

Paradigms of property

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Introduction

Amongst the many themes of continuing and increasing change at a global level may be included some well-known juxtapositions of issues:

- short term exploitation versus long-term sustainability;
- boundaryless pollution versus environmental awareness;
- centralised ownership versus global equity; and
- the 'developed nations'/'developing nations' dichotomy versus valued diversity.

The complexities of these issues - from a futures perspective and many others - have of course been discussed in depth by many different authors. It is noticeable, however, that in each of these issues an apparent key sub-theme is paradigms of property, or, more specifically:

- changing perceptions of property - what it is, what it provides, who has it, who doesn't have it;
- changing awareness of responsibility for property - especially in the context of sustainability;
- increasing awareness of interrelatedness of people, of property, and of the overall environment.

It would thus seem relevant to explore perceptions and paradigms of property from a futures perspective, to identify common factors that might be useful for assessment or inclusions within normative futures.

One useful approach to start this exploration would be through causal layered analysis (CLA), [1] because many common property issues can be identified through its lens:

- *litany* layer - data-to-day transactions - and endless complaints!
- *discourse* layer - development, discussion and implementation of property law, and the regulation of exchange;
- *metaphor* layer - symbolic exchange, especially money and its equivalents;
- *epistemology/myth* layer - an individual's, group's or society's sense of that which is valued, and the deep mythic origins of ownership and title.

A layered view also provides us with understanding of the interactions between the layers - for example, the way in which implicit beliefs and worldviews from the deep mythic layers are expressed as unquestioned assumptions in property-law. One such example is the concept of the 'right' of exclusive possession, which - as discussed later - forms perhaps *the* core assumption in the property-models used throughout so-called 'developed' nations. In British law and its derivatives at least, this is clearly illustrated by the eighteenth-century jurist Sir William Blackstone's assertion that '[t]he right of 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'. [2] Yet also from those deeper layers arise the respective culture's answer to what must surely be the most obvious question, yet perhaps also the most-often forgotten, in regard to property: what is meant by 'property', anyway? What exactly *is* it?

What *is* property, anyway?

One formal definition of property is 'the condition of being owned by or belonging to some person or persons'. [3] Another is that it is 'an attribute or quality belonging to a thing or person'. [4] Blackstone above identifies property as a kind of right. Yet it is noticeable that in

none of these examples is there an actual definition of what property *is* - or, perhaps equally to the point, what it is not. This is not a mere semantic quibble, but a core problem within property-law:

Of all the intricacies that the law can throw up to the student it is ironic that perhaps the most difficult is in the definition and regulation of property: something about which everyone has a commonsense understanding but which does not reflect the view of the law. This book, your home and your car are items of property in the general understanding. But in terms of legal analysis property consists of rights. The book is not your legal property so much as is the right to possess and deal with the book and to deny similar rights to others. These rights may be in respect of something physical, or they may be in respect of something non-material, for example a patent held in respect of an idea. [5]

This strict legal view does not include any kind of property, or properties, which are not subject to such assertions of right. Neither, in most cases, does it include much of a notion of *responsibility* for the property, concomitant with the asserted right. This means that many commonsense properties - attributes or qualities - seem to be excluded or ignored, especially if they are non-material, such as feelings or desires or unexpressed ideas. Other properties would seem to exist not so much as attributes of a person or thing, but as a relationship *between* people or things - such as a partnership, or a commitment, or a sense of loyalty or trust. These latter examples are non-material, but are property in the literal sense of being 'proper' to the person or thing, and, like material property, can be created, maintained and, in some but not all cases, can also be destroyed.

As the law text-book quoted above also comments, 'the range of property is enormous'. And once we move outside the legal domains of items which can be controlled - nominally, at least - by assigned 'right', the conventional categories tend to break down into irrelevance or meaninglessness. An alternate option is classify property under four traditional headings from beyond the strict legal domain:

- *physical* property - land, 'territory', objects of all kinds;
- *mental* property - 'intellectual property' such as copyrights, patents and the like, together with unexpressed ideas and perceptions which are outside the legal definitions of non-material property;
- *emotional* property - relationships, associations and feelings;
- *spiritual* property - 'epistemology'-layer attributes such as vision, value, purpose and personal or collective sense of meaning.

