

## EQUITABLE PROPERTY

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(1994) 47(2) *Current Legal Problems* 157 – 214

*Take note of the meaning of the ancient song: that what there is shall  
belong to those who are good for it*

(Bertolt Brecht, *The Caucasian Chalk Circle*)

Not so long ago I was talking with a couple of Martians at one of those seminars in Oxford organised by Professor Peter Birks. The visitors explained that they were engaged in a piece of joint research on the terrestrial concept of property -- a mode of thinking which apparently finds no parallel within their own jurisdiction. The present paper is prompted in some measure by the conversation which I had with the Martian lawyers, for I was stimulated to look afresh, from perhaps a wider perspective, at the strange way in which we humans make claims of 'property' or 'ownership' in respect of the resources of this world. My concern is to share an essentially descriptive, rather than normative, view of the phenomenon of property, whilst bearing in mind how readily the descriptive and the normative can merge.

My Martian interlocutors reminded me of the highly anomalous nature, unparalleled within our own galaxy, of the terrestrial impulse to view external resources as belonging properly or exclusively to particular members of the human race. Social psychologists like Ernest Beaglehole used to speak of 'the hidden nerve of irrational animism that binds the individual to the object he appropriates as his own'.<sup>1</sup> My Martian colleagues were especially intrigued by the fact that, in one of the earliest phrases articulated by almost every human child, there lies the strongest affirmation of this internalised concern to appropriate.<sup>2</sup> The phrase, 'It's mine!', is, of course, literally untranslatable into any of the Martian

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<sup>1</sup> *Property: A Study in Social Psychology* (London 1931), p 23 et seq.

<sup>2</sup> 'Even with animals one finds the recognition of *meum* and *tuum*...With children this impulse develops very early. It must be considered as an innate tendency' (L. Litwinski, *Is there an instinct of possession?* 33 *British Journal of Psychology* 28, 36 (1942-43)). There is a substantial literature on the peculiar status of the child's 'first treasured object' (see eg D.W. Winnicott, *Transitional Objects And Transitional Phenomena: a study of the first not-me possession*, 34 *International Journal of Psycho-*

languages.<sup>3</sup> Yet, as my friends pointed out, even our own judges and legislators seem obsessed with the need to formulate human perceptions of the external world in the intangible terms of individualised ownership and 'private property'. Our lives are in every respect dominated by an intuitive sense of property and belonging.

This insistent allocation of private rights of ownership is not without its own subtlety: it is widely recognised that claims of ownership may sometimes transcend the superficial evidences of formal title. Even if a resource does not belong to someone in any formal or officially recorded way, there is a whole branch of jurisprudence devoted to the proposition that the same resource may 'belong in equity' to a particular claimant. I still remember the curious thrill of opening up the year books to read the poignant plea of the cestui that, when the stranger with notice comes to purchase the entrusted land, he is bound because 'in conscience he purchases my land' (*en conscience il purchase ma terre*).<sup>4</sup>

Legal history similarly pulses with timeless discussion of the extent to which underlying but nevertheless substantial claims of private ownership may be maintained in such elusive assets as swarms of bees,<sup>5</sup> wild animals,<sup>6</sup> wounded whales,<sup>7</sup> and shipwreck treasure<sup>8</sup> -- all in the course of their

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Analysis 89 (1953)). It is argued that such transitional phenomena, by reinforcing the self-other distinction, are particularly significant in promoting successful individuation and the construction of self-identity in very young children (see O. Stevenson, *The first treasured possession*, 9 *The Psycho-Analytic Study of the Child* 199 (1954); J. Newson and E. Newson, *Seven Years Old in the Home Environment* (London 1976), p 128; L. Furby, *The origins and early development of possessive behaviour*, 2 *Political Psychology* 30 (1980); L. Levine, *Mine: Self-definition in 2-year-old boys*, 19 *Developmental Psychology* 544 (1983)).

<sup>3</sup> In the possible absence of a Martian dictionary, see H. Dittmar, *The Social Psychology of Material Possessions* (Hemel Hempstead 1992), p 49, for reference to the 'astonishing feat' involved in the 'comprehension and verbal expression of possessive relationships [as] one of the very first stages in children's language development.' See also C. Cooley, *A study of the early use of self-words by a child*, 15 *Psychological Review* 339 (1908); F.W. Rudmin, *Historical Note on the Development of Possessive Pronouns*, 50 *Journal of Speech and Hearing Disorders* 298 (1985); Rudmin, *Dominance and children's use of possessive case*, 61 *Perceptual and Motor Skills* 566 (1985).

<sup>4</sup> YB 11 Edw IV, fol 8. See *The Collected Papers of Frederic William Maitland* (ed H.A.L. Fisher, Cambridge 1911), Vol III, p 345.

<sup>5</sup> *Bl Comm*, Vol II, p 393; *Kearry v Pattinson* [1939] 1 KB 471, 481 per Goddard LJ. See also *Young v Hichens* (1844) 6 QB 606, 611, 115 ER 228, 230; (1939) 17 Can Bar Rev 130; G.W. Paton, *Bees and the Law*, (1939-41) 2 Res Judicata 22.

<sup>6</sup> *Pierson v Post*, 2 Am Dec 264, 265f, 3 Caines 175 (1805).

<sup>7</sup> *Littledale v Scaith* (1788) 1 Taunt 243(n), 127 ER 826; *Hogarth v Jackson* (1827) Moo & M 58, 173 ER 1080; *Skinner v Chapman (ex rel Alderson)* (1827) Moo & M 59(n), 173 ER 1081; *Baldick v Jackson* (1911) 30 NZLR 343, 345.

<sup>8</sup> *Treasure Salvors, Inc v Unidentified Wrecked and Abandoned Sailing Vessel*, 640 F2d 560, 567 (5th Cir 1981).

active pursuit. Their modern equivalent, the fugitive or maturing commercial opportunity, was said in *Cook v Deeks*<sup>9</sup> to belong 'in equity' not to the aggressively opportunistic company directors concerned in that case but rather to their company.<sup>10</sup> Deep in the human psyche is some primal perception of an inner rightfulness inherent in certain kinds of private proprietary claim -- even where the claims in question relate to incipient or inchoate opportunities of exploitation and enjoyment. We are continually prompted by stringent, albeit intuitive, perceptions of 'belonging'. Accordingly there is widespread recognition of the wrongfulness of certain *misappropriations* of resource and opportunity. In this context we are still not far removed from the primitive, instinctive cries of identification which resound in the playgroup or playground: 'That's not yours; it's *mine*.'

This constant labelling as *meum* and *tuum* is perhaps inevitable. As Blackstone said, '[t]here is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property'.<sup>11</sup> Neither, ironically, is there any concept quite so fragile as this right: property is not theft but fraud.<sup>12</sup> Almost all of our everyday reference to the property concept is unthinking, naive and relatively meaningless. Property talk is generally careless and vacuous; property talk is mutual deception. In our crude way we are seldom concerned to look behind the immediately practical or functional sense in which the term is employed. Thus, for example, we tend, almost as a reflex response, to think of property as the *thing* or *resource* which is owned. It was, however, Jeremy Bentham who long ago pointed out that 'property' is what we have *in* things, not the things that we think we have.<sup>13</sup> 'Property' is the name given to a legally (because socially) endorsed constellation of power over things and resources. Property is not a thing at all, but a socially approved power-relationship in respect of socially valued assets.

Criteria of 'proprietary' quality founded on transmissibility and permanence are, moreover, merely circular and self-fulfilling.<sup>14</sup> Invariably, on closer analysis, the language of property collapses back into

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<sup>9</sup> [1916] 1 AC 554, 564.

<sup>10</sup> Thus a fiduciary's undisclosed profit 'belongs in equity' to the fiduciary's entrustor (see *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 108f per Mason J). For further reference to the way in which the operation of fiduciary principles 'appropriates' unauthorised gains for the benefit of the entrustor, see *Chan v Zacharia* (1984) 154 CLR 178, 198 per Deane J. See also *Fraser Edmiston Pty Ltd v A.G.T. (Qld) Pty Ltd* [1988] 2 Qd R 1, 11.

<sup>11</sup> *Bl Comm*, Vol II, p 2.

<sup>12</sup> *Property in Thin Air*, [1991] Cambridge LJ 252.

<sup>13</sup> Bentham indicated astutely that 'in common speech in the phrase "the object of a man's property", the words "the object of" are commonly left out; and by an ellipsis, which, violent as it is, is now become more familiar than the phrase at length, they have made that part of it which consists of the words "a man's property" perform the office of the whole.' See *An Introduction to the Principles of Morals and Legislation* (ed by W. Harrison, Oxford 1948), p 337, note 1 (Chapter XVI, section 26).

<sup>14</sup> [1991] Cambridge LJ 252, 292 et seq. See, for instance, the assertion of Lord Wilberforce in *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1247G-1248A, that before a right can be

communal perceptions of the boundary between liberty and privacy. Property talk is ultimately reducible to a dialogue about moral space, about the mutual frontier between autonomy and vulnerability. Thus, argues Loren Lomasky, property rights 'demarcate moral space within which what one has is marked off as immune from predation.'<sup>15</sup> Given the relativity of this moral space, 'property' is not static, but dynamic. 'Property' is not absolute but conditional. I may have 'property' in a resource today, but not necessarily tomorrow (as is amply demonstrated by the case of copyright). There are distinct limits, practical, moral and social, upon the amount of property which I may claim in any resource.<sup>16</sup> Thus, for instance, I cannot demand to build a skyscraper on 'my' suburban block of land, any more than I may use 'my' meat cleaver or 'my' wood-chopping axe to make large holes in a neighbour's head.

On this view we can perhaps say that my 'property' in any given resource is best represented by a continuum along which varying kinds of 'property' status shade finely into each other. Property has an almost infinitely gradable quality. It was, for instance, Blackstone who distinguished 'absolute' from 'qualified' forms of property.<sup>17</sup> The *Restatement of Property* is likewise careful to differentiate 'complete property' from lesser configurations of the property notion.<sup>18</sup> The amount of 'property' which I may claim in any resource thus varies -- along some sort of sliding scale -- from a minimum value to a maximum value, and it becomes feasible to measure or calibrate the quantum of 'property' which I have in a particular resource at any particular time.<sup>19</sup> Under such analysis casual lay concepts of 'ownership' dissolve into differently constituted aggregations or bundles of power exercisable over particular resources. 'Ownership' of a resource breaks down into distinct quanta of 'property' which are capable of distribution to a potentially vast range of persons; and popular ascriptions of 'ownership' serve at best to indicate merely the current allocation of a predominating or strategic quantum of

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admitted within the category of 'property' it must be 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability.'

<sup>15</sup> L.E. Lomasky, *Persons, Rights, and the Moral Community* (Oxford 1987), p 121.

<sup>16</sup> '[P]roperty may be better understood, both historically and legally, as the result of a balance struck between competing individual and collective goals, the private and the public interest' (Tim Bonyhady, 'Property Rights', in Bonyhady (ed), *Environmental Protection and Legal Change* (Sydney 1992), p 44).

<sup>17</sup> Blackstone pointed to the way in which, along the continuum of 'propertiness', there often occurs a subtle gradation between 'absolute property' and 'qualified property' in a disputed resource. At common law this relativity has long been recognised in relation to such resources as wild animals (see *Bl Comm*, vol II, pp 391, 395). Even the landowner's 'qualified property' in wild animals persists only so long as he 'can keep them in sight' and has 'power to pursue them'. See also *Blades v Higgs* (1865) 11 HLCas 621, 631, 11 ER 1474, 1478f; *Walden v Hensler* (1987) 163 CLR 561, 565f; Tim Bonyhady, *The Law of the Countryside: the Rights of the Public* (Abingdon 1987), p 215ff.

<sup>18</sup> American Law Institute, *Restatement of the Law of Property* (St Paul, Minn 1936), Vol 1, p 11 (§ 5, comment e).

