communal and capital economies. As important as this context is, it retreats from explicating how it is possible to define indigenous Australians as "strangers in their own land" within a 'local' Australian land law. Buck separates his comparison of indigenous and colonist regimes of property from considerations of how property could be identifiably 'local' and in so doing leaves open the question of the identity of Australian property law. The conclusions of both Buck's arguments though superficially opposite are mutually conditioned. The identification of property law as local or "recognisably Australian" depends not only on its divergence from imperial counterpart. The localness of Australian property law depends on the extent to which the term 'local' describes the adaptation or reconciliation of an alien economy with the economy of indigenous Australian peoples and lands.

Brendan Edgeworth

Edgeworth argues that the doctrine of feudal tenure "was inappropriate and inadequate to describe the legal nature of landholding in all Australian jurisdictions from the earliest days of settlement."⁶⁷ His research contrasts feudal tenure to allodial forms of property and he argues that colonial Australian property law was allodial from the outset. Feudal tenure bound the tenant by obligations of service to the landlord. Servitude lay at the heart of the system of tenure with its essentially hierarchical structure whereas land held allodially was owned independently without obligation to an overlord.⁶⁸ Importantly, land owned allodially could be alienated and could exclude others.

The connotation of allodialism, therefore, as republican freedom with rights to exclude as its central feature, while tenure with its pattern of interlocking inclusive rights and obligations symbolised monarchical despotism.⁶⁹

⁶⁵ Ibid 50.

⁶⁶ Ibid 54.

⁶⁷ Edgeworth, above n 3, 398.

⁶⁸ Ibid 399.

⁶⁹ Ibid 399-400.

The alienation of land by grant and statutory regulation in Australian property law he argues "point distinctly to the gradual appearance of allodialism."⁷⁰

Edgeworth argues that the conclusion of Chief Justice Stephen in *Attorney-General v Brown* is inconsistent not only with colonial land law at the time and the evidence presented in the case, but also with "features of local landholding that are actually identified in the judgment."⁷¹ Edgeworth argues that Stephen CJ presented an "enlarged formulation"⁷² of the feudal doctrine and redefined its terms. According to the doctrine of tenure in England, the overlord owned the rights to the services of the tenant. These rights were not transferable independently of the land itself. Stephen CJ argued in *Attorney-General v Brown* that the Crown owned the rights to the coal as part of the land, severable from the land, as a corporeal hereditament.⁷³ Edgeworth notes that if this were so, and the form of landholding conveyed by Crown grants in colonial New South Wales reserved to the Crown the ownership of the coal, then is "fundamentally at odds with the system of tenure."⁷⁴

Edgeworth does not attribute Stephen's reworking of the doctrine of tenure to obtuseness but rather to politics. He argues that Stephen CJ was one of many Australian jurists who translated their sense of Englishness into the law, "seeing the present as the final or most recent manifestation of that ancient tradition."⁷⁵ For Edgeworth, *Attorney-General v Brown* demonstrates the way in which Australian courts tended "to fit the square peg of local land law into the round hole of English common law."⁷⁶ The political motivation of such efforts Edgeworth insists was to legitimise local land law against the absence of local authority. The authority of colonial New South Wales, being always and already vested in sovereignty of Great Britain, could never inspire the confidence of colonial jurists to respond to local situations independently of English law and custom. To strengthen his point, Edgeworth compares the Australian jurists to their American counterparts whom "with their new found political independence, led property lawyers to join the republican political theorists in proclaiming the feudal origins of land law irrelevant."⁷⁷ By acknowledging that "feudal doctrinal narrative had outlived its

⁷⁰ Ibid 406.

⁷¹ Ibid 407.

⁷² Ibid 411.

⁷³ Ibid 409.

⁷⁴ Ibid 410.

⁷⁵ Ibid 424.

⁷⁶ Ibid 398.

⁷⁷ Ibid 402.

usefulness," American colonists could make two claims. Firstly that American property law had unequivocally departed from English land law, and secondly that the authority of the local law was precisely its indigeneity.

In claiming that American land law bore the stamp of allodialism, Adams and Jefferson were basically claiming not only that the indigenous model was very different from the English prototype, but also that it had been created locally: it was seen as a product of the colonists' ingenuity.⁷⁸

Edgeworth explicitly links the identification of property law as local to the extent to which that law was colonial, colonising, republican or reconciliatory. Nevertheless he does not take into account the materiality of legal discourse and so his claim that Australian property law was local remains a claim of abstract political identity. His central point, that property in Australia was allodial not tenurial and therefore neither feudal nor English reinforces the traditional terms of the debate that Australian property law is defined by reference to its proximity to English land law.

Valerie Kerruish

Kerruish argued that *Attorney-General v Brown* was a dispute between colonial interests in property: between an individual colonist and a colonial government. The case ignored completely the interests of Aboriginal nations as though they did not exist. She agrees with Buck and with Henry Reynolds to the extent that land law was deployed instrumentally to underwrite the interests of various colonists, including the government in the case of *Attorney-General v Brown*. Unlike the delivery of conventional property law courses (see Chapter 5: Pedagogy and Practice), her lectures begin with questions of the construction of national and individual identity in property law en route to an understanding of the political economy of property law. She disagrees however with Edgeworth's argument that "only an understanding of the sense of self-identity of Australian judges and jurists can explain why the centrality of the traditionally defined doctrine of tenures has been the prevailing orthodoxy in the Australian jurisdictions." She argues that it was and is part of the political economy of ongoing colonialism. The aspects of power and authority raised by the colonial regulation of property are implicated in this ongoing colonialism. "They are questions of foundations and origins, which, like traditions, are constructed in ideologies, mythologies and various other discourses." Kerruish consistently links definitions of

⁷⁸ Ibid 402.

Australian property law to the law and economy of Aboriginal nations. Thus whilst her theory examines the definition of Australian property law in terms of political identity, because she conceives colonisation principally as the process of invasion and appropriation, her frame of reference extends to include its material or geo-political effects. Kerruish presents property law in terms of material appropriation and possession rather than in terms of doctrinal traditions and legal essence. Her analysis is thus partly a materialist analysis. It refuses to define Australian property law purely in terms of national identity, between English and Australian land laws. It does however connect national identity to property by defining Australian identity as a dispute between Aboriginal Nations and colonists.

3. DEFINING AUSTRALIAN PROPERTY LAW AS ALIEN

The concept of exclusive property in land as a norm to which other practices must be adjusted, was now extending across the whole globe, like a coinage reducing all things to a common measure.⁷⁹

Although conventional definitions of Australian property law repeat the idea that it is essentially English because the feudal doctrine of tenures and estates was and remains fundamentally significant to Australian property law, a brief examination of the annexation, distribution and evaluation of Australian lands from the outset of colonisation reveal a different story. The long and complex historical development of property law in England was unique to England. It could neither be preserved and repeated against the institutionalisation of English capitalism, nor applied by an Imperial government to its penal colony. Instead, the regulation of land use and proprietorship assumed a specifically and necessarily colonial character. The colony was never intended to be foreign to England and her interests but rather expressed the "interplay between the demands of imperial policies and the response of colonial conditions."⁸⁰

It is precisely the 'response' or adaptation of property law to 'colonial conditions' that revisionist theorists argue defines Australian property law as local. This section argues however that local responses are not the same as local origins and that the localness of

⁷⁹ Thompson, E.P. *Customs in Common* (London: Merlin Press, 1991) 164.

⁸⁰ Burroughs, above n 2, 1.

property law in Australia is limited to a comparative relation to English property law. In defining Australian property law in terms of an abstract antipodean relation, the materiality or practice of land law is overlooked and in the process, a partial conclusion emerges. Australian property law is not English property law. Yet despite the fact that Australian property law, from the earliest days of colonisation, differed from English property law in significant ways, the ideological foundations of Australian property law and its material consequences were far from indigenous or local.

The concepts of sovereignty, exclusive possession, alienability and labour that form the basis of private property law were transported from Europe to Australia via two inter-related discourses, that may be regarded as the products of English Enlightenment: *terra nullius* and improvement theory. These discourses largely determined the development of Australian property law and institutionalised the paradigm of Nature/Culture (discussed in the previous chapter). Both discourses applied in Australia demonstrated a striking lack of a sense of locality and place, not least a sense of its own local specificity. In place of a sense of the particularities and diversities of place, the discourses of *terra nullius* and improvement articulated the relation between people and place as universal and atopic. The attachment of the idea of universalism to the concepts of sovereignty, exclusive possession and alienability that characterise both the modern British nation and the modern private proprietor locate Australian property law within the twin ideologies of Enlightenment and Empire. It is in this way that Australian property law may be defined as alien.

The Discourse of Terra Nullius

The primary basis on which Australian lands became the property of European colonists was the assertion of British sovereignty and the dispossession of the original owners of those lands. The discourse of *terra nullius* was fundamental to that process and its logic and language are important examples of the alien ideological foundations of Australian property law.

Australia was never considered a *terra nullius* in the sense of being void of people. It was the interaction between the land and the people, an economy, that made the continent a wasteland both available and in need of improvement. *Terra nullius* was the language of the narrative of the spread of benign empire of property. It was a mythology that

translated conquest, capitalism and imperial expansion into improvement and progress - the twin goals of Enlightenment. "The cause of improvement and that of empire were closely intertwined."⁸¹ The expression *terra nullius* therefore better described European lands and peoples than Australian lands and peoples.

The assumption of *terra nullius* formed "part of the mental furniture of the founders of New South Wales."⁸² The phrase signified unimproved land that could rightfully belong to no one until, as Locke had said, someone "removes it out of the State that Nature hath provided...[and] mixed his Labour with, and joyned to it something that is his own, and thereby makes it his Property."⁸³ As discussed in the previous chapter, private property was considered so important that Locke and Smith had argued that the primary function of government was to protect the property of private individuals. Because "political power and property were so closely intertwined" in the origins of Australian property law, it is necessary to ask, despite claims of the High Court, to what extent they remain so. How defensible is it to say that the discourse of *terra nullius* and its ideological components are irrelevant to the operation of Australian property law given that its prescription of land use is still practiced and that Australian sovereignty depends on the related claims of rightful occupation and possession.

The following Editorial in the *Sydney Herald* of 1838 articulates the ideological coupling of cultural progress and agricultural improvement explored in this section. It also presents the co-articulation of sovereignty and property.

This vast land was to them a common - they bestowed no labour upon the land - their ownership, their right, was nothing more than that of the Emu or Kangaroo. They bestowed no labour upon the land and that - and that only - it is which gives a right of property to it. Where, we ask, is the man endowed with even a modicum of reasoning powers, who will assert that this great continent was ever intended by the Creator to remain an unproductive wilderness? ... The British people... took possession...; and they had a perfect right to do so, under the Divine authority, by which man was commanded to go forth and people, and till the land. Herein, we find the right to the dominion, which the British Crown, or, more properly speaking the British people, exercise over the continent of New Holland.⁸⁴

⁸¹ Gascoigne, above n 12, 74.

⁸² Ibid 8.

⁸³ Locke *Two Treatises on Government* 1689 quoted in Gascoigne, above n 12, 8.

⁸⁴ Editorial, *Sydney Herald* 1838 in Rowley, C *The Destruction of Aboriginal Society* (Melbourne: Penguin, 1972) 37.

Although Australian property law is regarded as now being formally distinguished and separated from political sovereignty, in the absence of an alternative foundation for an alien regime of property in Australia, the logic of colonisation and the ideological components of *terra nullius* remain vital to its continued imposition over indigenous forms of land law and land use. The "belief in the possibilities of improvement" was so pervasive that "in many ways it informed the terms on which Aboriginal-European relations were conducted."⁸⁵

The ethic of improvement - which had been so closely linked with agricultural growth through enclosure and the substitution of individual ownership in place of the common fields - heightened that sense of individualism which stood in such conspicuous contrast to the communal identity of Aboriginal culture.⁸⁶

Terra nullius is a discourse of activity, specifically the activity of land use. As such *terra nullius*, despite its universalist claims, prescribes a particular relationship between people and place, based on a particular ideal of the interaction between the two imagined realms: Nature and Culture. That relationship and ideal were particular to England during and after enclosure.

The Idea of Cultural Progress

The discourse of *terra nullius* draws on the notion of cultural progress. At the time Australia was colonised, the twin ideological forces of Christian theology and Enlightenment philosophy articulated the same vision of the unity of all humankind. "Christianity was adamant that all humans were descendants of common ancestors and this belief had survived increasing contact with non-Christian peoples."⁸⁷ Enlightenment philosophy similarly advanced the ideology of monogenism, indeed it was the condition of the possibility of progress and civilisation.

Enlightenment thinkers of the late eighteenth century were generally inclined to explain human varieties in terms of evolutionary development. Hence the view that human society went through different phases, the ultimate goal of which was the development of a society remarkably like that of the theorists of the Enlightenment.⁸⁸

⁸⁵ Gascoigne, above n 12, 167.

⁸⁶ Ibid 12.

⁸⁷ Ibid 148.

⁸⁸ Ibid.

Captain Watkin Tench wrote in his account of the journey of the First Fleet to Botany Bay and the first four years of settlement that Aborigines were "Children of the same omniscient paternal care" and that "untaught, unaccommodated man, is the same in Pall Mall, as in the wilderness of New South Wales."⁸⁹ The idea that Pall Mall man was biologically the same as Australian Wilderness man meant that the differences of Europeans from other peoples around the world could not be explained as natural and inevitable difference, but rather by degrees of cultural and therefore changeable order. Because the colonists "did not recognise these different but complex and highly functional sets of ways of living together and living with the land, they could claim that Australia was a *terra nullius*."⁹⁰ Degrees of culture could explain differences between people in terms of levels or points on a scale. At the lowest level was barbarism and at the highest level was civilisation. The differential term, Culture, could be measured by proximity to Nature. Thus 'savages' or 'natural races' stand in the "most intimate relations with Nature" if not indeed "in bondage to Nature."⁹¹ Locke had said the same thing in 1689 when he said that the savage was not "removed from the common state Nature placed it in."⁹² If Nature was something from which to be removed, then Culture was something to be attained. "The conception of 'natural races' involves nothing anthropological or physiological, but is purely one of ethnography and civilisation. Natural races are poor in culture."⁹³ The 'primitive' embodies Nature by contrast to the 'citizen' who embodies Culture. At the centre of the discourse of *terra nullius* was the juxtaposition of Nature and Culture and the privileging of the latter term.

The European perspective was that agriculture was the logical end point of cultural development. "Societies evolve, and eventually they evolve into agricultural societies, and then comes civilisation."⁹⁴ Locke went so far as to claim that the entire purpose of law and the state was the protection of property, implicitly as the means to define civilisation. "The great and chief end, of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property."⁹⁵ As Fitzpatrick points out, the regime of property was increasingly conflated with law because in the

⁸⁹ Tench, Watkin quoted *ibid*.

⁹⁰ Hodge, Bob 'White Australia and the Aboriginal Invention of Space' in Barcan and Buchanan (eds) *Imagining Australian Space: Cultural Studies and Spatial Inquiry* (Nedlands: University of Western Australia Press, 1999) 59.

⁹¹ Ratzel, F *The History of Mankind* London: Macmillan 1896 quoted in Head, Lesley *Second Nature: The History and Implications of Australia as Aboriginal Landscape* (New York: Syracuse University Press, 2000) 36.

⁹² Locke, quoted in Fitzpatrick, Peter *The Mythology of Modern Law* (London: Routledge, 1992) 82.

⁹³ Ratzel 1896 quoted in Head, above n 91, 36.

⁹⁴ Horton, David *The Pure State of Nature: Sacred Cows, Destructive Myths and the Environment* (St.Leonards: Allen & Unwin, 2000) 59.

experience of the English, the joint arrival of agriculture and property, and their combined articulation of a highly developed Cultural order

requires a complex and more intense regulation than the episodic assertions called for in the nomadic state; what is required is an explicit, permanently sustained ordering that is law. In the result the paradigm of law corresponds to the property relation.⁹⁶

The idea that private property law was the signifier of civilisation was contemporaneous with the colonisation of lands and peoples outside Europe. Culture could be signified not only by agriculture and private property in Europe, but also by colonial expansion. The coloniser, like the private proprietor was enlightened and cultured. The assessment of uncultured people was their want of enlightenment: property and law. In 1840, the *Adelaide Chronicle* remarked that

The marks of civilisation, and consequent improvement, are everywhere visible, both in town and country, - but the natives of the land remain unimproved, unenlightened, and almost as savage as we found them.⁹⁷

The Idea of Waste

Cultural progress was not an empty claim. Cultural progress could be demonstrated and measured by correspondence to the state of Nature that surrounded any given society. Viewed as a landscape, improved and exploited land evidenced the labour of an advanced cultural group. Unimproved land to the contrary, evidenced a basic cultural group. "Unimproved land was indicative of sloth and mismanagement."⁹⁸ The landscape of unimproved land was perceived as wasteful and wasted. The literature of Australian colonists well demonstrates the dominance of the ideology of landscape and the twin images of productivity and waste.⁹⁹ Australian lands were predominantly described in negative terms as waste. Importantly however, the landscape was not described as hopelessly or forbiddingly wasteful, but as ripe with potential to sustain the project of colonisation.

Picturesque landscapes are described in such a way as to invite colonisation; once a colony is implanted, however, the land is then constructed according to the 'gloomy, melancholy and monotonous' paradigms of description. The

⁹⁶ Locke, quoted in Fitzpatrick, above n 92, 84-85.

⁹⁶ Ibid 84.

⁹⁷ *Adelaide Chronicle* 1840 quoted in Gascoigne, above n 12, 162.

⁹⁸ Gascoigne, above n 12, 71.

⁹⁹ James Tully notes the consistent contrast between improvement and waste in colonial literature. See Tully, *James An Approach to Political Philosophy: Locke in contexts* (Cambridge: Cambridge University Press, 1993).

'whitewashed buildings [which] bore outward testimony to the cleanliness and regularity of the inhabitants' stand in opposition to the gloomy forest.¹⁰⁰

Australia was considered "an awful contrast to that beautiful place of England."¹⁰¹ The eucalyptus trees were regarded as "a forest in rags."¹⁰² As depressing as the Europeans found the Australian landscape, they likened it to the former commons of England and believed fundamentally in its capacity for 'improvement'. The land needed to be "rescued from a state of nature."¹⁰³ Describing Australian lands as a wasteland opened them to the possibility of change and the demonstration of superior cultural evaluation and relations to land. "Trackless wastes of barren lands became the scene of industry and plenty."¹⁰⁴

Cultivation and improvement were not simply a matter of the earth's potential, they were a matter of human duty. In the same way that the commons had made way for enclosure in the interests of national prosperity and progress, foreign lands had to make way for cultivation in the interests of empire and civilisation. De Vattel wrote in *The Law of Nations* in 1760 that land belongs not to nations but "to mankind in general; destined by the Creator to be their common habitation... and to derive from it whatever is necessary for their subsistence, and suitable to their wants."¹⁰⁵ Those nations whose population exceeded their resources however could legitimately claim the lands and resources from other places if its inhabitants were not sufficiently exploiting their land. By extending this argument that humans bore the burden of responsibility for cultivating the land *as* humans, de Vattel asserted that it was the right and duty of all people to improve nature by cultivation. Those who did not observe their duty were therefore less entitled to the goods of life because they disobeyed what he believed was the law of human necessity.

But when the human race became extremely multiplied, the earth was no longer capable of furnishing spontaneously, and without culture, sufficient support for its inhabitants; neither could it have received proper cultivation from wandering tribes of men continuing to possess it in common.¹⁰⁶

¹⁰⁰ Ryan, Simon *The Cartographic Eye* (Cambridge: Cambridge University Press, 1996) 80.

¹⁰¹ Quoted in Young, Ann *Environmental Change in Australia Since 1788* 2nd ed., (Melbourne: Oxford University Press, 2000) 1.

¹⁰² *Ibid.*

¹⁰³ Gascoigne, above n 12, 71.

¹⁰⁴ *The Australian Miscellany* [1840] quoted in Gascoigne, above n 12, 70.

¹⁰⁵ DeVattel *The Law of Nations* [1760] excerpt in McRae, H., Nettheim, G. and Beacroft L., *Aboriginal Legal Issues* (Sydney: Law Book Company, 1991) 76-77.

¹⁰⁶ *Ibid.*

The origins of the law of colonisation expressed the same rationale as the origins of the law of private property. When Captain Cook described Aborigines as "hav(ing) no fixed habitations but move from place to place like Wild Beasts in search of food" he encapsulated the sense in which Australia was a *terra nullius*.¹⁰⁷ Certainly people lived there, but their economy was inferior and thus undeserving of the land. Land had the potential for improvement and people had a duty to cultivate its fruits. Waste was the ideological condition of both these developments. Waste signified opportunity for people and place. Opportunities not seized were forfeited.

At almost every point, the practice of agricultural improvement undermined Aboriginal society. For the Aborigines, the arrival of the Europeans with their strange animals was an invasion of their hunting lands and a grave interference with the water supplies so essential to life. For the Europeans it was the transformation of 'waste lands' into productive use, as Providence intended.¹⁰⁸

The idea of waste is central to the discourse of *terra nullius* because it links land use to law and thus legitimates the dispossession of indigenous peoples and simultaneously displaces their common ownership, replacing it with the logic of private property. Aborigines were likened to English commoners - they needed to make way for progress. The idea that Aborigines lived in a wasteland was plausible only according to the universalist projection of one particular idea: land use. This was well articulated in 1957 by J. W. Cleland when he coined the phrase "intelligent parasitism" to describe the relationship between indigenous Australians and Australian lands.¹⁰⁹ The ideal of land use at the centre of discourses of improvement and waste finds succinct expression in the concept of *terra nullius*.

Improvement Theory and the Cultivation of Australia

The circulation and application of improvement theory in colonial Australia indicated the ubiquity and relevance of the Enlightenment precept: progress. "Progress meant a willingness to accept change for future advantage and a confidence that the application

¹⁰⁷ Cook, quoted in Horton, above n 94, 30.

¹⁰⁸ Gascoigne, above 12, 153-154.

¹⁰⁹ Quoted in Horton, above n 94, 14.

of reason would ultimately mean a better world."¹¹⁰ As distant as an Antipodean penal colony was from philosophical inquiry, the philosophy of Enlightenment, and particularly the ideal of progress, was transported into the materiality of colonial Australian life via improvement theory. Improvement theory applied to various aspects of daily life: agriculture, education, religion and criminal punishment for example. However the dominant and most tangible form of improvement was in agricultural cultivation. "In the voluminous printed literature dealing with agriculture in the settling of colonial Australia, the concept of improvement occurs again and again."¹¹¹

It is important to note the insidiousness of the discourse of improvement across many key aspects of colonial Australian life. The moral improvement of convicts and aborigines is particularly significant here because these discourses fed back into the colonial regime of property that governed the use and proprietorship of Australian land. The moral improvement of convicts and aborigines was considered attainable via three processes, each of which directly supported colonial sovereignty and private property. First, these peoples were dispossessed of their lands. In the case of convicts (and paupers) "People who lost their means of subsistence at home with enclosure were 'allowed, encouraged and forced' to go to the colonies."¹¹² Second, they were detached from their homes and families according to the ideals of individualism and the alienability of land. Third, they became the labour force vital to the existence of the classical liberal economy. A person or a tract of land could not be improved, if it was not first dominated or controlled in the same sense of a private property owner's unlimited control over his land. Improvement discourse therefore required a particular mode of ownership and control, investment and domination.¹¹³

The theory of agricultural improvement, the cultivation of the soil and its connection to enclosure and the development of private property were outlined in the previous chapter. The concept of landscape in eighteenth century England associated private property with civilisation through cultivation. "Enclosing the land was a way of bringing it into the known landscape."¹¹⁴ An early description of Australia by British explorer William Dampier in 1697 when the English called the continent *Terra Australis*

¹¹⁰ Gascoigne, above n 12, 10.

¹¹¹ Ibid.

¹¹² Kerruish, above n 3, quoting N.G. Butlin *Economics and the Dreamtime* (Cambridge: Cambridge University Press, 1993) 195.

¹¹³ See Brace, Laura 'Husbanding the Earth and Hedging Out the Poor' in Buck et al (eds), 2001, above n 45.

Incognito, referred to the country as a wasteland needing improvement and cultivation to produce Fruits, Drugs and Spices.¹¹⁵ That Australia was regarded as *Incognito* indicated two things. First, that because the English did not know Australia, they regarded the country as universally mysterious. Second, that Australia was not subject to the sovereignty of any (European) nation states. The English idea of property, characterised by the unlimited sovereignty of possession unites these two senses in which *Terra Australis* could become known: productively and exclusively. This was precisely the sense of property conveyed by the Australian historian Keith Hancock when he wrote that "Many nations adventured for the discovery of Australia, but the British peoples have alone possessed her."¹¹⁶ The British possessed Australia because they made the land yield the fruits that Dampier had described as lacking in its 'natural state'. In the mythology of modern law, the British sovereignty of Australia signified the transformation of an unknown land into a productive land - it was an "act of Creation."¹¹⁷

The belief in the universalism of improvement determined not only a cognitive framework but also and perhaps more powerfully an emotional attitude to the 'strange' country that manifested itself in the activity of conquest. Conquering and cultivating land in New South Wales in the earliest days of settlement required a genuine belief in the possibility of changing the land in an enduring way. The improvement of land was thus a philosophy of English people-place relations that provided entitlement to property on national and global scales. Agricultural improvement legitimised the conquest and colonisation of foreign peoples and places as British property or more properly, as British Empire.

Australian land law was explicitly constructed to service this distinct ideology that locates place in terms of its subservience to social and economic needs. The dispossession of English peasants and the growing number of criminals in England were arguably the sole rationale for the colonisation of New South Wales - to relieve England of an unwanted class. Accordingly, Australian lands were valued simply as the goods of life that would sustain the penal colony.

¹¹⁴ Barrell, John *The Idea of Landscape and the Sense of Place 1730 - 1840* (London: Cambridge University Press, 1972) 94.

¹¹⁵ Shaffer, Kay 'Landscape Representation and Australian National Identity' (1987) 4 *Australian Journal of Cultural Studies* 2:47-60, 52.

¹¹⁶ Hancock, Keith *Australia* (London: Benn, 1930) quoted in Shaffer, *ibid* 47.

¹¹⁷ Fitzpatrick, above n 92, 82.

Particularly in those colonies where all unalienated or 'waste' land belonged to the Crown, the government could, through the regulations it adopted, exercise a profound influence over the progress of settlement, the pattern of land utilisation, the structure of land ownership, and the rate of economic growth. Consequently there was a very close and fundamental correlation between the way in which the British government discharged its responsibility for the administration of the Crown lands and the extent to which individual colonies could be made to satisfy British requirements.¹¹⁸

Instructions issued to successive governors "envisaged cultivation by gangs of prisoners on Government farms and by time-expired convicts and free settlers on their own smallholdings."¹¹⁹ Grants of land to private individuals were intended to complement rather than compete with the landholding of the British Crown. Land in New South Wales was not alienated by sale, as in the market economy of England, until the 1830s. Nevertheless, the assumption and annexation of land in Australia was intended to constitute a self-sufficient colony, in accordance with the desires and needs of an alien economy and polity.

Land Grants

The land granting system was the primary form of conveying property from the colonial authority to private individuals until alienation of Crown land by sale replaced land grants in 1831. Official sales of lands were permitted prior to this, but rarely and only according to particular conditions. Grants and even promises of grants were sold only between private individuals.¹²⁰ In any case, with the exception of native title interests, "all other interests originated in Crown grants."¹²¹ The grants were "intended to create a group of small landholders who could sustain the colony by producing food crops."¹²² The various sizes of the land granted related to "the amount of capital brought into the colony by the petitioners, or their military rank, or presumed social worth. Each governor introduced variations. Social rank and favouritism generally influenced their actions."¹²³ This early colonial system of official land distribution clearly and explicitly married law and politics in a noticeably different way than it was in England. The social relations prescribed by the property rights of land grants were thus also different to

¹¹⁸ Burroughs, above n 1, 1.

¹¹⁹ *Ibid* 2.

¹²⁰ Campbell, Enid 'Promises of Land from the Crown' (1994) 13 *University of Tasmania Law Review* 6.

¹²¹ Edgeworth, above n 3, 403.

¹²² Lane, Patricia 'Native Title - The End of Property as We Know It?' (2000) *Australian Property Law Journal* 8, 5.

¹²³ Weaver, John C. 'Beyond the Fatal Shore: Pastoral Squatting and the Occupation of Australia 1826-1852' (1996) *American Historical Review* 985.

social relations organised by the regime of private property in England. Nonetheless, the young colony undoubtedly established quickly the same connection between property and status prevalent in England, albeit under varied circumstances.

The early Governors of New South Wales were authorised to grant land of the Crown in accordance with Instructions of the Colonial Secretary regarding the qualifications of grantees, the acreages to be made available and not insignificantly the conditions on which grants were to be made.¹²⁴ But while the process was 'local', the logic and ideology underlying it were not. The conditions of grants conveyed the imperative of agricultural improvement of land, the requirement of the payment of quit rents, the prohibition on alienation for a fixed period,¹²⁵ and "the reservation to the Crown of rights over minerals, water and rights of way."¹²⁶ In this way property in colonial New South Wales linked private landholding to the service of public good, or rather, imperial policy. In formal terms it operated against the ideology of private property and was arguably more protective of the rights of the sovereign and of sovereignty than the private individual who was constructed as a landholder rather than a landowner.¹²⁷ Such conditions to grants of land were inconsistent with the legal discourse of private rights to property, which in England at that time had never been more insistent and widespread. New South Wales could not be conceived as an additional instalment or continuation of English property law whilst "Crown ownership of natural resources was seen to be essential given the paramount need to control development and maximise revenue in its colonies."¹²⁸ But practically speaking, the agricultural improvement required by the conditions of land grants ensured that the earliest departures of Australian land law remained grounded in the ideology and natural economy of English property law. The land use was, even at this early time, identical between them. The realisation of improvement theory was differently effected in the English 'garden' than in the Australian 'desert' but nevertheless stemmed from the same beliefs, concepts and aesthetics.

In 1792, Governor Phillip granted land to 'deserving' convicts, to James Ruse for 'Experiment Farm' at Parramatta that he had been working since 1789 and to ex-marines.

¹²⁴ Campbell, above n 120, 2.

¹²⁵ Edgeworth, above n 3, 404.

¹²⁶ Edgeworth, above n 3, 403.

¹²⁷ For a discussion of the distinction between landholding and landowning in the context of the regime of property in colonial North America see Edgeworth, above n 3, 401.

¹²⁸ Edgeworth, above n 3, 410.

In 1793, land grants were extended to officers of the New South Wales Corps. "To every non-commission officer one hundred acres, and to every private man fifty acres."¹²⁹ Convict labour was made readily available to work the land of this latter group of grantees. "All the civil and military officers may as such be allowed two convicts each, to be maintained out of the public stores for two years."¹³⁰ Not surprisingly, the larger areas of land owned by officers combined with their access to convict labour made this group of colonists almost completely responsible for transforming the economy of New South Wales from struggling subsistence to "successful agriculture with the ability to export produce."¹³¹ The deployment of free or cheap labour and the free grant of land certainly was at odds with the operation of private property law in England. But again, despite this divergence, the ideology of labour that the convicts practiced, was strictly an alien ideology intricately tied to an alien theory of property.

Convicts, Labour and the idea of property

In Britain, the Scientific Revolution had accompanied the rise of private property so that changes to the landscape, notably the creation of enclosures and hedgerows were associated with improved agricultural processes and outcomes. The increased landholding and economic power of fewer individuals made possible large-scale commercial agricultural development. This progress paralleled (and required) the large-scale forced dispossession of more than half the original landholders¹³² and the destruction of the peasant economy.¹³³ The law protected private property and its principle of exclusive possession by creating and administering game laws and prohibitions against gleaning and nutting. Combined with public warning notices against trespassing and defined boundaries these legal and physical barriers between landowners and peasants conveyed an ever-stronger sense of the institution of private property and its social magnitude. Those lives that had depended on common or community property rights became part of a massive workforce vital to the prosperity of the industrial market economy. Despite the costs and contradictions of this "undeclared

¹²⁹ 'Phillip's Instructions re Land Grants' August 1789, *Historical Records of Australia Series 1, Volume 1*, 124-8.

¹³⁰ The Right Hon. Henry Dundas to Lieutenant-Governor Grose, June, 1793. *Historical Records of Australia Series 1, Volume 1*, 441-2.

¹³¹ Linn, Rob *Battling the Land: Two Hundred Years of Rural Australia* (St.Leonards: Allen & Unwin, 1999) 9.

¹³² Between 1774 and 1874 more than 50% of original land-holders lost all or part of their land through the process of enclosure. Neeson, J M *Commoners: Common Right, Enclosure and Social Change in England 1700-1820* (Cambridge: Cambridge University Press, 1993) 242 and 280.

¹³³ Siemon, James 'Landlord not King: Agrarian Change and Interarticulation' in Burt, Richard and Archer, John (eds) *Enclosure Acts: Sexuality, Property and Culture in Early Modern England* (Ithaca: Cornell University Press, 1994) 17.

civil war between the British landed classes and their underlings¹³⁴ was fought in the name of Progress. With increased conviction rates for new crimes against private property, punishable by transportation, the vital supply of labour was extended to the British colonies. The improvement of the lands of private sovereigns and of the political Sovereign, the Crown supported both the British empire and its economy.

Although convict labour was arguably a distinguishing feature of Australian land law, particularly as attachments to land grants in the earliest years of colonisation, in other ways, being central to English and European concepts of property distribution and the role of law, it was entirely alien. Labour, like private property, had been theorised extensively in Enlightenment philosophy as an alienable commodity. Adam Smith and John Locke provided distinct, but related ideas of labour and law and their importance to private property, the market economy and the accumulation of wealth. Whilst Smith wrote of labour in terms of the "necessity of the subordination"¹³⁵ of the labouring masses to the institution of private property, Locke abstracted the materiality of the relationship between labour and property. For Smith, labour and law are physical materialities that make possible the accumulation of wealth offered by private property. Labour is a commodity, law is enforcement, and both are instruments rather than rationalisations of property. Smith notes that "for every one rich man, there must be at least five hundred poor" and that the "indignant" poor "driven by want, and prompted by envy" would "invade his possessions." Private property is "not a public good but a private good"¹³⁶ the injustice of which can only be protected by "the powerful arm of the civil magistrate continually held up to chastise it." For Smith law and property are partners: "where there is no property, civil government is not so necessary."¹³⁷ Because the role of law and government is the protection of private property, sovereignty is vested in the state so long as the state serves proprietors. Sovereignty to Smith belongs ultimately to property owners. Smith expresses his concept of sovereignty in terms of the limitlessness and exclusivity of wealth: the owner of property has the right to be its sovereign, controlling access and distribution to it without himself being controlled.

¹³⁴ Hughes, Robert *The Fatal Shore* (1987) quoted in Flannery, Tim *The Future Eaters* (Kew: Reed Books, 1994) 346.

¹³⁵ Smith, Adam *An Inquiry into the Nature and Causes of the Wealth of Nations* (1776) Book V: Chapter 1, Part II: 'Of the Experience of Justice' Campbell, RH and Skinner, AS (eds) (Oxford: Clarendon Press, 1976) 710.

¹³⁶ Siemon, above n 133, 21.

¹³⁷ Smith, above n 135.

Labour to Locke was an ideological justification of property, a material yet somehow disembodied process that transformed uncultivated waste into resource commodities. Locke's idea of labour worked against actual labourers not by seeing their subordination as simply necessary as Smith had, but by devaluing their former common landholding on the basis that common property was the same thing as uncultivated waste.

God gave the World to Men in Common; but since he gave it to them for their benefit, and the greatest Conveniences of Life they were capable to draw from it, it cannot be supposed he meant it should always remain common and uncultivated. He gave it to the use of the Industrious and Rational, (and Labour was to be his title to it).¹³⁸

Locke's treatise presented private property as a universal and transcendental good. The cultivation of land signified progress only to the extent that practical improvement was linked to moral and intellectual improvement, which was implicitly an indicator of greater social improvement. The connection Locke drew between civilisation and private property presented private property as an achievement, a mark of a sophisticated society. In this way Locke's ideology of labour suggested that private property benefited not only the proprietors but also and more importantly, society as a group or nation. Locke's sovereign is God and the responsibility of the state is to elaborate God's creation appropriately and appropriatively. Significantly, the white god of England is also the god of the Americas.

Both Locke and Smith define sovereignty as limitless and exclusive, absolute not relative. Despite the fact that Locke's idea of private property is discussed in terms of responsibilities and duties rather than rights and freedoms, the justification of the unequal distribution of the fruits of God's earth still emerges as an economic rationality. Like Smith, Locke argues that the purpose of law and government is the protection of private property.

The great and chief end of Men uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property. To which in the state of Nature there are many things wanting.¹³⁹

The right of the private property owner, for which the government exists to protect, is the right to exclude all others and to enjoy his property without restriction. Property to Locke was "'an enclosure from the common,' that is, primarily place in the world where

¹³⁸ Locke, John *Two Treatises of Government* (1689) Book II Chapter V, Laslett, Peter (ed) (Cambridge University Press, 1970) 308.