(The term 'spiritual' here is meant not in a religious sense but a more generic one of 'a sense of meaning and purpose, a sense of self and of that which is greater than self'.)

These categories are, of necessity, somewhat arbitrary, and also interweave with each other, but can be useful as a means to illustrate key differences between types of property - which, in turn, can point to approaches to property in general which may be relevant to the current context of global change. Some suggestions for functional distinctions between these categories are as follows.

Physical property

Physical property is that which is tangible or otherwise directly measurable in some way, and hence is most easily understood as 'property' in colloquial terms. It exists, or appears to exist, independent of any person: property-rights are associated *to* it rather than inherent in it.

As property, it can be assigned to a person, and exchanged with or assigned to another person. (In this it differs from spiritual property, and from most mental or emotional property, as will be described later.)

Although it may go through many chains of 'added value', property title - the assignment of right to the item of property - seems ultimately to derive from an assertion of right over land, or some other type of 'territory' such as airspace or offshore fishing zones.

A core concept in relation to physical property is the notion of 'the commons': property which is not assigned to an individual, but which is expressly shared, and for which responsibility is also shared. A commons may be defined explicitly in law, such as common grazing; or it may be implied, especially for items around which it is impractical to construct boundaries of property-ownership, such as the air, or the sea, or sunlight and the day's weather.

Mental property

Mental or conceptual property consists of ideas - or, legally, speaking, the *expression* of ideas, in the form of copyrights, patents, trade secrets, plant or animal breeds and the like. Until it is expressed in some form, it seems to exist only within the person who conceives of it. Yet in some ways it only fully comes into existence when it is shared - the point at which the law usually considers that issues of ownership come into play:

In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work. [6]

Once it is legally recognised as property, the expression of mental property can be assigned to another person, or a 'legal person' such as a company. The idea itself, however, cannot be assigned or exchanged in any normal (physical) way, because it does not exist within physical space.

It seems that no-one knows where ideas ultimately arise: 'the origin of discoveries is beyond the reach of reason'. [7] Independent and even simultaneous 'discovery' of ideas in the sciences and elsewhere are commonly recorded, such as the almost simultaneous development of variations on the calculus by Pierre Fermat, Isaac Newton and Gottfried Leibniz. [8] Ownership of ideas is usually assigned by registration on a 'first past the post' basis within the respective jurisdiction, though this may sometimes be overruled by lawsuits and/or by revocation. [9] Copyright is a special case in that in many jurisdictions, no explicit registration is required: 'material is protected from the time it is first written down, painted or drawn, filmed or taped'. [10]

A core concept of mental property, analogous to the physical concept of 'the commons', is the notion of 'the public domain'. This assumes especial importance since the ultimate source of ideas is unknown: the public domain is deemed to be the place from which ideas arise, and to which they ultimately must return. There is also an important concept of 'fair use', in which the absolute 'despotic dominion' over ownership of ideas may be overruled in a limited way for criticism, education and other support for the creation of new ideas.

Emotional property

What we might term 'emotional property' consists of relationships, feelings, associations and the like. Like mental property, it is virtual: it has no tangible existence, but can be expressed in actions. Unlike mental property, which has a kind of independent existence of its own, emotional property indicates a 'between-ness', a perceived relationship or connection. The relationship may be two-way, as between people, or one-way, as occurs in charisma or 'star

quality'. The relationship may also be personal - such as between two people - or abstract - such as loyalty to a brand, or to a family, group, organisation, nation. It may also be *against* something, a negative relationship, such as hatred or denigration of some 'Other' or 'othered' group.

Unlike mental property, expressions of emotional property are at best difficult to assign, and cannot be 'owned' in the usual legal sense - in fact attempts at possessive 'ownership' by others will usually result in the destruction of the property, when the relationship is destroyed or converted to a relation of repulsion rather than attraction. A trust-relationship, for example, is notoriously difficult to transfer from one person to another, even in straightforward commercial relationships. [11] Financial estimates of the value of customer-loyalty and brand-loyalty, although inherently unverifiable, are often included under the heading of 'goodwill' in company accounts.