<sup>19</sup> For an elaboration of this argument, see Kevin Gray, *The Ambivalence of Property*, in G. Prins (ed), *Threats without Enemies* (London 1993), p 158 et seq.

'property' in the resource in question. It becomes rapidly apparent both that I can have 'property' in assets supposedly 'owned' by someone else and that our shorthand attributions of 'ownership' conceal only superficially the constant and comprehensive interpenetration of 'property' in the resources of the earth. It is an inevitable fact that all 'property' references have about them an utterly *interdependent* quality.

## 1. The doctrinal origins of equitable property

Where then does 'equitable property' fit into all of this? If general notions of property are so fragile and febrile, it must be difficult indeed to isolate the nature of *equitable* property. The task is made even more problematical because, in normal usage, the word 'equitable' more usually qualifies the word 'rights' (as in the phrase 'equitable rights of property'). It is with the origin and function of such equitable rights that much recent discussion has been concerned. To what extent, if any, should English law adopt innovative approaches from other jurisdictions which emphasise, for instance, the formative role of doctrines founded on unjust enrichment or unconscionability? The debate has enjoyed the benefit of many contributions, not the least being made by Lord Browne-Wilkinson who, in his address to the Holdsworth Club in 1991, cautioned against any broad or comprehensive application of such formulae in the solution of contemporary problems of English property law.<sup>20</sup>

But it is not on such issues that I wish to concentrate here. My concern is to take perhaps a more institutional view of the regime of equitable property and to suggest several directions or nuances of approach which have already begun to impact upon the law both in this jurisdiction and overseas. As will become obvious, my recent encounter with the Martian observers has encouraged me to seek a more clearly extra-terrestrial vantage-point in viewing the regime of 'equitable property' as a distinctively human or global institution. My concern is less to argue for the adoption of certain positions than to highlight the fact that certain movements are already underway in what we may call the law of equitable property. It may be that, in this wider perspective, the distinction between enacted and judge-made law dwindles towards relative insignificance and equitable property begins more assuredly to fulfil the primary call of equity -- recognised so long ago by Aristotle -- that equity must be the corrective of legal justice.<sup>21</sup>

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<sup>20</sup> *Constructive Trusts and Unjust Enrichment* (Holdsworth Club of the University of Birmingham 1991).

<sup>21</sup> See *The Ethics of Aristotle* (transl by J.A.K. Thomson, London 1955), p 166 et seq.

Our starting point is *Commissioner of Stamp Duties (Queensland) v Livingston*.<sup>22</sup> Here the Privy Council denied forthrightly that, where the 'whole right of property' is vested in one person, there is any need to suppose the separate and concurrent existence in this one person of two different kinds of estate or interest, ie the legal and the equitable.<sup>23</sup> Merger in one owner of the totality of entitlement renders such a distinction unnecessary and indeed impossible.<sup>24</sup> The absolute owner has no separate equitable estate since this is 'absorbed in the legal estate'.<sup>25</sup> The Privy Council proceeded to point out that equity 'calls into existence and protects equitable rights and interests in property only where their recognition has been found to be required in order to give effect to its doctrines'.<sup>26</sup> In this sense, equitable interests, as and when they arise in response to the dictates of equitable doctrine, are not so much 'carved out of' the legal estate as 'engrafted' upon it.<sup>27</sup> An equitable right of property finds its origin not as a pre-existing component of some larger interest which is then hewn free as a block of equitable entitlement; instead it represents the result of a doctrinally-driven movement which impresses new rights upon the pre-existing estate under the mandate of the controlled conscience of equity. Equitable rights of property thus derive from conscientious obligations to deal with an asset or resource in a certain way. In seeking long ago to express what he termed 'historically the right point of view', Maitland spoke of the way in which, in equity, 'the benefit of an obligation has been so treated that it has come to look rather like a true proprietary right'.<sup>28</sup>

For a good demonstration of this process we need look no further than the ruling of Lord Cottenham in *Tulk v Moxhay*.<sup>29</sup> As is well known, this case traditionally marks the emergence of the restrictive covenant as an equitable proprietary interest in land. Yet, in holding that the covenantor's successor

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<sup>22</sup> [1965] AC 694.

<sup>23</sup> [1965] AC 694, 712C-D per Viscount Radcliffe. See also *D.K.L.R. Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1978] 1 NSWLR 268, 278B-E per Sheppard J, (1982) 149 CLR 431, 463 per Aickin J; *Re Transphere Pty Ltd* (1986) 5 NSWLR 309, 311D-E per McLelland J; *Grey v IRC* [1958] Ch 690, 708 per Evershed MR.

<sup>24</sup> *Corin v Patton* (1990) 169 CLR 540, 579 per Deane J. For this reason an absolute owner is often said to be incompetent to transfer a bare legal estate whilst purporting to retain the absolute beneficial interest (see *D.K.L.R. Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (N.S.W.)* (1982) 149 CLR 431, 442 per Gibbs CJ, 463f per Aickin J, 473f per Brennan J).

<sup>25</sup> *D.K.L.R. Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (N.S.W.)* (1982) 149 CLR 431, 442 per Gibbs CJ.

<sup>26</sup> [1965] AC 694, 712E. See also *D.K.L.R. Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties* [1978] 1 NSWLR 268, 278D-E.

<sup>27</sup> *D.K.L.R. Holding Co (No 2) Pty Ltd v Commissioner of Stamp Duties (N.S.W.)* (1982) 149 CLR 431, 474 per Brennan J; *Re Transphere Pty Ltd* (1986) 5 NSWLR 309, 311E-F per McLelland J.

<sup>28</sup> *Equity* (2nd edn revd by J. Brunyate, London 1936), p 115. See also A.W.B. Simpson, *The Equitable Doctrine of Consideration and the Law of Uses*, (1965-66) 16 U Toronto LJ 1, 7.

<sup>29</sup> (1848) 2 Ph 774, 41 ER 1143. See Kevin Gray, *Elements of Land Law* (2nd edn, London 1993), pp 149, 1137.

was bound by his notice of the original covenant, the Lord Chancellor spoke not in terms of property at all, but rather in terms of obligation. The relevant question, said Lord Cottenham, is not the circular question 'whether the covenant runs with the land, but whether a party shall be permitted to use the land in a manner inconsistent with the contract entered into by his vendor, with notice of which he purchased.' Of course, said the Lord Chancellor, 'the price would be affected by the covenant, and nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price, in consideration of the assignee being allowed to escape from the liability which he had himself undertaken.'<sup>30</sup> What clearer vision could there be of the 'moral space' which marks out the limits of property? And it will be observed that English law has subsequently found no difficulty in saying that the beneficiary of a restrictive covenant has been allocated some of the 'property' in his or her neighbour's land.<sup>31</sup> The covenantee (or his or her successor<sup>32</sup>) is in a position to control or inhibit activities on the burdened land and, to this extent, owns an important part of the utility -- an important quantum of property -- in the servient tenement. (Nor is it merely metaphorical to add that the socialisation of private restrictive covenants in modern planning legislation now enables all citizens, in some significant sense, to claim a certain quantum of property in everyone else's land.<sup>33</sup>)

A further, and indeed quite striking, manifestation of the coalescence of property and obligation is provided by the recent holding of the Privy Council in *Attorney-General for Hong Kong v Reid*.<sup>34</sup> Reid, who had risen to the rank of Acting Director of Public Prosecutions in Hong Kong, had in the course of the corrupt discharge of his office received bribes which amounted in value to more than HK\$ 12 million. There was evidence that some of this illicit profit now lay invested in three freehold properties situated in New Zealand. In the view expressed on behalf of the Privy Council by Lord Templeman, as soon as the false fiduciary received the bribe, he became a 'debtor in equity to the Crown' for the

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<sup>30</sup> (1848) 2 Ph 774, 777f, 41 ER 1143, 1144.

<sup>31</sup> Under the canon confirmed in Law of Property Act 1925, s 1(1)-(3), the restrictive covenant ranks in English law as an equitable proprietary interest in the burdened land. See also *Commonwealth of Australia v Tasmania* (1983) 158 CLR 1, 286 per Deane J ('The benefit of a restrictive covenant...can constitute a valuable asset. It is incorporeal but it is, nonetheless, property').

<sup>32</sup> See the liberalising impact of the decision of the Court of Appeal in *Federated Homes Ltd v Mill Lodge Properties Ltd* [1980] 1 WLR 594.

<sup>33</sup> For reference to the way in which state regulation of land use enables 'the organized public' to vindicate its 'meta-property', see Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U Chi L Rev 711, 772 (1986). See also R.H. Nelson, *Private Rights to Government Actions: How Modern Property Rights Evolve*, (1986) U Ill L Rev 361, 366 ('zoning creates collective property rights').

<sup>34</sup> [1994] 1 AC 324.

amount of the bribe.<sup>35</sup> He was bound by an obligation to 'pay and account for the bribe' to the person to whom his fiduciary obligation was owed.<sup>36</sup>

Thus far the judgment is, of course, unexceptionable. But Lord Templeman went on to indicate that '[a]s soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured.'<sup>37</sup> The bribe, as soon as accepted by the corrupt employee, belonged 'in equity' to his employer, on the strength of the moral imperative that equity looks on as done that which ought to have been done.<sup>38</sup> Quoting from Sir Peter Millett's recently published address on the subject,<sup>39</sup> Lord Templeman pointed out that equity insists on treating the fiduciary 'as having acted in accordance with his duty'.<sup>40</sup> In consequence the dishonest employee, although he takes legal title in the bribe, cannot be heard to say that he retains any equitable property in it. In equity the bribe belongs -- has always belonged -- to the employer and is accordingly held by the employee on constructive trust. The Privy Council thus considered the New Zealand properties, so far as they represented bribes accepted by Reid, to be held 'in trust for the Crown'<sup>41</sup> and, by upholding the Crown's caveats over these properties, the Privy Council averted the clear risk that the proceeds of their sale might be 'whisked away to some Shangri La which hides bribes and other corrupt moneys in numbered bank accounts.'<sup>42</sup>

The *Reid* case may still contain further difficulties, but I refer to it, for the moment, merely as a good demonstration of the doctrinally-driven nature of equitable property. There was, said Lord Templeman, no inherent incompatibility between the twin analyses of equitable debt and constructive trust, provided that they did not result in a double recovery. The Privy Council accordingly discarded the venerable authority of the Court of Appeal in *Lister v Stubbs*,<sup>43</sup> which for over a century had distinguished so sharply between trust and debt, between ownership and obligation.<sup>44</sup> Argument is certain to rage over

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<sup>35</sup> [1994] 1 AC 324, 331C.

<sup>36</sup> [1994] 1 AC 324, 331C.

<sup>37</sup> [1994] 1 AC 324, 331E.

<sup>38</sup> [1994] 1 AC 324, 331D-332A.

<sup>39</sup> *Bribes and Secret Commissions*, [1993] RLR 7, 20 et seq.

<sup>40</sup> [1994] 1 AC 324, 337F.

<sup>41</sup> [1994] 1 AC 324, 339B.

<sup>42</sup> [1994] 1 AC 324, 339D.

<sup>43</sup> (1890) 45 Ch D 1.

<sup>44</sup> For an interesting exploration of this theme, see Judith Nicholson, *Owning and Owing*, (1988) 16 Melbourne UL Rev 784.



this development,<sup>45</sup> but the *Reid* case provides yet another remarkable articulation of the moral space which delimits the linked claims of autonomy and immunity from predation.

Now if equitable property is doctrinally driven, it may be interesting -- particularly if one adopts a more remote or extra-terrestrial standpoint -- to ask in which direction it is being driven today? Such a question -- if answerable at all -- requires that we survey a reasonable timescale, that we strive for objectivity, and that we suppress or at least suspend many of our internalised inhibitions in order to perceive more clearly the fullness of the human phenomenon which we know as property.