¹³⁹ Locke, quoted in Gascoigne, above n 12, 8.

that which is private can be hidden and protected against the public realm."¹⁴⁰ The idea of private property then is an idea of exclusion.

Hannah Arendt's critique of Locke and Smith (1958) argues that the rise of labour was parallel with and connected to a changing concept of nature. Nature was not an earthly reality, but a subject of process. The idea of private property and the theories of Locke and Smith are contingent on the idea that Nature is not simply categorically not-Culture, but that Nature can be appropriated and transcended by Culture. The concept of sovereignty thus also depends on a particular concept of nature. The activity of exclusion requires the appropriation of nature. The declaration of British sovereignty in Australia imposed an alien concept of nature that made the rise of private property possible and necessary for colonisation.

Other critiques of Locke's work on property, notably C.B. Macpherson (1962) and Barbara Arneil (1994) debate the extent to which Locke's concepts of labour and law were instrumental justifications for colonisation and the unlimited accumulation of private wealth. Macpherson argues that Locke's theory of property reflects what he calls the "possessive individualism" of early capitalism.¹⁴¹ Arneil argues that Locke's theorisation of private property "has specific historical roots in England's colonisation of the new world."¹⁴² Either way, Locke's work was used by colonists to justify their appropriation of foreign lands and their commodification and trade of human labour. If one links together the work of Macpherson and Arneil one may conclude that Locke's concept of property is an interarticulation of colonialism and liberal commerce that well describes the ideology and function of Australian property law. Convict labour was not an add-on, but part of the system of land grants. The identification of grantees as "private men" reminds us that whilst labour was critical to their entitlement in terms of the lease conditions of improving the land, the ownership of the labour and of the fruits of their labour were the real 'thing' of property in colonial land grants, not the land itself. Convict labour was fundamental to the cultivation and improvement of colonised lands and therefore both materially and ideologically part of an alien theory of property law.

¹⁴⁰ Arendt, Hannah *The Human Condition* (Chicago: Chicago University Press, 1958) 115.

¹⁴¹ C.B. Macpherson *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962).

¹⁴² Arneil, Barbara 'Trade, Plantations and Property: John Locke and the Economic Defence of Colonialism' (1994) 55 *Journal of the History of Ideas* 591, 609.

In 1824 by Imperial Act of Parliament, the Australian Agricultural Company was founded and was granted a million acres of land "under unusually liberal conditions."¹⁴³ The foundation of the AAC signalled the institutionalisation of improvement theory and its officially endorsed connection to the British economy. Apart from being an institution of the British government by virtue of its official enactment, the company was also effectively British in that it owned the company's product. The Act provided "for granting certain power and authorities to the company to be incorporated by charter... for the Cultivation and Improvement of Waste Lands in the Colony of New South Wales and for other purposes relating thereto."¹⁴⁴ The company was empowered to grant land in accordance to the principles of its charter, and to ensure the economic self-sufficiency of the colony. In 1826, 63 710 acres of land was granted to 38 private individuals, "the smallest grant of which was 320 acres and the average grant was almost six times this size."¹⁴⁵ The magnitude of the land granted indicates another divergence between landholding in England and New South Wales. Vast tracks of land were literally given away because property in colonial New South Wales was central to the program of colonising a foreign country. The British colonisation of Australia was a project of expansion in a very physical, territorial sense. Certainly agricultural production was needed to sustain the colony, but territorial expansion was disproportionate to the colonial population and their needs. Territorial expansion exceeded the needs of an ideally self-sufficient colony: it generated Imperial economic wealth and secured the political sovereignty of the 'parent' country against the sovereignty of all others, but most necessarily against the Aboriginal nations. The distinctiveness of colonial Australian property law is overshadowed by the unambiguously familiar British penchant for global appropriation.

Colonists, emancipated convicts, free settlers or officers, were "permitted to enter into possession of a tract of land of the Crown with an assurance that they would receive a formal grant of it."¹⁴⁶ This practice created difficulty for newly arrived Governors who were required to pursue and formalise the promises of grants made by their predecessors. Governor Brisbane complained in 1822 that he had

discovered that Major General Macquarie [his predecessor] had been exceedingly liberal in his promises of land:- so much so, that, exclusively of

¹⁴³ Buck, 1994, above n 16, 131.

¹⁴⁴ Quoted in Buck, *ibid.*

¹⁴⁵ Ashton, Paul *On the Land: A Photographic History of Farming in Australia* (Kenthurst: Kangaroo Press, 1987) 22.

¹⁴⁶ Campbell, above n 120, 4.

those he had himself been enabled to perfect, there remained a balance of unexecuted grants to the amount of 340 thousand acres.¹⁴⁷

Indeed, during his office, Macquarie transformed the nature of land ownership in New South Wales. He granted 162 000 hectares of land whilst previous governors had jointly granted only 72 900 hectares. The distribution of land by free grant departed radically from the distribution of land in England where in addition to the vast landholdings of the long-established landed-class, a class of landholding mercantile professionals was strengthening and land itself had become a major part of the market economy. In colonial New South Wales by contrast, the distribution of land through free grant, often a result of imperial patronage, arguably undermined market forces.¹⁴⁸ This was precisely the situation criticised by proponents of utilitarianism.

Jeremy Bentham, in his criticism of the colony of New South Wales in 1803, had linked free land grants to the unreformed and corrupt excesses of colonial government. "Until the 1820s, the governor was the sole executive and legislative authority in the colony. It was a government founded on overt military power."¹⁴⁹ Governors "had powers to establish courts to try breaches of the regulations they themselves had decreed."¹⁵⁰ Bentham argued that these powers were unconstitutional because they were inconsistent with the representative and responsible government of separation of powers. He wrote that the colony was "Star Chamber-out-Star-Chamberized; legislature and judicature confounded and lodged together, both in one and the same hand."¹⁵¹ Despite constitutional reforms in 1823 that limited the executive authority of the governor, namely by the establishment of the New South Wales Legislative Council and a Supreme Court, the government of the colony remained unrepresentative because although the Council was constituted of 15 members by 1828, the Governor nominated them. Nominated members were invariably wealthy settlers representing the interests of pastoral capitalists.

The reforms of the 1820s rationalised, rather than liberalised, the colonial regime. In spite of concessions allowing wealthy settlers an advisory role, the British state retained its authority in those areas that vitally concerned the creation of a colonial periphery - namely, the disposal of land and convict labour. The colonial state continued to be an autocratic regime under imperial authority. In other words, the British state maintained a mercantilist political

¹⁴⁷ Governor Brisbane, April 1822 cited in Campbell, *ibid.*

¹⁴⁸ Gascoigne, above n 12, 62-63.

¹⁴⁹ McMichael, *Phillip Settlers and the Agrarian Question* (Cambridge: Cambridge University Press, 1984) 82.

¹⁵⁰ Gascoigne, above n 12, 41.

¹⁵¹ Bentham, Jeremy 1803 quoted in Gascoigne, *ibid.*

structure that served the imperial division of labour (premised on transported labour).¹⁵²

In the 1820s, Edward Gibbon Wakefield criticised free land grants and transported labour on the basis that it "smacked of the use of government favouritism and monopolies to distort the workings of a free market."¹⁵³ He called the existing manner of transporting convicts "shovelling out of paupers" and argued for more organised migration based on the suitability of migrants for colonisation.¹⁵⁴ New South Wales, he claimed was a place where

The colonial members of the governor's council... have been deeply interested in the misgovernment of which they shared the profits, in the shape of contracts, undue supplies of convict labour, and immense grants of land.¹⁵⁵

The relationship between land, law and politics seemed far closer in colonial Australia than in England and was certainly a departure from the Enlightenment ideals of civilised government and utilitarian social progress. Arguments against free grants of land and against convict labour from Bentham and Wakefield combined with their proposals for the systematic and regulated alienation of colonial wastelands ultimately influenced the Imperial Government to discontinue free grants in 1831.¹⁵⁶ The *Imperial Land Act 1831* authorised the sale of Crown land by public auction at a 'sufficient price' of 5s. an acre and the expenditure of the proceeds financed the emigration of British labourers.¹⁵⁷ After this Act was passed, and immigration was encouraged under the Wakefield system, "a period of intense commerce in land took place."¹⁵⁸

The alienability of property and the commercial value of land

The system of alienating Crown land through free land grant in colonial New South Wales evidenced alien concepts of land and law. British sovereignty was the first condition of both these forms of land law. Land could not be granted were it not already exclusively possessed of a sovereign: private or public. The system of free land grants, as Bentham and Wakefield had remarked, were based on political favour and that related land law to the hierarchical class structure of English society. The assignment of free or

¹⁵² McMichael, above n 149, 84.

¹⁵³ Gascoigne, above n 12, 63.

¹⁵⁴ Wakefield, E.G. quoted in Gascoigne, above n 12, 62.

¹⁵⁵ Wakefield, E.G. quoted, *ibid*, 65.

¹⁵⁶ Gascoigne, above n 12, 64.

¹⁵⁷ Burroughs, above n 1, 3.

convict labour to landholding officers marked "the rise of landed property with all its imported prestige, privileges and rights" which was "inextricably bound" with rising mercantile activity and a merchant class.¹⁵⁹ The operation of land law in colonial New South Wales at this time was certainly different to the operation of private property law in England, but the capital economy and social structure it produced was not. The subsistence of the colony even from the earliest years was never more important than individual profit: a point well demonstrated by the monopoly of wheat production and trade during the interregnum period between Governor Phillip's departure in 1792 and Governor Hunter's arrival in 1795. Landholding officers rapidly increased their wealth and status through monopolising the production and sale price of wheat. The capital gains of officers also allowed them to use their land for grazing and pastoralism. Although small settlers such as emancipated convicts and free migrants were numerically predominant in the colony, their landholding was limited to sixty acres or less and they lacked the acreage and capital to graze animals. The officers produced wheat not to share with the colony but to sell to the colony, at considerable profit. Land and its resources, regarded as commodities, from the earliest days of colonisation were part of an alien capitalist economy.

Contrary to utilitarian critiques of land grants undermining market forces, land grants were commonly bought and sold. The sale of land grants and land permits evidenced the prevalence of alien concepts of private property and economy of commerce. "Despite restrictions of transfer a thriving land market grew up."¹⁶⁰

No less than four fifths of the lands in Sydney and Parramatta were then held under occupation permits. These permits were commonly bought and sold. Nearly every town allotment, Governor Brisbane reported to the Secretary of State on 3 September 1823, had been purchased from some obscure individual, who had exercised the right to sell, under an old verbal permission to occupy, given him by a magistrate or the surveyor.¹⁶¹

With this land market already in place, the introduction of alienation of Crown land through auction in 1831, saw a further "explosion of enterprise."¹⁶² Thus whilst land law in colonial New South Wales clearly exhibited distinct and specific modifications to suit colonial politics and economy, the concepts and operation of those politics and economy

¹⁵⁸ Lane, above n 122, 6.

¹⁵⁹ Ashton, above n 145, 16.

¹⁶⁰ Lane, above n 122, 5.

¹⁶¹ Campbell, above n 120, 6.

¹⁶² Lane, above n 122, 7.

were not-local. The land market evidenced not simply a heritage, but a continuation of the capitalist economy.

Edgeworth argued against the decision in *Attorney-General v Brown* that Australian property law was allodial rather than tenurial in nature. It is important to note that the central element of allodial forms of property is its right to exclude all others and alienate the property independently.¹⁶³ Whilst Edgeworth convincingly advances the idea that Australian property law was not feudal, he concludes from this that it was not English. I would argue that the alienability of land at the centre of allodial and private property rights values land as a tradeable commodity was precisely what made it English, albeit an Englishness suitable to a post-Lockean capitalist ideology. The Aboriginal epistemology of property was very different: emphasising communal rather than private rights and inalienability rather than alienability of land. Alienation in Aboriginal economy was based on exchange rather than accumulation.¹⁶⁴

Purchasers were required to buy a minimum of 640 acres¹⁶⁵ and were offered allowances for keeping convicts.¹⁶⁶ The idea that the sale of land was conditional upon a *minimum* size indicated that although market forces were instituted by the systematised alienation of Crown land, the context in which that market operated was entirely different both geographically and politically to England. The sale of land was imagined to be, in the same way that land grants had been imagined, part of the British colonisation of an alien country: central to the populating and exploiting of 'new' lands. The larger size of land deemed appropriate for grants also reflected the adjustment of evaluation of land to suit the productivity of Australian lands. "In Australian conditions the massive quantity of land was made to serve as alternative to the generally better quality of British land: country where agriculture was marginal could be put to use to pasture stock."¹⁶⁷ The size of land grants also indicated the idea that land was available in abundance, a consequence of the discourse of *terra nullius*. The idea of abundance and the discourse of *terra nullius* thus carried substantial consequences in the economic evaluation of land.

¹⁶³ Edgeworth, above n 3, 399-400 and 406.

¹⁶⁴ Muecke, Stephen *Textual Spaces: Aboriginality and Cultural Studies* (University of New South Wales Press, 1992) 47.

¹⁶⁵ Ashton, above n 145, 22.

¹⁶⁶ Lane, above n 122, 7.

¹⁶⁷ Gascoigne, above n 12, 76.

The value of land articulated by the system of free grant differed greatly from the value of land in England at the same time. Land was valued in New South Wales in terms of its territorial sovereignty against original owners, its capacity to sustain the colonial population, its marriage to colonial politics and later to furnish the growing mercantile interests of Imperial, and therefore distant powers. Directives to successive governors of NSW were to develop agricultural economy to the level of self-sufficiency and beyond to the service of the British empire. In 1803, the Colonial Secretary Lord Hobart wrote to Governor King that:

The improvement and extension of the agriculture in the country already settled is an object of the first importance, not only as affecting the subsistence and resources of the inhabitants in general, but as it regards the employment of the convicts now under your charge, or who may be sent hereafter.¹⁶⁸

By 1819 the export of wool from New South Wales to Britain was so significant to the economies of both the colony as well as to Britain,¹⁶⁹ that the ideology of improvement adjusted to accommodate the debate about whether pastoralism constituted sufficiently sophisticated land use as compared with agriculture. The theory of improvement was never more important or more compelling than the theory of economic development and its measure: the accumulation of wealth. Enlightenment thought linked progress to limitless economic development. The production and accumulation of wealth was associated with the sophistication of economic activity and the degree of exploitation of the land.¹⁷⁰ Thus whilst the system of free grant was particular to New South Wales and demonstrated an unambiguous divergence from English land law, it cannot be said to be local because it functioned within the economy of empire and the ideology of European Enlightenment.

Sovereignty and Exclusion

Universal exclusion is central to the idea of sovereignty that defines modern English law. It is something discussed at length by Peter Fitzpatrick in *The Mythology of Modern Law* (1992). Fitzpatrick argues that modern law defines itself exclusively, by what it is not, a process he calls negative transcendence.¹⁷¹ He observes that law cannot define itself positively, or in other words by what *it is*. Fitzpatrick quotes Carty that "the

¹⁶⁸ Letter from the Colonial Secretary, Lord Hobart to Governor King February, 1803 quoted in Gascoigne, above n 12, 74.

¹⁶⁹ Gascoigne, above n 12, 82.

¹⁷⁰ *Ibid* 69.

¹⁷¹ Fitzpatrick, above n 92, 10.

essence of this law is that it has no essence¹⁷² yet goes on to claim that "no essence" actually means an essence of negativity, rather than the absence of essence. Without considering alternative modes of identity and definition, Fitzpatrick maintains that law's essence (he insists it does have one) is negativity and negation. Law he argues, defines itself as universal, unified, omniscient and controlling by setting these qualities against or in opposition to the qualities of law's *other*: particular, diverse, incompetent and requiring control.¹⁷³ The law thus excludes the Other and qualities of otherness. The universal exclusivity of modern law according to Fitzpatrick is part of its *essential being*.

This chapter contends however that the quality of universal exclusivity defines modern law as *having*, not *being*. The absence of positive being or essence of law indicates an alternative mode of self-identification: possessive. Law identifies itself by acquisition, not essence. Modern law is defined by what *it has*. Exclusion is the imperative activity of acquisitiveness. The modern law of property does not define itself in opposition to its *other*, rather it defines itself by excluding *all others* from what *it has*. Linguist Benveniste distinguished between two verbs of being, or *verbes d'etat*: 'to have' and 'to be', in terms of the relationships they describe between people. It is possible to extend his terms of reference to relationships between people and place.

To be is, the state of that who is being, the one who is something. *To have* is the state of the possessor, the one for whom something is. The difference appears thus. Between the two terms it joins *to be* establishes an intrinsic relation of identity: it is the consubstantial state of being. On the contrary, the two terms joined by *to have* remain distinct... it is the relation between the possessor and the possessed.¹⁷⁴

The reason that the distinction between these *verbes d'etat* is important is because they indicate very different modes of identity and therefore different concepts of property. Recalling the etymology of the word *property* presented in the previous chapter, *property* originally described the peculiar nature of a place and the intrinsic relationship between that particular place and the people living there such that the two were mutually identified. Here, people and place are "fused"¹⁷⁵ in a 'consubstantial state of being'. This sense of property describes the state of being that uses the verb *to be* with regard to the

¹⁷² Ibid.

¹⁷³ Ibid.

¹⁷⁴ Benveniste, Emile *Problemes de Linguistique Generale* (Paris: Gallimard, 1966) quoted in Hage, Ghassan *White Nation: Fantasies of White Supremacy in a Multicultural Society* (Sydney: Pluto Press, 1998) 139-140.

¹⁷⁵ Hage, *ibid.* Hage explores this socio-linguistic point with regard to diversity and culture in *White Australian multiculturalism*.

relationship between the place and the people.¹⁷⁶ In that context, to say "that is my/our own" indicates that the place is connected with and formed part of that people. The modern usage of the word *property* describes nothing about the nature of a place, only that it is owned and the extrinsic relationship between that place and the person who owns it. They 'remain distinct' and separate and are joined only by the verb *to have*. In this context, to say "that is my own" indicates that the person is "the subject who has" and the place is "the object that is had."¹⁷⁷

Fitzpatrick describes the relationship between culture and nature in the mythology of modern law as that of negative transcendence, "nature and culture are there placed in opposition" and then "culture advances by taming and appropriating nature."¹⁷⁸ In the context of the colonisation of Australia the law has never successfully tamed and appropriated the land or nature to the extent that they became 'fused in consubstantial being'. Culture did not transcend Nature. Culture acquired Nature, thus the state of having land rather than being land better describes the extrinsic relationship between the coloniser and the 'new' land. The universalism of modern English law articulated an ideal of an extrinsic and possessive relationship between nature and law, nature and culture, and place and people. This ideal is apparent in the twin institutions of private property and empire.

Arguably, the primary characteristic of sovereignty, both feudal and modern, both public and private is exclusive possession. As more and more sections of Australian land were annexed: by government grants, squatting and then free selection, British sovereignty of the land was the constant assumption. The land was always and everywhere Crown Land. British sovereignty consistently underwrote the development of Australian property law. The very definition of squatting is contingent on original and exclusive proprietorship: one cannot squat unless one squats on someone else's land. Squatting licences and leases in Australian property law affirmed British sovereignty despite demonstrating colonial innovation. Furthermore, the institution of private property and the push to bring squatters' interests within the operation of that institution evidenced an alien economy and cultural value of land and its resources.

¹⁷⁶ See for example Neidjie, *Bill Story About Feeling* (Magabala Books, 1989) 1-19.

¹⁷⁷ Hage, above n 174.

¹⁷⁸ Fitzpatrick, above n 92, 53.

William Blackstone wrote in 1765 that the benefit of private property was the "free use, enjoyment, and disposal of all his acquisitions, without any control or diminution."¹⁷⁹ The right to private property was the right to deprive others of the place and its resources. Thus the similarity between the modern individual of liberalism and the (feudal and) modern sovereign is that they both claim *dominium*.

The *dominium* of Roman law comprised both the legal title and the right of actual beneficial enjoyment. In other words, *dominium* treated as conceptually inseparable the owner's right to use, dispose of, and exclude others from, his property.¹⁸⁰

The idea of *dominium* in private property meant that the private individual was as significant, if not more significant than the public. "So great moreover is the regard of the law for private property, that it will not authorise the least violation of it; no, not even for the general good of the whole community."¹⁸¹ The exclusion of others is the bottom line of private property and also of imperial and national sovereignty.

The colonisation of Australia and the development of its property law indicate the same cultural values of nature, labour and law theorised by Locke, Smith and Blackstone. Their theories are not only prescriptions as to who should get what in the distribution of the earth's resources, they are also prescriptions as to how to keep it. The ideal market of their economy is not regulated by the supposed random dynamics of supply and demand but rather by the specific hierarchical class structures organised by pre-existing land ownership. Locke's English farmer of "reason and industry" was no peasant. The legitimacy of private property is not the actual tillage of the soil, but the ownership of the tillage of the soil. The legitimacy of the ownership of the tillage of the soil is determined less by reason and industry than by the idea of the private sovereign. The relationship between property and sovereignty is best demonstrated by the case, *Attorney-General v Brown*. The court restricted the debate about the relationship between property and sovereignty to the historical development of property law in England from tenurial to allodial systems of title. Most theorists follow this restriction as noted above. Yet the debate is contingent not simply on different legal forms of title, but on a different scale of the same concept, sovereignty. The Attorney-General, representing the interests of a public and imperial sovereign, successfully argued that the Crown was entitled to mine and dispose of the coal on the land over which it was both sovereign and

¹⁷⁹ Blackstone, William *Commentaries on the Laws of England* Book One 1765 Oxford, reprinted (London: Dawsons, 1966) 134.

¹⁸⁰ Gray, Kevin *Elements of Land Law* 2nd ed., (London: Butterworths, 1993) 34.

¹⁸¹ Blackstone, above n 179, 135.

proprietor without interference from others. Windeyer, representing the interests of a private sovereign, Brown, argued that Brown was entitled to mine and dispose of the coal on the land he leased without interference from the government. Both arguments connect the concept of exclusive possession and sovereignty to an instrumental view of nature characteristic of the philosophies of classical political economy, notably Locke and Smith.¹⁸² Both claims to sovereignty, private and imperial are claims to exclude others and to alienate the fruits of property. *Attorney-General v Brown* is a dispute between private and public sovereigns. Both parties' arguments present the same concept of sovereignty: unlimited control of land use and the right to exclude all others. Both parties insisted that their right to property could not be shared, limited or controlled. The right to exclude all others was the property right that neither party disputed in this important case. The idea of exclusive possession is the core principle of an alien regime of property, the discourse of private property.

Squatting and Pastoralism

'Squatting', initially referring to the illegal occupations of Crown land by landless men of ill-fame who preyed on others' livestock, achieved social legitimacy as land-owning graziers advanced their flocks into unsettled districts en masse.¹⁸³

Squatters and the rise of the pastoral industry in New South Wales arguably represent the most distinctive development in Australian property law. Pastoral squatters and the laws that accommodated their property interests left an indelible trace in the Australian landscape. Various accounts of Australian history, legal, economic, sociological, geographical and ecological, unanimously acknowledge the distinctiveness of pastoral squatting in Australia. Legal historian Bruce Kercher claims that squatters "were the most audacious breakers and makers of law in Australian history."¹⁸⁴ John Weaver presents the history of the "pastoral invasion of the continent" as unique amongst the less remarkable histories of squatting in other "neo-Europes," particularly on the North American frontier.¹⁸⁵ Property historian Andrew Buck ties the rise of pastoral squatting to the unique evaluation of land in colonial New South Wales as a mere means to support the wool industry, which by the mid-nineteenth century had collapsed the

¹⁸² See Harvey, David *Justice, Nature and the Geography of Difference* (Oxford: Blackwell, 1996) 121-131.

¹⁸³ McMichael, above n 149, 84.

¹⁸⁴ Kercher, Bruce *An Unruly Child* (Sydney: Allen & Unwin, 1995) 118.

¹⁸⁵ Weaver, above n 123, 982.

distinction between real and personal property in Australian law.¹⁸⁶ Paul Gascoigne's history of the influence Enlightenment ideology on the colonisation of Australia observes the initial contrariety and later integration of pastoralism within the ideal of progress achieved through agricultural improvement.¹⁸⁷ Peter Burroughs and Phillip McMichael each relate the squattocracy to colonial politics and to the contradictory imperatives of imperial policy: economic profitability and agricultural ideology.¹⁸⁸ Nancy Wright shows that the vast landholding of squatters was the critical issue over which the first election in New South Wales was fought.¹⁸⁹ Paul Ashton analyses squatting within the context of land use, and demonstrates the way in which the pastoral industry contributed to the degradation of the Australian natural environment.¹⁹⁰ Ann Young also situates pastoral squatting within the environmental history of Australia, explicitly tying law and order to materiality.

The first major development of agriculture came after the 1830s, as squatters moved out from the established settlements. This expansion into previously unsettled areas was anarchic and uncontrolled, and its impacts were devastating.¹⁹¹

Squatting was initially, until and including the 1820s, an activity restricted to the coastal regions of New South Wales within an area formally known as 'the Limits of Location.' Settlement was officially limited to this area for two reasons. First to ensure that the alienation of land would be controlled and certain. "Land distribution should have been an orderly process under which it was surveyed before having been placed in private hands."¹⁹² The second reason a fixed area of settlement was prescribed was so that a concentrated population of yeomen would work an agricultural economy, resembling the English economy and social organisation.

For the colonial authorities civilisation was closely linked with concentration of settlement as farming communities could develop within the sound of church bells and within reach of schools and the forces of law and order.¹⁹³

Yet despite the early decision to encourage small farms and close settlement, the materiality of Australian land, soil quality, climate and rainfall for example, made this

¹⁸⁶ Buck, 1994, above n 16.

¹⁸⁷ Gascoigne, above n 12.

¹⁸⁸ Burroughs, above n 1, and McMichael, above n 149.

¹⁸⁹ Wright, Nancy and Buck, Andrew 'Property Rights and the Discourse of Improvement in Nineteenth Century New South Wales' in Buck et al (eds) 2001, above n 45, 105.

¹⁹⁰ Ashton, especially Chapter 2, above n 145.

¹⁹¹ Young, above n 101, 35.

¹⁹² Kercher, above n 184, 119.

¹⁹³ Gascoigne, above n 12, 76.

policy non-viable. Farmers of smallholdings could not sustain cropping much beyond subsistence levels and thus could not successfully impose their alien economy onto Australian lands. They claimed that "British land policies were entirely inappropriate in a country that was much more suited to pastoralism than farming."¹⁹⁴ Farmers began to occupy tracts of land beyond that of which they had been granted (if granted land at all) to graze animals. Sheep farming proved particularly profitable. "Gradually and reluctantly it was conceded that the future of the colony lay with larger estates, which, increasingly were devoted almost exclusively to pastoral activity."¹⁹⁵ Thus, though the shift from agriculture to pastoral grazing appears to be a form of adaptation, and of becoming a local practice, the practice of grazing itself and the commercial economy it supported were alien.

Squatters argued that their supply of fine wool made a positive contribution to the economy and character of New South Wales. "Pastoralism was the saviour of the colony of New South Wales, they claimed, and the way it could turn from the disgrace of convictism to respectability."¹⁹⁶ Furthermore, and more importantly in terms of eventual official acquiescence to squatting, the economic benefits of pastoralism could potentially extend to Britain. "The authorities in London came to view the Australian continent as a valuable wool-producing region which could relieve British manufacturers of their existing dependence on foreign supplies."¹⁹⁷ In 1819, the Colonial Commissioner of Inquiry, J.T. Bigge reported that the future of the colony lay in the pastoral industry rather than in small-scale agricultural farming. Bigge recommended that "the rearing of sheep and cattle, on an extensive scale" be encouraged.¹⁹⁸ Pastoral squatting was described and encouraged in terms of Imperial interests.

The official endorsement of large-scale pastoralism and the consequent adjustment of imperial policy regarding the ideal forms of land use and economic production effectively changed the legal status of squatting. Whereas squatting was officially trespass in law, the squatters had sufficient political leverage via their mercantile significance to influence land policy in their favour.

The colonial and imperial governments gave into this pressure and mass disobedience of the law... the governments of the 1820s responded by

¹⁹⁴ Kercher, above n 184, 120.

¹⁹⁵ Gascoigne, above n 12, 76.

¹⁹⁶ Kercher, above n 184, 120.

¹⁹⁷ Burroughs, above n 1, 2.

¹⁹⁸ Bigge, J.T. 1819 quoted in Ashton, above n 145, 20.

allowing them to graze their stock on Crown land under a ticket of occupation. This allowed them to take their stock wherever they wished, but it did not mean that they acquired title to the land.¹⁹⁹

The extent to which squatting was not only accepted but strangely legitimised, differentiated Australian property law not only from English law, but also from colonial counterparts such as Northern American law. Even so, this distinctive and remarkable rise of pastoral squatting in Australia in the 1820s "was infinitesimal as compared with the migrations of the Heroic Age of the thirties."²⁰⁰ The notion that squatters were heroes evidenced a frontier mentality particular to foreign people in 'new' lands. The changed status of squatters on account of their mercantile significance demonstrates the prevalence of a system of commerce alien to Australia until the arrival of the colonists.

From the 1830s squatting expanded dramatically beyond the limits of official settlement and included such a vast number of people and from socially diverse backgrounds, that squatting "diluted the clear social hierarchy dominated by the pastoral gentry."²⁰¹ Social structure was so affected by squatting that Governor Gipps distinguished Australian squatters from their American counterparts "who are generally persons of mean repute and of small means, who have taken unauthorised possession of patches of land." In New South Wales, to the contrary, squatters he said, were among

the wealthiest of the Land, occupying with permission of Government thousands and tens of thousands of acres; Young men of good Family and connexions in England, Officers of the Army and Navy, Graduates of Oxford and Cambridge are also in no small number amongst them.²⁰²

Significantly the very definition of squatting was undone and recreated in the Australian context: squatters in Australia seemed to have "eradicated the liabilities of illegal occupation."²⁰³ This was despite the fact that the licences were intended to force squatters to "at least recognise the title of the Crown."²⁰⁴ Either way, the definition of squatting was distinctively Australian and the interests and rights of pastoral squatters afforded legal sanction were unique. Importantly however, this distinctive development depended utterly on the squatters' "connexions in England" and on being "graduates of Oxford and Cambridge." Thus this 'development' perpetuated the link between class

¹⁹⁹ Kercher, above n 184, 121.

²⁰⁰ Rae-Ellis, Vivienne 1988 quoted in Weaver, above n 123, 984.

²⁰¹ McMichael, above n 149, 87.

²⁰² Gipps, quoted in McMichael, *ibid* 85.

²⁰³ Weaver, above n 123, 983.

²⁰⁴ Lane, above n 122, 7.

and property seen in English property law, and politically between the English aristocracy and the Australian squattocracy.

Squatting licences were "created ad hoc in response to a situation which was well beyond the control of the administration."²⁰⁵ In their efforts to superintend what they could not control, Governors Bourke and Gipps introduced legislation in 1836 and 1839 respectively to legitimise the squatters' unlawful occupation of Crown land by issuing them with licences. Squatters were licensed to run an unlimited number of animals over an unlimited area of land for ten pounds a year. A squatting licence was not designated to any particular piece of land, in part because there were little means by which to resolve boundary disputes in the absence of surveyed boundaries and a land registry. Fencing was expensive until the introduction of wire in the 1860s and so squatters developed alternative semiotics for boundaries. "By the early 1840s, bounds might be tied into trees that had been ringbarked or marked with a carved symbol, ploughed furrows, piles of rock, and heights of land separating watersheds."²⁰⁶

The squatters' practice of bounding land superficially resembled the practice of land transfer that preceded cartography and the registration of titles in England.²⁰⁷ But English land transfer law in that period relied on a "local sense of place"²⁰⁸ in which landmarks used to measure boundaries were not created to be boundaries "according to external standards of proportion and orientation"²⁰⁹ but rather were recognised according to a local knowledge of land. This knowledge was articulated in terms of "the images which local culture superimposed upon the landscape."²¹⁰ The question of identifying the bounds of land therefore "could be addressed only by someone who was sufficiently familiar with this local sense of place."²¹¹ In Australia by contrast, the semiotics of boundaries between squatters' runs, although neither fenced nor surveyed cartographically, could not be said to be expressions of a local knowledge of the land nor part of a local cultural narrative of place. Rather, this alternative 'pioneer' semiology was the direct function of establishing externally recognisable marks "of proportion and orientation" motivated only to avoid and to resolve disputes over exclusive possession of the land. The question of identifying the bounds of land was never imagined to be

²⁰⁵ Ibid.

²⁰⁶ Weaver, above n 123, 1000.

²⁰⁷ See Pottage, Alain 'The Measure of Land' (1994) 57 *Modern Law Review* 364-374.

²⁰⁸ Ibid 366.

²⁰⁹ Ibid.

²¹⁰ Ibid 365.

addressed by a local, or indigene of the land. It was a pre-existing expectation that the question would be resolved by an 'objective' account both in measure and in person, external to the place itself. "Evidencing land ownership" to establish exclusive possession, if temporary in the form of licensing, was what the squatters' landmarks were about.²¹² The measure and process of evidencing land ownership was adjusted in the Australian context of squatting to evidencing land licence possession, yet it was an adjustment, a modification of English legal traditions rather than a creation. Squatting licences bore an uncanny resemblance to modern English land law: providing unrestricted enjoyment of lands in exclusive possession.

Boundaries or fences meant the same thing in England that they meant in colonial Australia. The signifier: fence and the signified: boundary of exclusion - was a semiotic code common to imperial and colonial property regimes. The local indigenous nations came to grief because they did not understand, through no fault of their own, what a fence signified. The regime of property installed throughout the colonisation of Australia was not universal. It is only possible to claim that 'a fence is a fence' within a universalist ontological and material economy. Australian legal discourse maintained the private property principles of exclusive possession and unrestricted enjoyment that define Australian property law as alien.

Agricultural improvement had been based on the move to enclosed lands, which undermined traditional patterns of common ownership. So, too, in Australia land use was based on notions of exclusive ownership, which left little or no role for sharing the land with its original inhabitants.²¹³

Kercher argues that the concept of property articulated by squatting licence legislation departed radically "from English notions of land holding" and yet, he acknowledges these new concepts were ones that "the colonial judges and London let past the repugnancy test."²¹⁴ This admission that the legislation was both repugnant to and approved by English authority well demonstrates the way in which the greatest differences and departures of colonial property law from English law were legitimated by English authority to serve English interests. The 1839 Act distanced Australian property law from its imperial antecedent most obviously by creating commissioners with power to decide boundary disputes. Kercher argues that the Act sanctioned the

²¹¹ Ibid.

²¹² See Pottage, Alain 'Evidencing Land ownership' in Bright and Dewar (eds) *Land Law: Themes and Perspectives* (New York: Oxford University Press, 1998).

²¹³ Gascoigne, above 12, 154.

removal of an "essentially judicial function... from the courts and handed to other officials. Practical law was now a long way from the common law model."²¹⁵ Weaver suggests to the contrary that the commissioners may have been modelled on English land stewards employed to manage Crown and private estates in England.²¹⁶ Either way, the significance of the commissioners relates directly to the question of whether Australian property law is identified as local. Both historians look to English land law and land management in answering this question thus confirming the notion that Australian property law is better defined as an Antipodean relation than local or placed.

Kercher's point about the squatting legislation departing from common law, and thus from traditional English concepts of property is tied to his broader argument that Australian laws, like the key players in its origins were "unruly children."²¹⁷ The relationship between imperial England and colonial Australia is likened to the relationship between parent and child. The creation of laws in Australia, their 'localness' is symptomatic of their failure to import completely and 'to the letter' the English common law. Kercher represents squatting as "mass disobedience." Indeed, his narrative of squatting is a story of disrespect and disdain for the law by a group of people he calls "law breakers."²¹⁸ For Kercher, the localness of Australian property law expressed by squatting licences was attributable to its lack of subtlety, its disrespect for tradition - its immaturity. "The squatters, who now included the wealthiest and most powerful people in the colony, demanded secure title at minimal cost; white men's greed was at a peak."²¹⁹ His portrait of squatters as greedy, insistent and aggressive is shared by John Weaver who describes Australian squatters as "well-placed and ambitious people" who recognised wool exports "offered a path to fortune."²²⁰ Ann Young goes further still, describing squatting as "anarchic". These histories of squatting recall the contemporaneous criticism of pastoralism that likened squatters to:

the ancient patriarchs, consist(ing) entirely of their flocks and herds, and who live a sort of semi-barbarous life themselves in the wilderness, neither cultivating the land, nor improving the country in any way.²²¹

²¹⁴ Kercher, above n 184, 121.

²¹⁵ Ibid 122.

²¹⁶ Weaver, above n 123, 996.

²¹⁷ Kercher, above n 184.

²¹⁸ Ibid 118.

²¹⁹ Ibid 121.

²²⁰ Weaver, above n 123, 982.

²²¹ Lang John, Dunmore 'Repeal or Revolution' 1848 quoted in Gascoigne, above n 12, 83.