As for mental property, the origin of emotional property is invariably within the individual, although external factors such as social pressures, propaganda and marketing campaigns may affect its creation and the forms in which it is experienced and expressed. Other people may hold the same emotional property - for example, loyalty to a brand or to an external ideal - but it is maintained in parallel rather than shared as such.

Because emotional property is essentially personal, there seems to be no obvious analogue of 'the commons' or 'the public domain'.

Spiritual property

Spiritual property is perhaps the least-understood category of properties, but in some ways perhaps the most important. Examples of spiritual property include vision, values, purpose, health - especially as a sense of well-being - hope, memories, self-confidence and self-esteem. The overlap with other forms of property - physical, emotional and conceptual - can become extremely complex, as can be seen in personal relationship with land and territory, especially in most indigenous cultures. [12] The boundaries between emotional and spiritual property often seem to blur somewhat, but perhaps the clearest distinction is that emotional properties essentially describe relationship of self to other, whilst spiritual properties describe relationship of self to self.

Almost by definition, spiritual property cannot be 'owned' in the legal sense, or assigned to others, since it is a relationship of self to self.

As with emotional property, the origin of spiritual property seems to be within the self, though external conditions can affect the creation, maintenance and destruction of spiritual property. Perhaps because of the human 'need' to belong to 'that which is greater than self', social myth and world-order will often be key drivers behind spiritual property, through the social construction of personal reality. [13]

As for emotional property, there seems to be no obvious analogue for spiritual property for 'the commons' or 'the public domain'.

To summarise the distinctions between these categories of properties:

<i>Property type</i>	<i>Existence</i>	<i>Source</i>	<i>May be owned by / assigned to others</i>	<i>Common property</i>
Physical	Tangible	External	Yes	The commons
Mental	Virtual, expressed as object or	Internal? External? Both? Neither?	Expression only	The public domain

	action			
Emotional	Virtual, expressed in behaviours	Internal - relationship with/to others	Legally / functionally dubious, yet commonly practised	None?
Spiritual	Virtual, expressed in behaviours	Internal - relationship with self	No	None?

Ownership models

Using this summary of distinctions between different types of property, we can return to the metaphor/epistemology layers of CLA to explore the issue of ownership. It's clear that this is related to property, but in what way? The legal description refers to purported exclusive rights - 'sole and despotic dominion' - but makes no mention at all of concomitant responsibilities. And yet responsibilities of some kind would seem to be necessary for maintenance of property, especially of common property.

What this absence points to is two very different models of ownership, which we could describe as *possession* and *stewardship*. These could be summarised as follows:

	<i>possession</i>	<i>stewardship</i>
<i>rights versus responsibilities</i>	rights only (responsibilities generally exported to Other)	rights deemed to arise from responsibilities
<i>time-frame</i>	focussed on immediate, personal	focussed on long-term (often beyond lifetime), collective
<i>integration</i>	exploitation / extraction of 'high value' components	maintenance of whole as whole
<i>developmental stage</i> [14]	about two years old	about eight years old
<i>in legal system</i>	'western' law [15]	(most?) indigenous law [16]

The concept of possession-rights of more than just non-physical properties is indicated, for example, by the inferred US right to 'life, liberty and the pursuit of happiness', or the 'right to bear arms' enshrined in the US Constitution. [17] In each case, however, such 'rights' depend on *someone* taking the responsibility to create and maintain conditions under which the 'right' can exist, yet it seems rare that such responsibilities are explicitly defined. Traffic law is one of the few common examples: in Britain and in Australia alike, 'right of way' is defined in terms of responsibilities to 'give way' to other traffic, rather than as a right as such. The result is that most legal definitions of possession - especially exclusive possession by asserted right, a 'sole and despotic dominion' - in effect depend on what Douglas Adams described as a 'Somebody Else's Problem field': a responsibility (or, in Adams' case, a fictional spaceship) that is somehow made invisible by the simple act of asserting that it is 'somebody else's problem':