## 2. Equitable property as a means of empowerment

1994 marks the 30th anniversary of two pieces of writing whose implications, when taken in combination, foretell in my view some of the future of equitable property. I refer here to the publication in the Yale Law Journal of 1964 of Charles Reich's famous article on *The New Property*<sup>46</sup> and the appearance in the same year of the influential Oxford paperback version of C.B. Macpherson's *The Political Theory of Possessive Individualism*.<sup>47</sup>

Any attempt to summarise here the import of these two contributions can do but scant justice to the original. It may perhaps be said, however, that Macpherson's account of the emergence of possessive individualism during the 17th and 18th centuries -- against the backdrop of the broad Lockean interpretation of 'property' as inclusive of a person's 'life, liberty and estate' -- was to lay the foundation for Macpherson's lifelong exploration of the tension between two opposed views of the institutional function of property. On one view, property comprises essentially a right to exclude strangers from privately owned resources while, on an older and more expansive view, property had once consisted of a right *not to be excluded* from participation in the goods of life.<sup>48</sup> It was Macpherson's chosen task to seek out a modern equilibrium between the latter sense of property as a *right of access* and the absolutist sense of property as a *right of exclusion*. In opposition to the exclusory view, which had

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<sup>45</sup> See C. Rotherham, *The Redistributive Constructive Trust: "Confounding Ownership with Obligation"?*, (1992) 5 Canterbury L Rev 84; [1994] Cambridge LJ 31 (A.J. Oakley).

<sup>46</sup> 73 Yale LJ 733 (1964).

<sup>47</sup> *The Political Theory of Possessive Individualism: From Hobbes to Locke* (Oxford 1964).

<sup>48</sup> Macpherson pointed to the way in which pre-market societies established and maintained 'legal rights not only to life but to a certain quality of life.' Macpherson referred particularly to 'the rights of different orders or ranks -- guild masters, journeymen, apprentices, servants and laborers; serfs, freemen and noblemen; members of the first and second and third estates. All of these were rights, enforced by law or custom, to a certain standard of life, not just of material means of life, but also of liberties, privileges, honor, and status. And these rights could be seen as *properties*' (*Human Rights as Property Rights*, (1977) 24 Dissent 72, 77).

gained pre-eminence with the advent of market-dominated societies during the past three centuries, Macpherson argued for the reassertion of property as a public right to share in those socially valued resources which enable us to lead fulfilled and dignified lives. Thus, in Macpherson's view, the idea of property is constantly being broadened to secure the right of the citizen to 'that kind of society which is instrumental to a full and free life', and therefore to 'a set of power relations that permits a full life of enjoyment and development of one's human capacities'.<sup>49</sup> Macpherson was later to contend that, without this reinvigoration of the property concept, we risk a disastrous contradiction of the 'democratic concept of human rights'. Only by accommodating the wider perspective can our modern law of property avoid 'an inequality of wealth and power that denies a lot of people the possibility of a reasonably human life'.<sup>50</sup>

I will return to this thesis later, but let me add that, for his part, Charles Reich advocated the recognition of a 'new property' comprising the unprecedented largesse, in the form of welfare payments, salaries, pensions, franchises, licences and subsidies, distributed by the modern administrative state. In the wealth transformation of the 1950s and 1960s the significance of such benefits had, in Reich's view, overtaken that of more traditional property forms. In consequence Reich argued that the 'new property' deserved the same standard of legal protection -- largely in the shape of immunity from arbitrary deprivation -- accorded in the past to the more conventional entitlements of private property. We must, said Reich, 'try to build an economic basis for liberty today -- a Homestead Act for rootless twentieth century man. We must create a new property'.<sup>51</sup>

The Reich thesis today presents something of a paradox. It seems that Reich's article on *The New Property* is far and away the most heavily cited article ever published by the Yale Law Journal.<sup>52</sup> It is clear that the article has exerted an immense influence on all recent thinking about property and the utilisation of social resource. It is also commonly agreed that, apart from a brief flowering in Justice Brennan's Supreme Court judgment on the termination of welfare rights in *Goldberg v Kelly*,<sup>53</sup> the Reichian vision has not been realised and his enthusiastic optimism has proved unfounded.<sup>54</sup> As Reich

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<sup>49</sup> See C.B. Macpherson, 'Capitalism and the Changing Concept of Property', in E. Kamenka and R.S. Neale (ed), *Feudalism, Capitalism and Beyond* (Canberra 1975), p 116 et seq.

<sup>50</sup> *Human Rights as Property Rights*, (1977) 24 Dissent 72, 73.

<sup>51</sup> 73 Yale LJ 733, 787 (1964).

<sup>52</sup> See 100 Yale LJ 1449, 1462 (1990-91).

<sup>53</sup> 397 US 254, 262, 25 L Ed 2d 287, 295f (1970).

<sup>54</sup> For criticism of Reich's exaggerated concern in 1964 with material well-being, as distinct from more spiritual and less tangible values of human self-realisation, see H.A. McDougall, *The New Property vs the New Community*, 24 U San Francisco L Rev 399 (1989-90).

himself acknowledged recently,<sup>55</sup> the America of Nixon, Reagan and Bush simply did not take the road opened up by *Goldberg v Kelly*, although Reich has no doubt that the nation is the poorer for not having done so.<sup>56</sup>

Charles Reich is nevertheless an unreconstructed Reichian and argues now that he would expand the scope of the 'new property' to embrace not merely such governmental benefits as have survived the rightward drift of the past 20 years but also the benefits dispensed by private employers or quasi-public institutions within the modern corporate state.<sup>57</sup> He would also extend the 'new property' to embrace environmental rights.<sup>58</sup> According to Reich, writing in 1991, we live as never before under the shadow of concentrated and authoritarian economic power which threatens gravely to diminish personal liberty within the 'individual sector'.<sup>59</sup> He says, with perhaps less hyperbole than we on either side of the Atlantic might care to admit, that 'we live in a world in which you starve unless you can obtain a contract with an organization'.<sup>60</sup>

Like Macpherson, Reich is unable to 'accept the idea of a propertyless people in a democratic society', which is the result he fears if 'we limit the concept of property to its traditional forms'.<sup>61</sup> In an era in which security in homes, jobs and pensions has proved increasingly fragile, thereby withdrawing from many the possibility of conventional property forms, the 'new property' offers the only property rights that some people will ever have.<sup>62</sup> 'If we are to safeguard liberty in the coming age,' says Reich, 'we will have to create more ownership rights than now exist...A society organized into large institutions must rethink and reconceive the idea of property, or the foundation of democracy will disappear.'<sup>63</sup>

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<sup>55</sup> *Beyond the New Property: An Ecological View of Due Process*, 56 Brooklyn L Rev 731 (1990-91).

<sup>56</sup> See also C.A. Reich, 100 Yale LJ 1465 (1990-91).

<sup>57</sup> See Reich, *The New Property After 25 Years*, 24 U San Francisco L Rev 223, 225 et seq (1989-90); *The Liberty Impact of the New Property*, 31 William and Mary L Rev 295, 296 (1989-90).

<sup>58</sup> Reich, 100 Yale LJ 1465, 1468 (1990-91); 24 U San Francisco L Rev 223, 226 (1989-90). For a cogent exploration of the 'new property' or 'due process' analogy which links *Goldberg v Kelly* with the requirement of an environmental impact statement prior to decision-making under the United States' National Environmental Policy Act 1969, see M. Herz, *Parallel Universes: NEPA Lessons for the New Property*, 93 Col L Rev 1668, 1684 et seq (1993). See also M.C. Blumm, *Liberty, the New Property, and Environmental Law*, 24 U San Francisco L Rev 385, 397 (1989-90).

<sup>59</sup> 'Exclusion from the system has become a form of internal exile' (Reich, 100 Yale LJ 1465, 1467 (1990-91)). See also Reich, *The Individual Sector*, 100 Yale LJ 1409 (1990-91).

<sup>60</sup> 31 William and Mary L Rev 295, 299 (1989-90).

<sup>61</sup> 100 Yale LJ 1465, 1468 (1990-91).

<sup>62</sup> Reich, 24 U San Francisco L Rev 223, 227 (1989-90).

<sup>63</sup> Reich, 31 William and Mary L Rev 295, 304 et seq (1989-90).

Reich reminds us, interestingly, that '[a]t the heart of new property philosophy is the concept of boundaries...Every person must be able to say, "This is mine, this is yours, this belongs to the community."<sup>64</sup> Here again we have the demarcation of moral space to which reference was made earlier, a demarcation which may be essential if, as Reich would say, '[e]veryone has a right to a share in the commonwealth.'<sup>65</sup>

Now there is much to admire, and perhaps much to criticise, in the broad theses advanced by Macpherson and Reich. Both place a central emphasis on the need to assure access to certain human goods as a vital precondition of securing freedom, dignity and the flourishing of the human spirit. In both there is found a strong resonance of James Madison's statement in 1792 that just 'as a man is said to have a right to his property, he may be equally said to have a property in his rights.'<sup>66</sup> Nevertheless Macpherson and Reich alike court the danger that *all* rights become property rights and, as Duncan Kennedy in fact says, 'all rules are property rules'.<sup>67</sup> Yet this objection (which is doubtless overstated in any event) may merely point to the fact that we should be more broadminded, historically more accurate,<sup>68</sup> and perhaps even more honest in our contemporary use of the property accolade. It may be our preconception of property which is wrong.

But, I hear you say, all this is merely the faded credo of latterday hippies. Name me one example in the modern era where property rights have been harnessed for the conscious purpose of assuring citizens access to a life of reasonable human dignity. Provide one instance in which a common law-based legal system has dispensed property rights *de novo* as a concerted means of guaranteeing a minimum floor of decent living standards. Where has property ever been recreated in order to fashion a *modus vivendi* for the propertyless and provide all with a share in the commonwealth?

Strange to relate, recent times disclose at least one stunning assertion of precisely this 'access dimension' of property. Remarkable in its legal scope and social impact, this instance of *property as access* will reach deep into the lives of millions of people in this country including, in all likelihood, close on half of all those who read this paper. Pursuant to Part II of the Matrimonial Causes Act 1973, the courts in this jurisdiction are empowered to reallocate the assets and finances of divorcing parties in total disregard of their historic rights of title. The courts are authorised to refashion the living

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<sup>64</sup> 100 Yale LJ 1409, 1413 (1990-91).

<sup>65</sup> 56 Brooklyn L Rev 731, 745 (1990-91).

<sup>66</sup> 'Property', in *The Papers of James Madison* (ed R.A. Rutland et al, Charlottesville Va, 1983), Vol 14, p 266 (*National Gazette*, 27 March 1792).

<sup>67</sup> D. Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv L Rev 1685, 1763 (1975-76).

<sup>68</sup> See Richard Tuck, *Natural Rights Theories* (Cambridge 1979), p 16, for a reminder of the way in which the medieval period initiated a process 'whereby all of a man's rights, of whatever kind, were to come to be seen as his property'.

arrangements of divorced spouses -- to reorder their beneficial entitlements -- in such a way as to open for both parties (and particularly for a custodial parent) a gateway to a better or at least a sustainable lifestyle. Matrimonial legislation effectively confers on the courts a special power of appointment over the available economic resources of disaffected marital partners.<sup>69</sup> In this context the law adopts not 'a painfully detailed retrospect', but rather 'a forward-looking perspective' in which 'questions of ownership yield to the higher demands of relating the means of both [parties] to the needs of each, the first consideration given to the welfare of children.'<sup>70</sup> In this way matrimonial legislation recognises and gives prospective effect to a latent or subsisting equity in the property relations of those who marry.