These accounts also recall the influential critique of the treatment of native title in the development of Australian property law by Henry Reynolds who contended that Australian law, whether a modification of English law or a unique and local creation, was ultimately conceived and administered for the benefit of the colonists.²²²

McMichael offers a different perspective on the pragmatism of enacting squatting licences in the 1830s. He acknowledges the convenience of the legislation: "it was certainly pragmatic to sanction squatting for commercial reasons and to save the expense of trying to restrain it." But he goes on to attach the pragmatism to the particular political values and goals of the Governor who "managed to blunt the monopolistic pretensions of the land-owning gentry by legally sanctioning squatting."

Bourke's approach to squatting, in fact, symbolised his opposition to privilege in colonial society, in particular his aversion to the exclusive clique whose dominance in the council frustrated his Whig conceptions of colonial government.²²³

Gascoigne's history also attributes to the squatting legislation qualified but nonetheless positive motivating forces. The ideology of Enlightenment and its insistence on agricultural improvement and close settlement evident in much early imperial policy and colonial regulation of property fell short of realistic adaptation to local conditions and was constantly undermining the actual progress of the colony by failing to adapt theory to practice. Whereas Kercher saw the distance between theory and practice in terms of disorder and capitalist greed, Gascoigne attributes good sense to the same distance. "Ultimately, Australia was too large and too arid to be ever fully improved in the way of Europe where human activity overshadowed almost the entire landscape."²²⁴ To support his view, Gascoigne quotes from a letter that Governor Gipps wrote to the Colonial Secretary in 1840 regarding the legitimacy of pastoral squatting:

As well might be attempted to confine the Arabs of the Desert within a circle, traced upon their sands, as to confine the Graziers or Woolgrowers of New South Wales within any bounds than can possibly be assigned to them: and as certainly as the Arabs would be starved, so also would the flocks and herds of New South Wales, if they were so confined, and the prosperity of the Country be at an end.²²⁵

²²² Reynolds, Henry *The Law of the Land* (Ringwood: Penguin, 1987).

²²³ McMichael, above n 149, 88.

²²⁴ Gascoigne above n 12, 83.

²²⁵ Gipps, 1840 quoted in Gascoigne, *ibid.*

The connection between squatting and property law by all accounts was the growing commercial economy in Australia and particularly its dependence on the production and supply of wool. "By 1840 some 20 per cent of British wool imports came from Australia and 50 per cent by 1850."²²⁶ But where did land fit into this equation and how did it effect property law? The 1847 case *Attorney-General v Brown* addressed these questions to some extent, but elided them in other respects. Two key pieces of legislation introduced in the same period as this case provide further insight into the cultural value of land in the colonial regime of property.

First, the *Waste Lands Occupation Act 1846* (UK) which was brought into operation in 1847, granted squatters property rights more closely approximating proprietorship than ever before. The Act provided for established squatters to take up fourteen-year leases without competition at ten pounds per annum rent for each station, with a capacity of carrying 4000 sheep. The leases included the option to purchase freehold title to the property for one pound per acre at the conclusion of the lease period and offered compensation for improvements made to the property. The legislation gave squatters superior rights than those they had enjoyed under licensing, which had denied proprietorship by permitting only usufruct rights to property. "Leasing implied attachment to an area; licensing did not."²²⁷ The legislation was criticised as "locking up the land" for the benefit of large-scale pastoralists at the expense of small landholders.²²⁸ Kercher elaborates the meaning of 'locked-up land' thus: "the legislation meant that large squatters would tie up thousands of acres at minimal cost calculated by reference to the number of animals a run could support." He calls the Act the squatters' "final victory in London."²²⁹ Pastoral leases were a local innovation of property law, and how they are viewed depends on whether having a 'localised' (i.e. not-English) law is positive or negative. In any case, the legislation "recognised the supremacy of pastoral pursuits in New South Wales."²³⁰

In fact, the growing demands and rights of pastoral squatters in colonial New South Wales that culminated in the *Waste Lands Occupation Act 1846* evidence the non-localness of Australian land law. Under this Act, squatters enjoyed the rights of private property to exclusive possession since "the underlying conception of property that these

²²⁶ Gascoigne, above n 12, 81.

²²⁷ Weaver, above n 123, 994.

²²⁸ Buck, 1995, above n 45, 158, quoting petitions against the legislation made in NSW Parliament in 1847.

²²⁹ Kercher, above n 184, 122.

developments reflected was perfectly in accord with their desire to treat land as a tradeable commodity.²³¹ The unlimited enjoyment of the land and their insistence on evermore exclusive and alienable possession indicated a commitment to the principles of private property theorised and developed in England. The alienability of property was present amongst colonists from the outset of colonisation.

The second significant development in Australian property law at this time passed by the New South Wales Legislative Council in 1843 was the *Liens on Wool Act* which allowed a pastoralist to mortgage a wool-clip while still 'on the sheep's back'. As Buck acknowledges, this legislation "raised the issue of just what property was in a colonial context"²³² and "was changing the meaning of property in colonial Australia."²³³ In relation to the question of identity of Australian property law, Buck argues that the legislation indicated that "the social and economic context of New South Wales was substantively different from its metropolitan parent."²³⁴ How were these differences understood and articulated at the time? Lord Stanley, Secretary of State for the Colonies, understood the Australian law to be so radically different from English law as to be repugnant to it. He insisted that the legislation be repealed or else would be disallowed.²³⁵ His criticism was perceived as misunderstanding the nature of property in Australia and was opposed successfully. A Select Committee established to inquire into the operation of the Act conducted the following interviews in 1845. The first respondent is lawyer, Hastings Elwin:

- Q: Here, sheep, cattle and horses are the principal property?
 A: Sheep pre-eminently.
 Q: Without them the land would be of no value whatever?
 A: None.²³⁶

The second respondent is Leslie Duguid, Managing Director of the Commercial Bank. When asked about the status of sheep, cattle and horses in the colony he replies:

They form, in my opinion, the 'real property' of this country. You have said sheep, cattle and horses... I would rather restrict my opinion to sheep and wool.²³⁷

²³⁰ Buck, 2001 above n 45, 52.

²³¹ Ibid 53.

²³² Buck, 1995, above n 45, 156.

²³³ Buck, 1996, above 15, 97.

²³⁴ Buck, 1994 above n 16, 137.

²³⁵ Buck, 1994, *ibid* 136.

²³⁶ NSW Parliament 'Report of the Select Committee on the Liens on Wool Act' (1845) quoted in Buck, 1995, above n 45, 156-157.

Such unequivocal statements convinced the Committee that land was not the basis of the regime of property in New South Wales and it concluded that:

Sheep, cattle and horses should possess all the incidents of fixed property in England; that it is sound policy not to curtail those incidents, directly or indirectly, but to give them their fullest scope; and that any state of the law which should prevent the freest use of them, would be an unwarrantable interference with the rights of property.²³⁸

Pastoral squatting and the mortgage of wool represent the apotheosis of English concepts of land use. Land had become so irrelevant in the reality of the property market that it was valued precisely by the extent to which it was limitlessly exploited by the pastoral industry. Property had become utterly dephysicalised.

Nevertheless, Buck presents the *Liens on Wool Act* as an instance of the divergence of colonial Australian values of land from English values of land because the doctrinal concept of real property was altered. His view is consistent with critiques of the Act at the time that likened it to the category or 'species' of personal property under English common law. The Act was regarded as an articulation of the cultural and legal irrelevance of the distinction between the categories of real and personal property in Australia. It was explicitly a statement of the meaninglessness of land to Australian property law. But rather than examine why that would be and what it says about colonial Australia, the Act and its values are described both at the time and still today as examples of local law only to the extent that they contest and confound the law and culture of Imperial heritage. Past and present analyses of the effect of pastoral squatting on the development of Australian property law usually connect the pastoral industry, as the main mode of the production of wealth in Australia, to colonial ideas of the nature of property and thus to their divergence from the English ideas. The Chief Justice of the Supreme Court of New South Wales, Alfred Stephen said in 1854 that whilst the distinction between real and personal property existed in English law, in New South Wales, "the state of things is widely different."²³⁹ Buck's research into the origins of Australian property law demonstrates various significant differences between property and law in Australia and England, chiefly the different values of land and also different processes affecting Intestate Estates and registration of title.

²³⁷ Ibid 136-137.

²³⁸ Ibid 137.

What is not raised in discussions of pastoral squatting and property law however is the relationship between the apparent meaninglessness and valuelessness of land and the lack of payment of compensation to original owners. The absence of this analysis is particularly striking given that Australia is the only country in which squatting was redefined as a positive and lawful activity. The conventional determination of squatting, which usually depends on the presence of original proprietorship for trespass to exist, was not forgotten in Australia. From the outset, squatters were identified as squatters and the gradual transformation of the meaning of squatting corresponded to the gradual transformation of land materially and not just ideologically in becoming the property of the British Crown. An exceptional analysis of squatting is provided by Kerruish who does not define squatters according to the conventional sense, as trespassers on Crown land, as other theorists have done. Rather, Kerruish defines squatters inside and consistent with colonial law: regarding them as invaders on Aboriginal land. Land, she argues, was assumed and granted by

the British crown to the colonists, or the squatters took it from the Aboriginal nations without, initially, the consent of the colonial administration. Either way, there seemed to be an abundance of land and so it didn't have the economic value that it had in England.²⁴⁰

In the absence of any treaty or formal reconciliation between indigenous and colonial property interests in Australian law, I agree with Kerruish that the marriage of property and sovereignty cannot be regarded as satisfactorily severed. As ongoing disputes in Australian cases addressing native title claims demonstrate, statements by the High Court that sovereignty and property are separated are unilateral and not uncontested.²⁴¹

The degree to which Australian property law is local seems unambiguously the degree to which it departed from English legal categories and practices. Is this symptomatic of a movement away from colonialism? In order to establish the sense of law as local and to identify Australia as a nation rather than a colony, a creature of empire, it seems necessary first to repeat the English framework and then to describe the degree of divergence from it. "Anti-colonial nationalism operates from an impetus that is

²³⁹ Stephen, CJ evidence to the Select Committee on the Administration of Intestate Estates, (1854) quoted in Buck, 1996 above n 15, 97.

²⁴⁰ Kerruish, above n 3.

²⁴¹ See for example *Members of the Yorta Yorta Aboriginal Community v State of Victoria and Others* [2002] HCA 58 (12 December, 2002).

antagonistic to precisely its host body, colonial nationalism.²⁴² But further steps are required to convincingly define and identify Australian property law as local.

Certainly the divergence of Australian law from English law seems an adequate preliminary strategy, and it is one that legal and economic historians have well achieved. What remains is to explore and to acknowledge in greater depth the relationship between sovereignty and property, not as a question of feudal doctrine and meta-theoretical legal discourse, rather as a response to the material condition of an alien sovereignty, whether that is expressed as imperial, colonial or post-colonial. The association of pastoral squatting with land law needs to take account of the relationship between Aboriginal nations and squatters in order to be convincing as a narrative of local law. As *Attorney-General v Brown* shows, whether for feudal reasons or commercial reasons, the importation of the doctrine of tenures and estates, like the adaptation of law to pastoral squatting, was required to assert and control an alien land and its resources. The argument that Australian property law is local works only within the paradigm of an uncontested British sovereignty, an ideology of uncontested improvement, and a structure of the uncontested privilege of Culture over and against Nature. Problematically for property law, alien sovereignty was indeed contested by the Aboriginal nations and until this is acknowledged, the claim that legal responses to squatting and the pastoral industry evidences a localised land law is both inadequate and partial.

Australia seems to be caught in a post-colonial syndrome, because, unlike America, independence has not been fully achieved either historically, through war for instance, or symbolically, the Fourth of July. On the other hand, post-colonialism is something that can only be properly achieved in relation to the *original inhabitants* whose occupancy of the country was never properly acknowledged by the invaders, and whose dispossession was quickly carried out in the rush to establish Australia's primary industry wealth in the last (19th) century.²⁴³

Finally, it is important to note that the success of the pastoral industry in New South Wales and the strange legitimacy of squatting developed despite the strength of anti-pastoral protest that emphasised the enlightenment ideal of agricultural improvement in Australia. Much debate about the legitimacy of squatting was argued in terms of improvement theory. Although the spirit of improvement and the faith in scientific progress were at work in the improvement of wool and the breeding of larger sheep,

²⁴² George, Rosemary *The Politics of Home* (Cambridge: University of Cambridge Press, 1996) 13.

²⁴³ Muecke, above n 164, 11.

many colonists argued against pastoralism on account of the waste of land required for the pasture of the sheep and cattle. Pastoralists, Lang argued in 1848, were "neither cultivating the land, nor improving the country in any way."²⁴⁴ Furthermore, pastoralism required vast tracks of land and so, in association with squatters, was regarded as 'locking up the land' from other, better uses. In 1831 the Colonial Secretary wrote to Lieutenant-Governor Arthur that

it would have been more for the interest of the colony if the settlers, instead of spreading themselves over so great an extent of territory, had rather applied themselves to the more effectual improvement and cultivation of a narrower surface.²⁴⁵

Thus it was for economic and political reasons, that appealed to British commercial interests and economic philosophy of capitalism that the pastoral industry persisted and flourished. Pastoralists could reconcile the enlightenment preference for progress with their commercial interests by describing animal husbandry and the production of wool in terms of improvement. Experiments with cross-breeding sheep and importing "quality breeding stock" were regarded as vital to "improving the breed of this useful animal."²⁴⁶ Furthermore, improvement extended from sheep to people, and in accordance with the logic of Enlightenment, contributed to a yet more civilised culture "the employment of the convicts in the management of sheep in New South Wales, may be highly conducive to their moral improvement and reform."²⁴⁷

Larger sheep and finer fleeces were instances of the possibilities of progress, as techniques of experimentation endorsed by the Scientific Revolution yielded economic and social benefits. The humble sheep was a motor of change: turning waste lands into profitable ventures, improving convicts into honest workmen and dispossessing the Aboriginal population.²⁴⁸

The growth of the wool industry and its commercial benefits for Imperial Britain and colonial New South Wales influenced the legislative instruments that property theorists and legal historians have argued are distinctly local. Squatting pastoralism affected Australian land law to such an extent that the categories of real and personal property were said to collapse with the *Liens on Wool Act* 1843.²⁴⁹ The licences and later leases of squatters represented a substantial departure of Australian land law from English land law. And in strictly doctrinal terms that claim is possible. But the difference between the

²⁴⁴ Lang quoted in Gascoigne, above n 12, 83.

²⁴⁵ Quoted in Gascoigne, *ibid.*

²⁴⁶ Hobart Town Gazette, 1818, quoted in Gascoigne, *ibid.* 84.

²⁴⁷ Commissioner Bigge, quoted in Gascoigne, *ibid.*

²⁴⁸ Gascoigne, *ibid.* 85.

economic value of land in Australia and England was not more than a variation. Australian property law protected the same economic value of property and maintained the same principles of its regulation: that property is alienable and exclusive. The unlimited enjoyment of private property advanced by Locke, Smith and Blackstone is nowhere more evident in the development of Australian property law than in the laws regarding pastoral squatting. Colonial land law encouraged the expansion and assumption of vast tracks of Australian lands and protected the rights of colonists, particularly squatters, to enjoy that land without restriction. Indeed, the conditions or restrictions on which squatters were granted land related to minimum size of land and the minimum number of stock required to graze thereon. The number of sheep in New South Wales increased from 99 487 in 1820 to 13 million in 1850.²⁵⁰ Overstocking and consequent soil exhaustion devastated Australian lands. "Erosion as a result of overgrazing increased the bare areas, so that less rainfall seeped into the soil and grasses did not grow well in the drier soil conditions."²⁵¹ Environmental historian Ann Young claims that 70% of land degradation in the semi-arid and arid areas of Australia happened in the first 20 years of settlement of those areas.²⁵² Australian property law was fundamental to the existence and continuation of an alien and dominant form of land use in Australia: pastoralism.

4. DEFINING AUSTRALIAN PROPERTY LAW AS MALADAPTED

Land law neither lead nor followed land use. Rather the two were conceived and practised together as the materialisation of an alien paradigm of property. The non-localness of land law and land use in colonial Australia is evident not only through the ideology of progress and improvement, and the socio-legal developments of land grants and squatting, but through the physical, material consequences of those developments. The environmental impact of Europeans on 'new' lands resulted from an attempt on the part of the colonists to make themselves feel at home by making alien lands more like their home.²⁵³

²⁴⁹ See above.

²⁵⁰ Gascoigne, above n 12, 36.

²⁵¹ Young, above n 101, 42.

²⁵² Ibid 35.

²⁵³ Dunlap, Thomas *Nature and the English Diaspora: Environment and History in the United States, Canada, Australia, and New Zealand* (Cambridge: Cambridge University Press, 1999) 19.

Whereas the orthodox theses treat the question of land law by comparing law to law, as a horizontal relationship across differences in degree, the approach of adaptation compares instead the vertical relationship of law to land across differences in kind. And here it is apparent first, that the relationship of law *to land* was the same in both places; and second, that the relationship in Australia was distinguished by the attempt to adapt the land to the law and not the law to the land. It is this different relationship – invisible from the relativistic and legalistic standpoint adopted by Buck and Edgeworth – which becomes the focus of an adaptive analysis; and this *inversion* of the respect for land conditions in relation to law that justifies its description as ‘maladapted.’

Recreating A Gentleman's Park

Perceptions of nature and the land expressed the expectations of the colonists. Their perceptions and expectations were made real through land use. Early perceptions of Australian lands likened them to large private English parks. James Cook described the Illawarra region of New South Wales as appearing "like plantations in a gentleman's park."²⁵⁴ Through the glasses of improvement theory, Australian forests represented to English eyes bountiful land comparable to enclosed, private estates. This perception changed when the colonists found themselves struggling to subsist without imported supplies of food. The same cultural value of land that introduced private property, agriculture and pastoralism to Australian lands also prevented the newcomers from successfully adapting to them. "Although they appear foolish in hindsight, they were in reality only terribly maladapted."²⁵⁵ The maladaptation of the colonists cannot be attributed to their inability to adapt, or to the impossibility of adaptation to Australian lands. The enduring struggle of colonial Australians to adapt to Australian lands can be attributed to their perception of the land and their attitude to adaptation. Rather than observe the land law and land use of local Australians, colonists "thought instead of ways to make Australia adapt to them... attempting to create a second Britain in Australia."²⁵⁶

The philosophy and economy of the English Enlightenment described the earth, or Nature, in terms of an objective and universal reality, independent of Culture. To the colonists, the Australian landscape was autotelic: its significance was independent of

²⁵⁴ Cook 1785 quoted in Flannery, above n 134, 348.

²⁵⁵ Ibid 355.

²⁵⁶ Ibid.

cultural expectation and interpretation.²⁵⁷ Colonial land use and land law however reveals that the expectations the colonists had of Australian lands determined the way in which they perceived the land and related to it. Expectations of the 'new lands' related directly to the materiality of land and its resources. Sensibility to land "is a product of economic structure and working relations with the earth."²⁵⁸ To a large extent, Australian property law articulated the expectations and interpretations of people alien to Australian lands. The meaning they attributed to land and its function in their economy were not derived from local values and economy. They were imported.

John O'Carroll claims that Australian self-representation is characterised by a persistent claim of disorientation, estrangement and alienation. He suggests this may be due to the transportation of an English topographic imaginary to Australia since the earliest days of colonisation.²⁵⁹ Tim Flannery similarly argues that colonial Australians brought with them their European ideas of the relationship between people and place.²⁶⁰ Stephen Muecke argues that the ideology of imperialism

sought to unify, to relate all geographical sites, economic exchanges and even ideas, back through a diminishing perspective to London... to bring the city to a country without cities, a way of bringing places into relation with a city (London), and then setting up little copies of it in colonial places.²⁶¹

Dunlap argued that the European relation to Nature through Science, notably taxonomical categories of natural things was extended and used to appropriate the 'natural' world of foreign lands, or 'neo-Europes.' Land and its resources were not related to by colonists, rather they were 'known' through the technology of taxonomic language. Taxonomies are more than catalogues: they are ways of thinking. For example, "placing bats and whales in the class Mammalia... requires deciding what characteristics are basic, which peripheral, to the idea of 'mammal'."²⁶² The experience of colonists in Australia demonstrated both the roles of law and ideology in shaping landscape, and the physical limitations of ideology. The platypus, for example, confounded the European taxonomic categories because the animal did not fit their ideas of mammal or reptile. The creation of a dedicated category for platypus,

²⁵⁷ See Fitter, Chris *Poetry, Space, Landscape: toward a new theory* (Cambridge: Cambridge University Press, 1995) 9

²⁵⁸ *Ibid.*

²⁵⁹ O'Carroll, John 'Upside Down and Inside Out: Notes on the Australian Unconscious' in Barcan, Ruth and Buchanan, Ian *Imagining Australian Space: Cultural Studies and Spatial Inquiry* (Nedlands: University of Western Australia Press, 1999) 18-19.

²⁶⁰ Flannery, above n 134, 345.

²⁶¹ Muecke, above n 164, 4.

monotremata, was added to the class of mammals and became known and knowable within the umbrella of science. The species remains subversive to the European paradigm of Nature/Culture because it demonstrated the way in which taxonomic thought is dependent on the specifically (European) physical environment, and thus that ideology is not independent of materiality.

Starvation

Rather than attributing their difficulties producing food for several years to their newness and lack of knowledge and familiarity with the local conditions and offerings, the colonists attributed their problem to the emptiness and lack of the land itself. Governor Phillip was so convinced of the inadequacy of the land to yield sufficient food to sustain the colony that he wrote "No country offers less assistance to the first settlers than this does... a regular supply of provisions from England will be absolutely necessary for four or five years."²⁶³ Food shortages, the constant threat of starvation and the importation of food, flora and fauna from Europe evidenced the maladaptation of the colonists and their detachment from Australian lands and peoples. Furthermore the difficulties they encountered trying to make the land adapt to their economy perpetuated the idea of Australia as harsh and wild and in need of improvement. The local flora was condemned as "too contemptible to deserve notice."²⁶⁴ Without developing a knowledge of the native food available locally and without ploughs and horses to recreate their British agricultural economy, starvation "daunted the settlers and left them feeling isolated and abandoned at the end of the earth."²⁶⁵ Flannery claims that "starvation was ubiquitous, with several convicts actually dying from want of food."²⁶⁶

Viewing the new world of Australia through the filter of agricultural improvement shaped by alien British experience could also be distorting. It was symptomatic that they made almost no use of Aboriginal knowledge of the land... hence the irony of explorers dying in areas that could support Aboriginal tribes.²⁶⁷

²⁶² Dunlap, above n 253, 30.

²⁶³ Phillip quoted in Gascoigne, above n 12, 71.

²⁶⁴ Captain Watkin Tench, quoted in Gascoigne, *ibid* 72.

²⁶⁵ Jeans, D.N. 1972 quoted in Young, above n 101, 1.

²⁶⁶ Flannery, above n 134, 348.

²⁶⁷ Gascoigne, above n 12, 99.

Even attempts to 'adapt' were limited. Early sowing of wheat crops and improving breeds of sheep for finer wool arguably constituted efforts to adapt to the 'new' environment. Yet really these were attempts to make the land adapt to their alien economy rather than an attempt to adapt themselves, as strangers, to the economies and laws of the land. Despite the imposition and functioning of a commercial economy, agricultural production in New South Wales did not exceed domestic consumption until 1898. Western Australia imported over fourteen million pounds worth of agricultural produce until 1906.²⁶⁸ The insistence of the colonists on the private property principles of exclusion and unlimited enjoyment of land and the capitalist economy that land law served was at odds with the dismal degree of adaptation evidenced by food shortages and starvation. Viewed in this light, land grants seem alien rather than local - colonial adaptations of imperial laws according to desires and interests produced in another land.

Europeans were not discouraged by the imagined 'hostility' of the land because they were believers in improvement and progress. "The continent they had taken to be their own could be moulded to meet their needs. For all the strangeness and harshness of the landscape it was amenable to improvement."²⁶⁹ Agricultural improvement in Australia implied not only an ideal land use, it implied the availability and capability of Australian land to agricultural improvement. What this indicates is that the logic of improvement theory turns around two distinct beliefs: first, the universal appropriateness of agricultural improvement and second, the universal amenability of all land to improvement. The universalistic logic of improvement theory conveys the lack (or rejection) of a sense of locality: neither land nor land use is local. The theory and its logic endured, despite the difficulties they encountered, the colonists never considered these as instances of maladaptation, rather, it was taken as proof that the program of conquest was not finished. Over sixty years after the foundation of the Australian Agricultural Company, the idea of improvement had not waned and was officially promoted again by taxes on unimproved land. In 1884 the South Australian government imposed a tax on unimproved land in order to release under-utilised or unproductive land for agricultural use.²⁷⁰ New South Wales followed in 1885.

²⁶⁸ Ashton, above n 145, 32.

²⁶⁹ Gascoigne, above n 12, 9.

²⁷⁰ Ashton, above n 145, 30.

Land Degradation

Both agriculture and the pastoral industry affected enormous degradation of Australian lands. The necessary clearing of lands, consequent soil erosion and loss of native flora and fauna were direct consequences of the imposition of an alien land law and land use. Geoffrey Bolton's ecological history of the colonisation of Australia titled a chapter on land clearing: "They Hated Trees".²⁷¹ Tim Flannery on the other hand suggests that Australian colonists regarded timber resources as abundant and almost inexhaustible. He cites the professional opinion of Commissioner Frye of the New South Wales public service in 1847 that the "Big Scrub of northern New South Wales could not be cleared in five or six centuries." Flannery continues dryly "Clearance of the Big Scrub began in earnest in the 1880s, and by 1900 it was all gone."²⁷² Tree felling was needed for agricultural development, for building, for fuel, for furniture, for gold mines - cutting trees down supported the social economy of the colonists and the discourse of private property encouraged the activity because human agency in the natural environment legitimated entitlement to property. Even so, the extent of tree clearing was extravagantly wasteful and the effects were irreversible.

The woods, like other elements of the landscape, such as grasses, soils and waters... were swept away in the pursuit of improvement, development and progress as then understood... the prodigality was matched only by the ignorance and misperception of the extent of the wooded endowment of the continent.²⁷³

One method of land clearing was ringbarking. This technique involved cutting away the bark in a ring around a tree trunk and its branches in order to kill the tree or just the affected part. It was effective and cheap and was used from the outset of the colonisation of Australia. This method was particularly popular with pastoralists and agriculturalists and so as more and more land was annexed by the colonists, the landscape gradually but dramatically transformed. In 1873, the first secretary of Agriculture in Victoria, A.R.Wallis argued for the need for remedial action and technical education in agricultural matters. In Goulburn, not long after colonisation, "concern was expressed for increasing scarcities of timber."²⁷⁴ "By the 1890s, over a quarter of the forests extant in New South Wales a century earlier had been destroyed. The environmental

²⁷¹ Bolton, Geoffrey *Spoils and Spoilers: Australians Make Their Environment 1788-1980* (Sydney: Allen & Unwin, 1981) 37.

²⁷² Flannery, above n 134, 360.

²⁷³ Williams, 1988 quoted in Young, above n 101, 18.

²⁷⁴ Ashton, above n 145, 26.

consequences... were to be immense."²⁷⁵ The failure of the colonists to 'know', understand and tame Australian lands was regarded as a consequence of the strangeness, the inadequacy of the land. The colonists did not describe their difficulties and struggles as a consequence of their strangeness to the land.

Property law made purchases and grants of land conditional on 'improvement'. The instances in which that ideology and practice failed were not however subversive, because of the abundance of unexceptionally cheap and vast tracts of land grants and purchases. Instead, instances of the failure of improvement theory could therefore be ignored. Improving colonists, maladapted to Australian lands were "guilty of flogging the land. On exhaustion, the ground was either abandoned for fresher fields or left 'fallow' and unattended."²⁷⁶ One commentator of the time remarked that the logic of the land law determined this result.

So long as virgin soil is to be had at one pound an acre, so long will the average South Australian farmer prefer to spend the money in the purchase of new land, rather than in the improvement of what has been impoverished.²⁷⁷

The failure of improvement theory demonstrated its maladaptation but remained irrelevant to its perpetuation, because although the law imposed conditions on proprietors to improve the land, it did not adjust the commercial value of land to make those conditions compelling.

5. CONCLUSION

The two dominant accounts of the historical development of Australian property law, conventional and revisionist, present the character of the law as imperial or local, English or Australian respectively. Both presentations of the origins of Australian property law have unfailingly provided contested interpretations of both the function and character of the common law according to its socio-historic rather than its terrestrial context. Law was categorically separated from Nature and in this respect failed to provide a land ethic despite regulating forms of possession and ownership that affect land use. Property law is a discourse that shapes the land. The expectations of nature

²⁷⁵ Ibid 33.

²⁷⁶ Ibid 26.

²⁷⁷ Witness to a Commission established by the South Australian colonial government in 1875, *South Australian Parliamentary Paper, No.77*, (Government Printer) quoted in Ashton, above n 145, 24.

and earthly resources prescribed by the paradigm of property law dominated relations between European colonists and Australian lands.

Flannery argued that the damage to the Australian natural environment wrought by "cultural maladaptation" can best be regarded as the result of the national economic addiction to home ownership.²⁷⁸ Flannery is right to link land use to land law, specifically the legal institution of private property around which the Australian economy orbits. But Buck and Edgeworth are right too - the origins and development of Australian property law were distinctive from the development of English land law. The two arguments can be reconciled. Buck and Edgeworth approach property law critically, but without situating it within the physical context of the 'natural' environment and its vital, though unacknowledged, place. The localness of Australian property law exists only in so far as 'local' means not English. But property law cannot be detached from the discourse and practice of land use and so its localness, when assessed materially, is maladapted. Perhaps the final proof of this can be found in *Attorney-General v Brown*. Richard Windeyer, the defence counsel for James Brown in that case argued that

it was quite at the option of the grantee to do whatever he pleased with the land, as long as he held it in possession, and he might even destroy it, so far as land could be destroyed.²⁷⁹

These words convey the core principles of private property: sovereignty, exclusive possession and unrestricted use of the land. This law governed land use in colonial Australia. There was no question in this case that the land and its resources could and should be exploited to the maximum economic benefit. Rather the question in this case was which colonial interest was more important: the private sovereign or the public sovereign. As Buck observes, it was a "dispute between competing interests within the settler society"²⁸⁰ and so not a dispute between imperial and indigenous and local values. The historical development of Australian property law does not identify or define it as local or Australian. It is better understood as the manifestation of an antipodean relation. The practice and consequences of colonial land law and land use were alien and maladapted. It is precisely because we do not know the extent to which "land could be destroyed" that it is important to establish a relationship between law and land that

²⁷⁸ Flannery, above n 134, 400.

²⁷⁹ Windeyer, Richard, Defence counsel for James Brown, in *Attorney-General v Brown* 1847 quoted in Buck 2001, above 45, 53.

²⁸⁰ Buck, 2001, *ibid* 50.

takes account not only of the interests of the present individual owner but the interests of both future owners and the community itself.

DEPHYSICALISING PROPERTY IN THEORY

CHAPTER FOUR

Chapter Four

DEPHYSICALISING PROPERTY IN THEORY

Political revolutions aim to change political institutions in ways that those institutions themselves prohibit.¹

However unreal social reality was becoming under the fetish of the commodity it was also actual. The logic of the thing-thing conception is a totalisation. It is not the totality.²

1. INTRODUCTION

Theories of property sustain the paradigm of modern property law because they inform and are informed by both the pedagogy and practice of law. Legal theory describes people-place relations according to the dichotomous logic of persons/things. The person/thing paradigm dephysicalises and universalises an infinite number of actual, particular people-place relations into a finite set of abstract, non-specific person/thing relations. This paradigm sustained the rise of private property and the project of colonisation. The paradigm is reproduced by the uncritical state of legal theories of property which have not changed significantly over time, but have rather rearticulated the person/thing framework variously as person-person and thing-thing relations. Despite the appearance of theoretical development, the vocabulary of 'persons' and 'things' remains, insistently maintaining that the fundamental concept of property law is dephysicalisation, in which case, physical things, like land, are irrelevant.

The ubiquitous concept of dephysicalised property in legal theory demonstrates the particular contribution of legal scholarship to the process of abstraction and alienation of people and place. What does dephysicalisation mean? In legal theory, the notion of dephysicalisation describes the reconceptualisation of real property, from the possession of a physical thing, land for example, to the possession of an abstract thing, a legal right.

¹ Kuhn, Thomas *The Structure of Scientific Revolutions* 3rd ed., (Chicago: Chicago University Press, 1962) 93.

² Kerruish, Valerie *Property and Equity* (unpublished lectures, School of Law, Macquarie University, 1999).

Dephysicalisation is usually associated with the theoretical movement from the model of person-thing to the model of person-person relations that is thought to have started in the late 18th century with the work of Bentham. This conventional understanding of dephysicalisation regards it as a peculiarly legal concept rather than as part of broader paradigmatic process. As the previous chapters argued however, dephysicalisation can be traced back further, to the marriage of entitlement to property with the improvement of land and the work of Locke. Bentham did not invent the idea of dephysicalisation, he merely restated it. He himself noted that it was only unlearned people who confused the legal category of 'thing' with the physical thing itself,³ suggesting that the dephysicalisation of 'things' was by then well established. The significance of Bentham's work to theories of property law is that he argued against Locke and Blackstone, that entitlement to property is not vested in natural rights or natural law, but in positive law. The idea that the 'thing' of property, land for example, was an object, whose defining characteristic was that it was an abstract, legal right possessed by the person or subject, was already accepted.

The first section of the chapter presents the contributions of Bentham, Mill, Hohfeld, Vandavelde and Macpherson to the person-person theory of property. For both Bentham and J.S. Mill, property was described in terms of its use value, as an instrument of an idealised state and economy. Bentham and Mill conceived of property as part of the positivisation of law and utilitarian political theory respectively. Both theorists present property as relations between persons rather than between persons and things. This does not mean that 'things' were irrelevant to property, but that they were objectified to such an extent that their role was implicit and subordinate. The person-person model of property relations simply assumes that 'things' are the objects of the relation between persons. The focus of the property right is not therefore the 'thing' attached to the right, it is the right of a person or subject against the rights of other persons. The use value of property, between persons, is the precursor of the exchange value of property theorised by Wesley Hohfeld, Kenneth Vandavelde and C.B. Macpherson. Hohfeld qualifies the legal relativity of property rights between persons, whilst Vandavelde and Macpherson emphasise the political potential and consequences of dephysicalised property rights. Both the use value and the exchange value of property advanced by these theorists present property relations as relations between persons, and

³ See Chapter 2, Section 4, 'Land as Capital'.

thus as exclusively socio-political relations. This idea of property eclipses place, because property relations are entirely Cultural and Cultured.

The next section of the chapter, 'Thing-Thing Property', presents the critiques of the dephysicalisation of property, and its model of person-person relations. Karl Marx argued that modern property relations are better described as thing-thing relations. The thing-thing model of property relations does not however rephysicalise property or describe property outside the paradigm of Nature/Culture. Rather, it critiques and emphasises the way in which people themselves become objectified by dephysicalised property, along with the objectification of nature. Marx conceives of dephysicalisation as a three-stage process that abstracts, inverts and fetishises the 'real' or 'thing'. Marx's theory of property-as-fetish is descriptive rather than prescriptive. It offers a critique of dephysicalisation as an instance of resistance to the Nature/Culture paradigm. Jean Baudrillard also presents property as a relation between things. Baudrillard reconceptualises the commodity value of property in Marx's theory of thing-thing property in terms of its symbolic value. For Baudrillard, property participates in a semiotic economy. The paradigm of nature/culture is meaningless to him not because it dephysicalises a real world, but because meaning, the 'real' world, exists only within the paradigm, and thus indicates the impossibility or absence of any external reality.

Contemporary legal theorists Kevin Gray and Alain Pottage also consider property in terms of a semiotic economy, in which the sign value of property protects the illusory sanctity of law as an institution. This theory of property challenges not merely the legal category of property but the foundation of law itself because it questions the constitutive foundations of law's authority. Whilst Gray's theory is content to playfully contemplate property as an economy of symbolic things, Pottage critiques this economy and the very concept of dephysicalisation. What emerges from the very different work of Gray and Pottage is the idea that property law is abstract and elusive. Positivist, political and postmodern theories of property differ on the question of what property signifies, but they are unanimous on the point that property in itself is meaningless. Whether property is theorised as being power, capital, wealth or commodity, the starting point is the same - property is always a metaphor for something else.

As powerful as critiques of the concept of dephysicalised property are, they stop short of asking whether their conclusions are viable, desirable and inevitable. The meaninglessness of property is regarded as fact rather than as ideology. The conclusion

of contemporary property theory, that property law is elusive and indeterminable and that reality has been commodified, does open up other questions. What happened to the 'real' in property? What is the physical "reality of commodification"?⁴ The second and third chapters attempted to address the first question, the fifth chapter attempts to address the second question. This chapter locates the concept of dephysicalisation within theories of property law and argues that theory plays an important part in maintaining, by rationalisation, the modern paradigm property law and its separation of people and place.