'An SEP', he said, 'is something that we can't see, or don't see, or our brain doesn't let us see, because we think it's somebody else's problem. That's what SEP means. Somebody Else's Problem. The brain just edits it out, it's like a blind spot. If you look at it directly you won't see it unless you know precisely what it is. Your only hope is to catch it by surprise out of the corner of your eye.' [18]

This issue of invisibility of responsibility leads in turn to what might best be described as 'anti-property' and 'anti-possession'. A property-right without matching responsibilities will usually result in a kind of 'asset-stripping' split of the properties of an item - the full mixture of physical, emotional, conceptual and spiritual properties of the item - with the desired properties being retained as profit, and the undesired properties, or destruction of unvalued

properties, shoved into invisibility as Somebody Else's Problem. These undesired properties become unwanted anti-property for which possession is often actively avoided - hence anti-possession.

A classic example - immediately visible from my desk - is mining-waste. In order to gain access to a minute amount of valued gold, miners dug over and washed away all the topsoil in the valley, cut down almost every tree as props and firewood, dumped many tonnes of waste in vast spoil-tips, and walked away with 'their' handfuls of metal. More than a century later, the wreckage can still be seen everywhere; the land grows few crops, supports few people, and much of the tree-cover that's returned arose from a government planting programme a few decades later which probably cost more than the value of the gold. The miners took possession of the gold, from which the government literally excised its 'cut'; the anti-property from that possession - the spoil-tips, the dangerous shafts, the physical wreckage, the conceptual, emotional and spiritual despoliation - was abandoned, anti-possessed, dumped onto the future and the present, to everyone other than the assigned owner of the mining property-right.

Anti-possession is the end-result of dispossession; anti-property is the excrement that remains after 'asset-stripping' plunderers have moved on.

The various properties of an item, or associated with an item, are interwoven into one whole. This interwovenness is especially obvious with land, as in the Aboriginal concept of the Dreaming [19], or the Plains Indians' concept of the Medicine Wheel. [20] But it can, and perhaps always does, apply to every item: for example, an idea - a conceptual property - may be perceived to have beauty or elegance - emotional and/or spiritual properties - and may be expressed in practice in the construction of a physical object. When these interwoven properties are wrenched apart - perhaps through greed, perhaps more often through lack of understanding - the interwovenness that *is* the whole, that is a 'soul' property in its own right, is invariably destroyed. [21]

This destruction is inherent in, and probably the inevitable result of, any property-model which fails to address in an integral way the full range of properties of items, or which permits the separation of property-'rights' from property-responsibilities. The standard 'western' property models such as that described by Blackstone do both, and hence would seem to be inherently unsustainable. Worse, the basic economic model depends on governments, non-profit organisations and society in general 'picking up the tab' for the anti-property and anti-possession created by the operations of commercial organisations, and then attempting to transfer the costs back to those organisations through taxes or through social 'outrage'. [22] Yet the rise of supranational corporations means that in many cases there is no obvious means by which the 'tab' can be returned, especially in poorer countries. The result is that more and more anti-property is exported with relative ease onto such peoples and countries - increasing short-term profit in one place but creating long-term risk, poverty and ill-health elsewhere. One much-reported recent example is the continuing transfer of toxic high-technology waste from the USA for 'recycling' in Southern China. [23] As has occurred in many other contexts, international treaties on the issue exist, but the USA - the 'home-base' for many, perhaps most supranational organisations - has not ratified them, in effect protecting those organisations from fulfilling their international responsibilities. [24] Unless the basic property-models change, together with the underlying national and international law, this situation seems unlikely to improve.

Common confusions

The incompleteness - lack of holism - of the possession-based 'western' property model seems to lie right at the core of many current global issues. A number of fundamental confusions occur, of which the most common mistake is to try to 'control' or possess non-

physical property as if it is physical. The development of the so-called 'information economy' or 'knowledge economy' has led to increasing attempts to control intellectual property in the same way as for a scarce physical resource, creating a kind of 'information feudalism' [25] and greatly increasing the cost and complexity of information technology.