It is perhaps worth noticing that the historic function of equitable intervention in property matters has always been to ensure, promote and safeguard rights of access. Equity's concerns have long focused on the perceived need to preserve, for doctrinal reasons, various forms of access to the beneficial value of desired goods and resources. Thus, for example, the critical duty of the trustee is to deflect enjoyment to the beneficiary. The function of the restrictive covenant is likewise to permit the covenantee access to part of the utility in the land subject to covenant. The principal must be protected in his or her access to the commercial opportunities which the fiduciary might otherwise hijack. In each of these instances equitable property and the notion of stewardship seldom stand far apart. Whereas legal rights, with their stolid and uncompromising character, more clearly connote the exclusory aspect of property, equitable rights more subtly articulate a range of protected access to the benefits derived from profitable guardianship. This is not, of course, to say that the exclusion and access dimensions of property never overlap, for they certainly do. The functions of exclusion and access are never wholly discrete. There is even a confusing and somewhat unfortunate human tendency to assert access rights precisely in order to claim rights to exclude others from access later.<sup>71</sup> The relevant point is, however, that any set of property relations contains, at any given time, a balance which leans, in some degree, in either an exclusory or an access-related direction.

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<sup>69</sup> See Kevin Gray, *Reallocation of Property on Divorce* (Abingdon 1977), p 322 et seq.

<sup>70</sup> *Hammond v Mitchell* [1991] 1 WLR 1127, 1129D-E per Waite J. See the distinction drawn between 'prospective' and 'retrospective' approaches in Gray, *Reallocation of Property on Divorce* (1977), p 278 et seq.

<sup>71</sup> See eg *Gerhardy v Brown* (1985) 159 CLR 70.

### 3. Equitable property as a gateway for rights of access

I want now to suggest just three of the ways in which, across the jurisdictions of the common law world, equitable property is currently being refashioned in order to accommodate increasing claims of access in juxtaposition to those of exclusion. Broad connections link all three instances. Each relates essentially to land-based resources. Each involves the gathering protection accorded to newly emerging claims *not* to be excluded from access to the commonwealth. In each case it is possible to contend that an equitable property is being recognised and extended in order to protect and preserve various kinds of claim to human dignity and rightful participation in the goods or opportunities of life.

#### (1) *Equitable property in 'quasi-public' places*

My first example relates to the incipient recognition of rights of access to what we might call 'quasi-public' land. In conventional terms the ultimate prerogative of private property comprises an absolute right to determine who may enter or remain on land. No doctrine of reasonableness controls the grant by the landowner of access to his or her land by way of bare licence. Nor is there normally any legal necessity that in the exercise of this discretion the landowner should comply with rules of natural justice. The legal owner may exclude or evict without giving any notice or assigning any reason, subject only to such constraints as are imposed by doctrines of contract and estoppel or by the legislation prohibiting discrimination on grounds of race or gender. In the orthodox analysis the landowner simply has an unchallengeable discretion to withhold or withdraw permission to enter.<sup>72</sup>

By means of this dogma the common law appears to have maintained a strict dichotomy between rights of access in respect of so-called 'private' and 'public' places. Uncontracted privileges to enter upon private land are almost entirely defeasible in nature, whereas the exercise of public rights (such as a right of passage over the public highway) is generally unqualified and absolute.<sup>73</sup> Nowadays, however, it is strongly arguable that this dichotomy between the private and public domains (although perhaps workable under the social and economic conditions of a different era) no longer wholly accords with the reality of many modern forms of landholding.<sup>74</sup> Although the absolute nature of the

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<sup>72</sup> See Gray, *Elements of Land Law* (2nd edn 1993), pp 897-898.

<sup>73</sup> As Lord Wilberforce indicated in *Wills' Trustees v Cairngorm Canoeing and Sailing School Ltd*, 1976 SLT 162, 191, 'once a public right of passage is established, there is no warrant for making any distinction, or even for making any enquiry, as to the purpose for which it is exercised. One cannot stop...a pedestrian on a highway, and ask him what is the nature of his use.'

<sup>74</sup> For evidence that the boundary between 'private' and 'public' domains has become blurred in recent times, see *Moss v McLachlan* (1985) 149 JP 167. Here a Divisional Court indicated that the public right of passage on the highway may no longer be as absolute as it once was, the Court holding that police officers were entitled at common law to turn back motorway convoys of 'flying pickets' during the miners' strike in the mid-1980s.

landowner's common law right undoubtedly still applies to such 'private' property as the domestic curtilage -- an Englishman's home is still, by and large, his castle -- its extension today to many other kinds of premises increasingly involves an unacceptable denial of the citizen's just or equitable share in the commonwealth.

The modern world discloses many examples of places, premises and land areas which are heavily invested with a 'quasi-public' character and where a right of arbitrary or selective exclusion is not -- and perhaps never has been -- exercisable in its unfettered form. Important factors of public policy now urge that, in respect of such 'quasi-public' places, the law should confirm, as a matter of entitlement, the existence of certain carefully delimited rights of equal and reasonable access for all citizens. Particularly in a pluralist, multicultural society there is nothing quite so alienating as the perception that one is not welcome; that one does not belong; that one has entered a door through which one should not have come.

Many facets of modern living involve our ready access to places which, although strictly the subject of private ownership, are characterised by or are quite deliberately intended for general public use. Examples include local parks and leisure areas, railway stations, airports, shopping centres and megastores, public hospitals, museums, libraries, art galleries, community colleges and various other kinds of community facility -- sporting, educational and therapeutic. Such premises are only imperfectly described in terms of private ownership; they are underpinned by (and indeed exist only by virtue of) their 'quasi-public' quality. It is no longer feasible to regard premises within this 'quasi-public' category as being governed by the same absolute regulatory power as pertains to the fee simple owner of the private dwelling-house. It is no longer appropriate that the implied non-contractual licence which invites public entry should in every circumstance be revocable on the whim of the landowner. As Murphy J often pointed out in the High Court of Australia, '[t]he distinction between public power and private power is not clear-cut and one may shade into the other'.<sup>75</sup> It is at precisely this blurred borderline that the exercise of power calls for particularly vigilant scrutiny lest it become unreasonable and oppressive. In the words of Murphy J, '[w]hen rights are so aggregated that their exercise affects members of the public to a significant degree, they may often be described as public rights and their exercise as that of public power. Such public power must be exercised bona fide...and with due regard to the persons affected by its exercise'.<sup>76</sup>

Interestingly one of the test-cases in the present context has come to focus on the common areas of the large shopping centre. The modern shopping mall performs a mixture of functions of which the buying and selling of goods represent only one feature. The shopping centre facilitates no less the motiveless appraisal of consumer goods and, with its provision of seating, indoor plants, fountains,

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<sup>75</sup> *Gerhardy v Brown* (1985) 159 CLR 70, 107.

<sup>76</sup> *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242, 275 (dissenting).

open-plan cafés and so on, affords much of the recreational aspect of a meeting-place. The location effectively provides the equivalent, in an enclosed format, of a public park. The very layout of such centres points to a consciously designed versatility as a modern crossroads for the social intercourse of the general public. The shopping centre serves not least as a common meeting-place for the unemployed, the disadvantaged and the discouraged of society -- persons whose presence may not be entirely welcome to the private commercial interests which own the shopping centre. Yet arbitrary exclusion of such persons from the precincts of the shopping centre -- a practice which is becoming increasingly frequent in towns up and down the country -- may mean that sizeable portions of downtown areas are being effectively converted into no-go areas for proscribed classes of individual.<sup>77</sup> Are the private security firms which patrol shopping malls indeed entitled to extrude from the premises the jobless, the Rastafarian and the down-and-out? Nothing would epitomise quite so forcefully the growing apartheid between rich and poor as the reservation of exclusive consumerist havens for the relatively affluent of our society. Nothing would underscore so plainly the state of 'internal exile' which Charles Reich feared might become the fate of the unconventional and the unwaged.<sup>78</sup>

Against this background it can be argued that the right to exclude from certain kinds of privately held premises has now become qualified by an overriding principle of reasonableness. The power of arbitrary exclusion no longer comprises an inevitable proprietary incident in respect of land to which the public enjoys entry by general or unrestricted invitation.<sup>79</sup> Within the area of 'quasi-public' property the public's rights of access are supported and constrained by legitimate expectations of reasonable user, and these expectations are, in their turn, indivisible from certain civil liberties of association and assembly and more generally indivisible from freedoms of movement and expression.<sup>80</sup> The recognition of a rule of reasonableness cuts both ways, of course: it provides a clear ground for the exclusion of unreasonable users,<sup>81</sup> but also provides a guarantee of access during good (ie

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<sup>77</sup> The scale of some modern shopping plazas may be considerable. See eg *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza*, 391 US 308, 20 L Ed 2d 603 (1968) (perimeter of 1.1 miles); *Alderwood Associates v Washington Environmental Council*, 635 P2d 108 (1981) (1 million square feet of store area on 110 acres of land).

<sup>78</sup> See C.A. Reich, 100 Yale LJ 1465, 1467 (1990-91).

<sup>79</sup> It was Henry George who pointed to the unacceptable outcome of private power over land taken to its logical conclusion. '[T]o this manifest absurdity does the recognition of individual right to land come when carried to its ultimate -- that any one human being, could he concentrate in himself the individual rights to the land of any country, could expel therefrom all the rest of its inhabitants; and could he thus concentrate the individual rights to the whole surface of the globe, he alone of all the teeming population of the earth would have the right to live' (see H. George, *Poverty And Progress* (New York 1981 (first published 1879), p 345).

<sup>80</sup> See the original 'company town' case, *Marsh v Alabama*, 326 US 501, 90 L Ed 265 (1946) (private ownership of town could not be asserted to stifle freedom of expression on sidewalk).

<sup>81</sup> See eg *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385, 395d per Lamer CJC, Sopinka and Cory JJ concurring).



reasonable) behaviour.<sup>82</sup> In the process it becomes possible to maintain that all citizens have thereby acquired some sort of equitable property in 'quasi-public' places; that all are effectively the beneficiaries in gross of a restrictive covenant implicitly undertaken by the landowner that the visitor shall not be arbitrarily or unreasonably excluded from the tenement concerned.

In recent years it is significant that other jurisdictions have increasingly imposed a requirement of reasonableness on the regulation of entry to and exclusion from 'quasi-public' premises. For instance, in a series of cases culminating in the ruling of the Supreme Court of California in *Robins v PruneYard Shopping Center*,<sup>83</sup> courts in the United States and Canada have upheld claims of reasonable public access to privately owned shopping centres for purposes which extend beyond commercial activity to encompass the peaceful communication of a range of personal and political concerns.<sup>84</sup> The 'quasi-public' nature of such premises has been said to follow from the fact that shopping malls have impliedly been made the subject of an open invitation to the public and therefore represent 'private property having an essential public character as part of a commercial venture'.<sup>85</sup> According to the Supreme Court of North Dakota in *City of Jamestown v Beneda*,<sup>86</sup> the shopping mall has come to provide 'the functional equivalent of the city streets, squares and parks of earlier days' -- areas which the United States Supreme Court has long declared to be 'held in the public trust'.<sup>87</sup> Perhaps most important, the courts have linked the protection of reasonable shopping mall access to the 'interest of a

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<sup>82</sup> See Laskin CJC's reference in *Harrison v Carswell* (1975) 62 DLR (3d) 68, 74, to privileged user of public areas which is 'revocable only upon misbehaviour...or by reason of unlawful activity.'

<sup>83</sup> 592 P2d 341 (1979), affd sub nom *PruneYard Shopping Center v Robins*, 447 US 74, 64 L Ed 2d 741 (US Supreme Court 1980). See also R. Moon, *Access to Public and Private Property under Freedom of Expression*, (1988) 20 Ottawa L Rev 339, 357 et seq.