2. PERSON - PERSON PROPERTY

Positive Property: Jeremy Bentham

Jeremy Bentham (1748 - 1832) profoundly influenced modern law and property in the Anglophone world by conceiving property as a creation of law, rather than as a material thing. Property was Cultural, not Natural. "It is metaphysical, it is a mere conception of the mind."⁵ Bentham rejected the natural rights theory of John Locke and William Blackstone, for whom property relations were relations between persons and things. The problem with Locke's idea of property in specific terms, Bentham argues, is that it "overlooks so many other valuable subject matters of possession, namely power, reputation and condition in life."⁶ Blackstone on the other hand had to a limited degree

widened the range of property discussed at a time when most discussions of property were restricted to land, interests in land and money in so far as it was to be regarded as a debt that could be charged against the debtor's land.⁷

Nevertheless, Bentham regarded Blackstone's work as a "striking example of the inability of the common law to provide adequate definitions of property."⁸ This was in part due to the definition and division of property into the categories of the 'real' and the 'personal' which Bentham argued was an obsolete structure inherited from and particular to the feudal context, in which land was the locus of both the means to life and to power. The problem in this division as he saw it was that such an historical definition of property failed to account for the changed economy, in which land no longer functioned as the sole source of wealth and power, and was thus anachronistic

⁴ Best, Steven 'The Commodification of Reality and the Reality of Commodification' in Kellner, Douglas (ed) *Baudrillard: A Critical Reader* (Oxford: Blackwell, 1994).

⁵ Bentham, Jeremy Chapter VIII: 'Of Property' in C.B. Macpherson (ed) *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 41.

⁶ Postema, Gerald J. *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1986) 174.

⁷ Sokol, Mary 'Bentham and Blackstone on Incorporeal Hereditaments' (1994) 15 *The Journal of Legal History*, 287: 297.

and irrational. Blackstone had not only upheld this "irrational" division of real and personal property, he had also hierarchised it by privileging real property.⁹ And indeed the need to reform property law to account for growing forms of wealth holding was the basis of Bentham's submission to the 1828 Real Property Commission.¹⁰

In this submission Bentham proposed a unified system of property law that would encompass "newer proprietary rights such as shares in companies and copyright"¹¹ and that would ultimately "take its place in the civil law, forming part of a code of law coherent in all its part and comprehensible to all."¹² Significantly, the agenda of the Commission itself was to promote efficient management and security of land title following the enclosure movement which had "made precarious many traditional rights in common land"¹³ and which was challenging the adequacy of the common law to enforce this program.¹⁴ Responsive to the 'needs' of law at the time, this Commission belonged to a changing operation of law as a "scientific administration" of positive principles. The reforms of the Commission, Bentham hoped, formed "a universal jurisprudence that would provide the necessary concepts of rights on which to base the rational utilitarian system of property law."¹⁵ Bentham had criticised the inadequacy of the common law for its inconsistency and confusion of real and personal property in his critiques of Blackstone.¹⁶ But the common law property regime was unsatisfactory to Bentham not merely because it was outdated, but because it vested law's legitimacy in nature.

Bentham's critique of natural rights in property was part of his broader radical philosophy of legal positivism and utilitarianism. "Bentham, conceiving himself as the Newton of the moral world, combined law's completeness with its limitless sovereignty in the prospect of an eventual attainment of total and 'certain order'."¹⁷ The impact of Bentham's philosophy on the development of modern property was twofold. His rejection of the person-thing relation in Blackstone's natural rights theory of property produced the notion of property as a person-person relation. Secondly, the proposed

⁸ Ibid 287.

⁹ Ibid 294.

¹⁰ Ibid 287.

¹¹ Ibid 287.

¹² Ibid 300.

¹³ Ibid 290.

¹⁴ See Brown, David and Sharman, Frank 'Enclosure: Agreement and Acts' (1994) 15 *The Journal of Legal History* 267.

¹⁵ Sokol, above n 7, 300.

¹⁶ Ibid 292.

integration of the distinct bodies of personal property and real property into one broad body of property rights, according to the person-person model of property, transformed the locus of social wealth from land, to law or legal right. In effect what Bentham's theory of property achieved was the separation of land from the idea of property and from the body of law itself by "elevating" the entire basis of property from natural rights to cultural rights. "Bentham anticipates the modern tendency to regard all rights secured to an individual by law as 'a species of normative property belonging to the right of the holder.'"¹⁸ To Bentham, the function of law was to protect the security of the individual citizen and the government by protecting the institution of property rights.¹⁹ The integration and codification of real and personal property into a positive scheme of private property rights Bentham argued was the means by which to achieve such a "civilised society." The expansiveness of Bentham's idea of property proposed that "all forms of social interaction available to human beings except political relationships and institutions fall under the concept of property."²⁰

In Bentham's time, the economic and legal primacy of the category of real property was diminishing and so law could no longer be conceptually dependent on "any exterior reality"²¹ for its authority. The particularities of reality had to be rejected or incorporated into a universal model of law that would transcend place.²² Bentham's property was law and the law was property. "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."²³ Both law and property were Cultural, and thus dephysicalised, Bentham argued, they existed only as abstract logical forms.

Bentham's claim that "there is no such thing as natural property"²⁴ (property in and through nature) does not undermine the logical bases of Locke and Blackstone however. The anthropocentric logic of the Nature/Culture paradigm that constructed the physical/metaphysical and body/mind dualisms, for example, is deployed by each theorist to rationalise the authority of their particular concepts of property. Nature was always Culture's *other*. For Locke, Nature had replaced God, natural rights replaced

¹⁷ Fitzpatrick, Peter *The Mythology of Modern Law* (London: Routledge, 1992) 57.

¹⁸ Postema quoting HLA Hart, above n 6, 174.

¹⁹ Postema, above n 6, 175.

²⁰ *Ibid* 174.

²¹ Fitzpatrick, above n 17, 56.

²² *Ibid*.

²³ Bentham, above n 5.

²⁴ *Ibid*.

divine rights.²⁵ Bentham's idea of positive law replaced Locke's notion of transcendent authority with rational immanence. Bentham's theory of law did not need to appeal to either God or (by parallel) Nature, because it was self-legitimizing and guaranteed by positive institutions and processes. Nevertheless, the instrumentalist view of nature was common to both theorists. Bentham, like Locke, conceived of nature as something to be Cultured. "Who has renewed the surface of the earth? Who has given to man this domain over nature - embellished, fertilised, and perfected?" The answer of course is the "beneficent genius" and security of law.²⁶

Bentham's theory of property separates people and place, defines them by mutual opposition as Nature/Culture, and values land, or nature, as an object or instrument of Cultural order. So did Locke and Blackstone. Bentham's difference from his predecessors is that the instrumentalist value of nature of his theory of property is not defended, it is assumed. For Bentham, the subordination of Nature to Culture is already accepted. The negativity and passivity of Nature is a human task insisted upon by Locke and Blackstone. For Bentham it has already been accomplished. Locke had linked the subordination of Nature to law's agency. Property was the active and abstract signifier, and place was the passive reality signified. But Bentham's theory of property pushed this equation further. For him, legal discourse did not merely *signify* property. It *was* property.

In other words, the sign is not experienced as arbitrary but assumes a real importance. As a consequence, the material reality that the sign was commonly supposed to point to crumbles away to the benefit of the imagination, which is no more than the over-accentuation of psychical reality in comparison with material reality.²⁷

The object, or 'thing', of real property, land, is erased by Bentham's insistence that it represents nothing at all, except the right to which it is attached. Nature, the physical realm is concealed by the "self-sufficient determination of positive law - the law posited by the sovereign."²⁸ This is precisely the conclusion of Bentham's positivist program. The meaning and origin of law is entirely self-referential.

To say that "property is entirely a creature of law"²⁹ is to argue that "the origins of property *just are* the origins of law."³⁰ By asserting the omnipresence of law/Culture and

²⁵ See Chapter 2, Section 4, 'Nature as Law and the Antilogy of Natural Rights'.

²⁶ Bentham, Chapter X: 'Analysis of the Evils which result from Attacks upon Property' above n 5.

²⁷ Kristeva, Julia *Strangers To Ourselves* (New York: University of Columbia Press, 1991) 186.

²⁸ Fitzpatrick, above n 17, 54.

²⁹ Bentham, Jeremy *The Works of Jeremy Bentham* Vol. I, Bowring, John (ed) (Edinburgh, 1838) 308.

³⁰ Postema, above n 6, 184.

the absence of Nature, Bentham "brings to light, that which ought to be hidden,"³¹ the question of the origin of the authority of law. "The question and the quest are ineluctable, rendering irresistible the journey toward the place and the origin of law."³² This question of origin subverts Bentham's idea of property precisely because, being vested in positive law itself, property is without origin. Bentham approaches the question thus:

What is it that serves as a basis to law, upon which to begin operations...
Have not men, in the primitive state, a natural expectation of enjoying certain things, an expectation drawn from sources anterior to law?³³

His answer is that there was and remains a "savage" and "very limited" form of possession outside the law but that it is "miserable and precarious." Indeed, these very "physical circumstances" are so dire that they necessitate or give rise to law.

A feeble and momentary expectation may result from time to time from circumstances purely physical; but a strong and permanent expectation can result only from law.³⁴

For Bentham, the origin of the law is the happy and inevitable miracle of civilisation. Indeed the "force and origin" of Bentham's law derives "purely from its intrinsic being."³⁵

After briefly celebrating this rupture from nature, Bentham's Cartesian focus shifts swiftly from the abject physical condition at the origin of law, to its beneficial abstract consequences. Bentham's movement from the real to the abstract enacts the "scheme of elevation"³⁶ Freud described in his account of repression at the origins of morality.

The scheme of elevation, the upwards movement, everything that is marked by the prefix *super* is here as decisive as the schema of purification, of the turning away from impurity, from the zones of the body that are malodorous and must not be touched. The turning away is an upward movement. The high and the pure, are what repression produces as the origin of morality, they are what *is better* absolutely, they are the origin of value and the judgment of value.³⁷

Bentham's property seems to turn away from the primitive possessions (consisting of dead animal) hidden in a cave³⁸ and the "impenetrable forests, sterile plains, stagnant waters and impure vapours" of "savage nature"³⁹ to the "healthy and smiling" cultivated

³¹ Freud, Sigmund 'The Uncanny' (1919) *Penguin Freud Library, Volume 14 'Art and Literature'* Strachey, James (translated and edited) (London: Penguin, 1990) 345.

³² Derrida, Jacques 'Before the Law' in *Acts of Literature* Attridge, Derek (ed), Roulston, Christine (trans) (New York: Routledge, 1992) 192.

³³ Bentham, above n 5.

³⁴ *Ibid.*

³⁵ Fitzpatrick, above n 17, 55.

³⁶ Derrida, above n 32, 193.

³⁷ Derrida discussing Freud's idea of repression above n 32, 193-4.

³⁸ Bentham, Chapter VII, above n 5.

³⁹ Bentham, Chapter X, above n 5.

and enclosed fields of "peace and abundance."⁴⁰ Bentham's movement conceals, rather than departs from, the physical realm. Nature is not somewhere else; it is covered by law. Bentham's repression of Nature forgets the ground on which it stands. "The law, intolerant of its own history, intervenes as an absolutely emergent order, absolute and detached from any origin."⁴¹ Denying its "terrestrial dimensions,"⁴² Bentham's theory of dephysicalised property endows his concept of law with "the qualities of a fable"⁴³ which deconstruct the possibility of his ahistoric positivism. Bentham's theory that property is a dephysicalised relation between persons demonstrates that the paradigm of modern property law is, as Karl Marx called it, the "illusion of jurisprudence."⁴⁴

Utilitarian Property: J.S. Mill

J.S. Mill's idea of property had a moral purpose that required the alienability of the physical, as advanced in Bentham's positive theory of property. Mill's *Principles of Political Economy* (1848) expresses the idea that the absence of place in property, permits the priority of the state and its economy. But Mill's theory of property differs from Bentham's in that Mill's property has a physical function, even if it has no physical value. Mill's utilitarianism does not erase 'things' from the equation of property precisely because its use value depends on its thingness. "When the property is of a kind to which peculiar affections attach themselves, the compensation ought to exceed a bare pecuniary equivalent."⁴⁵ Mill admits here that real property exists as a distinct category of property in its physicality and particularity, yet he simultaneously asserts that this real property right can be alienated and exchanged, like other property rights.

In his critical reflection on the state of private property, Mill casts grave doubt over the "discretion of a class of persons called landlords who have shown themselves unfit for the trust" of the community which "has too much at stake in the proper cultivation of the land."⁴⁶ Mill's idea of a proper use of the physical as "a railroad or new street," is a morally qualified utilitarianism, defined socially rather than individualistically. Importantly, Mill's better and morally sound use of place transforms its very physicality or thingness into a semi-real, semi-abstract space or meta-place, the predominant

⁴⁰ Ibid.

⁴¹ Derrida, above n 32, 194.

⁴² Fitzpatrick, above n 17, 55.

⁴³ Derrida, above n 32, 199.

⁴⁴ Marx, Karl *The Poverty of Philosophy* [1847] (Moscow: Progress Publishers, 1975) 142.

⁴⁵ Mill, John Stuart *Principles of Political Economy* (London: Nelson, 1971) 249.

⁴⁶ Ibid 250.

function of which is to carry the common public citizen to and from their particular private places. The lack of physical particularity in public spaces, such as roads and railways foreshadowed in Mill's thesis, anticipates and avails the development of dephysicalised property in the following centuries.

Mill's acknowledgment of the physical, remains based on morality not nature. Nevertheless, it remains quite different to Bentham's radical eclipse of the category of real property. For Mill nature is valued completely in terms of its usefulness to the utilitarian project and thus, all private property, is secondary to the needs of public property and the sovereignty of state.

Landed property is felt even by those most tenacious of its rights, to be a different thing from other property... (but) the claim of the landowners is altogether subordinate to the general policy of the state. The principle of property gives them no right to the land, but only a right to compensation for whatever portion of their interest in the land it may be the policy of the state to deprive them of.⁴⁷

Yet Mill's prioritisation of public over private property is consistent with Bentham's positivist scheme of property rights because the physical loss of property as a thing, as *reality*, can be neutralised by compensation or purchase and thus can participate in the grander altruistic economy of the state and security of its citizens.

Mill's economy of property stops short of a complete commodification of the physical, or real. For him, the function of compulsory acquisition, for example, is not as part of a monetary economy, but rather as part of an explicitly utilitarian program. It is the useability, not the profitability of the land that matters. Certainly the utilitarian economy and the monetary economy of property both construct nature as the negative *other* of the law, but where Mill's theory of property attributes a *negative meaning* to nature, Bentham's theory of property makes nature *meaningless*.

Property Rights: Wesley Hohfeld

Courts "began to define property as the right to value rather than to some thing."⁴⁸ The subsequently augmented body of property rights had been relativised according to liberal and utilitarian ideals of social organisation, and since the distinction between real and personal property rights was eroding, determinations of what constituted a

⁴⁷ Mill, above n 45, 249.

legitimate property right varied from case to case. Such indeterminacy of property was the reason for, as well as the context of the property theory of Wesley Newcomb Hohfeld, according to Kenneth Vandevelde.⁴⁹ Hohfeld contributed two essays to the growing controversy over the definition of property law in 1913 and 1917.⁵⁰ Hohfeld's work does not really offer more than a clarification and reduction of the concepts relating to recent changes to property law. His main point is that property law weighs the "aggregate of abstract legal relations" rather than deferring to "figurative or fictional" categories of property according to distinctions between physical things.⁵¹ Property was no longer defined absolutely, by categories of 'real' or 'personal' things, because these 'things' were now, as 'things', meaningless. Instead, property was defined as relative, that is, by relating the rights of persons to each other.

Hohfeld did however provide a theory for the slowness with which these changing concepts were received into society more generally. Where Bentham and Mill were concerned to prescribe particular social structures and values around the idea of dephysicalised property, Hohfeld sought to revise and adapt the language of law to those prescriptions in order to correct and stabilise the "unfortunate tendency to confuse and blend" the true and definitive model of dephysicalised property.⁵² To this extent, Hohfeld's essays provide an excellent discussion of the disjuncture within the discourse of property between what he classifies as 'legal and non-legal' conceptions of property. In so doing, he articulates a set of basic property rights, described as "the lowest common denominators of the law" which are believed to define the regime of modern or 'new' property.⁵³ The common feature of these rights was that they were all legal relations between persons rather than between persons and things. In a statement that is strikingly similar to a statement by Bentham on the definition of property, Hohfeld argues that

[t]he term 'property', although in common parlance frequently applied to a tract of land or chattel, in its legal signification 'means only the rights of the owner in relation to it'. It denotes a right over a determinate thing.⁵⁴

⁴⁸ Vandevelde, Kenneth 'The New Property of the Nineteenth Century: The Development of the Modern Concept of Property' (1980) 29 *Buffalo Law Review* 325: 333.

⁴⁹ *Ibid.*

⁵⁰ Hohfeld, Wesley Newcomb 'Some Fundamental Legal Conceptions as Applied in Legal Reasoning' (1913) 23 *Yale Law Journal* 16 and 'Fundamental Legal Conceptions as Applied to Judicial Reasoning' 26 *Yale Law Journal* (1917) 710-770.

⁵¹ Hohfeld (1913), above n 50, 189.

⁵² *Ibid.* 176.

⁵³ Vandevelde, above n 48, 359-360.

⁵⁴ Hohfeld, (1913), above n 50, 22. Hohfeld quotes Smith J in *Eaton v B.C. & M.R.R. Co* 51 N.H. 504, 511. Compare this with Bentham's quote in Chapter 2, Section 4, 'Land as Capital'.

Hohfeld unequivocally buried the significance of the physical to the meaning of property. Place was pronounced irrelevant. And any thought to the contrary, Hohfeld argued was "fallacious."

Political Property: Kenneth Vandavelde and CB Macpherson

Kenneth Vandavelde's article (1980) makes much of Hohfeld's work in the development of what he terms the "new property."⁵⁵ And indeed Hohfeld provides one of the clearest statements of modern property available. But Hohfeld's conception of property was not new; it restated the concept of dephysicalised property that Bentham and Mill had theorised within their respective theories of positivism and utilitarianism. Vandavelde overlooks the influence of these theorists and their indelible traces in the writing of Hohfeld. He posits Hohfeld as an exponent rather than as a contributor to the theory of dephysicalised property. This omission is particularly notable given the explicitly political focus of Vandavelde's thesis and the explicitly political nature of the work of Bentham and Mill. Vandavelde instead structures his thesis into a juxtaposition of two parts: the "Old Property" of Blackstone and the "New Property" of Hohfeld. He draws from this contrast his central point that the shift from natural rights in property (person-thing) to dephysicalised rights in property (person-person) is a movement toward an unbridled politicisation of property and hence the destruction of law. Hohfeld's significance to Vandavelde's thesis is twofold. First, Hohfeld's articulation of property as abstract legal relations clarifies the person-person model that firmly locates property law within the realm of social politics. Second, Hohfeld's qualification of those relations or rights as relative rather than absolute and ordered, supports Vandavelde's thesis that the evaluation of property was indeterminable by recourse to a fixed structure or hierarchy of absolute categories. So far as property was

reconceived to include potentially any valuable interest, there was no logical stopping point. Property could include all legal relations... (so) if property included all legal relations, then it could no longer serve to distinguish one set of relations from another.⁵⁶

Vandavelde argues that because property was no longer finite and absolute, it was *indeterminable*. "This century long evolution resulted in an inability of property concepts to settle controversies and legitimate the results."⁵⁷ The "explosion of the

⁵⁵ Vandavelde above n 48, 325.

⁵⁶ Ibid 362.

⁵⁷ Ibid 330.

concept of property" meant that property, as a distinct category of law had become meaningless. The consequence of this development bears a profound impact on the legitimacy of law, Vandevælde argues; "the destruction of meaning in the concept of property destroyed the concept's apparent power to decide cases."⁵⁸ The courts' response to this crisis in meaning could no longer derive from any specific logic of property law, as it did not exist, but only from "overt recourse to political goals."⁵⁹ Property *as* law he concludes thus "came at the price of the courts' legitimacy."⁶⁰ Vandevælde, drawing from American jurisprudence concludes that in this way, property was ultimately "what the law said it was."⁶¹

The increasing rise of dephysicalised forms of property according to the economic demands of capital combined with the Courts' subsequent abandonment "of the myth of judicial neutrality"⁶² through recourse to a relativist rights discourse, destroyed the authority of law. Vandevælde measures the loss brought about by the dephysicalisation of property not in physical terms, but in terms of a metaphysical form, an idea of government. His critique of property is based on a theory of political justice. The loss of the physical in the "new" de-physicalised equation of property is therefore immaterial to his anthropocentric critique. Dephysicalised property subverts Vandevælde's ideal of positive law. Vandevælde's theory of the politicisation of property finds dephysicalisation problematic because the "government of law" has descended into the "government of nine old men."⁶³ The increased power of the market and politics to make law⁶⁴ erodes the legitimacy of law. The specifically dephysicalised form of property Vandevælde identifies is but a part and product of this erosion.

Vandevælde, like Bentham, tied the concept of property to the idea of the rule of law. Positive law eclipsed the physical. Speaking of dephysicalisation, he says "the creation of the new property, was in microcosm, the destruction of the rule of law."⁶⁵ But Vandevælde's thesis is that this destruction is owed directly to the "expansion and transformation" of dephysicalised property rights available to law's protection rather than directly to the erosion of the categories of real and personal property. Bentham's

⁵⁸ Ibid 363.

⁵⁹ Ibid 330.

⁶⁰ Ibid 366.

⁶¹ Ibid 364.

⁶² Ibid 330.

⁶³ Ibid 367.

⁶⁴ See for example, Unger, Roberto *Law in Modern Society* (Free Press, 1976) 198.

⁶⁵ Vandevælde, above n 48, 367.

utilitarian theory of property would have eliminated the basis of Vandevelde's critique in so far as Bentham argued for a codification of property rights to protect various and changing interests in wealth by a properly and procedurally appointed legislator.⁶⁶ The moral component of Mill's theory of property may also have attended to the determinacy of property for the sake of justice. Perhaps this is why Vandevelde's thesis relies wholly on the radical shift from Blackstone to Hohfeld, because the precursors to Hohfeld anticipated the very problems Vandevelde presents as consequences of the dephysicalisation of property.

The historical development of property law from Blackstone to Hohfeld via Bentham and Mill, according to the evolution of rationality and British empiricism⁶⁷ indicates the shifting evaluation of nature and physicality from a negative other to an irrelevance. Vandevelde is right in pointing to the link between the increasing rise of dephysicalised forms of property in law and the increasing economic demands of capital. Certainly the values of nature accompanying the process of dephysicalisation of property law corresponded to the economy of non-physical wealth. In both economy and law, the value of land was becoming increasingly symbolic. Power and wealth were increasingly produced and maintained symbolically. Whilst Mill arguably revived the physical if only for its alienable use-value in his theory of property, for Vandevelde it had vanished altogether.

Whilst Vandevelde laments the meaninglessness and subsequent socio-political danger brought to law by the dephysicalisation of property, another political theorist sees it as an opportunity to reform social organisation. C.B. Macpherson in his essay "A Political Theory of Property" (1973) critiques the modern function of private property from the perspective of the democratic tradition.⁶⁸ Reading modern property relations in terms of exchange value (person-person), Macpherson however sees the process of dephysicalisation as a result of the conquest of the 'scarcity' that had informed earlier theories of property. Macpherson not only presents a different account of the reason for dephysicalisation of property, he also presents a different account of the consequences and opportunities it brings to bear on society. Approaching a time of "material plenty"

⁶⁶ Thanks to Valerie Kerruish for this point.

⁶⁷ Godden, Lee 'Preserving Natural Heritage: Nature as Other' (1998) 22 *Melbourne University Law Review* 719: 725.

⁶⁸ Macpherson, C.B. 'A Political Theory of Property' in *Democratic Theory: Essays in Retrieval* (Oxford: Clarendon Press, 1973).

Macpherson describes modern property as "an individual right... an individual share in political power."⁶⁹

Importantly, Macpherson acknowledges that the precondition for the idea of property as the right to power is the (belief in the) abundance of nature as a resource. As long as nature is a resource and is unlimited or constrained as a utility, the right to property-as-power functions, in a manner quite similar to property according to Adam Smith and utilitarian theorists, not simply as the right to the means to life: but the right to the means to the "right kind"⁷⁰ of life.

Property has always been seen as instrumental to life, and justified as instrumental to a fully human life. In the circumstances of material plenty, which we now envisage, the relative importance for a fully human life, of a merely sufficient flow of consumables will diminish, and the importance of all the means to life of action and enjoyment of one's human capacities will increase.⁷¹

Of course the abundance of property only makes sense if it is exchangeable, and abstract, if in short, it has lost all sense of its specificity. As a political theorist, Macpherson like his predecessors, maintains an anthropocentric approach to property, hierarchically coupling metaphysical/physical, human/non-human. His idea of life is constructed by the contrast between a basic natural existence and a sophisticated socio-political lifestyle. For Macpherson, the economy of Nature or, the physical is unquestionably inferior to the economy of the metaphysical. If property was wealth for Smith and utility for Bentham and Mill, it was a "consumable" for Macpherson whose ideal economy centred the evolution of *homo actioa* beyond the physical which he pairs with need. Place and its 'products' for Macpherson exists only in so far as it is consumed in order to maintain the "right kind of society."

Macpherson in his utopian vision⁷² sees dephysicalised property rights, between persons, as rights, which properly exercised, offer not only meaningful relations between persons but also a "fully" meaningful and "free" life for persons. Thus in "retrieving property in line with a reconstructed polity"⁷³ Macpherson abstracts the physical into an ideal world of consumption which can then be transcended.

⁶⁹ Ibid 37.

⁷⁰ Ibid 38.

⁷¹ Ibid.

⁷² See Arendt, Hannah *The Human Condition* (Chicago: University of Chicago Press, 1958) 130.

⁷³ Bowrey, Kathy (ed) *Law of Property* (unpublished course materials, School of Law, Macquarie University, 1993) 175.

Vandevelde and Macpherson describe a contemporary culture of property in which the status of physical things, most obviously land, has been eroded. The wealth and well-being of humans are apparently determined by property relations which consume physical things not in and for themselves, and even according to their use or exchange value, but rather so that we may transcend materiality and attain the abstract ideals of Vandevelde's meaningfulness and Macpherson's social order. Both Vandevelde and Macpherson therefore implicitly contend that the physical is the antithesis of meaning and order. This "highly instrumental view of nature consisting of capital assets – as resources – available for human exploitation... is viewed as a necessary pre-requisite to emancipation and self-realisation."⁷⁴ In the ideal worlds of Macpherson's self-realisation and Vandevelde's emancipation, the importance of property lies not in physicality, the land, the thing or *reality*. The importance of property lies in what it represents - its abstract political right. The economy of representation in this equation of property has been inverted. Originally, the property right stood for or signified the thing. Now the physical stands for, or signifies the property right.

The evolution of property rights traces the changing value from a natural right, representing a physical thing to a de-physicalised un-thing representing a political right traces the changing value of land from its use and exchange values to its symbolic value. The property discourse presented by Vandevelde and Macpherson uncritically participates in the discourse of property-as-symbol, in which the signification itself assumes importance over the 'thing' signified. This latter discourse is the language of the fetish of the commodity. In so far as property decreasingly represents any thing or right, property signifies nothing at all. The power of property to be both present as signifier and absent as signified resembles the operation of illusion. And indeed, illusory is how property has come to be described by the most recent theorists tracing the development of this ultimate stage in the dephysicalisation of property.

3. THING - THING PROPERTY

The model of thing-thing property relations is not a development or continuation of the concept of dephysicalised property, nor is it a concept of rephysicalised property. Thing-thing property theory is predominantly a critique of the concept of dephysicalisation and the related person-thing and person-person theories of property. Central to this

⁷⁴ Harvey, David *Justice, Nature and the Geography of Difference* (Oxford: Blackwell, 1996) 125.

critique is the interpretation of dephysicalisation as a process of objectification. Dephysicalisation is such a totalising discourse that it not only objectifies the objects or 'things' of property relations, but also the owning 'persons' and the meaning of law itself.

The critiques of Arendt and Marx speak directly to the abstraction of the physical world, or Nature, advanced by Bentham, Hohfeld, Vandevelde and Macpherson. Importantly, they include persons, or people, within their understanding of nature rather than situating people outside nature. Arendt and Marx argue that abstraction is a process of commodification and consumption. Their work situates the concept of dephysicalisation within the broader context of the material and ideological sustainability of the paradigm of modern property law. The section then turns to the theory of Baudrillard by way of introducing the connection between dephysicalisation and illusion that contemporary theorist Kevin Gray draws, and which Alain Pottage interrogates.

It is important to note here that Gray and Pottage approach the idea of the meaninglessness of property as a question of discourse and signification. Although their emphases and conclusions are substantially different, they are both concerned with the difficulty, if not the impossibility, of ever defining what property is. Both theorists relate this failure of meaning directly to the dephysicalisation of property. In this way, their work does not posit different or newer ideas of what property is or should be. Superficially, their works mark an increasing awareness and discomfort with the idea of property-as-symbol and with the exhaustion of the values of use and exchange within property discourse. Nevertheless, contemporary property theory, with few notable exceptions, accepts, describes and thus repeats the paradigm of property law rather than interrogates it. Gray's piece is perhaps the best example of this. His playful fetishisation of the meaninglessness of property is by no means obscure or irrelevant to the development of property law. It is precisely this theoretical material that is in turn relied on by the judiciary and legal educators. The dephysicalisation of property is not therefore exclusively theoretical or ideological, it is practiced and taught, constructing an unreal reality that is, "as real as real can be."⁷⁵

⁷⁵ Kerruish, above n 2.

Consuming Property: Hannah Arendt

Arendt is concerned with the sustainability of dephysicalised property relations. She interrogates the possibility of an unreal reality and in so doing challenges the anthropocentrism of theorists like Vandavelde and Macpherson. Arendt directs her attention to the person-person model of property and the mutual exclusivity of metaphysical human Culture and physical non-human Nature. She uses the word "with" to relate these so-called oppositions, linking both as the "condition of human life." Her definition of "human life" extends beyond the limited political sphere of Vandavelde and Macpherson.

Without being at home in the midst of things whose durability makes them fit for use and for erecting a world whose very permanence stands in direct contrast to life, this life would never be human.⁷⁶

Arendt argues that the concept of dephysicalisation is both ideologically and physically unsustainable. She warns against its trajectory toward the commodification of property because the "explosion of the concept of property"⁷⁷ "harbours the grave danger that eventually no object of the world will be safe from consumption and annihilation through consumption."⁷⁸ She argues that the erasure of the physical is a departure from the home of "being". Echoing the moral utilitarianism of Mill who retained the trace of the physical in his utilitarian theory of property, Arendt argues that "the man-made home erected on earth and made of the material which earthly nature delivers into human hands, consists not of things that are *consumed* but things that are *used*."⁷⁹ The distinction between Mill and Arendt is that the agency of nature is negated by Mill, whereas Arendt asserts this agency within the vital, mutual person-thing relation.

The sustainability of dephysicalisation concerns Arendt because she views nature as the condition of human life and Culture, rather than something that can or should be transcended.

Painless and effortless consumption would not change but only increase the devouring character of biological life until a mankind altogether 'liberated' from the shackles of pain and effort would be free to 'consume' the whole world and to reproduce daily all things it wished to consume. How many things would appear and disappear daily and hourly in the life process of such a society would at best be immaterial for the world, if the world and its thing-character could withstand the reckless dynamism of a wholly motorised life process at all.⁸⁰

⁷⁶ Arendt, above n 72, 135.

⁷⁷ Vandavelde, above n 48, 362.

⁷⁸ Arendt, above n 72, 132.

⁷⁹ *Ibid*, 135 (my emphasis).

Arendt's theory presents the real or physical as inescapable and necessary, but also as enabling rather than inhibiting. Arendt's critique of dephysicalised property revisits Marx's thesis that the emancipation from labour is emancipation from necessity, which she argues would "ultimately mean emancipation from consumption as well, that is from the metabolism with nature which is the very condition of human life."⁸¹ Through this alternative approach Arendt anticipates environmentalist critiques of the property discourse as commodification of the physical. Nevertheless, far from presenting an ecocentric critique of property, Arendt's concept of property still applies the nature/culture dualism of anthropocentric logic, separating humans from non-humans, nature from culture. Where she departs from the dominant theory of property is that she collapses the hierarchy of the couple, presenting nature as the condition of human life. In this way, Arendt's concept of property radically presents the interactive dependence of culture on nature, against the notion of cultural transcendence.

Property-as-Fetish: Karl Marx

The idea of an unalienated relationship between people and nature was central to Marx's philosophy of property,⁸² it was also central to his critique of capitalism and the modern paradigm of property law. Critiquing classical liberal economy in the 19th century, Marx's work is by no means recent and yet it remains strange, even threatening, to law. In property theory, the noticeable absence of any discussion of the fetishisation of property is significant.⁸³ Why would this be so? What do these concepts present to law? Marx's ideas of fetish and inversion provoke an interrogation of the purpose of property law, which illuminate and even undermine the authority of that law, particularly Australian property law. They do this by bringing questions of meaning and of logic to the positive discourse of law that seeks to control and define property in terms of its facticity rather than its normativity. Although the contemporary theories of Gray and Pottage do not take up the ideas of inversion and fetishism directly, their focus on the production of meaning and the functionality of logic in property law echo Marx's themes of fetish and inversion.

⁸⁰ Ibid 130.

⁸¹ Ibid.

⁸² Harvey, above n 74, 126.

⁸³ Property theory following Locke and Marx deal with the notion of alienation in dephysicalised property in terms of labour. This is not something addressed by this thesis. The Marxist critique of alienation is however valuable in thinking through the separation of people and place through property law. See for example Dickens, Peter *Reconstructing Nature: Alienation, Emancipation and the Division of Labour* (London: Routledge, 1996).

The idea of abstraction in Marxist theory explains the historical development of the dephysicalised forms of property that Bentham had envisaged. Rather than material things such as land having value of and for themselves as particular and unique places, the demands of changing forms of wealth created quantitative values of place as spaces or areas.⁸⁴ The quantitative evaluation of a thing, or object standardised the thing according to other objects, which allowed its trade. The 'new' forms of property that Bentham was concerned to protect to the same degree enjoyed by old forms such as realty therefore needed to be comparable and measurable against these older forms as well as against each other in order that newer forms of trade could flourish. This process of comparison and measurement effectively dissolved "the concrete and the particular"⁸⁵ of place and with it claims to such reality and particularity in law. Marx speaks of this change as a movement from qualitative value to quantitative value.⁸⁶ Quantitative value was signified as money and the uniformity of the language of money which standardises the evaluation of things, became its own logic so that things or objects could only be spoken of, related and exchanged in terms of that language. For Bentham, that abstraction through standardisation or commodification was positive for law because it positivised law.

But Marx attended to the normative aspects of commodification, particularly the means through which abstraction was produced and legitimised. The self-sufficiency of the language of quantitative evaluation of property could ultimately produce meaning without any reference to 'reality'. In trading stocks and finance capitalism, "money is made out of money, profit is made through the manipulation of figures with no apparent connection to the commodity world already abstracted from social relations and activity."⁸⁷ As 'real' property and social wealth changed from land to capital, land, as place, ceased to be part of legal discourse. This allowed the category of 'real' property to untie itself from physicality such that the evaluation of 'things' became an independent logic from the precursor logics of use and exchange. "Life is lived only in the abstract" because the physical had been 'transcended' and the concrete and particular dissolved.⁸⁸

⁸⁴ See Pottage, Alain 'The Measure of Land (1994) 57 *Modern Law Review* 361-384.

⁸⁵ Best, above n 4, 44.

⁸⁶ Marx, Karl *The Marx-Engels Reader* 2nd edition, Tucker, Robert C. (ed) (New York: Norton, 1978) 93.

⁸⁷ Best, above n 4, 44.

⁸⁸ *Ibid* 43-44.

The “dawn of abstraction”⁸⁹ brought about by dephysicalised forms of property was read by Marx as a form of cultural as well as physical, or natural, loss. Marx's ecological concern was that the dephysicalisation, abstraction and alienation of natural and social realities were inherently unsustainable. Perceiving the materiality of nature and the materiality of human society as organically bound, the process of commodification, he argued, threatened not just a way of life, but life itself.

Man lives on nature – [this] means that nature is his body with which he must remain in continuous interchange if he is not to die.⁹⁰

Considered against the contemporary idea or theory of biodiversity,⁹¹ Marx's critique of quantitative evaluation and its abstraction of materiality profoundly disturbs modern legal theories of property. This criticism of dephysicalisation, taken seriously, could revalorise real property as a distinct and prior category of law because it suggests that law itself is produced by and because of *reality*, that is to say, founded and constituted by materiality. Marx's notion that the abstraction of reality “turns [subjects and objects] into abstract entities, strips away their unique characteristics and reduces them to a numerical expression”⁹², implies that dephysicalised property law merely administers and enforces an “economic calculus.” The positivisation of law consequent upon the dephysicalisation and commodification of reality, makes law itself part of that abstractness by being just another mechanism for the production, signification and exchange of commodities. But this goes to the heart of law's legitimacy which derives precisely from its exteriority to that signification. The Marxist idea of abstraction directly and specifically confronts the strangeness of dephysicalised property as something that undoes the foundational and authoritative logic of law.