One of the characteristics of physical property is that apparent scarcity is often deemed to increase relative value compared to other physical property. In other words, given that money is in effect a standardised form of barter, the price of an item of physical property generally goes up as the availability goes down. On occasion, shortages are artificially created, often by hoarding or other form of withholding, in order to increase price - which assigns the 'owner' the 'right' to more of other resources. These 'price/value games' become more complex with non-physical property, primarily because it is more difficult to anchor a 'fair' relative price. Mental and intellectual property seems to be assigned price/value according to almost random concepts of 'marketability' and desirability, and attempts made to control its availability as if for physical property, as described above - with increasingly questionable success. [26] Emotional and spiritual properties, such as health, or justice, or spirituality itself, seem often to be hidden away, accessible only through layers of professional intermediaries such as doctors, lawyers and priests. Emotional relationships such as brand-loyalty are bought and sold as if they are physical commodities, sometimes for very high prices - in many companies the 'goodwill' value may exceed the nominal value of the physical assets by ten times or more. [27] Unlike physical property, there is no tangible anchor for this price, other than a belief that the 'property' will continue to exist indefinitely - even though in fact it can evaporate to nothingness in the blink of an eye, as many failed 'dot-com' companies discovered to their cost.

In much the same way as for customers, relationships with company employees, suppliers and other stakeholders are routinely treated as if they are tangible assets, to be controlled via 'despotic dominion'. 'Our people are our greatest asset!' is a cry trumpeted by many companies, apparently oblivious that using the term 'asset' in relation to people is historically linked to slavery. As Charles Handy comments, commercial law in Britain, the US and elsewhere identifies the shareholders as the exclusive owners of a company, and asserts that the company in turn exists solely to create a financial return for those shareholders. This, Handy, argues, is now not only out of date, but morally and ethically indefensible as well:

I believe, myself, that a more radical rethink [of company law] is necessary. I believe that the whole concept of owning a company is, today, misplaced. Buildings one can own, or land, or materials, but companies today are much more than these things - they are quintessentially collections of people adding value to material things. It is not appropriate to 'own' collections of people. Particularly it is inappropriate for anonymous outsiders to own these far from anonymous people. It is inappropriate, it is distorting, it may even be immoral. [28]

Immoral or not, it *is* the current state of the law. Yet Handy seems to be one of the few writers pointing out, as Thomas Macaulay did in the British House of Commons in 1841, discussing a proposed amendment to copyright, that there is no natural right to *any* kind of property - that property 'rights' are, instead, no more than an artificial construct for which, ultimately, there needs to be an ethical rather than arbitrary basis:

It is not necessary to go, on the present occasion, into a metaphysical inquiry about the origin of the right of property ... [P]roperty is the creature of the law, and that the law which creates property can be defended only on this ground, that it is a law beneficial to mankind. [29]

All manner of possible confusions and clashes arise from this artificiality and arbitrariness. For example, on occasion two or more distinct systems of property or 'title' may be overlaid, in space, in time, or by competing legal systems. An example of the latter occurred after the fall of East Germany: people with nominally-valid property titles dating from before the communist period rushed to assert the priority of claim to 'their' property over equally-valid communist-period ones - but often abandoned the claims once they discovered the responsibilities for repair that this also entailed, wanting the possession but not the anti-property! [30] Similarly, Australian land-titles apply only to the topmost 250 feet - anything below that is classed as a separate title available as mining rights - and for an apparently undetermined height above - the rest being available for overflight, subject to air traffic rules and regulations.

Even more bizarre, yet nominally legal, is the claimed ownership of the Moon and all eight planetary bodies by Dennis Hope, a Californian entrepreneur. [31] Over the past twenty years, his 'Lunar Embassy' has sold moon plots to almost 1 million people, at a typical price of around US\$25 per acre, which he purports also includes all mineral rights. [32] At present, the only legal basis for his claim is that Article II of the Outer Space Treaty 1967 forbids nations, but not individuals, from claiming ownership, and that he formally registered that claim in writing to the UN in 1980; [33] though more recently, he has aimed to bolster his claim by other means:

Hope hopes to officially assert his rights in June, by sending a computer disc with all the legal details to the moon as part of TransOrbital, the first commercial spacecraft to land on the moon. Hope's spokesman, Gregory Nemitz, says the computer disc is similar to a trick used by gold prospectors, who stake claims by putting a piece of paper in a jar on the land. [34]