<sup>84</sup> Later cases have made it clear that the permitted forms of communication include 'nondisruptive speech' such as that comprised in the wearing of a T-shirt or button which contains a political message (*Board of Commissioners of the City of Los Angeles v Jews For Jesus, Inc*, 482 US 569, 576, 96 L Ed 2d 500, 508 (1987) per O'Connor J). Protected communication may also involve a display or celebration of a particular lifestyle or cultural or political affiliation. See the statement of Tobriner J in *In re Cox*, 90 Cal Rptr 24, 32 (1970) that a shopping centre 'may no more exclude individuals who wear long hair or unconventional dress, who are black, who are members of the John Birch Society, or who belong to the American Civil Liberties Union, merely because of these characteristics or associations, than may the City of San Rafael'.

<sup>85</sup> *R v Layton* (1988) 38 CCC (3d) 550, 568 per Scott Prov Ct J. See also *Harrison v Carswell* (1975) 62 DLR (3d) 68, 73 per Laskin CJC. For further reference to private property which has assumed 'the functional attributes of public property devoted to public use', see *Central Hardware Co v National Labor Relations Board*, 407 US 539, 547, 33 L Ed 2d 122, 128 (1972) per Powell J.

<sup>86</sup> 477 NW2d 830, 837f (1991). See also *Alderwood Associates v Washington Environmental Council* 635 P2d 108, 117 (1981) (Supreme Court of Washington).

<sup>87</sup> *Frisby v Schultz*, 487 US 474, 481, 101 L Ed 2d 420, 429 (1988) per O'Connor J. See eg *Hague v Committee for Industrial Organization*, 307 US 496, 515, 83 L Ed 1423, 1436 (1939).

free society in the highly placed value of open markets for ideas.<sup>88</sup> As the Supreme Court of Washington made clear in *Alderwood Associates v Washington Environmental Council*,<sup>89</sup> '[t]he ability...to communicate ideas would be greatly reduced if access to such centers were denied'.

Although developments in the United States and Canada are often coloured by constitutional or charter considerations,<sup>90</sup> the controlling factor in the emerging jurisprudence is the constant reference to an overarching requirement of reasonableness. Thus, in *Uston v Resorts International Hotel Inc*,<sup>91</sup> Pashman J confirmed that 'when property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner towards persons who come on their premises.' Similarly, in *State v Schmid*,<sup>92</sup> Princeton University was adjudged to have violated a defendant's state constitutional rights by evicting him from university premises and by securing his arrest for distributing political literature on its campus. In the view of the majority of the Supreme Court of New Jersey, 'the more private property is devoted to public use, the more it must accommodate the rights which inhere in individual members of the general public who use that property'.<sup>93</sup> The Court recognised that the owner of private property is 'entitled to fashion reasonable rules to control the mode, opportunity and site for the individual exercise of expressional rights upon his property'.<sup>94</sup> Here, however, the university's rules had been 'devoid of reasonable standards' designed to protect both the legitimate interests of the university as an institution of higher education and the individual exercise of expressional freedom. In the total absence of any such 'reasonable regulatory scheme', the university was at fault for having ejected a defendant whose actions had themselves been 'noninjurious and reasonable'.<sup>95</sup>

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<sup>88</sup> See *City of Jamestown v Beneda*, 477 NW2d 830, 835 (1991), citing *International Society for Krishna Consciousness v Schrader*, 461 F Supp 714, 718 (1978). For reference to the importance of 'free trade in ideas', see *Abrams v United States*, 250 US 616, 630, 63 L Ed 1173, 1180 (1919), where Justice Holmes went on to suggest that 'the best test of truth is the power of the thought to get itself accepted in the competition of the market'.

<sup>89</sup> 635 P2d 108, 117 (1981). See also *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385, 449d-f per McLachlin J.

<sup>90</sup> Contemporary developments are not, however, attributable solely to the infusion of constitutional or charter-based norms. As was explained for instance in *R v Layton* (1988) 38 CCC (3d) 550, 570, the enactment of the Canadian Charter of Rights and Freedoms merely confirmed, in present respects, the common law position already elaborated in Laskin CJC's seminal judgment in *Harrison v Carswell* (1975) 62 DLR (3d) 68, 73f.

<sup>91</sup> 445 A2d 370, 375 (1982) (Supreme Court of New Jersey).

<sup>92</sup> 423 A2d 615 (1980).

<sup>93</sup> 423 A2d 615, 629.

<sup>94</sup> 423 A2d 615, 630.

<sup>95</sup> For reference to the social value derived from treating as 'inherently public' property which is used for political speech, see C. Rose, 53 U Chi L Rev 711, 778 (1986). According to Professor Rose,

Fears that there might be difficulty in delineating the scope of quasi-public premises have proved largely unfounded within the present context. North American courts have been careful to emphasise that the reasonable access rule does not invade the 'property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment'.<sup>96</sup> Central to the reasonable access rule is the demarcation of an area of 'private autonomy'<sup>97</sup> whose parameters comprise, in themselves, the essential defining characteristic of rights of property.<sup>98</sup> Correspondingly the enforcement of reasonable access has been extended to many other kinds of premises which are deliberately laid open to public resort and where the claim of private autonomy has thus been waived in whole or part.<sup>99</sup> In *The Queen in Right of Canada v Committee for the Commonwealth of Canada*,<sup>100</sup> for instance, the Supreme Court of Canada was entirely prepared to uphold the citizen's right of access -- even for the purpose of disseminating political ideas -- to the government-owned public terminal concourse at Montreal International Airport. Although agreeing that the government's proprietary rights were the same as those of a private owner,<sup>101</sup> the Supreme Court forthrightly dismissed the government's argument that it was entitled within its absolute discretion to exclude any person it wished from the airport concourse.<sup>102</sup> In the Court's view the airport terminal bore the earmarks of a 'public arena'<sup>103</sup> and was

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the Supreme Court decision in *PruneYard Shopping Center v Robins*, 447 US 74, 64 L Ed 2d 741 (1980) could legitimately be considered to be an extension of public trust doctrine.

<sup>96</sup> *Diamond v Bland*, 113 Cal Rptr 468, 478 (1974) per Mosk J, cited with approval in *Robins v PruneYard Shopping Centre* 592 P2d 341, 347 (1979). See *Johnson v Tait*, 774 P2d 185, 190 (1989) (Hell's Angel in full regalia rightly excluded from Crazy Horse Bar in Anchorage). See also *Amalgamated Food Employees Union Local 590 v Logan Valley Plaza*, 391 US 308, 325f, 20 L Ed 2d 603, 616 (1968) per Douglas J; *Harrison v Carswell* (1975) 62 DLR (3d) 68, 73 per Laskin CJC.

<sup>97</sup> *Johnson v Tait*, 774 P2d 185, 190 (1989) (Supreme Court of Alaska).

<sup>98</sup> See text accompanying note 15.

<sup>99</sup> See eg *In re Hoffman*, 64 Cal Rptr 97, 100 (1967) per Traynor CJ ('a railway station is like a public street or park'). The key notion here is that of 'dedication' to public use (see eg *The Queen in Right of Canada v Committee for the Commonwealth of Canada* (1991) 77 DLR (4th) 385, 402f per La Forest J).

<sup>100</sup> (1991) 77 DLR (4th) 385.

<sup>101</sup> (1991) 77 DLR (4th) 385, 402e per La Forest J.

<sup>102</sup> (1991) 77 DLR (4th) 385, 393d-h per Lamer CJC, Sopinka and Cory JJ concurring, 402f per La Forest J, 421h-422b per L'Heureux-Dubé J, 449d-450c per McLachlin J. See also *City of Jamestown v Beneda*, 477 NW2d 830, 835 (1991).

<sup>103</sup> (1991) 77 DLR (4th) 385, 426f per L'Heureux-Dubé J. The Supreme Court noted, however, that the public forum doctrine expounded for many years in the United States was currently under considerable attack and the Court was not therefore prepared to endorse it in its full form ((1991) 77 DLR (4th) 385, 391b per Lamer CJC, 428d per L'Heureux-Dubé J, 452d per McLachlin J. See now *International Society for Krishna Consciousness, Inc v Lee*, 120 L Ed 2d 541 (1992); *Lee v International Society for Krishna Consciousness, Inc*, 120 L Ed 2d 669 (1992); D.S. Day, *The End of the Public Forum Doctrine*, 78 Iowa L Rev 143 (1992-93).

'in many ways a thoroughfare'<sup>104</sup> or 'contemporary crossroads',<sup>105</sup> a 'modern equivalent of the streets and by-ways of the past'.<sup>106</sup> Such property was 'quasi-fiduciary'<sup>107</sup> and was owned for the benefit of the citizen.<sup>108</sup> Within this forum the Supreme Court was quite prepared to protect civic rights of access and communication not least because, as McLachlin J explained, the safeguarding of such rights is integrally linked with the 'pursuit of truth, participation in the community and the conditions necessary for individual fulfilment and human flourishing'.<sup>109</sup> Only through 'the encouragement of a tolerant and welcoming environment which promotes diversity in forms of self-fulfilment and human flourishing' could the Court recognise 'the role of expression in maximising human potential and happiness through intellectual and artistic communication'.<sup>110</sup>

Such developments in the comparative law make it increasingly feasible to contend that the private owner of 'quasi-public' premises may nowadays exclude members of the public only on grounds which are objectively reasonable.<sup>111</sup> The imposition of a requirement of reasonableness is already well established in relation to private owners whose rights of control derive from statutory authority,<sup>112</sup> and

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<sup>104</sup> (1991) 77 DLR (4th) 385, 396*h* per Lamer CJC, Sopinka and Cory JJ concurring.

<sup>105</sup> (1991) 77 DLR (4th) 385, 430*g* per L'Heureux-Dubé J.

<sup>106</sup> (1991) 77 DLR (4th) 385, 459*g* per McLachlin J.

<sup>107</sup> (1991) 77 DLR (4th) 385, 393*d* per Lamer CJC. In the Federal Court of Appeal, Hugessen J had emphasised that the government owns its property 'not for its own benefit but for that of the citizen' and that the government therefore has an obligation to 'devote certain property for certain purposes and to manage "its" property for the public good' ((1987) 36 DLR (4th) 501, 509*f*).

<sup>108</sup> (1991) 77 DLR (4th) 385, 393*f* per Lamer CJC, Sopinka and Cory JJ concurring. ('[I]t must be understood, since the government administers its properties for the benefit of the citizens as a whole, that it is the citizens above all who have an interest in seeing that the properties are administered and operated in a manner consistent with their intended purpose.')

<sup>109</sup> (1991) 77 DLR (4th) 385, 457*d*.

<sup>110</sup> (1991) 77 DLR (4th) 385, 457*h*. It was Lon Fuller who identified as the 'central indisputable principle of what may be called substantive natural law' the requirement to '[o]pen up, maintain, and preserve the integrity of the channels of communication by which men convey to one another what they perceive, feel, and desire' (see L.L. Fuller, *The Morality of Law* (New Haven and London 1964), p 185 et seq).

<sup>111</sup> The standard of objective 'reasonableness' is of course likely to vary in its application over time; exclusion which seemed reasonable in the late 19th century will not necessarily seem reasonable today.

<sup>112</sup> See eg *Cinamond v British Airports Authority* [1980] 1 WLR 582, 588A-E, where Lord Denning MR declared, in relation to a statutorily established airport authority, that '[i]f a bona fide airline passenger comes to the airport, they cannot turn him back -- at their discretion without rhyme or reason -- as a private landowner can. Nor can they turn back the driver of the car. Nor the friends who help him with the luggage. Nor the relatives who come to see him off.' Lord Denning emphasised, significantly, that the airport authority would have a right to exclude only 'if the circumstances are such as fairly and reasonably to warrant it', although the Master of the Rolls indicated that there were clear

there appears to be no good reason why the same approach should not apply to the ownership of premises whose 'quasi-public' status is not fixed by legislation.<sup>113</sup> It is strictly inaccurate, in any event, to suppose that the delineation of special rules for quasi-public property represents a startling innovation in English law. The clearest counter-example is afforded by the venerable case of the common innkeeper, who, in the absence of some reasonable ground of refusal,<sup>114</sup> has always been bound by the common law and custom of the realm to receive and provide lodging in his inn for all comers who are travellers.<sup>115</sup> For centuries it has been settled law in all common law jurisdictions that 'the business of an innkeeper is of a quasi public character, invested with many privileges, and burdened with correspondingly great responsibilities'.<sup>116</sup> In the discharge of this important calling the common innkeeper is neither entitled to select his guests nor justified in applying any ground of exclusion or discrimination which is itself unreasonable.<sup>117</sup> It is indeed only the dimming of our collective memory which obscures the fact that premises used in pursuit of a public calling have been subjected from time immemorial to special rules curtailing the freedom arbitrarily to turn away all comers.