The process of inversion between the abstraction of reality and the fetishisation of that unreality is central to Marxist and later to poststructuralist critiques of linguistic, libidinal and logical economies. Inversion is the key component of Marx's theory of property relations, which are he says, between things, not between persons. To put it simply, inversion for Marx is the “triumph of the economy over its human producers.”⁹³ Traditionally the subject (person), although coupled with the object (thing), is the privileged term that dominates the condition of their relationship. In conventional

⁸⁹ Ibid 42.

⁹⁰ Marx *Paris Manuscripts* (1844) in *Marx, Engels: Collected Works* III (London: Lawrence and Wishart, 1975) 276.

⁹¹ See for example Takacs, David *The Idea of Biodiversity: Philosophies of Paradise* (Baltimore: John Hopkins University Press, 1996).

⁹² Best, above n 4, 44.

⁹³ Ibid 43.

economic terms, that hierarchical relationship was articulated as human or Cultural domination and exploitation of natural things as resources. As we have seen, the person-thing property relationship was displaced by the person-person relationship. Marx's counter-reading of that process concludes that modern property is a thing-thing relation. The dephysicalisation of the object or thing has not removed it from property relations but rather commodified both the subject *and* the object. Only quantifiable and standardised objects remain.

Forced to sell his or her labour-power to survive, 'the worker sinks to the level of commodity and becomes indeed the most wretched of commodities', reduced from the status of qualitative individual to mere exchange value in the form of labour power.⁹⁴

The alienation of the modern worker to Marx is the "loss of human reality" which is inseparable from the loss of reality generally. "The increase in the quantity of objects is accompanied by an extension in the realm of the alien powers to which man is subjected."⁹⁵ But strangely, objects are neither dominant nor dominated by subjects because of the totalising effect of the logic of commodification. Marx's theory of inversion of subject-object in the commodification of reality thus subverts the very paradigm of person-thing central to, if not constitutive of the logic of modern property law. This, perhaps, partly accounts for the relative absence of discussion of his critique from legal theories of property.

Marx's theory of the *phenomenon of fetishisation* in commodity society combines his theories of abstraction, alienation and inversion. Marx argued that the conventional basis of modern property, its "real measure", labour⁹⁶, was exceeded by the fetishistic logic of the commodity. Because dephysicalisation commodifies people as well as place, the purpose of property is therefore neither for people, nor their environment, but for the profit or commodity itself.⁹⁷ Marx's critique of this economy is not based on the fact of its existence, but on the degree to which it dominates all social relations. "Before capitalist society, commodity production existed, but always marginally in relation to other activities."⁹⁸

⁹⁴ Marx, quoted in Best, above n 4, 43.

⁹⁵ Marx, above n 86, 93.

⁹⁶ Benton, Ted 'Adam Smith and the Limits to Growth' in Copley, Stephen and Sutherland, Kathryn (eds) *Adam Smith's Wealth of Nations* (New York: Manchester University Press, 1995) 150.

⁹⁷ Kerruish, above n 2.

⁹⁸ Best, above n 4, 43.

By fetishism, Marx means that 'things', abstracted and inverted, as commodities, mysteriously acquire lives of their own and come to dominate the lives of their makers.⁹⁹ The fetish value of the 'object' or 'thing' of property is greater than its use or exchange value, because it hides the physical conditions of its production. Marx compares the force and illusion of religious and superstitious attitudes to the transcendence of the fetishised object of property in positive legal discourse.

Fetishism describes the way in which markets conceal social (and we should add geographical) information and relations... This was Marx's agenda: to get behind the veil, the fetishism of the market, in order to tell the full story of social reproduction through commodity production and exchange.¹⁰⁰

The Marxist task of unveiling the 'illusion' is concerned to retrieve the knowledge of the physical materiality of economic production. The statement and later interrogation of property as meaningless, as illusion in contemporary legal theory, participates in this process of unveiling. The point of stating that contemporary property is a thing-thing relation is primarily to indicate the strangeness of the thing-person and person-person theories of property.

Marx's critique presents an apparently immaterial reality expressed and performed by property relations, and asks how it is (materially) lived and how it is (materially) sustained. He suggests that the (un)reality of the commodity culture is something so excessive and totalising that it is both impossible and unsustainable. The ideas of concealment, illusion and impossibility are taken up explicitly by both Gray and Pottage through reference to the language and the logic of property. At this point then, it is worthwhile recalling how Baudrillard coupled Marx's theory of fetishism with structuralist theories of social semiology in his idea of simulation.

Property as Symbolic Exchange: Jean Baudrillard

Baudrillard's work *Symbolic Exchange and Death*¹⁰¹ distinguishes modern and postmodern societies by their relation to commodities. Modern societies are "organised around the production and consumption of commodities" whilst postmodern societies are "organised around simulation and the play of images and signs."¹⁰² Baudrillard calls this fetishised economy of signs 'simulation'. In this economy of signs meaning is made

⁹⁹ Kerruish, above n 2.

¹⁰⁰ Harvey, above n 74, 232-233.

¹⁰¹ *L'échange Symbolique et la Mort* (1976) Cited and translated in Kellner, above n 4, 8-12.

¹⁰² *Ibid* 8.

despite the absence of any "earthly referent." In hyper-reality, "the object is absorbed altogether into the image."¹⁰³

The commodity form has developed to such an extent that use and exchange values have been superseded by 'sign value' that redefines the commodity primarily as a symbol to be consumed and displayed.¹⁰⁴

In contemporary property relations therefore, the primary function of the object or thing is not to be used or exchanged as a thing. Instead, it is to signify or represent that thing as property. The object or thing is not dephysicalised *for* property but *as* property. The dialectic of subject-object, person-thing "implodes"¹⁰⁵ because property rights do not signify any physical reality and because physical reality does not exist. Reality is produced by the appearance of itself. Place is not a reality. It is not prior to property, but an abstract, semiological creation of it.

Abstraction today is no longer the map, the double, the mirror or the concept. Simulation is no longer that of a territory, a referential being, or a substance. It is the generation by models of a real without origin or reality: a hyperreal. The territory no longer precedes the map. Henceforth, it is the map that precedes the territory... it is the map that engenders the territory.¹⁰⁶

For Marx, the phenomenon of fetishism described the way in which markets conceal the conditions of the production of commodities. The semiology of property functioned only so long as the physical was signified as irrelevance and absence, pointing to the omnipresence of law and culture. For Baudrillard however, in the economy of simulation there is no reality, no place, behind the veil of the fetish. The reality is the veil. Whereas in modern property relations, the signifier 'property' had signified the use or exchange of a thing as a resource, in postmodern property relations, the signifier 'property' signifies only itself. The thing in postmodern property discourse "is represented as the rule of law. It is invested with the qualities of objectivity, impersonality, (represented as neutrality) and universality."¹⁰⁷ Thus, law itself is fetishised in the economy of simulation.

The collapse of the dialectic of subject-object, which had founded positivist, utilitarian and political rights-based theories of property, brings us to a theory of property law as the signification and administration of a land market. The rise of the land market and the increasing importance of the property interests of abstract entities, indicates the end (or the repression) of earlier (instrumentalist) values of property, particularly the

¹⁰³ Best, above n 4, 51.

¹⁰⁴ Ibid 41.

¹⁰⁵ Ibid 51.

¹⁰⁶ Baudrillard, quoted in Best, ibid 50.

utilitarian and exchange functions of the physical. Contemporary property theory defines property as the abstract signification of the property right itself. The recent work of Pottage, Harvey and Gray, point to the decreasing significance of the private interests of individuals. In the place of these interests are the abstract interests of corporate institutions. Property law, as the guardian of such institutions, protects the interests of neither persons nor things. Instead, property protects its representation, as an institution.

A good example of the semiotic economy of property law is the standard description of property relations in contemporary real property law textbooks. These accounts ascribe to property law immense importance as the primary legal institution that structures the market economy. Land functions just like any other commodity, it carries no distinguishing, 'physical' features. Strangely, acknowledgment or homage is made to the 'traditional' physical significance of land as property in order to authorise modern 'developments' along the trajectory of dephysicalisation.

In the twentieth century land has not only continued to serve its traditional role in the production of wealth and in the provision of shelter, but has increasingly become an independent commercial commodity to be bought and sold in the same manner as many other investments.¹⁰⁸

The 'traditionally' real and physical significance of land in property law is described as part of an evolution of property. According to this account, a survey along this linear development finds that physical property traditionally valued for use and exchange, "shelter and wealth," has not been absented or diminished but rather improved into an uber-species of property which has accumulated all the good parts of older species of property. This glossy account fetishises law and conceals the trajectory of dephysicalised property into the primarily symbolic significance of property. The institutional aura of property in the market culture is the focus of contemporary theorisation of property and jurisprudence broadly. Indeed, "some would say that *the* major institution in the emergence of the modern law and modern private property is the land market."¹⁰⁹ But what does it mean to speak of property as an institution? How and why does the 'institution' of property reproduce the dialectic of person-thing, subject-object, and real-abstract? These are the questions directly explored in the writing of Alain Pottage.

¹⁰⁷ Kerruish, above n 2.

¹⁰⁸ Neave, MA, Rossiter, J and Stone, MA (eds) *Sackville and Neave Property Law Cases and Materials* 5th Ed., (Sydney: Butterworths, 1994) 429.

¹⁰⁹ Kerruish, Valerie and Bowrey, Kathy (eds) *Property Law and Equity* (unpublished course materials, School of Law, Macquarie University, 1999) 143, emphasis in original.

Critiquing the Person/Thing Paradigm: Alain Pottage

In "Instituting Property" (1998)¹¹⁰ Pottage works through these questions via a review of two recent mainstream works in property law.¹¹¹ Both theorists, he argues, approach property uncritically as a socio-legal institution without saying how and what that is, as though the signifier connected to the signified. His central point is that neither the terms 'property', nor 'institution', are immediately meaningful today and particularly no longer in the undefined sense in which those writers deploy the terms. Thus he argues, their theorisation of property as a socio-legal institution fails both intellectually and even ethically to account for the normativity and facticity of property relations, and reproduces the empty language of property as though it were meaningful. Pottage approaches contemporary property law as an historically specific discourse that both constructs and is constructed by its social culture. As such, the meaning of property is married to the prevalent economy of signification itself which he argues is treated uncritically if at all by these theorists. Pottage insists that preliminary analyses of the "constructive interpretation of social practices and expectations" that constitute legal principle are strategically absented in these two works by presenting property simply as an institution because they take legal principle to be already "descriptive of society." Pottage claims that to speak of property as an institution is thus an empty and dangerous claim that avoids and conceals the conditions of property and of the rule of law. The "hollow resonance" of fetishised property produces the sense of "law's foothold in the factual world, while at the same time closing off the very historical and sociological investigations of the facts which would make that foothold seem less plausible."¹¹²

Thus on the one hand Pottage's critique suggests that behind the claim that property is an institution is nothing at all, that it is simulated: an idea that "promises more than it can deliver."¹¹³ Yet on the other hand, it is precisely the unexamined 'thing' behind the institutional flag, waved by the property theorists he reviews, that motivates his critique. The simultaneous presence and absence of property apparent in Pottage's critique is precisely the uncanny *unreality* that characterises contemporary property discourse. In lifting the veil of the 'institution', he brings into focus the disjuncture

¹¹⁰ Pottage, Alain 'Instituting Property' (1998) 18 *Oxford Journal of Legal Studies* 331.

¹¹¹ A review article of J.W.Harris *Property and Justice* (Oxford: Clarendon Press, 1996) and J.E.Penner *The Idea of Property in Law* (New York: Oxford University Press, 1997).

¹¹² *Ibid* 331.

¹¹³ *Ibid* 331.

between the theory and practice of property. The praxis of property disrupts and yet is strangely disguised by the conventional economy of signification that property theory constructs. The subject-object dichotomy central to the person-thing property relation, like the categorical opposition of real/personal, the real/abstract is inconveniently meaningless. Property law increasingly augments the 'rights' of abstract corporate bodies (also regarded as 'institutions') as the most 'real' or compelling interests warranting the protection of the law. Pottage directly confronts the degree to which the modern corporation disables the conventional person-thing paradigm of property:

If individual interest cannot be taken as the basic unit of analysis, so that the corporation cannot be seen as an aggregate of individuals, what other units are available? Can the corporation, which is not a thinking, feeling, being, be a coherent unit of analysis? To answer to these questions leads the analysis away from the model of scarcity, and towards an understanding of social processes which cannot be mapped on to 'real' persons and things.¹¹⁴

But what is significant about this postmodern shift in the subject(ivity) of property posed by the corporation is that the paradigm of person-thing remains not only theoretically, but practically, in the vocabulary of property law. So whilst the shift in the practice of property law "dissolves the category of property as a category of social analysis by dissolving its basic theoretical components", the dissolution itself is peculiarly disguised. For this reason, Pottage argues that to speak of property as an institution is to point to the difficulty of that reality, and to actively maintain the strange unreality of contemporary property.

It is more than the anachronism of its theory set against its practice. It is not only that property theory is "out of step"¹¹⁵ with property culture. Pottage claims that the dephysicalisation of property makes postmodern property strange because this process, which "has so decisively overtaken the conditions in which property categories were formed," fundamentally ruptures the logic of property.¹¹⁶ The failure or dysfunction of its logic therefore presents a crisis in its ability to mean. The dephysicalisation of property has arrested meaning because "the vocabulary of property is animated by operations which cannot be described in terms of that vocabulary."

Pottage directly critiques the contemporary operation and validity of the subject/object vocabulary of modern property theory in his article, "Persons and Things: an

¹¹⁴ Ibid 339.

¹¹⁵ Hannah Arendt describing Walter Benjamin in her Introduction to *Illuminations* (trans. Harry Zohn) (London: Fontana Press, 1992) 25.

¹¹⁶ Pottage, above n 110.

ethnographic analogy" (2001).¹¹⁷ Here he examines recent anthropological work specifically with regard to the logical and economic structures of different paradigms of property. Approaching property this way, Pottage offers property theory the depth he argues is missing from the mainstream theories he had earlier reviewed.

The 'facts' apprehended by Harris and Penner remain facts as they are fictionalised by legal categories. These categories impose an over-simplified model of 'society' and its components. Where a sociological or socio-theoretical perspective reveals a complex fabric of discursive roles and representations, property theory offers only a simple ontology of persons and things.¹¹⁸

The theoretical framework of both person-thing and person-person models of property relations present the individual person as the subject of property law. Pottage's critique of this framework is based on the changed function of property law. Whereas for Blackstone, Bentham and even Hohfeld, property law protected the rights of subjects, as individual persons, for Pottage, property law protects the rights of abstract entities and organisations, such as corporations. The political theories of property advanced by Vandeveld and Macpherson firmly situated the subject of property within the conventional framework of person-person relations, even though the actual subject of property protected by their theories was not the individual person at all. Pottage's critique suggests that the dephysicalisation of property makes the true subject of their property theories the abstract significance of political ideology. Vandeveld and Macpherson fetishise law. Pottage observes that within postmodern property discourse, claims that the subject of property law is still the individual person conceal that the subject and the object of property is in fact the property right itself, and the ideology that that protects. Following Kelsen, Pottage argues that to speak of a property right as protecting the interests of a person is to obscure the function of that right as the protection of a particular economic value.

If the subjectivity elicited by subjective right is merely an instrument for the realisation of legal or economic objectives, the subject soon dissolves into the insubstantial shadow of the right. That was Kelsen's point in suggesting that the category of the 'real' subject was logically or strategically necessary, but experientially empty.¹¹⁹

The admission that the subject/object framework of modern property is meaningless or "empty" does not indicate that property no longer exists, but rather that its existence is symbolic rather than substantial. The function of contemporary property law is to maintain the *appearance* of the modern logic without the economy of that logic. In doing

¹¹⁷ Pottage, Alain 'Persons and Things: an ethnographic analogy' (2001) 30 *Economy and Society* 112-138.

¹¹⁸ Pottage, (1998) above n 110, 337.

¹¹⁹ Pottage (2001) above n 117, 120.

so property law “amplifies an ambivalence in commodity logic in which ‘things and persons assume the social form of things.’”¹²⁰ Again it is clear that this understanding of property as a thing-thing relation is not equivalent by any means to its rephysicalisation. On the contrary, Pottage describes the dephysicalisation of persons and things alike.

Instituting Illusion: Kevin Gray

Kevin Gray published an oft-cited article “Property in Thin Air” (1991) which recalls Marx’s critique that the paradigm of modern property law is “the illusion of jurisprudence.”¹²¹ Nevertheless, set against mainstream property texts, Gray’s task of clarification is itself necessarily interrogative. Gray’s article is devoted to exposing precisely the strange lack of clarity around the idea of property. Positioning his own perspective outside this common opacity, Gray miraculously solves the problem and identifies the culprit. In a typically crystalline sentence Gray articulates contemporary property culture not as an historical development but as a misunderstanding. “Property is not theft – it is fraud.”¹²² By rejecting the association of property and theft Gray rejects the idea of property as a possession, and in consequence argues that property is not an evolution from the foundation theories of Locke and Blackstone but rather, is an awakening from their unreality. Certainly, his declaration contrasts with mainstream property textbooks, which reproduce that history as the foundation of law’s authority and as the explanation of why it is the way it is. But the achievement of Gray is that he explicitly identifies the real or true property as lack. The association of fraud and property conceives of property as a symbol or sign of absence of reality. In law as in regular usage, fraud is “advantage gained by unfair means, as by false representation of fact made knowingly.”¹²³ If property is fraud, then it is a representation ungrounded in reality, and law is the criminal agent of that representation. The point of this comparison highlights the role of property in the culture of simulation Baudrillard had theorised. Fraudulent representation, like simulation, breaks the connection between referent and representation.

Opening with the seemingly radical admission that property is “mere illusion” Gray seeks to avoid replicating the scholarly tradition of “sidestepping” the “unattainable

¹²⁰ Pottage quoting Strathern, M, above n 117, 120.

¹²¹ Marx, above n 44.

¹²² Gray, Kevin ‘Property in Thin Air’ (1991) 50 *Cambridge Law Journal* 252.

¹²³ *Macquarie Dictionary* 2nd ed., (Macquarie Library, 1992).

quality inherent in the notion of private property.” Gray relishes exposing the unfixity, the subtleties and the variations of property. Yet simultaneously he seems to lament the elusiveness of property in a tone reminiscent of Vandevelde’s nostalgic description of the ‘Old Property’. The ambivalence of tone and evaluative attitude to contemporary property evident in Gray’s critique is characteristic of the language of fetishism. This language of desire exhibits the lack and absence not merely of the desired object (in this case the definition of property) but importantly of the lacking subject.¹²⁴ In the case of contemporary property discourse, it is not simply that the subject lacks the object as conventionally conceived in the dialectic of desire – it is, as Pottage argued, that the very dialectic of subject-object is subverted. The absence of the object destabilises the identity of the possessive subject. Instability characterises Gray’s style as well as his theme. From the outset, Gray anticipates both with excitement and lament the impossibility of reaching a final and concrete reality or definition of property.¹²⁵

With private property, as with many illusions, we are easily beguiled into the error of fantastic projection upon the *beautiful, artless creature* 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.¹²⁶

Our relation to property, Gray indicates, is a relationship of desire, of lack. We are ‘beguiled’ and ‘seduced’ by its appearance. But it is only an appearance. The implication then is that ‘in reality’ it does not exist. And so we do not ‘have’ it. The fetish of the commodity made property unreal.¹²⁷ But the fetishistic desire remains.

Gray announces his intention to grapple with the radical un-reality of property, to search for the thing or essence signified by a property right. Following the consistent theme of “preoccupation with definitional rigour” in English property law, the nature of Gray’s inquiry therefore is seemingly to locate a precise definition of property to benefit both legal and cultural discourses:

The rights to which property relates must have a hard-edged definitional integrity conducive to the intellectual orderliness of the regime as a whole.

¹²⁴ I use the term ‘desire’ with regard to its theoretical evolution in the tradition of Western metaphysics from Plato through Hegel, Freud and Lacan. Their theories maintain that desire is a lack in being or want-to-be that simultaneously constitutes presence, or being. See Plato *The Symposium* (London: Penguin, 1951) 199; Hegel, *The Phenomenology of Spirit* (trans. Miller, A) (Oxford: Oxford University Press, 1977) 109-110; Lacan, Jacques *The Ethics of Psychoanalysis* (London: Routledge, 1992) 14. Freud linked the concept of desire to fetishism in his essay ‘Fetishism’ (1927) in *The Standard Edition of the Complete Works of Sigmund Freud Volume XIX* (London: Penguin, 1991).

¹²⁵ I have emphasised the indicators of excitement in *italics* and the indicators of lament by underline.

¹²⁶ Gray, above n 122, 252.

¹²⁷ Kerruish, above n 2.

'Property' must come in neat, discrete, pre-packaged conceptual compartments, immune from capricious tampering or even well-intentioned amplification.¹²⁸

But Gray destabilises the possibility of such a clear definition by perturbing mainstream catchphrases of jurisprudence, asking what exactly the modern notion of property as a 'bundle of rights' can mean. "What constitutes the 'propertiness' of property?"¹²⁹ His essay treads through familiar answers to this question and in so doing recalls the historical development of contemporary 'meaningless' property in a way more comprehensive than both Vandevelde and Macpherson. Having travelled the ideas of visual trespass and physically non-excludable resources from moral and legal perspectives, Gray reaches his conclusion headed "'Property' is a Relative Concept". Here he insists that defining property is impossible because it is a dynamic un-thing.¹³⁰

The reason that property is an illusion Gray says, is because it is not "itself a thing" but a "concentration of power over things."¹³¹ Property is not real it is abstract: a signification of a complex power relationship. Not unlike Bentham, and later Hohfeld, Gray attributes the difficulty of defining property to the misunderstanding of its un-thing-like quality and the inadequacy of property discourse to accommodate its symbolic value. Gray's inquiry is finally revealed to be a bold admission of "deep scepticism about the meaning and terminology of property."¹³² His concern suggests that the elusiveness of the concept of property is part and product of its moral function and operation. If the fetishised thing of contemporary property culture is the law itself, then property could not but be elusive as a category of that fetish. Property "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."¹³³ It is a fragility Gray seems uncomfortable with, although his own dissective analysis has reproduced it. Property has changed from a person-thing relationship, to the illusion or fantasy of the thing. A fetish is not the rephysicalisation of property, but the apotheosis of its unreality.

¹²⁸ Gray, Kevin and Gray, Susan Francis 'The Idea of Property in Land' in *Land Law: Themes and Perspectives* Bright, Susan and Dewar, John (eds) (New York: Oxford University Press, 1998) 31-32.

¹²⁹ Gray, above n 122, 259.

¹³⁰ Ibid 295-296.

¹³¹ Ibid 299.

¹³² Ibid 305.

¹³³ Ibid 307.

4. CONCLUSION

Contemporary or postmodern property theory, from a superficial perspective, departs from modern property theory because it discusses property as a thing-thing rather than person-thing or person-person relation. The thing-thing relation however, as a fetishistic economy of signs retains if not augments the central concept of its predecessors - dephysicalisation. Both modern and contemporary property theories abstract the physical and insist that property signifies something else. Whether a thing is a resource, a utility, or a sign of a commodity, it is intrinsically immaterial in property theory.

Describing property as an illusion, as something determined only through an economy of signs undermines the role and rule of law as an objective and original body of logic. The available role of law then is either to defraud its 'subjects', or to pragmatically administer (and maintain) the competing interests of the market. Either way the weakening of the rule of law and the strengthening of an "ideology of managerialism"¹³⁴ present fundamental challenges to mainstream fetishised representations of property law. "The corporate system has taken the place of the institution of private property in the economic organisation of capitalism."¹³⁵

Furthermore, because as Vandeveldt, Macpherson and Gray have argued, property relations are relations of power, to speak of property-as-illusion is to conceal the very real, material consequences of the distribution of that power.¹³⁶ Land, for example, remains actually possessed even if it is only abstractly exchanged and alienated. Thus whilst the idea of property-as-illusion is theoretical, it enacts that idea physically, that is, in a way that is neither abstract nor meaningless. "However unreal social reality was becoming under the fetish of the commodity it was also actual."¹³⁷ There are material consequences of the paradigm of immateriality that the theory of property has bequeathed to us and whose logical unfolding this chapter has traced from Locke to Baudrillard. Fraud is not theft to be sure, but the suffering and degradation it causes is nonetheless experienced in the physical world.

'Things' may be intangible; they are no less created as things by conceptualisation and exchangeability. It is certainly a consequence of the dynamic of wealth that forms of property less-connected to wealth creation than to use in everyday life tend to be seen as consumer goods,

¹³⁴ Kerruish, above n 2.

¹³⁵ Ibid.

¹³⁶ See also Cotterrell, Roger 'The Law of Property and Legal Theory' in Twining, William (ed) *Legal Theory and Common Law* (Oxford: Blackwell, 1986).

¹³⁷ Kerruish, above n 2.

to be protected by consumer rather than property law, or in the case of Aboriginal ideas of property to be virtually unprotected and increasingly seen as non-proprietary.¹³⁸

¹³⁸ *Ibid.*

DEPHYSICALISING PROPERTY IN PRACTICE

CHAPTER FIVE

Chapter Five

DEPHYSICALISING PROPERTY IN PRACTICE

Scientists have not generally needed or wanted to be philosophers. Indeed, normal science usually holds creative philosophy at arm's length.¹

[S]cience students accept theories on the authority of teacher and text, not because of evidence. What alternatives have they, or what competence? The applications given in texts are not there as evidence but because learning them is part of learning the paradigm at the base of current practice.²

1. INTRODUCTION

Dephysicalisation, the contemporary legal expression of the Nature/Culture paradigm, is not just a theory - it is a practice. The theory that property is an illusion is practiced and materialised by the ownership, use and 'management' of land. The theory, practice and pedagogy of property law, say that place is irrelevant. That irrelevance is tangibly evident. 70% of Australian land is owned (or leased) by, that is to say, is the property of, 220, 000 farmers.³ How the owners relate to their land is irrelevant to property law. Precisely because property law excludes the physical from its discourse, another area of law has become increasingly and rapidly important in regulating the ownership and use the physical - environmental law. Environmental law starts where property ends, not as a different set of values about place, and not even as a law about place, but as a quarantined section of law that addresses disputes about the physical that property law does not accommodate. Where property law determines who owns the land, environmental law determines how, and in what ways, that ownership can and cannot be manifest. Dephysicalisation is not therefore simply a theorist's concept, it is a paradigm of people-place relations that lawyers and pedagogues practice and make real. They are keeping the 'illusion' alive.

¹ Kuhn, Thomas *The Structure of Scientific Revolutions* 3rd ed., (Chicago: Chicago University Press, 1996) 88.

² *Ibid* 80.

Lawyers and legal educators, like scientists, generally distance themselves from philosophy, or more specifically, from legal theory. Their preordinate concern is practice. The separation of theory from practice is dichotomous rather than differential, and like other dualisms, the terms are hierarchically related. And like other dualisms, the distinction is blurred and transgressed. The claim that practitioners and pedagogues often make that theory can be set aside, or that it does not inform the practice of law, is as contentious as the claim that theory is law's thinktank whilst practitioners are mere administrators. The various theories of property-as-thing, as-commodity and as-fetish presented in the previous chapter all point to the profoundly dephysicalised culture of contemporary real property and the diminished value of 'nature'. The relationship between theory and practice is not unilateral. Theory neither leads nor reflects the practice of property law, they work together to produce legal discourse. The same may be said of legal and cultural discourses of property. Law as a cultural discourse prescribes, regulates and enables cultural practices, like the ownership, use and 'management' of land. This chapter asks how the theory of dephysicalisation, the paradigm of modern property law, is practiced and taught.

Legal and cultural discourses both describe property as a relation between persons, or between the relative rights of persons. Section 2: 'Legal Practice' discusses the way in which courts define property in terms of rights that are always exchangeable and alienable. The loss or 'acquisition' of property can always be compensated. The thing itself, land for example, has no intrinsic value, rather it is acquired and exchanged according to its value as property, as commodity. The valuelessness of the physical, as theorists have argued, directly relates to the meaning and definition of property. The Australian High Court acknowledges that property is a relation between persons, but remains unable to define property. One case, a property course staple, *Victoria Park Racing*,⁴ considered the meaning of property in a context new to the law at that time. No singular, authoritative definition of property emerged from the diverse values of property articulated in the judgments, and yet the case is taught as being 'seminal' precisely because it demonstrates the "complex character of modern Australian property law." The complexity is limited however to a dephysicalised understanding of land as separate to people and thus of real property rights being vested in the security of the

³ National Farmer's Federation, <<http://www.nff.org.au>>.

⁴ *Victoria Park Racing and Recreation Grounds v Taylor* (1937) 58 CLR 479.

title of a 'person' rather than with any (physical) relation between 'person' (the owner) and 'thing'. A more recent case, *Yanner v Eaton*⁵, considers the meaning of property in a context new to the law now. The question of place central to the case is swiftly transformed into a discussion of the abstract nature of real property rights. The case well demonstrates how the theory and practice of law feed into one another.

'Things' are also absent from the dominant cultural discourse of property. Section 3: 'Cultural Practices' discusses disputes about land ownership and land use that are invariably expressed in terms of rights, a strict vocabulary of 'persons'. The National Farmer's Federation (NFF) represents the interests of a small but powerful group of proprietors and lessees. What property is, to them, is a right to own and freely enjoy, or be compensated for the loss of, a commodity. The relationship between farmers and their land is determined by the commodity value of that property. Expressions like 'battling the land'⁶ that appear to admit the physical into cultural discourse are directly connected to the value of land as commodity. The land is 'battled' to release its marketable goods. Australian farmers are the iconic 'Aussie Battlers'. Their cultural identity is an unequivocal expression of their function, as 'persons', in an equation of property. Their ownership depends on their ability to appropriate the physical as a commodity, and more broadly, on their ability to subdue the physical.

Against this dominant discourse, dissident farmers like Bob Purvis describe ownership as a responsibility rather than a right. Purvis offers a critique of dominant property discourse and practice and of the concept of dephysicalisation. He refers to the maladaptation of Australian property law as being responsible for the "destruction of this country", which he says affects him "deeply."⁷ The degradation of land that Purvis encountered when he took over the farming of his father's property is what the NFF refers to as "historical" despite the fact that practices that caused it have been modified rather than stopped. The better-adapted farming practice Purvis describes is exceptional and resistant rather than dominant.

Aboriginal custodians like Paddy Roe critique the concept of dephysicalisation, describing ownership as being part of the land. He argues that the paradigm of

⁵ *Yanner v Eaton* (1999) 166 ALR 251.

⁶ See for example, Linn, Rob *Battling the Land: 200 Years of Rural Australia* (Sydney: Allen&Unwin, 1999).

⁷ Purvis, Bob 'I love this land, I was born here' in Sinatra, Jim and Murphy, Phin *Listen to the People, Listen to the Land* (Carlton South: Melbourne University Press, 1999) 67.

Australian property law is "killing this country" which he says also means "killing the people. We all go down together."⁸ The mutual relationship between people and place is also articulated by native title claimants. Significantly, the law abstracts this physical relationship into a matter of cultural identity. Whilst the relationship between people and place is important to the cultural identity of Aboriginal Nations, as the custodians express this relationship, it is also about the state of the land itself. One of the subversive questions posed by native title cases is whether property, or ownership, affects the land itself, or whether it is still only a contest of rights between people and cultures.

The dominant line of legal education is that, with the exception of the law of native title and native title interests in property, place is largely irrelevant and absent from the paradigm of property law. Despite the vast pedagogical and philosophical differences between 'black-letter' lawyers and critical legal scholars, and despite the very different ideologies of property relations particular to their respective courses - the thread of anthropocentrism is common to both in that land is presented principally as an object of property relations between persons. Indeed, it is only recently via the radical revision of property law according to the history of colonisation and dispossession of Indigenous Australians' land and property rights that concepts of place and land emerge at all. Even then, such concepts are regarded as uniquely and singularly those of Indigenous people, which are then parceled into the discourse of property rights.

Legal educators like lawyers and theorists create not simply an abstract value of dephysicalised property, but its practice. Proprietors and custodians define their relationship to place in terms of the dominant paradigm of property law, in terms of rights enjoyed or rights moderated by responsibilities. Together, legal and cultural discourses of property reproduce and practice the concept of dephysicalisation as the dominant relationship between people and place. The paradigm of Nature/Culture expressed by antipodean property law is not universal and this chapter attempts to demonstrate its contingency on particular and contested practices.

⁸ Roe, Paddy 'Black and white, a trail to understanding' in Sinatra and Murphy, above n 7, 11.

2. DEPHYSICALISED PROPERTY IN LEGAL PRACTICE

In the whole of Australia, for example, there are only one or two academic teachers of real value in real property, in contracts or in torts, yet there are about seventeen law schools. One finds a number of law schools without a single member of staff capable of teaching equity. There are, to be sure, multitudes of academic homunculi who scribble and prattle endlessly about such non-subjects as criminology, bail, poverty, consumerism, computers and racism. These may be dismissed from calculation: they possess neither practical skills nor legal learning. They are failed sociologists.⁹

Teachers of "real value in real property" according to Roderick Meagher Q.C., are teachers who provide law students with sufficient knowledge of property to *practice* law. He juxtaposes and prioritises "practical skills (and) legal learning" to a theoretical or "sociological" skill-base. In doing this, he draws on a familiar opposition between theory and practice, theory and reality. It is in the practical sphere or *in reality*, Meagher would argue that one would expect to find the definitive and current concepts of real property. The real business of law takes place in the courtroom and it is here that the values of real property are found and managed. Maureen Cain and David Sugarman take up this point, but from very different perspectives, in their work on lawyers, business and social order.¹⁰ Cain presents the power of legal practitioners to define law as a *licence* to create law's truths rather than as a genius's *access* to truth.

Lawyers are translators – that is their day-to-day chore. They are also *creators* of the language into which they translate... To think for the first time, a debenture share, say, is a creative act... It is in this sense that lawyers are conceptive ideologists.¹¹

If we agree, in part, with Meagher, Cain and Sugarman that the practice of law is also the location of its realities and truths, then to better understand the "real value" or ideology of place in real property law, we should look to the decisions of the High Court. The contemporary definition of real property as "difficult", "elusive" and "meaningless" must achieve its authority in the courtroom.

How does the Australian High Court define real property? What are the values of property articulated in its definitions? What relationships between people and place

⁹ Meagher, Roderick Q.C., *Commonwealth Law Conference*, 1984. Cited in Bates, Frank 'Like An Unwelcome Guest: The Moral Crisis in Modern Legal Education' (1984) 18 *Law Teacher Journal* 181.

¹⁰ See Cain, Maureen 'The Symbol Traders' and Sugarman, David 'Blurred Boundaries: the overlapping worlds of law, business and politics' in Cain, M and Harrington, C (eds.) *Lawyers in a Postmodern World: Translation and Transgression* (Buckingham: Open University Press, 1994).

¹¹ Cain cited in Sugarman, *ibid* 119.

does it recognise and legitimate? The discourse of property as 'rights' that dominates contemporary jurisprudence prefigures the abstractness of property law. The following two cases demonstrate the ongoing vitality of the rights discourse in property law. They also demonstrate the struggle of the High Court to articulate a definitive concept of property. Both the predominance of the rights discourse and the failure of the Court to define property indicate the ongoing creation of dephysicalised property in Australian property law.

Victoria Park Racing

The plaintiff company in the case owned and occupied land in an inner-city Sydney suburb on which it operated its horse racing business. The racecourse, known as Victoria Park, was enclosed by a fence and the company charged members of the public an admission fee. One of the defendants, Taylor, owned land adjacent to the racecourse on which he built a platform from which the races were observed and broadcast by another of the defendants, the Commonwealth Broadcasting Corporation via the radio station 2UW. The live broadcast reports of the races and betting results became so popular that the gate takings of Victoria Park dramatically decreased, and the plaintiff suffered damage as a result. The plaintiff sued the defendant, alleging the defendants had wrongfully used Taylor's land and thus caused damage to the plaintiff's property.

The High Court, by a majority of 3:2 dismissed the plaintiff's claim. Latham CJ, with whom Dixon and McTiernan JJ agreed held that

[t]he defendant does no wrong to the plaintiff by looking at what takes place on the plaintiff's land. Further, he 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.¹²

The principle of this decision is that an owner is free to enjoy his or her property without restraint by the interests of others. Property, according to Latham CJ is clearly defined by its physical boundaries. "If the plaintiff desires to prevent this, he can erect a higher fence."¹³ Dixon J says property is a right established or "fixed" by positive law. His judgment constantly defers to "English law." "It is not an interest falling within any category which is protected at law or in equity."¹⁴ He disagrees with the minority judgments because they are not "simply a new application of settled principle" but

¹² Latham CJ at 494.