An assertion of right of possession, without responsibility, in an inaccessible place, by what is freely admitted to be a 'trick' - yet, via payments for such 'rights', bringing real rights to physical property here. In effect, by an arbitrary assertion of right, 'despotic dominion', one individual has expropriated everyone else's rights, and thus claims the right to charge others on the basis of that expropriation. This is similar to many other forms of expropriation, either by individuals, groups or governments, such as enclosure of the common-land in England in the 18th century - or, for that matter, successive invasions from the Romans to the Anglo-Saxons, the Vikings, the Normans, and the English colonists in Australia, each with their own assignments of 'title' - to more modern-day example such as declarations of ownership of the human genome, or portions of the electromagnetic spectrum, or the steady erosion of the 'public domain' via ever-expanding assertions of copyright. [35]

Potential for breakdown?

Hope's 'extraterrestrial real estate' seems to illustrate the fragility of the entire legal framework of property, physical and non-physical. In essence, the reification of the entire structure would seem to be 'all smoke and mirrors', wishful thinking and deep fears and needs from the mythic layer held together by little more than lawyers' bluff, almost none of it sustainable in the long term.

The pressures towards globalisation are probably only making the overall situation worse. Transnational corporations face difficulties from inconsistencies and outright clashes between title-systems of different nation-states; the response has been a bewildering array of international 'agreements' such as GATT and TRIPS - on tariffs and intellectual property respectively - which, in effect, foist the hegemony of the US and its system of property law on the rest of the world. What Hazel Henderson describes as 'the global casino' sends trillions of dollars round the world each day, chasing short-term investments in imaginary

'financial derivatives'; but those trillions of dollars end up assigned to fewer and fewer 'big players', whilst everyone else's share of the world's real wealth is steadily diminished. [36]

Other trends are more worrying, particularly the increasing assertion of absolute rights of ownership of intellectual property. This reached its extreme in a landmark case in the US, in which a multinational corporation (DSC/Alcatel) was able to force a former employee to divulge and assign to the corporation an idea that he had been working on for twelve years before working for them, and which was not related in any way to the work for which he had been employed. As the former employee, Evan Brown, comments:

The effect of this ruling is that employers in Texas can claim ownership of thoughts in their employees brains. ... Texas courts can order an employee that has been fired to work for the former employer without compensation for time or expenses. What ever you have accomplished prior to going to work for your employer can become property of your current employer. DSC has also sued numerous ex-employees for "Inevitable Disclosure" claiming that an ex-employee can not keep from disclosing DSC's proprietary information. This finds you guilty before you have disclosed anything, that is, you can be found guilty before you do anything wrong. [37]

The chance of this ruling leading to legal battles between corporations as to who 'really' owns the contents of people's minds are probably very high. But the result of such fights would almost certainly be that individuals will discover that they cease to be creative - few people can work well when they are to be fought over like a bloodied carcass. As Charles Handy says, the basic model is 'inappropriate' - and less and less sustainable.

There are some signs of change. Charles Handy and the 'Centre for Tomorrow's Company' associated with the RSA in Britain represent one strand of more inclusive and aware thinking on property and business; [38] there are many others, from ethical business projects to 'fair trade' and fair labour programs to standards for corporate monitoring, [39] though few of these directly address in a fully layered way the complex issues of property. There are also signs of increasing 'outrage' at expropriation and anti-possession by corporations and their representatives - most recently, the outcry against 'excessive' executive remuneration and corporate fraud. [40] But these, too, are little more than patches on top of a system which seems, at its very root, to be unsustainable. Unless the basic property model changes from possession to stewardship, with full awareness of the fundamental differences between physical, conceptual, emotional and spiritual property, it seems probable that catastrophic breakdown on a global scale will remain inevitable.

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5 Terry and Guigni, *Business, Society and the Law*, 208.

6 Copyright Act 17 USC 102(b).

7 WIB Beveridge, *The Art of Scientific Investigation*, Heinemann Education, 1957, 95.

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