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examples of circumstances (eg traffic congestion or terrorist alert) in which it might be 'fair and reasonable for the airport authority to restrict or prohibit entry'.

<sup>113</sup> It may be that some similar doctrine of reasonableness provides part of the true explanation of the old 'railway cases' (see eg *Perth General Station Committee v Ross* [1897] AC 479; *Barker v Midland Railway Co* (1856) 18 CB 46, 139 ER 1281; *Foulger v Steadman* (1872) LR 8 QB 65).

<sup>114</sup> See *Hawthorn v Hammond* (1844) 1 Car & K 404, 407, 174 ER 867, 869.

<sup>115</sup> On the compellability of the common innkeeper to admit all comers, see YB 39 H VI 18, 24 (1460); *White's Case* (1558) 2 Dyer 158b, 73 ER 343, 344; *Calye's Case* (1584) 8 Co Rep 32a, 77 ER 520; *Anon* (1623) 2 Roll Rep 345, 81 ER 842, 843; *Newton v Trigg* (1691) 1 Show 268, 269, 89 ER 566; *Lane v Cotton* (1701) 12 Mod 472, 484, 88 ER 1458, 1464f per Holt CJ; *Robins & Co v Gray* [1895] 2 QB 501, 503f; *Lamond v Richard* [1897] 1 QB 541, 547. See also 24 *Halsbury's Laws of England* (4th edn (Reissue), London 1991), para 1113.

<sup>116</sup> *De Wolf v Ford*, 86 NE 527, 529 (1908) per Werner J. See *Garifine v Monmouth Park Jockey Club*, 148 A2d 1, 2 (1958). See also B. Wyman, *The Law of Public Callings as a Solution of the Trust Problem*, 17 Harv L Rev 156, 158f (1903-04); C.K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 Col L Rev 514, 521ff (1911); N. Arterburn, *The Origin and First Test of Public Callings*, 75 U Penn L Rev 411, 424f (1927).

<sup>117</sup> See *R v Ivens* (1835) 7 C & P 213, 219, 173 ER 94, 96f per Coleridge J ('The innkeeper is not to select his guests. He has no right to say to one, you shall come into my inn, and to another you shall not, as every one coming and conducting himself in a proper manner has a right to be received; and for this purpose innkeepers are a sort of public servants, they having in return a kind of privilege of entertaining travellers and supplying them with what they want').

## (2) *Equitable property in traditional country*

A second (and rather different) example of the recognition of the 'access dimension' of property is to be found in recent attempts to resolve claims of original or aboriginal title made by the historically dispossessed native peoples of Canada, the United States and Australia. The Australian experience is particularly informative. Blackburn J's well-known decision in *Milirrpum v Nabalco Pty Ltd*<sup>118</sup> expressly (albeit reluctantly) denied that the Australian Aboriginal's customary intimate relationship with his land - based upon the personal usufructuary right to go walkabout and forage over traditional tracts of country -- could ever conform to the essential indicia of proprietary ownership in its common law sense. The standard ingredients of conventional proprietary ownership were notably absent not least because the Aboriginal nomad had no concept of a right to exclude others, still less to alienate lands to a stranger.<sup>119</sup> At the heart of the Aboriginal concept of land has always been the notion of access not of exclusion.<sup>120</sup> Its fundamental feature has been the acknowledgement of a duty to care for the land -- to 'look after country'<sup>121</sup> -- in the discharge of which responsibility Aboriginal people 'see themselves as caretakers of a relationship of trust deriving from The Dreaming and passed on to them by their immediate forebears.'<sup>122</sup>

As Brennan J was to emphasise in *R v Toohey; Ex parte Meneling Station Pty Ltd*,<sup>123</sup> the connection of the Aboriginal group with the land 'does not consist in the communal holding of rights with respect to the land, but in the group's spiritual affiliations to a site on the land and the group's spiritual

<sup>118</sup> (1971) 17 FLR 141, 272ff.

<sup>119</sup> According to Kenneth Maddock, 'Aborigines regard land as a religious phenomenon. The earth owes its topography to the acts of world-creative powers who appeared mysteriously and moved about on the surface before sinking into the ground or the water or rising into the sky, leaving a formed and populated world behind them...The Aboriginal theory is thus that rights to land have to do with the design of the world, not with alienable title' (*The Australian Aborigines: A Portrait of their Society* (London 1972), p 27). See also *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 51 per Brennan J.

<sup>120</sup> 'Access to the country of one's forebears provided substance for the Dreamtime experience and an identity based on the continuity of life and values which were constantly reaffirmed in ritual and in the use of the land' (D. Bell, *Daughters of the Dreaming* (Melbourne and Sydney 1983), p 47f). In *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 272, Blackburn J found that 'the clan's right to exclude others is not apparent...Again, the greatest extent to which this right can be said to exist is in the realm of ritual. But it was never suggested that ritual rules ever excluded members of other clans completely from clan territory; the exclusion was only from sites.'

<sup>121</sup> 'Responsibility to look after country has always been an imperative for Aboriginal people' (House of Representatives, Standing Committee on Aboriginal Affairs, *Return to Country: The Aboriginal Homelands Movement in Australia* (Canberra 1987), para 1.20). For the range of meaning invested in the phrase 'looking after country', see G. Neate, *Looking After Country*, (1993) 16 UNSWLJ 161, 189 et seq.

<sup>122</sup> G. Neate, (1993) 16 UNSWLJ 161, 194 ('The relationship is reciprocal...Just as they know and care for their country, they believe that country knows and cares for its people').

<sup>123</sup> (1982) 158 CLR 327, 357f. See also *Gerhardy v Brown* (1985) 159 CLR 70, 149 per Deane J.

responsibility for the site and for the land.' Aboriginal ownership, said Brennan J, is 'primarily a spiritual affair rather than a bundle of rights.' Paradoxically, it is the performance of an amalgam of symbolic, organic and ritual duties which, for the Aboriginal, constitutes the closest approximation to 'land rights' known to his community. Right and responsibility emerge not only as correlatives but as deeply interpenetrating images of the 'proper' association with the resources of the earth. Here 'property' has more in common with 'propriety' than entitlement<sup>124</sup> and the notion of 'right' has more to do with perceptions of 'rightness' than with any understanding of enforceable exclusory title.

It was in the context of this intensely symbiotic relationship with the natural environment that in *Milirrpum* Blackburn J found that the Aboriginals had 'a more cogent feeling of obligation to the land than of ownership of it'. It was, he declared, 'easier...to say that the clan belongs to the land than that the land belongs to the clan'.<sup>125</sup> It thus followed, with brutal clarity, that native claims were incompatible with, were not accommodated within, and were indeed extinguished by, the common law system of property brought by the white settler two hundred years earlier. The Aboriginal relationship with land being essentially religious,<sup>126</sup> the spiritual or ritual evocation of The Dreaming could simply not be comprehended within the impoverished common law notion of property.<sup>127</sup>

It has taken virtually two centuries for the Australian conscience to catch up with the inequity that customary native title throughout Australia (as indeed elsewhere in the New World) should be wholly swallowed up by the process of colonisation.<sup>128</sup> During the 1970s and 1980s suggestions began to emerge -- and the language is significant -- that government owed some fiduciary obligation to the indigenous peoples, even that there was an element of trust (public or otherwise) in the relationship between government and Aboriginal in respect of native land.<sup>129</sup> This infusion of equitable terminology was given significant support by Canadian courts which slowly recognised that native Indians might

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<sup>124</sup> Semantically 'property' connotes the condition of a resource as being 'proper' to a particular person (see Gray, *Elements of Land Law* (1st edn, London 1987), p 8).

<sup>125</sup> *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 270f.

<sup>126</sup> See explicit recognition of this point in *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, 167 per Blackburn J; *R v Toohey*; *Ex parte Meneling Station Pty Ltd* (1982) 158 CLR 327, 356 per Brennan J.

<sup>127</sup> See *Mabo v Queensland (No 2)* (1992) 175 CLR 1, 178 per Toohey J.

<sup>128</sup> It was not until the decision of the High Court in 1992 in *Mabo v Queensland (No 2)* that Australian courts fully recognised that the historic assumption of Crown sovereignty could not, in itself, have made the indigenous inhabitants of Australia mere 'trespassers on the land on which they and their ancestors had lived' ((1992) 175 CLR 1, 184 per Toohey J), thereby converting them into 'intruders in their own homes and mendicants for a place to live' ((1992) 175 CLR 1, 29 per Brennan J). 40,000 years of prior possession must surely count for something.

<sup>129</sup> Such notions can ultimately be traced to the decision of the United States Supreme Court in *Cherokee Nation v Georgia* (1831) 5 Pet 1, 8 L Ed 1.

collectively have a beneficial interest in their reserved lands.<sup>130</sup> In *Guerin v The Queen*<sup>131</sup> Dickson J considered there to be 'no real conflict between the cases which characterise Indian title as a beneficial interest of some sort, and those which characterise it a personal, usufructuary right. Any apparent inconsistency derives from the fact that in describing what constitutes a unique interest in land the courts have almost inevitably found themselves applying a somewhat inappropriate terminology drawn from general property law.'<sup>132</sup> In the view of Dickson J and the Supreme Court, the sui generis character of native title, hovering between 'beneficial ownership' and 'personal right', was capable of giving rise to a 'distinctive fiduciary obligation on the part of the Crown to deal with land for the benefit of the...Indians.'<sup>133</sup>

Precisely this fiduciary theme has been taken up in Australia, most famously in the controversial ruling of the High Court in 1992 in the second *Mabo* case (*Mabo v Queensland (No 2)*)<sup>134</sup>. Here a strong majority in the High Court conceded that Australia, on first colonisation, was not *terra nullius*, and that the settlers' law of property must recognise pre-existing customary native rights in respect of the land.<sup>135</sup> Brennan J had earlier spoken of the 'sadly familiar' phenomenon of 'landless, rootless Aboriginal peoples'.<sup>136</sup> In dealing in *Mabo (No 2)* with the land rights of the Meriam people of the Murray Islands, Brennan J forthrightly condemned as 'discriminatory denigration' the theory that indigenous inhabitants of a 'settled' colony lost all 'proprietary interest' in the land which they continued to occupy.<sup>137</sup> Brennan J was therefore prepared to regard customary claims as comprising a 'proprietary community title' which could be recognised as 'a burden on the Crown's radical title when the Crown acquires sovereignty over that territory.'<sup>138</sup> According to Brennan J it was 'only the fallacy of

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<sup>130</sup> See *Cardinal v Attorney-General of Alberta* (1974) 40 DLR (3d) 553, 568ff per Laskin J (dissenting); *Guerin v The Queen* (1984) 13 DLR (4th) 321, 338; *Delgamuukw v The Queen in Right of British Columbia* (1993) 104 DLR (4th) 470, 495h. See also D.M. Johnston, *A Theory of Crown Trust towards Aboriginal Peoples*, (1986) 18 Ottawa L Rev 307.

<sup>131</sup> (1984) 13 DLR (4th) 321, 339.

<sup>132</sup> See also *Delgamuukw v The Queen in Right of British Columbia* (1993) 104 DLR (4th) 470, 494f-4495b, 511a-b per Macfarlane JA, 572f, 573e per Wallace JA, 650c-e per Lambert JA.