¹³ Latham CJ at 494.

rather they attempt the "introduction into the law of new doctrine."¹⁵ Dixon J was loathe to create new categories of law not only because he was a positivist, but also because he considered Australian law to be an unmediated extension of English law. As Edgeworth convincingly argued,

Victoria Park shows how Australian courts saw themselves overwhelmingly as the bearers of a tradition forged elsewhere... Australian jurists defined their legal subjectivity and nationality as essentially English.¹⁶

Thus whilst Dixon J sees property as a category of positive law, he also sees it as part of a particular and abstract cultural identity.

Like the majority, Rich J (dissenting) also says that property is a right. But a property right, he says is relative, not absolute. "Defendants' rights are related to plaintiffs' rights and each owner's rights may be limited by the rights of the other."¹⁷ Owners cannot do whatever they like on or from their properties without regard for the rights of others.

A man has no absolute right "within the ambit of his own land" to do as he pleases. His right is qualified and such of his acts as invade his neighbour's property are lawful only in so far as they are reasonable having regard to his own circumstances and those of his neighbour.¹⁸

For Rich J, property is defined in the socially determined context of wealth and must be protected as such. The majority acknowledged that the plaintiff's business had been damaged, but not its property. Rich and Evatt JJ argued to the contrary that the primary function of the plaintiff's property was its business and thus damage to the business was damage to property.

*One of the prime purposes of occupation of land is the pursuit of profitable enterprises for which the exclusion of others is necessary either totally or except on conditions which may include payment.*¹⁹

Rich and Evatt JJ conceive property as a right to an economic value. It is precisely this abstract formulation of property that Marx and Arendt had argued against.

What does the law in this case say property is? The answer is mixed. Property law textbooks refer to this case as an example of "how courts differ on what constitutes

¹⁴ Dixon J at 510.

¹⁵ Dixon J at 510.

¹⁶ Edgeworth, Brendan "Tenure, Allodialism and Indigenous Rights at Common Law: English, United States and Australian Land Law compared after *Mabo v Queensland*' (1994) 23 *Anglo-American Law Review* 397, 424.

¹⁷ Rich J at 503.

¹⁸ Rich J at 501-502.

¹⁹ Rich J at 502.

property"²⁰ and how "courts feel 'fettered' by existing categories of property rights"²¹ and how "property is always changing and developing"²² to address the major issue of "novel proprietary interests."²³ The decision was handed down by a majority of 3:2 despite the fact that "each judge had his own idea of 'what property is' and the nature and function of property law."²⁴ Gray argues that it is precisely the "conflict between the majority and minority views in this case (that) throw up critical clues to the identification of the "propertiness" of property."²⁵ The Court's difficulty in defining property in this case is not, in Gray's opinion, an obstacle to understanding the ideology of property, but the key to it. The 'essence' of property, its "propertiness" is precisely its elusiveness.

Gray devotes a substantial section of his essay about the abstractness and "elusiveness" of property to the "lasting significance" of the *Victoria Park Racing* decision.²⁶ Painting property as a "phenomenon", a mystery yet to be brought into the knowledge of legal science, Gray contends that the case "embodies one of the last great problems of property law."²⁷ His systematic analysis works rigorously through doctrinal points of property law in the case. His conclusion, however, works against the idea of law as science.

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 to "property" may sometimes be overridden by the need to attain or further more highly rated social goals.... 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*.²⁸

Gray, like Vandavelde, attributes the vagueness of property to what they both argue is the essentially *moral* project of dephysicalised property law - choosing between competing "rights" to property. But whilst Vandavelde is concerned about the

²⁰ Teh, G and Dwyer, B *Introduction to Property Law* 2nd edition (Sydney: Butterworths, 1992) 8-10.

²¹ Tooher and Dwyer, B *Introduction to Property Law* 3rd edition (Sydney: Butterworths, 1997) 4.

²² Hepburn, Samantha *Principles of Property Law* (Avalon, NSW: Cavendish Publishing, 1998) 24.

²³ Neave, M A; Rossiter, C J and Stone, M A (eds) *Sackville and Neave Property Law Cases and Materials* 6th edition (Chatswood: Butterworths, 1999) 45-46.

²⁴ Kerruish, Valerie *Property Law and Equity Lectures* (unpublished, School of Law, Macquarie University, 1999).

²⁵ This is the subheading title under which Gray discusses the *Victoria Park Case* in Gray, Kevin 'Property in Thin Air', (1991) 50 *Cambridge Law Journal* 252, 266.

²⁶ *Ibid* 307.

²⁷ *Ibid* 264-265.

²⁸ *Ibid* 281.

connection between the indeterminacy of property law and its authority, Gray issues no such warning, speaking of *Victoria Park Racing* in terms of fascination.

What Gray and Vandavelde missed in their critiques of the 'meaninglessness' of property law, was that despite the fact that each judge presented his own definition of property, there was a resounding common meaning between them - property was about competing social claims between persons. *Victoria Park Racing* was a case that debated and defined property as a question of rights. The Court framed that question in terms of whether property rights are absolute or relative. The framework used by the Court in this case was based on variable ideals of social order expressed in the vocabulary of rights. Rich J presented an ideal of neighbourly relations. Latham CJ presented an ideal of private freedom. This framework is what Gray and Vandavelde refer to as 'policy decisions'. But policy decisions do not make property law meaningless. All the judgments in *Victoria Park Racing* say that property means the rights of 'persons'. Property does not mean the 'thing', or land, or nature or a relation with place. Property is about Culture and the relation to nature expressed as its subordination. The majority agreed that owners of property were entitled to enjoy their property however they chose. One's freedom and power *over* place produces and reflects the right to property. The core meaning and function of property law is the protection of 'rights'. So insignificant is place to this decision, that the decision could well be read as a question over cultural practices and indeed competing ideas of leisure, the radio or the races.

Yanner v Eaton

The question of 'rights' is debated again in the case *Yanner v Eaton*. In 1994, the appellant, Murrandoo Yanner, a member of the Gunnamulla clan, killed and took two estuarine crocodiles from Cliffdale Creek near the Gulf of Carpentaria. Yanner was charged with breaching s 54(1)a of the *Fauna Conservation Act (Qld) 1974* which prohibited the hunting of prescribed species of protected fauna without a licence. Yanner argued that being a traditional owner of the land, he was entitled to exercise his native title right to hunt without a licence, on the basis of s 211 of the *Native Title Act*. The respondent argued that Yanner's native title right had been extinguished by s 7(1) of the *Fauna Conservation Act*, which states that "all fauna... is the property of the Crown".

The question before the High Court was whether the *Fauna Conservation Act* was subject to native title rights. In answering this question, the meaning of the word 'property' in the *Fauna Conservation Act* was debated. The sense of the term 'property' was not qualified in the legislation and thus became the subject of judicial analysis.²⁹ The Court decided by a majority of 5:2 that Yanner was entitled to exercise his native title right to hunt without licence otherwise required by State law. The decision was taken with direct reference to the definition of 'property'. Both the majority and the minority judgments deployed theories of property set out in the previous chapter. The case demonstrates the immediate connection between theory and practice in the definition of property.

Gleeson CJ, Gaudron, Kirby and Hayne JJ turned first to Bentham, stating that

property does not refer to a thing; it is a description of a legal relationship with a thing. It refers to a degree of power that is recognised in law as power permissibly exercised over a thing.³⁰

Like Bentham and Hohfeld, they note that "false thinking" about property mistakenly takes property itself to be a 'thing'. To emphasise the point they repeat the idea that property is a "legally endorsed concentration of power over things and resources."³¹ The majority claim that "Bentham recognised this long ago."³² But they go further, saying that though property is "[u]sually... treated as a 'bundle of rights'... even this may have its limits as an analytical tool or accurate description." They then recognise and quote Gray's point that "the ultimate fact about property is that it does not really exist: it is mere illusion."³³ Following this they argue that because property is elusive, its meaning unfixed, it is impossible to simply assume the meaning of the word 'property' in the legislation, it must be analysed. Similarly, Gummow J recognised and quoted Hohfeld's point that the word 'property' is "a striking example of the inherent ambiguity and looseness in legal terminology."³⁴ Gummow J also argues that because the meaning of 'property' is unclear in the legislation, it "then becomes a question of statutory of constitutional interpretation."³⁵ Gummow J 'interprets' the meaning of property with

²⁹ *Yanner v Eaton*, above n 5, at 264-268 'Property'.

³⁰ *Ibid* at 264.

³¹ *Ibid* at 264, quoting from Gray, above n 25, 299.

³² *Ibid* at 264. Here the judgment quotes Bentham in a footnote. The same quote is quoted in Chapter 2, Section 4, subsection 'Land as Capital' of this thesis.

³³ *Yanner v Eaton* above n 5, at 264 quoting Gray, above n 25, 252.

³⁴ Gummow J at 283.

³⁵ *Ibid*.

regard to Hohfeld's definition that "property comprised legal relations not things, and those sets of legal relations need not be absolute or fixed."³⁶

On the basis that the meaning of 'property' is not fixed in law, and that the legislation itself does not specify its meaning, the majority argued property is a right that can only be defined "without preconceptions about the intention with which certain words are used."³⁷ The majority held that whilst the crocodiles were the property of the Crown as set out by the Act, that 'property' did not mean full beneficial ownership to the exclusion of all others. They thus rejected the contention by the respondent that the *Fauna Conservation Act* had extinguished the native title right to hunt exercised by Yanner.

The minority also reach their conclusion directly by reference to the definition of 'property'. But McHugh and Callinan JJ explicitly rejected the elaborate analytic approach adopted by the majority in expressing their definition. McHugh J says that property is not elusive or unfixed. Furthermore, statute law is not open for interpretation.

Words in legislative instruments should not be read as if they were buildings on a movie set - structures with the appearance of reality but having no substance behind them.³⁸

Just when it seems the actual physical world of land or relationships to land will make an appearance in the High Court, it does not. The potential for a new view is undermined at the moment of its very opening. Property, McHugh J says, is power. Power to alienate and exclude all others. In other words, as the respondents contended, property means full beneficial ownership.

Property... describes a relationship between owner and object by reference to the power of the owner to deal with the object to the exclusion of all others, except a joint owner.

Callinan J repeats the positivist approach of McHugh, but even less elaborately. His bluntness is noteworthy:

The Act uses the word 'property' without qualification. If something less than absolute ownership were intended then an appropriate qualification in that regard could be expected to have been expressed.³⁹

³⁶ *Ibid.*

³⁷ Lane, Patricia 'Native Title – The End of Property As We Know It?' (2000) 8 *Australian Property Law Journal* 1, 17.

³⁸ *Yanner v Eaton*, above n 5, at McHugh J at 272.

³⁹ *Ibid.*, Callinan J at 295.

Absolute ownership is something English law never gave in the reality of the overlapping rights of equitable interests. Callinan J overlooks the history of property's qualifications in order to exclude yet more qualifications of ownership, in this case, *native title interests*. Callinan J finds meaning in property through reference to myths about individualism and freedom outside law, but he conceals this choice under the guise of positivism. His recourse to techniques of statutory application seemingly alleviates the need to 'interpret' property. Callinan J echoes the concerns of Vandeveld, that the abstractness or looseness of the meaning of 'property' makes it a political choice, and thus undermines the authority of the rule of law. Unlike Vandeveld however, Callinan does not seem to recognise that his 'choice' of law is political because his positivism conceals a mythology of property unsupported in the historical development of law. Whilst he may believe this saves law from politics and social relations, in fact it avoids confronting the question of the construction of property law as rights.

Patricia Lane argues that *Yanner v Eaton* is a radical development in property law. "The decision highlights the new analysis of rights and interests in land that is required as a result of recognising rights derived from traditional indigenous connection."⁴⁰ The novel aspect of the case is not however its definition of property; property remains 'rights'. The "new analysis" is another way of saying that property regulates and prescribes social order, and that this order has been modified. Whether the "new analysis of property rights" draws the Court into an inappropriate political process as Vandeveld and Callinan might argue, the "new analysis" does not engage the Court in an evaluation of non-indigenous values or relations to land so much as it translates traditional indigenous relations between people and place, into legal rights.

Yanner v Eaton maintains the core anthropocentric value of property law – that it is *not* about things. Commentators like Lane celebrate the newfound capacity of law to 'recognise' other forms of property, yet ignore the fact that to do so, law converts them into its pre-existing discourse of rights. The 'real business' of property law, as these cases demonstrate, is that property is an abstract and 'loose' matter of choosing between rights. Place is not part of the audit.

⁴⁰ Lane, above n 37, 17.

Environmental Law and Private Property

Property law excludes place from its discourse because it claims to regulate the ownership, not the use of a 'thing'. Yet as *Victoria Park Racing* and *Yanner v Eaton* both show, property law does regulate land use, even if it frames those questions in terms of ownership and translates people-place relations and land use into 'rights'. Environmental law by contrast defines itself as the regulation of land use.⁴¹ Even so, it denies that it directly prescribes how to use the land, rather it resolves disputes by recourse to administrative law.

Environmental law sets up legal frameworks within which public officials decide between competing uses of land. The law hardly ever tells them what decisions to make and rarely tells them that they *must* exercise the powers which they are given to protect the environment.⁴²

Like property law, environmental law distances the practice or use of land from its work. Like property law, environmental law also regards the natural environment anthropocentrically, "seeing the environment as a 'resource' to be used by human beings."⁴³ The core difference between the two separate areas of law is that private property protects the rights of owners with regard to their land-as-property, whilst environmental law limits those rights, as particular uses of land-as-environment.

In their seminal textbook on Environmental Law in New South Wales, Farrier, Lyster and Pearson note that because the function of private property often requires the "development" and sometimes the "destruction" of the natural environment, it clashes with the objectives of environmental law. In Australia, once the government has transferred Crown land into private ownership it becomes "politically more difficult to regulate land use" because it is "likely to be confronted with demands from owners that their 'private property' rights should be respected."⁴⁴ Private property rights are considered fundamental rights in cultural and legal discourse. Property and environmental laws are not therefore different and equal laws, they are ordered by the priority of property rights.

The issue of how to persuade or require private landholders and leaseholders to use and manage their lands in ways which are at least compatible with the interests of environmental protection is one of the most intractable problems faced by environmental policy-makers today.⁴⁵

⁴¹ Farrier, David; Lyster, Rosemary and Pearson, Linda (eds) *The Environmental Law Handbook: Planning and Land Use in New South Wales* 3rd edition (Redfern: Redfern Legal Centre Publishing, 1999) xiii.

⁴² *Ibid*, emphasis in original.

⁴³ *Ibid*, 1.

⁴⁴ *Ibid* 10.

⁴⁵ *Ibid* 11.

The argument that Farrier et al advance against the priority of property rights is that the rights of the public should not be secondary to the rights of private proprietors and leaseholders. The juxtaposition of private and public property interests is a familiar theme in critiques of private property, especially environmentalist critiques of private property.⁴⁶ But these too are anthropocentric approaches to land. Farrier et al, for example, cite J.S. Mill in the explication of the public or community rights critique of private property.

When the 'sacredness of property' is talked of, it should always be remembered, that any such sacredness does not belong in the same degree to landed property. No man made the land. It is the original inheritance of the whole species. Its appropriation is wholly a question of general expediency. When private property in land is not expedient, it is unjust.⁴⁷

Mill's notion of people-place relations is expressed in the language of property, land is inherited, appropriated and owned. For him, place is a resource that must be enjoyed expediently. The hierarchy of the Nature/Culture paradigm is unquestioned and indeed a separation of the terms and their realms is implicit in Mill's critique. People are not part of Nature any more than nature is protected by Cultural rights. In drawing from Mill, Farrier et al indicate how environmental law operates within the same conceptual framework as property law. The discourse of property is fundamentally a discourse of separation and subordination of nature from culture. Environmental law just emphasises it according to a different social ideal. The difference of emphasis between them hinges on their definition of human agency. Both laws are constituted by the idea of human agency, but in property law, agency is expressed as rights whereas in environmental law it is expressed as responsibility. Thus when Farrier et al argue

[w]e cannot leave decisions about land use solely in the hands of landholders claiming the right to do with their land what they please⁴⁸

they are not arguing against or outside rights discourse, rather they wish to redistribute those rights and redefine its terms.

The restriction of a property right effectively diminishes its 'propertiness' and in some cases is described as the 'sterilisation' or 'loss' of the property. The *Commonwealth*

⁴⁶ See for example, Bonyhady, Tim 'Property Rights' in Bonyhady, Tim (ed) *Environmental Protection and Legal Change* (Sydney: Federation Press, 1992) and also Dodds, Susan 'Property Rights and the Environment' in Cosgrove, Laurie, Evans, David and Yencken, David (eds) *Restoring the Land: Environmental Values, Knowledge and Action* (Carlton: Melbourne University Press, 1994).

⁴⁷ Mill, JS *Principles of Political Economy* quoted in Farrier et al, above n 41, 12.

⁴⁸ Farrier et al, *ibid*, 12.

Constitution refers to this loss as 'acquisition' and provides that any acquisition of property affected by government legislation or regulation should be made on "just terms" which may include compensation.⁴⁹ The idea that property is sterilised or lost by restriction of its use directly contradicts the notion that property law is not about land use or 'things'. In the *Newcrest Case*⁵⁰ the majority of the Australian High Court upheld the contention of the mining company, Newcrest, that its property rights (mining leases) at Coronation Hill adjacent to the Kakadu National Park were "sterilised" by government legislation, the *National Parks and Wildlife Conservation Act 1975* (Cth) which prohibited "operations for the recovery of minerals" in the park. Kirby J's (majority) judgment equated property rights to human rights saying

Ordinarily, in a civilised society, where private property rights are protected by law, the government, its agencies or those acting under the authority of law may not deprive a person of such rights without a legal process which includes provision for just compensation. Whilst companies such as the appellants may not, as such, be entitled to the benefit of very fundamental human right... (the Australian Constitution) extends to protect the basic rights of corporations as well as individuals.⁵¹

Karla Sperling argues that this "preoccupation with property rights... limits the ability of the government to act in the public interest through planning and environmental law."⁵² The High Court says in *Newcrest* that land use restrictions undermine property rights, which must then be compensated, as though property law did not itself enforce specific land uses. The connection between property law and specific forms of land use however are so deeply part of the law itself that it seems normalised. Patrick McAuslan says the historical connection between property and law constituted the common law itself.

It was, almost by definition, the property owners who used courts and it was in the resolution of their disputes that the common law was formed. So the whole climate and ideology of the law stressed private property, its uses and transactions.⁵³

Valerie Kerruish highlights this point by reversing the question of acquisition, from private land to public or common land.

The private acquisition of previously public land was normalised in England by enclosure of the commons. The private acquisition of the land of indigenous communities was part of the process of colonisation. Is this why making previously public land available for private development is not seen

⁴⁹ See Section 51 (xxxi) *Commonwealth Constitution*.

⁵⁰ *Newcrest Mining (WA) Limited v Commonwealth* (1997) 147 ALR 42.

⁵¹ Quoted in Sperling, Karla 'Going Down the Takings Path: Private Property Rights and Public Interest in Land Use Decision-Making' (1997) 14 *Environmental and Planning Law Journal* 427, 430-431.

⁵² *Ibid* 431.

⁵³ McAuslan, Patrick quoted in Sperling, above n 51, 428.

as the (private) acquisition of (public) land? Is this why the compulsory acquisition of native title land is named 'extinguishment' not 'acquisition'?⁵⁴

In the Australian context of colonisation, (the imposition of colonial sovereignty and a foreign regime of property relations) the connection between law and property is perhaps even stronger and more 'normal' than in England.

The centrality of property to law therefore explains why environmental, acquisition and compensation laws are conventionally defined from the perspective of private proprietors. The rights of the property owner in questions of land and land use dominate both legal and cultural notions of people-place relations. By distancing 'things' from its focus and disavowing the physical, property law implicitly maintains that land use is irrelevant to definitions and determinations of property. Yet by insisting that property is about 'rights' and upholding the rights of landowners to continue using the land as they wish, property law does speak to land use. The practice of property law conceals these proscriptions by referring to land only in terms of the land market.

3. DEPHYSICALISED PROPERTY IN CULTURAL PRACTICE

Why do we keep insisting that 'we' are variously disoriented, lost, estranged, and alienated in the face of manifestly contrary cultural and technological dominance?⁵⁵

One answer to O'Carroll's question might be that 'we' talk about the land with a sense of alienation because we, non-indigenous Australians, are alien to it. Perhaps our law and practice of property insistently abstracts land as 'thing' because we are losing the 'battle' to dominate. This section examines dominant and alternative relations to place and land practices.

'Battling the Land' - The National Farmers' Federation

Dominant forms of land-use in Australia, like farming, put dephysicalised theories and concepts of property into practice. Paradoxically, farmers define their cultural identity by their relation to the land. This relation is a 'battle' and farmers are 'battlers' in a

⁵⁴ Kerruish, Valerie (ed) *Property Law and Equity*, Vol. 3, (unpublished Course Materials, Macquarie University Law School, 1999) 269.

'hostile' land. They realign their physically dependent cultural identities as farmers with dephysicalised concepts of property by subduing the land, thereby asserting human or cultural agency over Nature.

Like the Newcrest Mining company, farmers do not welcome environmental regulation of their properties. Environmental regulation is equated with interference with their property rights which means undermining their freedom as private sovereigns. Anna Cronin, the CEO of the National Farmers' Federation (NFF) expressed the point thus:

It is our concern that the function of the *Environment Protection and Biodiversity Conservation Act* is a further step by the Federal Government toward increasing its jurisdiction over land, water and vegetation management.⁵⁶

The President of the NFF, Ian Donges, extended this concern to policy proposals of the federal opposition. "Comments by the Labor party, flagging the possibility of the establishment of new national regulatory regimes to control natural resource management are alarming."⁵⁷ From concern to alarm, from government legislation to opposition party policy, the NFF, representing the dominant value of property held by Australian farmers, defines property as the right to exclude the interests or rights of others.

Such values are not extreme or marginal, they are well founded in, and consistent with the broader social economy and with legal discourse. As Kirby J said in *Newcrest*, the basic rights of individuals and businesses are property rights. Farms are businesses and land is valued as an economic resource. Farmers make the land 'yield' resources, and so interference with their rights to use the land as their business requires, directly affects their function in the broader social economy of natural resources. It is not simply a question of theory, law and ideology: farmers' businesses (and the NFF would add the national economy) depend on the reproduction of the dephysicalised concept of property. Increasing environmental regulation is perceived as a threat to agricultural

⁵⁵ O'Carroll, John 'Upside Down and Inside Out: Notes on the Australian Unconscious' in Barcan, Ruth and Buchanan, Ian (eds) *Imagining Australian Space: Cultural Studies and Spatial Inquiry* (Nedlands: University of Western Australia Press, 1999) 19.

⁵⁶ Cronin, Anna 'A Better Deal for Farmers' Address of the CEO of the National Farmers' Federation at the AgForce Annual Conference, Mackay, Queensland, July 31st, 2001. See <http://www.nff.org.au/pages/speeches/speech_old/2001_AgForce_AGM.htm>.

⁵⁷ Donges, Ian 'Salinity a Landholder's View' Address of the President of the NFF at the National Local Government Salinity Summit, Echuca Victoria, June 18th, 2001. See <http://www.nff.org.au/pages/speeches/speech_old/2001_Salinity.html>.

and pastoral business. "The number one issue brought to the NFF Council meeting in May this year, is the question of asset security as defined by property rights."⁵⁸

Because the restriction of land use is translated as the infringement and even sterilisation of property rights, the question of compensation is forefront in the minds of Australian farmers. This issue allows farmers to claim that they are not against environmental conservation and restrictions on land use ideologically, just economically. Compensation is the ultimate expression of private property - every 'thing' can be alienated and exchanged - it's just a question of price. Farmers deploy the issue of compensation to argue that any environmental regulation of their property defended on the grounds of public interests ought to be paid with public money.

Across the country, farmers are increasingly faced with community/government expectations that they will deliver nature conservation outcomes for the public good but without due compensation for any loss in production asset value from such actions.⁵⁹

As well as tapping into long-established principles of property and constitutional laws, supported by cases like *Newcrest*, and in addition to consolidating their 'battler' identity in cultural discourse, NFF statements like this create links with environmentalist critiques of private property that emphasise public rights. The Australian Conservation Foundation for example works with the NFF, lobbying the government on the issue of assisting farmers achieve environmentally sound outcomes in their businesses.

But as Farrier et al point out, compensation for interference with private property rights maintains the priority of private property over environmental law and leaves unchallenged the role of farmers in environmental change.

If landholders are to undertake this responsibility, then they may legitimately expect to be paid for the work that they do. But this is very different from compensating them for interference with so called private property rights.⁶⁰

The NFF closes the sort of debate that Farrier et al open by repeating the connection between law and property observed by McAuslan. The relation between law and property is not unilateral; the NFF say 'if property changes, we, as proprietors, change the law'.

When you consider the fact that there are 11 current Coalition seats with a margin of one percent or less and seven of these are in rural areas, it will only take a puff of electoral wind for government to change.⁶¹

⁵⁸ Cronin, above n56.

⁵⁹ Ibid.

⁶⁰ Farrier et al, above n 41, 14.

Thinly veiled threats like these are not idle. In 2001 the NFF was declared the top industry lobby group in the national capital, Canberra.⁶² And even if it were possible to separate political power from environmental power, controlling 70% of the Australian land mass is an important factor in examining the relation between property and land use. Farmer Bob Purvis, describes the connection between values of place and property, land use and environmental change. Although Bob's story is by no means common, it defines itself by its departure from dominant concepts and practices of property. The difficulties he encountered as a farmer, the NFF might say, is an example of the battles farmers fight. Bob describes those difficulties in terms of adaptation rather than battle. His triumph over those difficulties is not a unilateral victory of 'Man' over land, it is a successful adaptation to the land. Furthermore, compared with the ongoing difficulties of his fellow farmers, Bob's success is difficult to see as anything other than adaptation. It is important to note however that Bob Purvis *is* a farmer. His pastoral farm in the desert environment of central Australia remains strange, alien. Bob's relation to land is not affecting or pretending an indigenous relation. His relation is an effort to live a better-adapted relation to land than his forebears.

Adaptive Farming - Bob Purvis

Atartinga Station, (formerly 'Woodgreen') 200km north of Alice Springs, in central Australia, is 2235 square kilometres. Before the Europeans appropriated the land, it had never had been grazed or supported cloven-footed or hard-footed animals. Bob inherited the farm from his European-born father in 1960. He also inherited debt in excess of the property's value.⁶³ The debt was due to land degradation and "near-permanent drought" caused by farming practice based on alien concepts of property: tree clearing; the impact of hard hooved animals; overgrazing and the introduction of weed and pest animals. Bob remarks that his father "didn't really understand this country."⁶⁴ The property Bob inherited suffered extensive soil erosion, pasture decline and the extinction of native plant and animal species.⁶⁵ Bob notes that the native plant species, especially the local grasses "were made for kangaroos and birds; they were not

⁶¹ Cronin, above n 56.

⁶² Ibid.

⁶³ Purvis, above n 7, 70.

⁶⁴ Ibid 67.

⁶⁵ Ibid 69.

made for cattle."⁶⁶ The damage to the land was so extensive that 75% of the land is now unusable. Bob notes that, though his father "sank the first bore in 1918"⁶⁷ and farmed the land until 1960, "most of the damage was done within five years of first being stocked."⁶⁸

That Bob's father continued to farm thirty good years after land degradation had started to appear and affect his productivity demonstrates the power of the 'battler' ideology. He was a farmer whose relation to land, despite being a lessee not an owner, can be likened to the notion of 'full beneficial ownership' expressed by the majority in *Victoria Parks Racing* and by Callinan and McHugh JJ in *Yanner v Eaton*. Any interference with his 'rights' to use his land as he chose, would have then, and certainly today if *Newcrest* holds, been discussed in terms of the 'sterilisation' of property rights and the importance of compensation. Though Bob's father literally sterilised the land, made it lifeless - because it is not the 'thing' but the 'right' that defines property - both environmental and property laws would still refer to the regulation of land use, rather than the land use itself, as sterilising the property.

The role of property law in environmental change is noted by Purvis. His father did not buy the land, he leased it. The conditions of the lease included a requirement about the use of the land.

The lease states that you have a minimum stocking rate of 3000 head for the property. We reckon that a sustainable number is about 400... In good heart, this country can only support a stocking rate of about 3 per square kilometre. That's what the land can carry, and my father had to stock 23 per square kilometre.⁶⁹

Bob's account of the connection between land law and land use demonstrates that law realises, in physical terms, the Nature/Culture paradigm by enforcing the ideology of improvement. It reflects the power of the paradigm this thesis critiques and it also demonstrates precisely what is maladaptive about that ideology. Bob inherited the lease and its conditions. It is a long time since colonial Australian governments imposed taxes for unimproved land⁷⁰ but contemporary property law, despite rhetorical distance from the 'thing' of property, still determines what it can and cannot be. Bob sees the law as politics, for him laws are made and permitted by government. He notes that "to this day many central Australian farmers retain the government-endorsed grazing philosophy

⁶⁶ Ibid 73.

⁶⁷ Ibid 69.

⁶⁸ Ibid 73.

⁶⁹ Ibid 74.

that nearly ruined Atartinga."⁷¹ And again later he says, "the Australian attitude - or this government's attitude - is to plunder that resource, you know, the finite resource, not the infinite resource."⁷² The philosophy of Michel Serres would appeal to Bob on this count: Serres describes contemporary relations between Nature and Culture, people and place as 'war'. Certainly the image of war is not far from the 'battler' ideology of the NFF and that remains in broader Australian cultural discourse today. But Bob might not adopt Serres' call for a 'natural contract' so much as a process of learning from and adaptation to Nature to replace the 'plundering' or 'battler' discourse he says characterises dominant legal and political concepts and prescriptions of land use. For Purvis, law's concepts are maladapted.

When Bob inherited his father's property, he was not losing the 'battle' to dominate nature. The 'battle', he felt, was already lost. In 1960 when debts exceeded the property's commercial value and 75% of its land was unusable, Bob decided on a radical change of land use that fundamentally subverted standard and familiar people-place relations. Those changes were successful. In 1985 he "paid off the debt and sold bullocks in the drier than average season whilst the rest of the pastoral industry in the Alice Springs region was in crisis."⁷³ Almost twenty years later the crisis continues, many farmers are "broke", "their land is going backwards" but "they don't want to know and they don't want to see."⁷⁴ Bob's anecdotal evidence contradicts the claims of the NFF that farmers are interested in environmental conservation because their businesses depend on sustainable productive land use. Farmers' reluctance to change the way they relate to their properties is arguably due to the potent discourse and ideology of property rights. The change and adaptation that Bob practices and recommends subvert the paradigm that sustains property rights discourse.

So what did Bob do? Is his use of land fundamentally different from other pastoral farmers and if so, how? Bob abandoned the notion that Culture was active and knowing. He approached the land as its student. He observed what sort of land his property was. He learned that his property was made up of three different sorts of country: "hard Mulga; spinifex sand plain and open woodland; and smaller areas of mixed sweet

⁷⁰ See Chapter 3 above.

⁷¹ Ibid 71.

⁷² Ibid 77.

⁷³ Ibid 71.

⁷⁴ Ibid 77-78.

calcareous country."⁷⁵ He examined the soil and learned what caused its erosion and began to restore its former conditions by reintroducing better-adapted vegetation and making ponding banks. He reintroduced fire. But the most radical change Bob initiated was reducing the number of stock on the property. The minimum stocking rate set by the conditions of the property lease is 3000. When Bob reduced by two-thirds the number of stock, he was in default of his lease. His account of this process illuminates the vital role of property law in determining land use.

We've got to convince the bureaucrat that the stocking rate is unrealistic. It took me twenty-odd years to get them to change, and then it changed only for me. Although it did show that there was something seriously wrong with the stocking rate in this area it is difficult to convince that those minimum stocking rates should be maximum stocking rates because the politician, he wants the rent now. He wants it yesterday, and your rent is based on the property's carrying capacity.⁷⁶

Bob still uses the land as a resource, and he remains a pastoralist in an arid region in a country to which pastoralism was alien. What is radical about Bob's farming practice is that he challenged the manifestation of the Nature/Culture paradigm in property relations. Unlike fellow farmers, rather than regarding land as the 'object' or 'thing', and rather than 'battling' the land, Bob transformed the property relation into a continuing process of adaptation to the particular sorts of lands he leased. "The hardest part was to obtain the expertise" he says "because all the landscapes are slightly different, what applies here doesn't necessarily apply somewhere else."⁷⁷ Bob adapted himself to the land rather than trying to force the land to adapt to him. In his experience, property rights are not restricted externally by environmental regulation, they are restricted by the 'thing' itself. "The land is what limits you."⁷⁸

The other obvious way in which Bob's theory and practice of property is radical is that he disconnects property from economy. Land "is worth more than money... it's the thing that drives you."⁷⁹ Like the character Daryl Kerrigan in the film *The Castle*, Bob Purvis resists the notion that property is alienable and exchangeable. "If you are completely broke, what do you do about it? The last thing you do is walk off. You just have to get better at looking after the land."⁸⁰

⁷⁵ Ibid 69.

⁷⁶ Ibid 77.

⁷⁷ Ibid 78.

⁷⁸ Ibid 77.

⁷⁹ Ibid 82-83.

⁸⁰ Ibid 83.

All the changes Bob's farming practice affected were gradual. Bob points out that he didn't know and wasn't taught how to care for the land and had to learn from the land itself over a long time, by trial and error. Unlearning the paradigm of Nature/Culture and departing from conventional property relations was slow. The time it took Bob says is unnecessary and particular to the cultural ignorance of colonial Australians.

450 ponding banks in twenty-odd years doesn't seem many, but five or six or eight years of that was learning how to do it. Whenever you are teaching yourself it takes a long time. If somebody had the knowledge they could maybe teach you in one week that which took me five years to learn.⁸¹

When talking about fire, Bob complains that people *had* learned over time, and did know and practice better-adapted land use. The loss of their knowledge and their dispossession he also connects to the paradigm of property that colonised the country.

The blackfella burned, but my father's generation stopped the blackfella from burning and the blackfella has another generation that is not taught how to burn. And then there's my generation... comes along and has to learn what the blackfellas knew three generations back.⁸²

Whilst Bob laments the loss of this knowledge, it remains to him an irreversible loss. He does not discuss his feeling about the dispossession of its original owners, or about the direct connection between their loss, and his own proprietorship. Without resuming a discussion of property as a simple matter of contested 'rights' between 'persons', or cultures, it is interesting to consider that Bob talks about their dispossession only in terms of their knowledge of the land, and not the land itself. The connection he himself feels with his property is felt despite, rather than because of his cultural heritage. And whilst he recognises the importance of that connection to the life of the land itself, he does not discuss the possibility of de-privatising his right and sharing his knowledge and his land with the dispossessed Aboriginal community of the region. "An easy acceptance of non-indigenous rural attachment to land runs the danger of perpetuating the erasure of Aboriginal relationships to land."⁸³

Custodians - Paddy Roe

The problem of losing knowledge of the land, and the environmental consequences that has, is also something that concerns Paddy Roe. His work is to pass on that knowledge,

⁸¹ Ibid 81.

⁸² Ibid 82.

⁸³ Gill, Nicholas 'The Ambiguities of Wilderness' in Stratford, Elaine (ed) *Australian Cultural Geographies* (Melbourne: Oxford University Press, 1999) 59.

in an effort to arrest what he calls "killing the country", the sort of land degradation Purvis inherited from his father. Paddy Roe is a Nyikina man who was "entrusted with the custodianship of the three countries held by the Jabirr Jabirr elders."⁸⁴ The contrast between the property relations of the Aboriginal nations of the Kimberley and the property relations of (high) colonial Australians like Bob's father is indicated by the different vocabulary used to describe Aboriginal property relations. Paddy was "entrusted" with "custodianship", rather than empowered by the ownership, of property. His identity as custodian emphasises the importance of a sense of responsibility in people-place relations to the Jabirr Jabirr elders. The arrival of pastoralists in 1865 "resulted in great changes to land use patterns" in their country and great changes to the land's people. The changes, led by introduced diseases, war and abduction of women and children meant that by the time Paddy Roe visited their country in 1931, "only the elderly members of the tribe remained."⁸⁵ The elders "walked him through the country" teaching its stories, names and sacred sites.

Paddy was concerned that the knowledge of country that the Jabirr Jabirr elders had passed onto him would be lost unless he too could teach it. "I must look after the country, that's what the old people told me."⁸⁶ In the 1980s Paddy developed the Lurujarri heritage trail to teach people "to respect" the country and "return home to become caretakers of their own country."⁸⁷ The country, Paddy says, is "waiting for people."⁸⁸ He taught his children and Dutch man Frans Hoogland tribal knowledge that

You are the land, and the land is you. There's no difference... We have separated from it because we are told it is separate... we have people and everything else. So people got separated from nature and don't see themselves as part of it anymore. But we are part of it. Like the fish, like the birds, like the rocks, we all have our function. We put birds into a box - they are birds. We put trees into a box - they are trees. But they are one and we part of it. We all make up the *living country*.⁸⁹

The Jabirr Jabirr knowledge of their country expresses a people-place relation that confounds the conceptual separation of people and place. This idea that people are in, and part of, a particular place or country is fundamentally different to the paradigm of Nature/Culture in the dominant cultural discourse of property.