<sup>133</sup> (1984) 13 DLR (4th) 321, 339. Dickson J doubted whether, in the strictest sense, this fiduciary obligation gave rise to a trust, but was quite clear that 'the obligation is trust-like in character' (ibid, 342). See also *R v Sparrow* (1990) 70 DLR (4th) 385, 408; *Delgamuukw v The Queen in Right of British Columbia* (1991) 79 DLR (4th) 185, 198, 482 per McEachern CJ.

<sup>134</sup> (1992) 175 CLR 1.

<sup>135</sup> (1992) 175 CLR 1, 48ff, 69 per Brennan J, 90ff per Deane and Gaudron JJ, 183 per Toohey J.

<sup>136</sup> See *Gerhardy v Brown* (1985) 159 CLR 70, 136.

<sup>137</sup> (1992) 175 CLR 1, 40.

<sup>138</sup> (1992) 175 CLR 1, 51. Brennan J (with whose reasons Mason CJ and McHugh J expressly agreed (1992) 175 CLR 1, 15)) considered that it might be 'confusing to describe the title of the Meriam people as conferring "ownership", a term which connotes an estate in fee simple or at least an



equating sovereignty and beneficial ownership of land that gives rise to the notion that native title is extinguished by the acquisition of sovereignty.<sup>139</sup> Some form of beneficial ownership thus remained vested in the indigenous peoples at least in relation to lands occupied by them at the date of the Crown's assumption of sovereign control.<sup>140</sup>

In *Mabo's* case Toohey J, another member of the High Court majority, was happy to adopt the reasoning in the parallel Canadian case law in pointing to the existence of a fiduciary obligation in the Crown to protect the integrity of native title.<sup>141</sup> Toohey J openly admitted that, in the present context, recognition of a fiduciary relationship 'may be tantamount to saying that the legal interest in traditional rights is in the Crown whereas the beneficial interest in the rights is in the indigenous owners'.<sup>142</sup> Although viewing as 'fruitless' and 'unnecessarily complex' any further inquiry as to whether native title is 'personal' or 'proprietary',<sup>143</sup> Toohey J had no doubt that, for present purposes, 'the kind of fiduciary obligation imposed on the Crown is that of a constructive trustee'.<sup>144</sup> Deane and Gaudron JJ likewise recognised the inappropriateness of forcing native title within conventional common law classifications,<sup>145</sup> but acknowledged nonetheless that the rights of occupation or use conferred by native title 'can themselves constitute valuable property'.<sup>146</sup> Any legislative extinguishment of such rights would thus comprise an 'expropriation of property'<sup>147</sup>; and any actual or threatened interference with the rights would normally 'attract the protection of equitable remedies' such as the 'imposition of a

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estate of freehold.' Brennan J nevertheless analysed native title, in essentially proprietary terms, as being 'effective...as against the whole world unless the State, in valid exercise of its legislative or executive power, extinguishes the title' ((1992) 175 CLR 1, 75).

<sup>139</sup> (1992) 175 CLR 1, 51.

<sup>140</sup> Only if the land had been 'desert and uninhabited, truly a terra nullius', would the Crown's assumption of sovereignty have conferred on the Crown not merely a 'radical, ultimate or final title', but also 'an absolute beneficial title' to the land ((1992) 175 CLR 1, 48 per Brennan J). See *Bl Comm*, Vol II, p 7; *Attorney-General (NSW) v Brown* (1847) 1 Legge 312, 319, 2 SCR App 30, 35 per Stephen CJ.

<sup>141</sup> (1992) 175 CLR 1, 200f.

<sup>142</sup> (1992) 175 CLR 1, 203.

<sup>143</sup> (1992) 175 CLR 1, 195.

<sup>144</sup> (1992) 175 CLR 1, 203. See also *Guerin v The Queen* (1984) 13 DLR (4th) 321, 334 per Dickson J.

<sup>145</sup> Deane and Gaudron JJ regarded the rights conferred by native title as merely 'personal', in the sense that such rights were not 'assignable outside the overall native system' ((1992) 175 CLR 1, 110), but were otherwise content to accept native title as 'sui generis or unique' (ibid, 89).

<sup>146</sup> (1992) 175 CLR 1, 113.

<sup>147</sup> (1992) 175 CLR 1, 111.

remedial constructive trust framed to reflect the incidents and limitations of the rights under the common law native title.<sup>148</sup>

In so far as 'equitable property is commensurate with equitable relief'<sup>149</sup> -- a theme much emphasised in Australian jurisprudence<sup>150</sup> -- the approach taken by the High Court majority in *Mabo (No 2)* clearly endorsed the recognition of a regime of beneficial entitlement as a means of securing access-oriented rights for Aboriginal peoples. Only by accommodating native title -- however approximately -- within the white man's notion of property could Australia be seen to live up to its international human rights obligations.<sup>151</sup> Only by confirming the right of the indigenous peoples of Australia to reconstruct their traditional relationship with their country could modern law restore the 'everlastingness of spirit' enjoyed by these people in earlier and happier times and buttress their sense of 'spiritual, cultural and social identity'<sup>152</sup> within the commonwealth which, in every sense, is Australia.

In Australia the eighteen months following *Mabo (No 2)* saw a rapid, and at times frenzied, public discussion of the High Court's ruling.<sup>153</sup> This debate culminated on 24 December 1993 in the enactment by the Commonwealth Parliament of the Native Title Act 1993.<sup>154</sup> Containing 253 sections, this legislation is complex and comprehensive in its attempt to institute a new regime for native title alongside existing proprietary and commercial rights of a more conventional kind. The Act confirms that native title is to be 'recognised, and protected' in accordance with the terms of the 1993 Act.<sup>155</sup> The legislation sets up a National Native Title Tribunal to determine the validity and scope of claims of native title<sup>156</sup> and a Native Title Registrar to maintain a public register of claims and decisions on

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<sup>148</sup> (1992) 175 CLR 1, 113. It is significant that native title rights were regarded by Deane and Gaudron JJ as partaking sufficiently of the character of rights of equitable property that the 'rules relating to requirements of certainty and present entitlement or precluding remoteness of vesting may need to be adapted or excluded to the extent necessary to enable the protection of the rights under the native title.'

<sup>149</sup> *Hoysted v Federal Commissioner of Taxation* (1920) 27 CLR 400, 423 per Isaacs J.

<sup>150</sup> See *Trustees, Executors and Agency Co Ltd v Acting Federal Commissioner of Taxation* (1917) 23 CLR 576, 583; *Patton v Corin* (1987) 13 NSWLR 10, 13G-14A per McLelland J; *Stern v McArthur* (1988) 165 CLR 489, 522f per Deane and Dawson JJ. See also *In re Cunliffe-Owen* [1953] Ch 545, 557 per Evershed MR.

<sup>151</sup> (1992) 175 CLR 1, 42. See Preamble to Native Title Act 1993. See also G. Neate, (1993) 16 UNSWLJ 161, 163 et seq.

<sup>152</sup> See *Gerhardy v Brown* (1985) 159 CLR 70, 136 per Brennan J.

<sup>153</sup> For reference to the 'hysteria and even paranoia' generated by *Mabo (No 2)*, see G. Nettheim, (1993) 16 UNSWLJ 1, 2.

<sup>154</sup> Act No 110 of 1993.

<sup>155</sup> Native Title Act 1993, s 10.

<sup>156</sup> Native Title Act 1993, s 107.

claims relating to native title.<sup>157</sup> Interestingly, in view of our discussion of the links between native title and beneficial ownership, the new Act contains a provision which resembles an almost pure application of the trust principle contained in *Saunders v Vautier*.<sup>158</sup> Section 21 allows native title holders, if they so wish, to join together in an agreement to surrender their native title rights to the relevant government on any lawful terms which they may stipulate.<sup>159</sup> In particular section 21(3) indicates that the condition of or consideration for this surrender may be the grant of a freehold estate or such statutory or other interest in the land 'that the native title holders may choose to accept'. Native title holders may, in effect, direct an exchange of their old Australian title for a new Australian one, which, as indicated in the explanatory memoranda accompanying the legislation, 'would facilitate their ability to put the land to commercial purposes'.<sup>160</sup> At this point, of course, the exclusory dimension of property will have begun to dominate over the competing dimension of property as a title to access.

### **(3) *Equitable property in the natural environment***

For my third and final example I turn to the natural environment. Recent years have plainly witnessed an accentuation of the importance and urgency of global environmental issues. Indeed it is in the context of this emerging range of concern that the twin themes of 'equitable property' in quasi-public places and 'equitable property' in traditional country are finally, and perhaps strangely, brought together. The juxtaposition of these themes lends an unexpected relevance to the way in which legal regimes across the world are nowadays coming to recognise, on behalf of the individual citizen, a significant 'equitable property' in the quality and conservation of the natural environment.<sup>161</sup> Here, perhaps even more clearly than elsewhere, the oscillating ambivalence of the 'property' notion is beginning to ensure that 'property' is not a mere mode of empowering exclusion, but is rather a means of empowering access.<sup>162</sup> Furthermore the evolution of a new regime of environmental 'property' not only confirms a relatively modern dimension of access to the goods of life, but also casts an intense

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<sup>157</sup> Native Title Act 1993, ss 95 et seq.

<sup>158</sup> (1841) 4 Beav 115, 116, 49 ER 282; Cr & Ph 240, 249, 41 ER 482, 485.

<sup>159</sup> Native Title Act 1993, s 21(2).

<sup>160</sup> *Mabo: Outline of Proposed Legislation on Native Title* (Commonwealth of Australia, September 1993), para 29. See also Parliament of the Commonwealth of Australia, House of Representatives, *Native Title Bill 1993: Explanatory Memorandum*, Part A (1993), p 6.

<sup>161</sup> For a philosophical argument that public goods (eg clean air) can be the subject of individual rights, see J. Waldron, *Can communal goods be human rights?*, 28 Arch Europ Sociol 296, 308 (1987).

<sup>162</sup> Gray, *The Ambivalence of Property*, in *Threats without Enemies* (1993), p 157 et seq. For a contention that traditional philosophical justifications of private property are equally supportive of unconsented public rights of access to private property in land, see W.N.R. Lucy and F.R. Barker, *Justifying Property and Justifying Access*, (1993) 6 Can Jnl of Law and Juris 287.

contemporary emphasis upon the interrelation of right and responsibility as inextricable components of our current conceptualisations of 'property'.

In the elaboration of this new equity in the biosphere, the vital ecological resources of the earth are increasingly seen as governed by a trust for the preservation of environmental quality under conditions of reasonable shared access for all citizens. Meaningful reference can thus begin to be made to the collective beneficial rights of the generalised public in respect of strategically important environmental assets. But -- just as with the proprietary title so recently recognised on behalf of the Aboriginal clan -- the essential constitutive feature of such beneficial rights is the pervasive awareness of an overriding duty to 'look after country'. In this modern emanation of beneficial title the concepts of right and responsibility are inseparably fused, thereby confirming the vacuity of any supposition that 'property' is ever naturally or intrinsically free of 'obligation'.<sup>163</sup> The social responsibility of caring for land is a fundamental, central and inescapable component of real entitlement.<sup>164</sup> It should never be overlooked that, in the law of the new property, rights of access -- when asserted in derogation of rights of exclusion -- come at a substantial price measured in the performance of social duty.

There may, of course, be some who detect unacceptable novelty, if not outright heresy, in the adaptation of trust doctrine towards the fashioning of an 'equitable property' in the environment. Such sceptics might do well to trace the steady intrusion of concepts of 'stewardship' into mainstream property discourse in the United States during the last quarter century.<sup>165</sup> Throughout this period the international lawyers have talked shamelessly, for instance, of the existence of a global or planetary trust on behalf of future generations.<sup>166</sup> Professor Edith Brown Weiss, perhaps the foremost proponent of this form of 'intergenerational equity', has argued that each generation is burdened by an obligation

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<sup>163</sup> See *Property in Thin Air*, [1991] Cambridge LJ 252, 297 et seq. For evidence of the marked resurgence of 'responsibility' as a key concept in property law discourse, see eg G.S. Alexander, *Takings and the Post-Modern Dialectic of Property*, 9 Const Comm 259, 260 et seq (1992).