⁸⁴ Roe, above n 8, 13.

⁸⁵ Ibid 13.

⁸⁶ Ibid 15.

⁸⁷ Ibid 15.

⁸⁸ Ibid 18.

⁸⁹ Ibid 19, emphasis in original.

Property law excludes such radical values of people-place relations. In 1999, the *Yorta Yorta* native title case⁹⁰ the Federal Court ruled that the relation between the Yorta Yorta clan and their land was severed by colonisation. Olney J argued that it was not possible to have or to 're-establish' a connection with the land, that the "connexion" had not "survived" and was "not capable of revival."⁹¹ He expresses here a familiar ideal of Aboriginal people as being somehow more 'Natural' than their Cultural, colonial counterparts. Olney J imagines Aboriginal land practices to be untouched by Culture and thus pre-historic. Native title, he says, protects relationships that remain 'Natural.' When Yorta Yortan people changed because of colonisation, they were thought to be somehow Cultured, or de-Natured, and thus, no longer 'Natural'. In legal discourse that idea is expressed by the concept of "unbroken" relationships between people and place which is a code for unchanged relationships. Significantly, the oral testimony of Yorta Yorta community members is excluded from the judgment. (In its place, the judgment relies heavily on a memoir of a colonial pastoralist.) Against that exclusion, and to demonstrate the subversiveness of Yorta Yortan property, I include here the poem 'Spiritual Song of the Aborigine' written by Hyllus Maris, a Yorta Yortan woman.

I am a child of the Dreamtime People
 Part of this Land, like the gnarled gumtree
 I am the river, softly singing
 Chanting our songs on my way to the sea
 My spirit is the dust-devils
 Mirages, that dance on the plain
 I'm the snow, the wind and the falling rain
 I'm part of the rocks and the red desert earth
 Red as the blood that flows in my veins
 I am eagle, crow and snake that glides
 Through the rain-forest that clings to the mountainside
 I awakened here when the earth was new
 There was emu, wombat, kangaroo
 No other man of a different hue
 I am this land
 And this land is me
 I am Australia.⁹²

Aboriginal relations to place articulated by Hyllus Maris, Yorta Yorta native title claimants and Paddy Roe, for example, unsettle the discourse of dominant cultural and legal discourses and practices of property. The relation they express is not different and

⁹⁰ *The Members of the Yorta Yorta Aboriginal Community v State of Victoria and Others* (1998) 1606 FCA 130, upheld by the 2002 High Court decision *The Members of the Yorta Yorta Aboriginal Community v State of Victoria and Others* [2002] HCA 58 (12 December, 2002).

⁹¹ *Ibid* 129. For a further discussion of the case in relation to Australian native title law see Graham, Nicole 'Ec-Centric Places: Departures in Property Law' in Pons, Xavier (ed) *Departures: How Australia Reinvents Itself* (Carlton South: Melbourne University Press, 2002) 245-257.

compatible with property law, it undermines the law. Aboriginal custodians and native title claimants voice the persistent identity of people (and) as place. They give the lie to a logic which separates who and where. They reinscribe the colonial history that law erases, and define themselves as local and particular rather than universal. The localness and particularity of Aboriginal relations to place contradict Olney J's notion of fixed and recognisable, unbroken and uniform Aboriginal 'connexion' with land.

Galarrwuy Yunupingu, Chairman of the Northern Land Council, argues that despite the impossibility of "an homogenous position" regarding land and place across Aboriginal peoples, that the subversive tug of indigenous philosophies against colonial jurisprudence remains constant.⁹³ Yunupingu wrote in 1997 that

The land is something that is always yours; it doesn't matter what nature or politics do to change it. We believe the land is all life. So it comes to us that we are part of the land and the land is part of us. It cannot be one or the other. It cannot be separated by anything or anybody.⁹⁴

The assumed homogeneity of people-place philosophies and practices across Aboriginal nations labours under the same illusion as the conflation of Aboriginal land use and wilderness. Both notions imagine Aboriginal people are "part of some timeless and stable nature; they are stereotyped according to Eurocentric concepts of indigenous identity and nature."⁹⁵

In her critique of the concept of wilderness, anthropologist Deborah Bird Rose links the "concept of wilderness as empty and primitive to the erasure of the presence of Aboriginal people."⁹⁶ Like the concept of wilderness, the concept of terra nullius and of the 'unbroken' connection between people and place in native title law, 'freezes' not only Aboriginal land use in time, but 'sterilises' Aboriginal property. The problem with this, as Roe argued, is that land or country is a living thing not a "pure state of Nature."⁹⁷ It ties Culture, albeit a more Natured Culture, to the practice of land use, erasing completely a discussion of adaptation. In this way, the subversive perspectives and practices of Aboriginal custodians for example are neutralised by being abstracted from physically derived and adapted practices into cultural traditions. But traditions are not

⁹² Maris, Hyllus 'Spiritual Song of the Aborigine' in Gilbert, Kevin (ed.) *Inside Black Australia* (Ringwood: Penguin, 1988) 60.

⁹³ Yunupingu, Galarrwuy *Our Land Is Our Life* (St Lucia: Queensland University Press, 1997) xv.

⁹⁴ *Ibid* 2-3.

⁹⁵ Gill, above n 83, 63.

⁹⁶ Rose, Deborah Bird quoted in Gill, *ibid*.

⁹⁷ Cook, James *Journal of the Voyage of the Endeavour 1768-71* quoted in Horton, David *The Pure State of Nature: Sacred cows, destructive myths and the environment* (St Leonards: Allen & Unwin, 2000) ii.

simply inherited, they are *made*. The responsiveness of Bob Purvis to the specificity of his three sorts of land is something he wishes to pass on to his children not simply as knowledge, or family tradition, but as a successful practice of living with those lands. If Bob's practices do become traditions, if they survive, it is partly because they are made in response to physical conditions that are inescapable and unfixed. The accumulation of knowledge of place that native title law refers to as 'tradition' is as physical as it is cultural. It is not because Aboriginal land practices are intrinsically "more ecologically sound than those of non-indigenous people"⁹⁸ that their traditions of property are important. It is not because their practices are 'natural' rather than 'cultural' that these traditions may help us. It is because these traditions are practices specifically adapted over a long period of time to specific places. Specifically Australian places.

4. DEPHYSICALISED PROPERTY IN PEDAGOGIC PRACTICE

From the standpoint of an educator, the more people who are trained in legal methodology, the better it is for our society.⁹⁹

That law and lawyers shape society is "a truth universally acknowledged."¹⁰⁰ That lawyers and legal methodology improve society is not. Certainly "lawyers as lawyers are uniquely placed to consider taking active steps to do things about the injustices they see around them."¹⁰¹ But whether or not they do is a question veiled by the cloak of professionalism that often assumes an impersonality and impartiality suggestive of the absence of values.¹⁰² It is precisely this point that constitutes the debate about the pedagogy of law. For if the cradle of contemporary legal theory and practice is the law school, then the question of the role of law directly bears upon the purpose and manner of legal education. Should lawyers as lawyers hold values and what should they be? Does property law contain values? What are they and how are they taught? The pedagogy of property law depends enormously on the evaluation of the role of law, but should it not also depend on the evaluation of the relationship of law to land? If law is

⁹⁸ Gill above n 83, 63.

⁹⁹ Miller, M 'Lawyers and American Politics' paper at the Annual Law and Society Association Conference, Philadelphia, May 1992, quoted in Cain, Maureen 'The Symbol Traders', above n 10, 18.

¹⁰⁰ Austen, Jane *Pride and Prejudice* (London: Oxford University Press, 1970) 1.

¹⁰¹ Warrington, Ronnie 'Land Law and Legal Education: is there any justice or morality in Blackacre?' (1984) 18 *The Law Teacher: Journal of the Association of Law Teachers* 77-94, 84.

¹⁰² For an excellent discussion of the impersonality of law as power see Unger, Roberto *Law in Modern Society* (New York: Free Press, 1976) 178-181 and 192-203.

concerned to teach what is 'good for society' then at some point, soon, it becomes necessary to ask what is good for the world in which that society exists.

The approach to the education of property law varies significantly across and within Australian universities.¹⁰³ This may be attributed to the "challenging," "problematic" and "difficult" nature of legal education which attempts to "satisfy simultaneously the immediate demands of legal practice and the traditional values associated with the university."¹⁰⁴ The disparity of value and purpose apparent in this dual commitment defines the contrast between the two main approaches to legal education: 'black-letter' law and critical legal education.¹⁰⁵ The key difference between these approaches is their understanding of the nature and role of law. The 'black-letter' model of teaching law emphasises the immediate practical function of legal knowledge. As law is thus regarded as a discrete system or practice, the teaching of law by 'black-letter' lawyers remains a training process in that it insists on the reproduction of relevant skills and rules. 'Black-letter' law quite literally presents the law as always and already written - *black letters on a white page*. The law is learned and practiced as the administration of rules that pre-exist the specific conflict before the law. Accordingly, law students are trained to master and engage in the technical craft of law as a means to resolve the conflict before them. Professor Margaret Thornton, refers to lawyers thus trained as "technocrats"¹⁰⁶ and thereby neatly confounds the idea that lawyers are learned or that they improve society. This approach to legal education entrenches the person-person theory discussed in the previous chapter. Critical Legal Education (CLE), the tradition from which Thornton writes, emphasises the political and economic function of legal knowledge. CLE pedagogues insist that legal education is, and should be, a rigorous academic inquiry rather than a procedural training process. The law student is perceived to be capable of improving society not simply because she becomes a lawyer but because she understands and critically evaluates both her "unique place" as a lawyer and the socio-economic role of law itself. This approach to legal education presents and critiques the person-person property theory, and in some cases, presents the thing-thing critique of property in Marxist philosophy and legal anthropology. Both black-letter law and

¹⁰³ Griggs, L and Snell, R 'The Curriculum and Teaching of Property Law in Australian Law Schools' (1997) 5 *Australian Property Law Journal* 213-226.

¹⁰⁴ Thornton, Margaret 'Portia Lost in the Groves of Academe Wondering What to do About Legal Education' *Inaugural Lecture* (Department of Legal Studies, La Trobe University, 1991) 1.

¹⁰⁵ The dichotomy between black-letter and critical legal education although reductionist and non-comprehensive, is a familiar one and sufficient for the purposes of this chapter.

¹⁰⁶ Thornton, above n 104, 2.

cultural legal studies conceive property law as a person-person relation. Thus, the pedagogy of property reproduces the anthropocentrism of Australian property law.

Black-letter Pedagogy

(i) Real Property Law is a Hard Subject

Real property law is a 'hard' subject in two different senses within black-letter pedagogy. First, the curriculum of predominantly 'substantive' or doctrinal laws of real property law secures its status as an important, pragmatic, 'hard' subject fulfilling the Uniform Admission requirements. Second, the 'scientific' method of rote-learning core rules and doctrines renders the course incoherent and meaningless: this is what lecturers and textbooks refer to as the 'difficulty' of real property law. Interestingly, the relationship between the two senses in which real property law is 'hard' law is circular and self-perpetuating.

For students at many Australian law schools, lectures are compulsory and the textbook is an exam staple. The first lecture usually starts with the announcement that property law is in a bad shape, a point echoed in several textbook introductions. "Property law has a reputation for being a difficult subject."¹⁰⁷ Indeed, a common feature of critiques of legal education is that the law of real property suffers from being "dauntingly difficult" and intellectually demanding¹⁰⁸, a "tortuous and ungodly jumble"¹⁰⁹ of out-dated concepts, rules and vocabulary. Why is property law so regarded? And how is it negotiated? Real property is regarded as a difficult or "mystifying"¹¹⁰ subject because in 'black letter' law schools and textbooks, its "notorious complexity"¹¹¹ is approached via a strategic deployment of history¹¹² and anachronistic grammar¹¹³ that makes any conceptual framework or meaning, "elusive."¹¹⁴ The history and etymology of property law doctrines and its vocabulary are not situated or rationalised within their varied socio-economic contexts, but rather are presented as a list of loosely related rules. Such

¹⁰⁷ Chambers, R *An Introduction to Property Law in Australia* (Sydney: Law Book Company, 2001) 4.

¹⁰⁸ Castan, M and Schultz, J 'Teaching Native Title' (1997) 8 *Legal Education Review* 75-98, esp. 78-79.

¹⁰⁹ Bates, above n 9, 182.

¹¹⁰ O'Donnell, Anthony and Johnstone, Richard *Developing a Cross-Cultural Law Curriculum* (Sydney: Cavendish Publishing, 1997) 65.

¹¹¹ Alexander, G 'Critical Land Law' in Bright, S and Dewar J (eds) *Land Law: Themes and Perspectives* (New York: Oxford University Press, 1998) 52.

¹¹² Alexander, G.S. 'History as Ideology in the Basic Property Course' (1986) 36 *Journal of Legal Education* 381-389.

¹¹³ Warrington, above n 101, 80.

¹¹⁴ Gray, above n 25.

disconnection between topics and doctrines in the subject of real property means that law students learn the “archaic maxims” as though they were “mathematical formulae” rather than cultural paradigms.¹¹⁵ The ‘training’ of law students to recognise and administer existing rules and procedures, referred to as ‘substantive law,’ is what defines the ‘black-letter’ pedagogy.¹¹⁶ The twin objectives of this approach are to prepare law students for commercial practice and to satisfy Uniform Admission requirements imposed on University law schools. Achieving such objectives maintains the ideology and practice of dephysicalised property because it presents and assesses a curriculum of abstract ‘mathematical formulae’ of ‘substantive’ property law rules. The ‘black-letter’ real property law course has neither the time nor the reason to provide law students with explicit articulations and questions of the meaning of property, much less the physical, material reality of land law.

The *Real Property Unit Outline* for the Faculty of Law, University of Sydney in 2001 below may be regarded as fairly representative of a ‘black-letter’ approach to real property in Australian law schools. The unit readings comprise of key statutes and case law and one textbook. More than 90% of the course is instructive in the ‘substantive’ property law. ‘Substantive law’ is an expression used to describe the doctrinal sources of law consisting in statute and case law. It is not a neutral expression; it carries a specific epistemological connotation. Substantive law subjects and topics are generally commercially oriented and are known as the ‘hard’ items that constitute the important, compulsory or ‘core’ units of a law subject and degree. They are distinguished from ‘soft’ subjects and topics, which are “less concerned with the maintenance of the societal status quo” and thus being of secondary importance, are offered as electives.¹¹⁷

¹¹⁵ O'Donnell, above n 110, 16.

¹¹⁶ See especially Bates, above n9, 190-193.

¹¹⁷ See Thornton, above n 104, 3 for a discussion of the dichotomy of legal knowledge into ‘hard’ and ‘soft’ areas.

Faculty of Law, University of Sydney *Real Property Law Unit Outline 2001*

1. Real property defined	1 hour
2. Tenures, estates and possession	1 hour
3. Legal and equitable interests	2 hours
4. Systems of title	2 hours
5. Leases and licenses	3 hours
6. Common law and equitable approaches to competing interests	3 hours
7. The <i>cujus est solum maxim</i>	4 hours
8. Fixtures	
9. Torrens title	14 hours
10. Co-ownership	6 hours
11. Easements and profits	6 hours
12. Covenants over freehold land	6 hours
13. Mortgages	4 hours
TOTAL HOURS	52 hours

The laws and cases selected in the course outline are not included to convince law students of the perspective of the teacher of the cases, but as Kuhn argued, "because learning them is part of learning the paradigm at the base of current practice." The 'trust me' attitude structured into the 'black-letter' property law curriculum intellectually disempowers students: if it is taught as given that property law is in a bad shape, then property law students need only know how to use the 'rescue kit'. The 'hard' topics of property rules and doctrines are the range of band-aids that are used to cover the multiplicity of problems that arise both within abstract property law categories and also because of them. The course works towards a 'practical' problem-solving competency that is not actually practical, but an abstract hypothetical stripped of detail in order to fit the formulae. This goal is then able to assess the students' potential utility to the legal profession, and more broadly, their social productivity.

According to the dichotomy of 'hard' and 'soft' areas of legal knowledge, the 'soft' or non-substantive topics of the unit are more theoretical and socio-historical in nature than the 'hard' doctrinal topics of pragmatic business culture. The purpose of 'soft' topics is paradigmatic rather than syntagmatic. What that means in this course is that the 'soft' topics would locate real property within cultural and economic paradigms regulated or prescribed by law. This is achieved by questioning and defining the purpose, the consequences, the contextual origins and ideologies of real property law. 'Hard' topics state the rules and behaviour of real property law in a list whose order is variable because no meaning is attached to the rules or their relations to other rules. Yet the 'soft' topics presented in this black-letter real property unit are so restricted by time allocation

and content that they are inadequate to achieve this purpose. So then, what purpose do these topics serve here?

The prescribed readings for the 'soft' topics in this unit; 1, 2 and 3, are all taken from the same, single textbook source. The reading begins:

It is difficult to begin a study of any area of law without some appreciation of its sources. To obtain that appreciation in the case of Australian land law, we must delve a little into the way in which English law became part of Australian law.¹¹⁸

Butt does not suggest here *why* or *how* the sources or history of property are useful to an understanding or "appreciation" of property law. In the following chapter of the textbook however, he explains that the historical material is "a prelude to discussing present-day law."¹¹⁹ The use of history in this textbook, and thus in this 'black-letter' real property course, is in fact more introductory than relevant to the course. More significantly, the history provided is used to substitute for other accounts of contemporary property that might be useful in examining the meanings or paradigms of property law. In this way, economic, anthropocentric, philosophical and ecological theories of property for example are absented from the course.

On closer inspection of the 'soft' topics in this course, one finds information that neither counters nor complements the doctrinal topics, but rather, information that is at best interesting and at worst, irrelevant. The irrelevance of the 'definition', conceptualisation and history of real property law is conveyed in two ways: the curriculum design and the assessment of the course. The unit outline allots 7% of the course time to these three topics in combined total. The readings for these three topics consist of chapters in a single textbook. The lecture states that property lawyers, not being philosophers or politicians, need have neither the ability nor the acquaintance with an understanding of the meaning or meaninglessness of real property law. Finally, because it does not fulfil either of the twin objectives of the unit, it does not form part of the assessment of the course. "So while alternative concepts of property have always made a nice jurisprudential add-on to the 'black-letter' syllabus, they have often been safely quarantined" by being non-examinable.¹²⁰ This strategic use and programming of history, as a 'soft' or non-substantive topic in both the real property law curriculum and

¹¹⁸ Butt, Peter *Land Law* 4th Edition (Sydney: Law Book Company, 2001) 1.

¹¹⁹ *Ibid* 8.

¹²⁰ O'Donnell, above n 110, 77.

assessment, “conceals more than it reveals about current policy issues and current conflict of values over land use.”¹²¹ For this reason, critical legal educators have argued that black-letter pedagogy “legitimizes select social and political values that underlie property law.”¹²²

“Several generations of property teachers have used history as a device to mitigate the student’s sense of frustration that accompanies her perception of the course as unintegrated and incoherent.”¹²³ But apart from history, very little is offered in this course by way of rationalising or relating the doctrines to each other, and to their practice and development. Given such lack of conceptual rigour in the three supposedly ‘soft’ topics of the course, it is hardly surprising that property is said to be “difficult”, “muddled” and “intellectually taxing”¹²⁴ in ‘black-letter’ property textbooks and lectures. Students learn real property law as though it were a science: by rote. We learn by rote axioms, things that structure our world, but are beyond our capacity to prove or disprove. For example, the times table, the alphabet, grammar. These things are beyond reason because they are neither true nor false, they just are. And this is how property is taught, not only uncritically, but as structural necessities with no normative significance. The dephysicalisation of property, therefore, is integral to black-letter pedagogy. This learning method and its objective are especially perplexing and concerning in light of the parallel claim of real property textbooks and lectures, that property law is one of the most important subjects in the entire law degree.¹²⁵

Many teachers would no doubt agree that the study of land law is so fundamental to any legal education that professional requirements are irrelevant, and that land law must be a part of any undergraduate course worthy of the award of a law degree.¹²⁶

To speak to students of the importance, the greatness and the historical gravity of real property law is a convenient means to account for the difficulty of the subject. The incoherence and meaninglessness of real property (un)accompanying the ‘substantive’ or doctrinal ‘black-letter’ course, far from being regarded as an obstacle to learning or a shortcoming of the course, distinguishes the successful completion of the course as intellectual achievement. The ‘black-letter’ real property course can thus provide

¹²¹ Ibid 89.

¹²² Bowrey, Kathy *Law of Property*, Book 1 (unpublished Macquarie University Course Materials, 1993) 8.

¹²³ Alexander, above n 112, 381.

¹²⁴ Mugambwa, John, ‘From Teaching the Law of Real Property to Teaching Property Law in Australasian Law School’ (1997) 4 *James Cook University Law Review* 5.

¹²⁵ Skapinker, Diane *Real Property Lectures* (unpublished, Faculty of Law, University of Sydney, 2001).

¹²⁶ Warrington, above n 101, 77.

students with a curriculum of loosely, if at all related doctrines and cases, with only occasional etymological references and historical flourishes that remain 'unnecessary for the exam.' Indeed, it is then claimed that in fact the disconnection of doctrines and rules is apparent only superficially: "for they are bound together in a creative tension which is part of the richness of our land law."¹²⁷ Such enamour with the complexity of property law is epitomised by the claim that "Real Property Can Be Beautiful."¹²⁸

But if the complexity of real property law doesn't gel into "intellectual beauty and symmetry"¹²⁹ for those students who perceive the lack of coherence and meaning in and between the doctrines – all the better! "Among the virtues of the English law of real property" argued Professor Lawson is "the way that the grammar of our property law allowed the courts and legislature to do or say anything that is necessary" without the need to comply with any over-riding coherent order and logic.¹³⁰ The pragmatically minded 'black letter' lawyer thus finds no "logical impossibilities" or prohibitions in real property law. The changes and development of property law rules are thereby depicted as "objective and apolitical"¹³¹ rather than logical or meaningful, which then distances and devalues the historical logic and context from contemporary application. 'Black-letter' pedagogy positivises real property law into a beautiful 'science', or rather, practice. Because practice is the preordinate concern, 'science' can be set aside if it is not practically useful. So it doesn't matter that it lacks meaning, because it is expedient and respectable. The abstraction of necessity leads to a semantic approach and one that removes place.

(ii) *Real property is not about things*

Swiftly following the announcement that real property is a hard subject, property law textbooks and lecturers "disabuse"¹³² students of any "unreflective and naïve"¹³³ ideas of property, such as those held by "ordinary non-lawyers,"¹³⁴ that property is a 'thing'. To the contrary, students are informed that the fundamental prerequisite to understanding

¹²⁷ Gray, K and Gray, S.F. 'The Idea of Property in Land' in Bright, S and Dewar J (eds) *Land Law: Themes and Perspectives* (New York: Oxford University Press, 1998) 51.

¹²⁸ Haydon, J 'Real Property Can Be Beautiful' (1955) 8 *Journal of Legal Education* 94 cited in Warrington, above n 101, 80-81.

¹²⁹ *Ibid* 80.

¹³⁰ Lawson *The Rational Strength of English Law* (1951) quoted in Warrington, *ibid*, 80.

¹³¹ Alexander, above n 112, 382.

¹³² *Ibid*.

¹³³ Gray and Gray, above n 127, 15.

¹³⁴ Alexander, above n 112, 382.

real property law is to “un-learn previous notions”¹³⁵ that property is about physical things. In this way, the pedagogy, or pragmatics of (teaching) property law begins, and indeed exists only through, the absenting of physicality, of place, from law. Gregory Alexander argues that

many property teachers would probably consider one of the principal objectives of their course to be just this transformation of consciousness; and so if property is perceived as unintegrated the problem is partially of the teacher’s own making.¹³⁶

Real property law is not about things, it is about persons, or inter-personal relations. This line is run in both ‘black-letter’ and Critical Legal Education (CLE) property courses. Yet, where critical legal educators address the political aspects of these legal relations, the ‘black-letter’ approach presents this definition of real property as curiously apolitical. The political aspects of land and property relations often register in material form, for example, the dispossession of indigenous people, homelessness and poverty. The presentation of property law as person-person relations in the ‘black-letter’ course then not only dephysicalises property by way of excluding the ‘thing’ or land of the property dispute, but also by excluding the material results of that dispute in its social forms. Black-letter real property law is as abstract as it can be. It is concerned with neither the natural, nor the social consequences of law in materiality. Its insistence on abstracting law from materiality renders its perspective, in addition to its curriculum and assessment, ‘mathematical’.

If the ‘black-letter’ real property curriculum makes little sense, or can be said to be difficult, it is because the very ‘thing’ or ‘property’ about which this law speaks does not exist. In other words, the course is meaningless because it merely reflects the meaningless ‘state’ of real property relations. But does the curriculum really reflect or follow this state in its education of new generations of lawyers? If so, who or what is responsible for changes and developments in legal property relations? And would the law school’s decision to follow or reflect existing property relations and structures constitute an abdication or a reverence for the responsibility of the creation of value? Kenneth Vandavelde, who draws the change in property law from Blackstone’s person-thing relation to Hohfeld’s person-person relation, argues that the values of property ought not to be created by lawyers but by separate political processes. The person-person property relation, however improperly, draws lawyers into that process. To

¹³⁵ Castan and Schultz, above n 108, 79.

¹³⁶ Alexander, above n 112, 382.

reiterate the idea that property is a person-person relation, or 'bundle of rights' then, as the current pedagogy of real property does, is to involve lawyers in the creation of values. So the law school does not follow or reflect the state of real property law as much as it leads it: by reproducing that state of real property law in its curricula and assessments. It is not adequate then for the 'black-letter' law teacher to simultaneously claim that real property is difficult and meaningless whilst failing to account or question why this may be. The "disintegration of property"¹³⁷ exists not simply because it is no longer about 'things' but because the cradle of legal thought, the law school, says it is so.

The 'black-letter' property law course works by a contradiction of the question of law and politics. On the one hand, it insists on the importance of the separation of law and politics, evidenced by the line that property law and their pedagogical method are apolitical. In this way they uphold Vandevelde's belief that the politicisation of law marks the end of law's authority. Yet on the other hand, their course reproduces the very meaningless lists of categories of dephysicalised property relations that Vandevelde argued created judicial recourse to political choice in the first place. Lawyers and law students, it is said, cannot be expected to be, nor should they be philosophers and politicians; dallying with concepts and problems of property.¹³⁸ Rather, law students are encouraged, and assessed on their ability, to work within the status quo of property law, conundrums and all.

(iii) The Function of Native Title in the Real Property Unit

The 'black-letter' real property course suggests that native title is irrelevant to the dominant culture of Australian real property law. It maintains this perspective through its restrictive curriculum schedule; through the limited provision of information about native title in course readings; and by excluding the subject from course assessment. In so doing, it contains the radicalism of native title to Australian property law. Native title challenges the conventional system of access to property rights and thus highlights the direct relationship between social justice and property law. Native title also challenges the conventional alienation between people and place on which Australian property rights are based. The 'black-letter' course excludes both of these recent and significant challenges to the doctrine and practice of real property law. Instead, the course presents the abstract technical or 'substantive' aspects of native title. In that native title acquired a

¹³⁷ Grey, Thomas 'The Disintegration of Property' in *Nomos XXII: Property* (1980) quoted in Alexander, *ibid* 383.

¹³⁸ Skapinker, above n 125.

'hard' or substantive nature in the form of case law and legislation, it can then be taught as *part of* the law of real property rather than a radical challenge to it. By focusing on the substantive aspects of native title, it becomes a "new form"¹³⁹ of traditional property law categories.

Of the thirteen topics set for the black-letter real property unit outline above, Native Title is taught as *one* of four parts of a topic the whole of which is dealt with in two hours: less than 4% of the curriculum schedule. Furthermore, native title is positioned in the 'soft' section of the course, as part of the 'introductory' stage of the curriculum.¹⁴⁰ This single lecture introduces native title as one of four forms of title in Australian property law: the others being Old System title, Torrens title and Crown land.¹⁴¹ It does not discuss what defines the specific kinship / communal property title of native title claimants. It does not discuss how or why this particular form of title requires a connection, rather than an alienation, between people and place. It does not explain how Australian property law is able to recognise such a radical title within its tradition, history and ideology of separating people and place.

The readings for this topic consist of sections of three landmark native title cases, *Mabo*, *Wik* and *Fejo* and a section of the final chapter of the course textbook. No other account of the specific conceptual nature of native title, nor its historical development in Australia are presented. The readings therefore do not provide adequate information regarding the highly specific property interests and values of native title claims and disputes. The textbook focuses instead on the 'substantive' aspects or technical "machinery" of native title.

In this Chapter we consider the nature and content of native title, and the ways in which it may be extinguished. We also consider the machinery established under the native title legislation to protect native title and to govern future activity over land where native title remains. We conclude by examining aboriginal land rights legislation in New South Wales, legislation which differs from and pre-dates native title legislation.¹⁴²

'Black-letter' pedagogues claim to provide 'value-free' or objective and apolitical information about law and its workings. The focus on native title legislation however, privileges existing values of what is important or 'substantive' in real property law. The failure of the topic and its reading to explicate the distinct property values of native title

¹³⁹ Griggs and Snell, above n 103, 213.

¹⁴⁰ Castan and Schultz, above n 108, 78.

¹⁴¹ Skapinker, above n 125, 7.

assumes that students have pre-existing knowledge of these values, or that these values are irrelevant to students' understanding of native title. The epistemological bias is not made explicit however, so the course obfuscates the distinctiveness and the radicalism of native title. This highlights the point of legal academics Castan and Schultz that "the challenge for teachers is to present these issues in such a way as to avoid accusations of bias, or to perhaps make biases explicit."¹⁴³

'Black-letter' pedagogy insists that the law school does not participate in the creation of value whilst the position itself sustains and elevates the value of 'objectivity.' Legal education protects if not creates the abstractness of contemporary real property law by defining, and then presenting as important, legal doctrines and rules that are not related to each other nor to the contexts of their own inception. The two to three problem questions set in the course assessment confirm the singular importance of doctrinal application and reinforce its mathematical nature by rewarding the reproduction of "right answers".¹⁴⁴ The diversity of people's relations to place, and both the cultural and natural significance of these relations, are excluded from the 'black-letter' pedagogy of real property law and thus rendered irrelevant. If contemporary real property is characterised by its "elusive" meaning, the "disintegration" of its logic, its dephysicalisation of legal relations and the abstractness of its reality; then the 'black-letter' real property course plays a significant role in its reproduction.

Critical Legal Education

(i) The Problem with Property Law

Critical property lawyers and educators believe that the problem with real property law is that it is in need of change and that effecting change is difficult. If we recall that the key difference between 'black-letter' and critical legal pedagogy is their view of the role of lawyers and the role of law, then the idea of changing law and "improving society" is where these pedagogies intersect. The property lawyer and the value of property law created by 'black-letter' pedagogy cannot "improve" society, so much as maintain its dominant values and practices with respect to land, because it teaches those values and practices as fact, or simply as an ends, and avoids discussion of any deficiencies or anachronisms of property law rules and doctrines. The concern of critical legal scholars

¹⁴² Butt, above n 118, 795.

¹⁴³ Castan and Schultz, above n 108, 78.

is precisely to avoid such unreflective reproduction of the status quo. CLE purports to teach real property law not as a neutral and inevitable system, but rather as a social institution with identifiable material objectives, decisions and consequences. Students are taught to recognise and evaluate the economic and moral choices made and upheld not only by property law and equity, but also by the constitutional laws of sovereignty, which some Critical Legal scholars regard as fundamentally related to property law. The primary focus of the critical property course is the political-material culture of real property law. Critical property law teachers perceive that 'black-letter' pedagogy fails law students because it teaches and privileges only the skills of applying doctrines that students cannot evaluate or situate within their culture. Critical property lawyers see two problems with this failure. First, because law and society change, law reform is desirable and necessary, not in itself but of and for society. 'Black-letter' education ill-prepares if not discourages students to partake of legal innovation and reform. Maureen Cain observes the paradox of this failure given that for lawyers "changing the law is not just their job but the most prestigious part of their job."¹⁴⁵ The second problem with presenting to students the complexity and incoherence of real property law as a fact, a commercial benefit and/or an intellectual conquest or science is that it produces resistance to the very idea of property law reform.¹⁴⁶ Critical property lawyers and pedagogues are concerned about resistance to change. They insist that change and reform must be intellectually and practically available and possible.

Critical property lawyers argue that key social inequalities are established and perpetuated by property laws. "The institution of private property plays a significant part in preserving material inequalities and legitimating the uneven distribution and use of power in contemporary societies."¹⁴⁷ Critical property lawyers relate the prevalence of homelessness and poverty; the ongoing dispossession of indigenous land; and the refusal to recognise indigenous sovereignty, to the ideologies and practices of property law. They juxtapose the dephysicalisation and abstractness of real property law to the physical reality of abundant social injustice. Because they see that law schools do participate in the creation of the values of real property law: they maintain that legal education contributes to the injustices of the status quo. Precisely because CLE is a

¹⁴⁴ Grigg-Spall and Ireland, *The Critical Lawyers Handbook* (London: Pluto, 1992) 92.

¹⁴⁵ Cain, above n 10, 19.

¹⁴⁶ Warrington, above n 101, 81; and Bowrey, above n 122, 7-10.

¹⁴⁷ Grigg-Spall and Ireland, above n 144, 90.

cultural materialist approach to property law, it maintains implicitly that place is irrelevant and that property relations are primarily social relations, between persons.

(ii) *How Legal Education can Change Property Law*

Critical property educators argue that legal education should not be a training process. Law students are “embryonic lawyers”¹⁴⁸ and their education is fundamentally important to the development and improvement of law. It is for this reason that Ronnie Warrington argues in his article subtitled “Is There Any Morality in Blackacre?” that real property or ‘land law’ teachers have a “moral responsibility.”¹⁴⁹

If one thinks that the world can and ought to be improved, and that lawyers have a role to play in fostering the necessary climate which might enable change to be made, and if it is possible to argue that lawyers are uniquely placed in society to help develop ‘progressive’ changes, then it is incumbent on law teachers to recognise that they ought to perform a role in helping students learn to question.¹⁵⁰

The ability to question is a technique taught by demonstration as much as encouragement in the first lectures of two different ‘critical’ property courses, which pose, as questions, where the real property course ought to begin. The questions below collectively form the first topic in the alternative curriculum of the Real Property Law unit at the Faculty of Law, University of Sydney, in 2001. It is significant that in a Faculty that already provides the core real property unit in the conventional ‘black-letter’ form, an alternative real property law course is concurrently offered for which a different assessment is set. It challenges the notion of inevitability of the ‘black-letter’ course.

Real Property Course Outline, Faculty of Law, University of Sydney, 2001.

Topic 1 Meanings and Purposes of the Concept of Property

- 1.1 *Definition and Policy.* What is the ‘essence’ of property? What are its philosophical foundations? What is its social function?
- 1.2 *Australian Native title.* What are the historical assumptions underpinning concepts of property in Australia? Is property a ‘living’ branch of law, where new interests can find expression? How is the balance between the need for certainty and justice struck?
- 1.3 *Traditional classifications of property.* What does a term like ‘real’ property mean? What are the historical origins of oxymorons like ‘chattels real’?¹⁵¹

Carney’s approach echoes that of influential property theorist Kevin Gray in his search for the “propertiness of property”¹⁵² as well as in his emphasis on the ‘person-person’

¹⁴⁸ Warrington, above n 101, 86.

¹⁴⁹ *Ibid* 87.

¹⁵⁰ *Ibid* 87.

model or 'power' of property relations. These questions indicate to students that the 'difficulty' of property law is not owed (only) to the disconnection of anachronistic doctrines and rules, but rather is found in its reproduction and creation of complex social values. Carney's use of history, although positioned in the introduction, is more interrogative than descriptive. Furthermore Carney presents history not as detached from the state of contemporary property law, but in a continuum with the present. In this way, the course situates students in that historical continuum rather than standing them 'objectively' outside it. This use of history in the above property law course "may not be as comforting to students as the conventional, instrumental history, but ultimately it conveys a more valuable lesson."¹⁵³ It engages students with the cultural materiality of property law and challenges the abstractness and dephysicalisation perpetuated by 'black-letter' property courses.

The second critical property course discussed here is radically different from both the course quoted above and the 'black-letter' course of the previous section of the chapter. "Property Law and Equity" was a 26-week rather than a 13-week course, offered by the School of Law, Macquarie University from 1993-1999. Its reading requirement and assessment scheme demanded stronger student involvement than the 'black-letter' curriculum. Designed collaboratively by Valerie Kerruish and Kathy Bowrey, the course characterised the former critical scholarship of the Macquarie University Law School.¹⁵⁴

¹⁵¹ Carney, Terry *Real Property Law* (unpublished Course Outline, Faculty of Law, University of Sydney, 2001).

¹⁵² Gray, above n 25, 266.

¹⁵³ Alexander, above n 112, 389.

¹⁵⁴ Macquarie University Law School had a strong reputation for its critical legal scholarship and critical pedagogy. It has been the subject of much external and internal debate about the nature of legal education and the functions of law schools. See Fraser, David 'What a long, strange trip it's been: deconstructing law from Legal Realism to Critical Legal Studies' and Gava, John 'Introductory essay - Current controversies in legal education' both in (1988/1989) 5 *Australian Journal of Law and Society* 1-10, 35- 43. See also Pearce, D., Campbell, E. and Harding, D *Australian Law Schools: A discipline assessment for the Commonwealth Tertiary Education Commission (The Pearce Report)* (Canberra: Australian Government Publishing Service, 1987).

Property Law and Equity School of Law, Macquarie University 1999.

Unit One: Origins and Traditions

1. Introduction
2. Tenure
3. Colonial Attitudes to Law and Land
4. Native Title at Common law
5. Law and Politics: The Native Title Act

Unit Two: Property, Family and State

6. Social Formations, Social Relations and Property Relations
7. Equity and Uses
8. Family Property
9. State and Civil Society
10. Equity and Commerce
11. Equity's Conscience

Unit Three: Property and Social Ordering

12. Enclosure and Colonisation: New World Order
13. Social and Legal Ordering
14. Real and Personal Property
15. Title, Ownership and Possession
16. Legal Ordering and Lawyers' Practices

Unit Four: Market, Commodification and Law

17. Place and Space: The Commodification of Land
18. Old System Title and Priorities
19. The Torrens System: Title by Registration
20. The Torrens System: Equitable and Unregistered Interests
21. The Torrens System: Exceptions to Indefeasibility

Unit Five: Financing and Corporatisation

22. Public Power / Private Power
23. Express Trusts
24. Trust Relations
25. Constructive Trusts

Unit Six: Community and Land Use

26. Co-Ownership
27. Freehold Covenants and Retirement Villages
28. Strata Schemes
29. Residential Tenancies
30. Compulsory Acquisition

Unit Eight: The Limits of Property

31. What Is Property?
32. Property and Welfare
33. Critiques of Private Property

Kerruish's first lecture of *Property Law and Equity* problematises the specifically Australian context of real property law by asking a series of questions that challenge the students' assumptions and knowledge of property law. It also draws their attention to the role that legal education plays in the development of property law. It explicitly interrogates and engages the biases of the student and shows how this is relevant.

Where should we begin? Let's say: in Australia, here and now. Australia or New South Wales or Darug country? And from what premises? What assumptions do we make and hold on to as we begin our study of property

law? You might say: enough questions. We are law students. We are here to study the property law in force here.

I could say: fine, but which law? Aboriginal law or Australian common law or the statute law of New South Wales or some transcendent law which overarches and in some ways shapes or founds all kinds of laws? Should a property law course begin with the root or origin in feudal England or should it begin with the invasion of Aboriginal Australia by the British?¹⁵⁵

This course begins with the questions Edgeworth and Buck raised in their analyses and definitions of Australian property law. The emphasis on the juxtaposition between colonial and Aboriginal laws also points to the centrality of 'rights' discourse in property law. Yet property is unquestionably presented as something that comes from people in social rather than geographic or physical, environmental contexts. There is no suggestion that, as Bob Purvis had found "the land limits you." In this course, property limits people and people limit property. Again, as with the black-letter course, place is not part of the audit.

The lecture anticipates the difficulties and hesitations of students with critical property law pedagogy and responds directly to it: "But now you might say: this is too abstract, too vague a notion of property for property law students. Be more precise. What is property?"¹⁵⁶ The following response resists any simplistic or dismissive strategy and instead directs the students to acquire their own evaluations of property independently: "This is a question with which many property law courses begin. In this course it is left to the end. We do not think that students are in a position to consider this question critically at the beginning. What is important is to see that the question matters."¹⁵⁷ In saying so, this approach to property pedagogy encourages students to respond to the difficulty of property law not by accepting and rote learning its substantive categories despite their contemporary anachronism, but by questioning those categories and their historical and current (ir)relevance. This contradicts the 'black-letter' line that the difficulty of property law is enduring and symptomatic of its mathematical abstractness.

An earlier version of the above course argues in the *Introduction* to its course materials that property law is difficult not because it is a beautiful science of anachronistic categories, or because of the consequences of its meaninglessness, but because of its complex social context.

¹⁵⁵ Kerruish, above n 24.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.*

Property is a difficult subject because it touches on so many fundamental human questions. It requires judgments to be made about politics and economics, about morality and ethics, about ecology and production. These value judgments will inevitably be informed by a vision of human nature – what it means to be human, how we should live, how we should transform the world, what kind of world it should be.¹⁵⁸

The course conscientiously avoids isolating property law doctrines from their historical inception so that students can understand both the objectives and outcomes of property laws individually as well as in relation to their development and contemporary usage. It “connects doctrinal shifts and conflicts with conflicts between different value systems.”¹⁵⁹ Such attention to conflict enables students to identify the connection between the person-person property relation and the power of the administrators and the victors of property disputes to order society according to their values. But values of nature are secondary to values of social order and ideals of law. Whilst they connect law to history, the connection between law, as a paradigm of people-place relations and geography or ecology is overlooked. Law remains an abstraction of place as an instrument of achieving such ideals of order and law. This is what is meant when property lawyers and teachers say ‘property is a power relation.’ Whilst ‘black-letter’ pedagogues may acknowledge this contemporary maxim, they do not convey the physical manifestations of power and powerlessness in property relations. The latter course “ignores the needs of those sections of society who do not conclude transactions in land in the same sense: public sector housing tenants, licencees, squatters, the homeless, etc.”¹⁶⁰ Critical property pedagogy by contrast suggests that

Although it may be possible to learn the law relating to mortgages as an abstract body of rules, a coherent understanding of the contemporary significance of these rules requires study of the contexts, policies and practices which influence their operation. Thus an analysis of the property/power relations between mortgagees and mortgagors might draw upon... a comparison of different types of housing tenure, the relationship between housing markets and capital finance markets (including the role of lending institutions), the development of housing policies and the ideology of home ownership.¹⁶¹

The critical property law course is better suited than the ‘black-letter’ course to conduct an examination and evaluation of the values of place at the basis of property law for two reasons. First, it demands sociological reflexivity and rigour whereas the ‘black-letter’

¹⁵⁸ Bowrey, above n 122.

¹⁵⁹ Alexander, above n 112, 389.

¹⁶⁰ Warrington, above n 101, 79.

¹⁶¹ Grigg-Spall and Ireland, above n 144, 95-96.

approach avoids normative inquiries. Second, it attends to the material reality of property in culture whereas the 'black-letter' course excludes any discussion of materiality. Nonetheless, the opportunity that native title presents to the critical property course to articulate and evaluate the values of place in the dominant paradigm of property, even at a comparative level, is missed in preference for a focus only on the political and cultural reality that native title has affected.

(iii) The Function of Native Title in Critical Property Law Course

From the outset of the critical property course, the dispossession of indigenous people and the inception of native title are related to Australian property law neither as an 'add-on', nor as a radical rupture. Rather it is set as an important part of a very complex system of social ordering. Because of the socio-political focus of the course, the history and development of native title is a useful vehicle for highlighting that context and demonstrating its importance. The first lecture makes two points about the significance of native title to the course. First, that it demonstrates the political nature of property law:

Native title is for us as students of property in Australia just one part of a land law that covers many other forms of interest in land. But it is a part of the law that has forced one of the most, if not the most important public debates in Australian politics since the formal inauguration of the Commonwealth of Australia.¹⁶²

Kerruish's second point about native title is that it reveals the immediate connection between property and economics and wealth, a major concern of critical legal scholarship.

Of course a property course is about economics and wealth... the fact that Indigenous people in Australia are the poorest, sickest, and most subjected to violence on and within their communities, has everything to do with the fact that their law and their property rights were not recognised for two centuries.¹⁶³

The cultural impact of Native title on law and society is of paramount significance in the critical property law course. It explicitly indicates the role of politics and power in questions of property. The importance of native title law to the course is measured by the extent to which it highlights those power relations. The course fails to include questions of place raised by native title interests except *as* native title interests. The dominant paradigm of place-as-absence that forms the basis of real property law

¹⁶² Kerruish, above n 24.

¹⁶³ *Ibid.*

remains unexplored and thus unchallenged. The situation of the Indigenous people in Australia is not related to the disruption of their relationship with place, with land, but rather, by the dispossession of their rights.

Place In The Pedagogy Of Property Law

(i) An Anthropocentric Focus on Dephysicalised Property

Whilst law schools and courses clearly vary in their degree of ideological elaboration, the neat division of legal education into "pragmatic" or "pedagogic"¹⁶⁴ teaching ignores that both 'black letter' and critical property law teachers share a belief in the social agency of the practice and pedagogy of property law. The key difference between their approaches is whether this agency is appropriate. The debate about the pedagogy of property law is restricted to anthropocentric questions of power because of the dominance of the role of social agency and ideology in critiques of legal education. The human-centred approach to property law is as necessary as it is clear. Nonetheless it is limited and weakened by the assumptions it makes and encourages that a universal and unilateral relationship between people and place does and should exist. The anthropocentrism of property law education does not acknowledge, much less account, for its particular ideology of the non-human world, which constitutes the obsolescent 'thing' of property.

The dephysicalised model of property law taught in law schools depends entirely on the objectification or denaturalisation of land. The adherence of property law teachers to the modern economic policy of property law regulating relations between persons with respect to a 'thing,' rather than relations between persons and things,¹⁶⁵ completely obscures the fact that such dephysicalisation of property is a culturally and historically specific value of nature. The idea of alienation, the primary dynamic of contemporary property relations, is thereby normalised in legal education. The efficient distribution and use of nature *as* a resource and as a political resource, is a value and a choice of property law and education. This point is noticeably missing in the pedagogy of both 'black-letter' and CLE property law.

¹⁶⁴ Warrington, above n 101, 79. See also Bates, above n 9.

¹⁶⁵ See for example Demsetz, Harold 'Toward a Theory of Property Rights' (1967) 57 *American Economic Review* 347.

The values of relations between humans and non-human 'things' remains unacknowledged and uncontested by the paradigm of anthropocentrism that dominates legal education. In the law school, 'black letter' and CLE pedagogues reproduce ideas and images of law and lawyers. If, as Maureen Cain contends, lawyers are "symbol traders" then law teachers are 'symbol makers.' Property law teachers reflect but also create values of place as well as values of law. The value of place as irrelevant to property law is taught by erasing the very 'thing' that constitutes the possibility of property's existence.

(ii) *The Death of Land Law: Teaching the Meaninglessness of Real Property*

Despite their philosophical and pedagogical differences, both the conventional and alternative approaches convey the sense that the law of property lacks clarity, certainty and contemporaneity. There is a vocabulary to be learned, but its obsolescence points to that lack. There are cases to be learned, but their inconsistencies point to that lack. There are theories to be learned, but their elaborate and fruitless search points to that lack. Students of property law could not but be convinced of the lack of meaning in the contemporary legal concept of property. That the lack, is the 'real', the land, is overlooked.

The meaninglessness and dephysicalisation of what was formerly called 'Land Law' and 'Real Property Law' is mirrored in discussions about appropriate course titles. In law schools today the subject is increasingly taught as 'Property Law.' "Law schools which offer land law as a separate course constitute a rapidly dwindling minority."¹⁶⁶ This development is also apparent in legal publishers' textbook titles and introductions remarking on the importance of the recent shift. It is a shift partly attributed to recently implemented *Uniform Admission Rules* that require knowledge of both real and personal property.¹⁶⁷ The new, 'comprehensive' subject that delivers both property categories in a single course thus meets "the demands of legal practice"¹⁶⁸ without increasing the number of compulsory or 'core' subjects in the law program. Mugambwa relates the "advantages" of this "switch" to the anachronism of the twin categories of real and personal property laws and the increasing similarities between 'real' and 'personal' property relations. "What are the possible policy or theoretical reasons for treating land

¹⁶⁶ Mugambwa, above n 124, 2.

¹⁶⁷ *Ibid.*

¹⁶⁸ Thornton, above n 104.

and personal property differently? Are the reasons still justified in this day and age?"¹⁶⁹ Mugambwa accepts that the line between the categories of real and personal property is blurred, as fact. Indeed, he argues that by combining the two categories into a single property law course, their diminishing contradistinction can be better understood and theorised.

Though the concept of property could (indeed should) be covered in land law, the scope for its discussion is likely to be limited to land-related issues. In property law, on the other hand, the scope for discussion of the concept of property is almost limitless.¹⁷⁰

The "day and age" of land-related or real property law is ending and unhelpful to "embryonic lawyers"¹⁷¹ whose trade is in "symbols"¹⁷² rather than "permanent objects."¹⁷³ If property law is a subject not directly related to land then what is it about? The shift from *real property* and *land law*, to *property law* courses suggests that contemporary dephysicalised concepts of property-as-commodity and property-as-fetish are structured into the law syllabus even before classes begin.

CLS resists the abstraction of black-letter law and insists that behind the abstraction and positivist rules, lurks social power relations. But there is nothing beyond legal anthropocentrism here. For black-letter law, property courses are a way of teaching about rules and rights. For CLS it is a way of exposing power and politics. For neither is it in any meaningful sense about a relationship of land to people.

(iii) What Property Law Courses Do Not Teach About Native Title

As argued above, native title is a political issue for the pedagogy of property law. Its political radicalism is either concealed or paraded depending on how political the property course acknowledges law to be. The 'black-letter' pedagogy either appropriates it into the dominant (non-indigenous) property paradigm, attributing it to the genius of that law; or it adds it in as a strange and irrelevant topic of the course. Critical property law courses use it to demonstrate the immediate relation between property and politics.

Both models of property courses above create and also reproduce values of nature and of human relationships to place. But these values are subsumed within questions of

¹⁶⁹ Mugambwa, above n 124, 4.

¹⁷⁰ *Ibid* 6.

¹⁷¹ Warrington, above n 101, 86.

¹⁷² Cain, above n 10, 15.

politics, whether or not that politics is acknowledged. Superficially, it seems to the students, if not also to their teachers, that property is only about people and their relationships with each other. This is especially concerning given the development and increasing prevalence of environmental law and native title law as well as the increasing prevalence of debates about national constitution and sovereignty. The practical and theoretical intersections of property and environmental laws in itself suggests that human relationships with nature are significant and worthy of legal focus. But the presence of a form of title based on precisely such a relationship, native title, demands an evaluation of the values of human-place relations within the dominant legal paradigm. The focus or evasion of the political aspects of native title does not prohibit the inclusion of attention to the values of place both at the heart of and on the outside of law's own culture.

Concepts of land and place are non-existent in property law education and "few students have an understanding of Indigenous concepts of property, relationships and 'country.'"¹⁷⁴ Few students have an understanding of *non-Indigenous* concepts of human-place relationships. The difficulty of property law is compounded perhaps by a failure to survey the "diversity of people's relationship to the earth"¹⁷⁵, particularly the relationship codified in the dominant paradigm of property law. This may be the biggest difficulty of marrying native title to traditional titles in 'black-letter' courses – the failure to see the difference of value because of the emphasis on the priorities of title.

5. CONCLUSION

This chapter examined the roles played by jurisprudential, cultural and pedagogic practices in absencing place from property law. Definitions of real property in High Court judgments, NFF speeches and legal education perpetuate both the legal discourse of dephysicalisation and its cultural authority. Australian property law is part of a particular cultural discourse of place, in which place and people are separated. The modern paradigm of Nature/Culture is maintained in law, by the practice of dephysicalised property. This chapter attempted to connect law's weight and force with a quasi-national culture of place that is neither reconciled with Aboriginal Nations, nor economically and ecologically sustainable, nor departed from its Colonial and Imperial

¹⁷³ Mugambwa, above n 124, 5.

¹⁷⁴ Castan and Schultz, above n 108, 81.

constitution. The legal, cultural and pedagogic practices of property transform abstract theories and concepts of people-place relations, as property, into reality. These various practitioners construct and maintain the framework of the dephysicalisation of property, and they are also its key players. In this way, they constitute "the creation of value"¹⁷⁶ that sustains the paradigm of modern property law and its maladaptation to the places it claims irrelevant.

¹⁷⁵ O'Donnell and Johnstone, above n 110, 66.

¹⁷⁶ Foucault, Michel *The Order of Things* (New York: Vintage, 1973) 189-195.

CONCLUSION: PLACING PROPERTY

CHAPTER SIX

Chapter Six

CONCLUSION: PLACING PROPERTY

The significance of crises is the indication they provide that an occasion for retooling has arrived.¹

The land is neither prison nor palace, but a decent home.²

Property law today is a tapestry of concepts of possession, ownership and title. Its threads are of different lengths and colours and some of the images it embroiders are fading with time. It is not adequate to an understanding of law to approach these central concepts (as though with amnesia) believing they come from nowhere. The vocabulary and discourse of property does not transcend place and culture, it is not universal, rather law has origins in time and in place. Property law is spoken of today in abstract terms. Property theorists have even contended that property is an illusion. In such an illusory relationship, how real can 'real property' be? What is the proper place for it? We are at a distance today from the time and place of origin of our contemporary property law, but we must interrogate the conditions of this history and geography to adequately grasp whether these conditions sufficiently reside here and now to warrant the residue of this past in our words today. Because we "cannot be concerned with the law, or with the law of laws, either at close range or at a distance without asking where it has its place and whence it comes."³

Thomas Kuhn argued that paradigms succeed because they are simultaneously ideological and practical, that is, they are able to make sense of the world, and they are physically possible. In Kuhn's theory, a paradigm reaches crisis not only because other

¹ Kuhn, Thomas *The Structure of Scientific Revolutions* 3rd ed., (Chicago: Chicago University Press, 1996) 76.

² Morris, William *New from Nowhere and Selected Writings and Designs* Briggs, Asa (ed.) (Harmondsworth: Penguin, 1984) 96.

³ Jacques Derrida "Before the Law" in *Acts of Literature* (New York: Routledge, 1992) 191.

ideas or frameworks of meaning seem more plausible than the current paradigm, but because other practices seem more viable. The crisis of one paradigm and the 'shift' to another are, to Kuhn, not instances of progress, but a matter of adaptation. A paradigm is not part of the imagined teleological movement from the primitive to the civilised, a process of perfection.⁴ Rather a paradigm is a function of time and place, it succeeds only within particular cultural and natural conditions. Importantly, Kuhn makes this point by reference to Darwin's theory of evolution, which he says

recognised no goal set either by God or by nature. Instead, natural selection, operating in the given environment and with the actual organisms presently at hand, was responsible for the gradual but steady emergence of more elaborate, further articulated, and vastly more specialised organisms.⁵

Following the metaphor of evolution, Kuhn argues that paradigms result, like organisms in any given environment, "from mere competition... for survival." It is difficult to accept that change and development are not part of a progress toward a specific goal because we are more familiar with the notion of *telos* than with the notion of *habitus*. Kuhn concludes that it is important to regard the specialisation and development of ideas not as paths to truths or pre-determined goals, but as products of particular historic and geographic circumstances.

Kuhn's theory is helpful to an understanding of the emergence and crisis of the paradigm of modern property law in Australia because it allows us to regard its origins and traditions not as lesser or better than they are, as more or less progressed, but as particular to their time and place. The paradigm of modern property law derives from an anthropocentric model of the world, in which humans are the first of two categories, the second being reductively, 'everything else' in the world. The dichotomous logic and the hierarchical dynamic governing the relation between the realms of Nature/Culture belong to a particular time and place - modern Europe. Property law, and its parallel paradigm of Persons/Things established and was established by increasingly exclusive interests in land as private property. The dispossession and diaspora of English commoners extended the regime of private property in England across the globe via colonisation. The logic, its dynamic and practice are universalising, but they are not universal.

⁴ Kuhn, above n 1, 170-171.

⁵ Kuhn, above n 1, 172.

In Australia today, debates about the dispossession of Indigenous Australians, the cultural identification with place articulated in the evidence of native title claimants, and environmental critiques of the regime of private property "force European Australians to reconsider foundation myths,"⁶ including the mythology of 'real property'. Considering the myths and traditions of Australian property law requires attention to both its intellectual and ideological development and its physical conditions and consequences. Viewed in this way, Australian property law can be understood not only in terms in cultural identity but also in terms of material or 'natural' adaptation. Or to reformulate, to see Australian property law as part of a discourse and relationship between actual people and actual places.

Australian lands were appropriated not only as territory of British sovereignty, but as the private property of individual colonists. The relationship between colonists and the appropriated lands were based on a pre-existing ideology of property that had developed in different social and natural environments. Thus, whilst doctrinal aspects of Australian property law diverged significantly from English law, its underlying logic or paradigm, was the same. Instrumentalist views of nature were expressed by property law both abstractly and materially. Lands annexed by the Crown or trespassed by squatters were constantly subject to the discourse and practice of 'improvement'. Improvement as an idea was made tangibly evident, by very particular forms of land use, agriculture and pastoralism. These practices not only evidenced and measured cultural progress, they provided entitlement to property. Property law policed the cultivation of Australian lands by imposing improvement conditions on leases and purchases and by imposing taxes on unimproved lands. The relationship between colonists and 'their' lands were defined by a property law that was not entirely English, but not really local or Australian. Property law was defined by an antipodean relation rather than by the possibilities and limits of local environmental conditions. The result of the inability of an alien regime of property to adapt the regulation of land ownership and land use to the conditions on the ground, was the degradation of the land on a large scale over a long period of time.

Presently, agriculture occupies over 60% of the Australian land mass, yet only 10 of 77 million hectares are undamaged by a land use poorly adapted to its local, physical

⁶ Ryan, Simon *The Cartographic Eye* (Melbourne: Cambridge University Press, 1996) 4.

conditions.⁷ The land itself demonstrates the limits of the relationship between people and place institutionalised by Australian property law. The paradigm of property law constitutes the abstraction and removal of place, and replaces relationships to places with a relationship between 'persons'.

Yet whilst lessons from the past, from the historical development of property law in Australia are available, contemporary property law and theory cling to the paradigm that in part created the circumstances that the law is increasingly unable to address. Currently, according to property law, the only 'thing' of which we are in possession is possession itself. Because property law emphasises possession, or 'rights' over the 'thing', it bases its legitimacy in power rather than place. The emphasis on 'rights' discourse in defining Australian property law maintains the notion that place is irrelevant. This discursive emphasis is materialised by land use. Most Australian land is owned or leased privately for agriculture. The National Farmer's Federation says that private property rights are more valuable and more important to farmers and to Australian society than environmental concerns. Thus if environmental concerns are to be addressed, it shall require a negotiation of 'rights' to property. Thus, although the deteriorating condition of Australian lands signal an environmental crisis, addressing that crisis has not yet been linked to a crisis of property law. As long as farmers successfully lobby the government for compensation for property rights lost by environmental regulation of their properties, the culture and law of property continues to dominate people-place relations in Australia.

It is not a coincidence that Australian property law says place is irrelevant, that 'things' are immaterial to law, and that Australian lands are in crisis. The unimportance of 'things', the insignificance of their particularity and diversity in property relations, creates a lack of care for the particularity and diversity of land, when and where it is the 'thing' of property. The values and work of land custodians demonstrates the difference a land ethic makes to sustainable people-place relations. Nevertheless, their land ethic remains marginal and subversive. In the semiology of Australian property law, the possession of land means power over it. An owner might say 'it belongs to me'. For

⁷ Young, Ann *An Environmental History of Australia since 1788* (Cambridge: Cambridge University Press, 2000) 34.

custodians, possession of land means identification with it. A custodian might say 'I belong to the land'.

Reading the differences in theories of property as diversities in time and place collapses the possibility of their transcendence. Thus, rather than accepting the theory of dephysicalised property, it becomes possible to ask where and when that theory emerged and whether its validity is related, if not limited to those historical and geographical conditions. Despite its claims, law cannot refer outside itself to an unmediated reality,⁸ rather it shapes, and partly creates that reality. The point is not to construe human agency in the environment as inherently destructive, or to valorise different cultural forms of human agency, as though they were inherently less destructive or somehow 'natural'. That would reverse the privileged term in the dyad of Nature/Culture, but at the same time maintain the paradigm that articulates these two distinct and all-encompassing terms. The point is that adaptation achieves a sustainable economy in its environment.

Adaptation is necessarily a process of becoming local. Presently, Australian property law is part of a process not of *being* or *becoming*, but of *having*. Things are had, not for their particularity, but for their general value in a global sense. Where adaptation requires connection with all things at a local level, property law disconnects people from 'everything else'. Therefore, the question is not whether environmental change is natural or anthropogenic, as though humans were not part of nature, nor is the question whether some cultural groups have a better entitlement to the land. The question is to what extent we recognise that our economy or ecology is historically and geographically specific and then, to what extent and for how long it can endure in a different time and place. The question of place in property law is thus disruptive.

Property law in Australia is an ideology and practice of a relationship between people and place. The practice and the ideology work together, they are part of a paradigm. The paradigm of property law in Australia is, like other paradigms, particular to specific cultural and natural conditions. My thesis is that because those conditions are not local conditions, the people-place relations that Australian property law practices and prohibits, have adverse consequences. In this way, it is possible to think of property law in Australia as maladapted. This thesis has not attempted to redefine the law of

⁸ Ryan, above n 6.

property, rather it has unpicked the paradigmatic components of legal definitions of property in order to evaluate how they inform and are informed by relationships between people and place. My conclusion is that the dominant notion in Australian property law that place is irrelevant, is both central to law's legitimacy, but increasingly unsustainable and undesirable. The paradigm of modern law, a paradigm of placelessness, is not meaningful or viable as a prescriptive theory and practice of relationships between people and place in Australia.

Appendix 1

The Lament of Swordy Well [c. 1812-1831] by John Clare¹

Pe[t]itioners are full of prayers
 To fall in pitys way
 But if her hand the gift forbears
 Theyll sooner swear then pray
 They're not the worst to want who lurch
 On plenty with complaints
 No more then those who go to church
 Are eer the better saints

I hold no hat to beg a mite
 Nor pick it up when thrown
 Nor limping leg I hold in sight
 But pray to keep my own
 Where profit gets his clutches in
 Theres little he will leave
 Gain stooping for a single pin
 Will stick it on his sleeve

For passers bye I never pin
 No troubles to my breast
 Nor carry round some names
 More money from the rest
 Im swordy well a piece of land
 Thats fell upon the town
 Who worked me till I couldnt stand
 And crush me now Im down

In parish bonds I well may wail
 Reduced to every shift
 Pity may grieve at troubles tale
 But cunning shares the gift
 Harvests with plenty on his brow
 Leaves losses taunts with me
 Yet gain comes yearly with the plough
 And will not let me be

¹ Robinson, Eric and Powell, David (eds) *John Clare* (Oxford: Oxford University Press, 1984) 147-152.

Alas dependance thou'rt a brute
 Want only understands
 His feeling wither branch and root
 That falls in parish hands
 The muck that clouts the ploughmans shoe
 The moss that hides the stone
 Now Im become the parish due
 Is more then I can own

Though Im no man yet any wrong
 Some sort of right may seek
 And I am glad if een a song
 Gives me the room to speak
 Ive got among such grubbling geer
 And such a hungry pack
 If I brought harvests twice a year
 They'd bring me nothing back

When way their tyrant prices got
 I trembled with alarms
 They fell and saved my little spot
 Or towns had turned to farms
 Let profit keep an humble place
 That gentry may be known
 Let pedigrees their honour trace
 And toil enjoy its own

The silver springs grown naked dykes
 Scarce own a bunch of rushes
 When grain got high the tasteless tykes
 Grubbed up trees banks and bushes
 And me they turned inside out
 For sand and grit and stones
 And turned my old green hills about
 And pickt my very bones

These things that claim my own as theirs
 Where born but yesterday
 But ere I fell to town affairs
 I were as proud as they
 I kept my horses cows and sheep
 And built the town below
 Ere they had cat or dog to keep
 And then to use me so

Parish allowance gaunt and dread
 Had it the earth to keep
 Would even pine the bees to dead
 To save an extra keep
 Prides workhouse is a place that yields
 From poverty it gains
 And mines a workhouse for the fields
 A starving the remains

The bees flye round in feeble rings
 And find no blossom bye
 Then thrum their almost weary wings
 Upon the moss and die
 Rabbits that find my hills turned oer
 Forsake my poor abode
 They dread a workhouse like the poor
 And nibble on the road

If with a clover bottle now
 Spring dares to lift her head
 The next day brings the hasty plough
 And makes me miserys bed
 The butterflyes may wir and come
 I cannot keep em now
 Nor can they bear my parish home
 That withers on my brow

No now not een a stone can lie
 Im just what eer they like
 My hedges like the winter flye
 And leave me but the dyke
 My gates are thrown from off the hooks
 The parish thoroughfare
 Lord he thats in the parish books
 Has little wealth to spare

I couldnt keep a dust of grit
 Nor scarce a grain of sand
 But bags and carts claimed every bit
 And now theyve got the land
 I used to bring the summers life
 To many a butterflye
 But in oppressions iron strife
 Dead tussocks bow and sigh

Ive scarce a nook to call my own
 For things that creep or flye
 The beetle hiding neath the stone
 Does well to hurry bye
 Stock eats my struggles every day
 As bare as any road
 He's sure to be in somthings way
 If eer he stirs abroad

I am no man to whine or beg
 But fond of freedom still
 I hing no lies on pitys peg
 To bring a gris to mill
 On pitys back I neednt jump
 My looks speak loud alone
 My only tree they've left a stump
 And nought remains my own

My mossy hills gains greedy hand
 And more then greedy mind
 Levels into russet land
 Nor leaves no bent behind
 In summers gone I bloomed in pride
 Folks came for miles to prize
 My flowers that bloomed no where beside
 And scarce believed their eyes

Yet worried with a greedy pack
 They rend and delve and tear
 The very grass from off my back
 Ive scarce a rag to wear
 Gain takes my freedom all away
 Since its dull suit I wore
 And yet scorn vows I never pay
 And hurts me more and more

And should the price of grain get high
 Lord help and keep it low
 I shant possess a single flye
 Or get a weed to grow
 I shant possess a yard of ground
 To bid a mouse to thrive
 For gain has put me in a pound
 I scarce can keep alive

I own Im poor like many more
 But then the poor mun live
 And many came for miles before
 For what I had to give
 But since I fell upon the town
 They pass me with a sigh
 Ive scarce the room to say sit down
 And so they wander bye

Though now I seem so full of clack
 Yet when yer' riding bye
 The very birds upon my back
 Are not more fain to flye
 I feel so lorn in this disgrace
 God send the grain to fall
 I am the oldest in the place
 And the worst served of all

Lord bless ye I was kind to all
 And poverty in me
 Could always find a humble stall
 A rest and lodging free
 Poor bodys with an hungry ass
 I welcomed many a day
 And gave him tether room and grass
 And never said him nay

There was a time my bit of ground
 Made freeman of the slave
 The ass no pindard dare to pound
 When I his supper gave
 The gipseys camp was not afraid
 I made his dwelling free
 Till vile enclosure came and made
 A parish slave of me

The gipseys further on sojourn
 No parish bounds they like
 No sticks I own and would earth burn
 I shouldnt own a dyke
 I am no friend to lawless work
 Nor would a rebel be
 And why I call a christian turk
 Is they are turks to me

And if I could but find a friend
 With no deceit to sham
 Who'd send me some few sheep to tend
 And leave me as I am
 To keep my hills from cart and plough
 And strife of mongerel men
 And as spring found me find me now
 I should look up agen

And save his Lordships woods that past
 The day of danger dwell
 Of all the fields I am the last
 That own my face can tell
 Yet what with stone pits delving holes
 And strife to buy and sell
 My name will quickly be the whole
 Thats left of swordy well

Appendix 2

The Mores [c.1812 - 1831] by John Clare ¹

Far spread the moorey ground a level scene
 Bespread with rush and one eternal green
 That never felt the rage of blundering plough
 Though centurys wreathed springs blossoms on its brow
 Still meeting plains that stretched them far away
 In uncheckt shadows of green brown and grey
 Unbounded freedom ruled the wandering scene
 Nor fence of ownership crept in between
 To hide the prospect of the following eye
 Its only bondage was the circling sky
 One mighty flat undwarfed by bush and tree
 Spread its faint shadow of immensity
 And lost itself which seemed to eke its bounds
 In the blue mist the orisons edge surrounds
 Now this sweet vision of my boyish hours
 Free as spring clouds and wild as summer flowers
 Is faded all - a hope that blossomed free
 And hath been once no more shall ever be
 Inclosure came and trampled on the grave
 Of labours rights and left the poor a slave
 And memorys pride ere want to wealth did bow
 Is both the shadow and the substance now
 The sheep and cows were free to range as then
 Where change might prompt nor felt the bonds of men
 Cows went and came with evening morn and night
 To the wild pasture as their common right
 And sheep unfolded with the rising sun
 Heard the swains shout and felt their freedom won
 Tracked the red fallow field and heath and plain
 Then met the brook and drank and roamed again
 The brook that dribbled on as clear as glass
 Beneath the roots they hid among the grass
 While the glad shepherd traced their tracks along
 Free as the lark and happy as her song
 But now alls fled and flats of many a dye
 That seemed to lengthen with the following eye
 Moors loosing from the sight far smooth and blea
 Where swopt the plover in its pleasure free
 Are vanished now with commons wild and gay
 As poets visions of lifes early day
 Mulberry bushes where the boy would run
 To fill his hands with fruit are grubbed and done
 And hedgrows briars - flower lovers overjoyed

¹ Robinson, Eric and Powell, David (eds) *John Clare* (Oxford: Oxford University Press, 1984) 167-169.

Came and got flower pots - these are all destroyed
 And sky bound mores in mangled garbs are left
 Like mighty giants of their limbs bereft
 Fence now meets fence in owners little bounds
 Of field and meadow large as garden grounds
 In little parcels little minds to please
 With men and flocks imprisoned ill at ease
 Each little path that led its pleasant way
 As sweet as morning leading night astray
 Where little flowers bloomed round a varied host
 That travel felt delighted to be lost
 Nor grudged the steps that he had taen as vain
 When right roads traced his journeys end again
 Nay on a broken tree hed sit awhile
 To see the mores and fields and meadows smile
 Sometimes with cowslaps smothered - then all white
 With daiseys - then the summers splendid sight
 Of corn fields crimson oer the 'headach' bloomd
 Like spendid armys for the battle plumed
 He gazed upon them with wild fancys eye
 As fallen landscapes from an evening sky
 These paths are stopt - the rude philistines thrall
 Is laid upon them and destroyed them all
 Each little tyrant with his little sign
 Shows where man claims earth glows no more divine
 On paths to freedom and to childhood dear
 A board sticks up to notice 'no road here'
 And on the tree with ivy overhung
 The hated sign by vulgar taste is hung
 As tho the very birds should learn to know
 When they go there they must no further go
 This with the poor scared freedom bade good bye
 And much the[y] feel it in the smothered sigh
 And birds and trees and flowers without a name
 All sighed when lawless laws enclosure came
 And dreams of plunder in such rebel schemes
 Have found too truly that they were but dreams

Appendix 3

Helpston Green [c. 1812] by John Clare¹

Ye injur'd fields ere while so gay
 When natures hand display'd
 Long waving rows of Willows gray
 And clumps of Hawthorn shade
 But now alas your awthorn bowers
 All desolate we see
 The tyrants hand their shade devours
 And cuts down every tree

Not tree's alone have felt their force
 Whole Woods beneath them bow'd
 They stopt the winding runlets course
 And flowrey pastures plough'd
 To shrub nor tree throughout thy fields
 They no compasion show
 The uplifted ax no mercy yields
 But strikes a fatal blow

When ere I muse along the plain
 And mark where once they grew
 Remembrance wakes her busy train
 And brings past scenes to view
 The well known brook the favorite tree
 In fancys eye appear
 And next that pleasant green I see
 That green for ever dear

Oer its green hill's I've often stray'd
 In Childhoods happy hour
 Oft sought the nest along the shade
 And gather'd many a flower
 With fellow play mates often joind
 In fresher sports to plan
 But now encreasing years have coind
 This play mate into man

The greens gone too ah lovly scene
 No more the king cup gay
 Shall shine in yellow oer the green
 And add a golden ray
 Nor more the herdsman's early call
 Shall bring the cows to feed
 Nor more the milk maids awkward brawl
 Bright echo in the mead

¹ Robinson, Eric and Powell, David (eds) *John Clare* (Oxford: Oxford University Press, 1984) 62-64.

Both milkmaids shouts and herdsmans call
 Have vanish'd with the green
 The king kups yellow shades and all
 Shall never more be seen
 For all that cropping that does grow
 Will so efface the scene
 That after many times will hardly know
 It ever was a green

Farwell delightful spot farwell
 Since every efforts vain
 All I can do is still to tell
 Of thy delightful plain
 But that proves short - increasing years
 That did my youth presage
 When every new years day appears
 Will mellow into age

When age resumes the faltering tongue
 Alas theres nought can save
 Take one more step then all along
 We drop into the grave
 Reflection pierces deadly keen
 While I the morral scan
 As are the changes of the green
 So is the life of man

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