<sup>164</sup> This much has always been apparent in the long history of the law relating to the concept of 'waste'. There is also a certain irony in the fact the historic abolition of the incidents of feudal tenure, by freeing land from archaic and obsolete obligations, contributed towards a more general dissociation of the notions of right and responsibility in landholding. See J.E. Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, (1986) U Ill L Rev 1, 39.

<sup>165</sup> See V.J. Yannacone, *Property And Stewardship -- Private Property Plus Public Interest Equals Social Property*, 23 S Dak L Rev 71 (1978); L.K. Caldwell, *Land and the Law: Problems in Legal Philosophy*, (1986) U Ill L Rev 319, 325 et seq; J.P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 Env'tl L 735, 748 et seq (1992-93).

<sup>166</sup> The Declaration of the United Nations Conference on the Human Environment (the Stockholm Declaration, 16 June 1972) stated, in Principle 1, that humankind 'bears a solemn responsibility to protect and improve the environment for present and future generations' (see 11 ILM 1416, 1417f (1972)). Principle 2 required that the 'natural resources of the earth including the air, water, land, flora and fauna and especially representative samples of natural ecosystems must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate.'

of trusteeship to conserve the quality and diversity of the natural and cultural resource base for future generations.<sup>167</sup> With some dexterity Professor Brown Weiss has elaborated the notion of trust in relation to environmental resources, detailing with specificity such matters as the nature of the trust corpus, the purposes of the trust and the definition of the relevant beneficiaries.<sup>168</sup>

But talk of an intergenerational equity availing future beneficiaries will inevitably strike some as mere metaphor. For those left unimpressed by the rhetoric of the international lawyers, it may be more compelling to examine the possibility of an environmental trust which confers *contemporary* benefits on *living* beneficiaries. In 1972 Christopher Stone posed his famous question: 'Should trees have standing?'<sup>169</sup> Stone's argument, that the jural rights of natural objects can be represented or defended by a next friend or guardian ad litem (ie a concerned environmentalist), was to bear a fruit which he could hardly have dared to expect.<sup>170</sup> Within days of the publication of Stone's historic contribution, Justice William O. Douglas delivered his powerfully dissenting (and highly influential) opinion in the United States Supreme Court in *Sierra Club v Morton*.<sup>171</sup>

In *Sierra Club v Morton* the majority in the Supreme Court denied<sup>172</sup> to the Sierra Club (a venerable wilderness conservation society) the requisite legal standing to seek orders restraining the destructive

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<sup>167</sup> *The Planetary Trust: Conservation and Intergenerational Equity*, 11 Ecology LQ 495, 502 et seq (1983-84). See generally *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity* (New York 1989). It has been recognised that in other contexts the rights of future generations have always controlled the validity of present assertions of private property. Richard Lazarus has observed, for instance, that '[p]roperty law has long reflected the need to protect the future from the dead hand of the past' (*Debunking Environmental Feudalism: Promoting the Individual through Collective Pursuit of Environmental Quality*, 77 Iowa L Rev 1739, 1761 (1992)).

<sup>168</sup> It is likely (and also fortunate) that the charitable nature of such a trust eliminates many of the technical problems which would otherwise arise. See, however, D. Parfit, 'On Doing the Best for Our Children', in M. Bayles (ed), *Ethics and Population* (1976), p 100; A. D'Amato, *Do we owe A Duty To Future Generations to preserve the Global Environment?* (1990) 84 AJIL 190.

<sup>169</sup> *Should Trees have Standing? -- Towards Legal Rights for Natural Objects*, 45 S Cal L Rev 450 (1972).

<sup>170</sup> See C.D. Stone, *Should Trees have Standing? Revisited: How far will law and morals reach? A pluralist perspective*, 59 S Cal L Rev 1, 2 (1985).

<sup>171</sup> 405 US 727, 31 L Ed 2d 636 (1972). For an environmentally sensitive precursor, see *Gould v Greylock Reservation Commission*, 215 NE2d 114, 121 et seq (1966).

<sup>172</sup> The denial was based solely on the Sierra Club's failure to plead any actual injury on the part of its members. Significantly the Court drew the plaintiff's attention to the facility for amending its complaint (405 US 727, 735, 740, 31 L Ed 2d 636, 643, 646). The Court emphasised that it was open to specific club members to allege individualised injury if they 'have used and continue to use the area for recreational purposes' and could plead, on their own behalf, that 'the aesthetic and recreational values of the area' would be diminished by the proposed development.

commercial development of the Mineral King Valley in the Sierra Nevada of Northern California.<sup>173</sup> In his dissent Justice Douglas not only endorsed Stone's argument that environmental objects should have standing to 'sue for their own preservation'.<sup>174</sup> He adumbrated the beginnings of a public trust doctrine specifically relevant to ecologically significant resources,<sup>175</sup> and concluded on this basis that 'the voice of the existing beneficiaries of these environmental wonders should be heard'.<sup>176</sup> Justice Douglas favoured the recognition of standing in those persons who have a 'meaningful' or 'intimate' relation with 'the inanimate object about to be injured, polluted, or otherwise despoiled.' In respect of the Mineral King Valley, those who 'hike it, fish it, hunt it, camp in it, frequent it, or visit it merely to sit in solitude and wonderment' were 'its legitimate spokesmen' and 'must be able to speak for [its] values'.<sup>177</sup> Only in this way could all the forms of life represented by the endangered environmental resource be enabled to 'stand before the court -- the pileated woodpecker as well as the coyote and bear, the lemmings as well as the trout in the streams.' Only thus could the court avert the risk that 'priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake)' would be 'forever lost or...so transformed as to be reduced to the eventual rubble of our urban environment'.<sup>178</sup> In his own way Justice Douglas was another remarkable exponent of an American wilderness tradition which extends richly from Audubon and Thoreau to Aldo Leopold and beyond.<sup>179</sup>

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<sup>173</sup> Walt Disney Enterprises Inc had won a competition (run by the United States Forest Service) to design and operate a winter and summer recreational resort in the Mineral King Valley, comprising motels, 13 restaurants, swimming pools, a nine-mile access highway, a cog-assisted railway and ski resort complex. For Justice Douglas this ghastly US\$35 million development, estimated to accommodate 14,000 visitors daily, clearly threatened to 'plow under all the aesthetic wonders of this beautiful land' (405 US 727, 759, 31 L Ed 2d 636, 656). Justice Douglas pointed out that the 'mammoth project' would multiply the visitor rate in the valley by a factor in excess of 70 (ibid, 743, 648), and Justice Blackmun questioned whether the expected vehicle frequency of one car every six seconds along the valley floor could possibly be 'the way we perpetuate the wilderness and its beauty, solitude and quiet' (ibid, 759, 656).

<sup>174</sup> Noting that inanimate entities such as ships and corporations are sometimes parties in litigation, Justice Douglas would have allowed environmental issues 'to be litigated...in the name of the inanimate object about to be despoiled, defaced, or invaded by roads and bulldozers and where injury is the subject of public outrage' (405 US 727, 741, 31 L Ed 2d 636, 647).

<sup>175</sup> See eg *National Audubon Society v Superior Court of Alpine County*, 658 P2d 709, 719 (1983), where, in the context of the Mono Lake controversy, the Supreme Court of California expressly found the public trust doctrine applicable to 'the scenic views of the lake and its shore, the purity of the air, and the use of the lake for nesting and feeding by birds.'

<sup>176</sup> 405 US 727, 750, 31 L Ed 2d 636, 651.

<sup>177</sup> 405 US 727, 743f, 31 L Ed 2d 636, 648f.

<sup>178</sup> Such was the eventual public outcry against the proposed devastation of the Mineral King Valley that Congress prohibited the project in 1978 by including the Valley within the Sequoia National Park (National Parks and Recreation Act 1978, s 314 (16 USCA s 45f (St Paul, Minn, 1992))).

<sup>179</sup> See R. Nash, *Wilderness and the American Mind* (New Haven and London, 1967), p 84 et seq.

Now no-one would, I think, pretend that the wilderness ethic so eloquently expounded by Justice Douglas in the *Sierra Club* case immediately generated unqualified acceptance of the notion of public equitable ownership of environmental resources. Yet his judgment resonated with coded articulations of the essential core or inner meaning of 'property'. These subliminal 'property' messages emerged in at least two forms.

*First*, in the same way in which traditional Aboriginal ties to land have now been recognised as constitutive of beneficial rights, Justice Douglas was prepared to accept that an intimate knowledge of wild country is creative of a certain beneficiary status in relation to that land. Justice Douglas knew the writings of John Muir<sup>180</sup> and would, of course, have been familiar with Muir's assertion, made a century earlier, that 'the true ownership of the wilderness belongs in the highest degree to those who love it most.'<sup>181</sup> Douglas was no stranger to the idea that immersion of the human spirit in the fierce majesty of wild places causes the land to 'belong' in some deep sense to the adventurer; his own extra-judicial writings gave expression to exactly such thoughts.<sup>182</sup> In this context, as elsewhere, habitual user generates its own form of title.

*Second*, Justice Douglas understood well that the most important 'property' in any resource is the right to participate in the selective exploitation or 'prioritisation' of its various forms of value. To be recognised as having authority to 'speak for' an asset -- to have a dispositive voice or strategic vote in determining its mode of utilisation -- is, in itself, to command an intensely significant component of 'property' in the resource.<sup>183</sup> It was ultimately this factor which lent proprietary impact to the argument about standing in *Sierra Club v Morton*, adding piquancy to Justice Douglas's assertion that where the 'inarticulate members of the ecological group cannot speak...those people who have so frequented the place as to know its values and wonders will be able to speak for the entire ecological community.'<sup>184</sup> In this respect Justice Douglas came close to describing the ultimate beneficial prerogative of mature persons of right mind to join together in predicating the future disposition of their trust interests.

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<sup>180</sup> For evidence of his deep acquaintance with Muir's journals and other publications, see W.O. Douglas, *Of Men And Mountains* (London 1951), pp 112, 203. See also J.M. Caragher, *The Wilderness Ethic of Justice William O. Douglas*, (1986) U Ill L Rev 645.

<sup>181</sup> R. Engberg and D. Wesling, *John Muir: To Yosemite And Beyond -- Writings from the Years 1863 to 1875* (Madison, Wisconsin 1980), p 8.

<sup>182</sup> 'When one stands on Darling Mountain, he is not remote and apart from the wilderness; he is an intimate part of it...These peaks and meadows were made for man, and man for them. They are man's habitat...Man must explore them and come to know them. They belong to him...' (W.O. Douglas, *Of Men And Mountains*, p 90). Douglas did, however, recognise that the resources of the wilderness 'will eventually reclaim [man] and rule beyond his day as they ruled long before he appeared on the earth...'

<sup>183</sup> 'If property ownership consists of the right to control use, the Sierra Club and the Wilderness Society are already partners with the government in owning wilderness areas' (see R.H. Nelson, (1986) U Ill L Rev 361, 371).

<sup>184</sup> 405 US 727, 752, 31 L Ed 2d 636, 653.

In the America of the late 1960s and early 1970s Justice Douglas's *Sierra Club* dissent coincided with, and doubtless contributed towards, a fresh realisation that all property rights are necessarily limited by social values and preferences.<sup>185</sup> Professor Richard Powell had already spoken of 'a playing-down of absolute rights and a playing-up of social concern as to the use of property'.<sup>186</sup> Explicitly adopting Powell's language, the Supreme Court of New Jersey observed in 1971 that the viewpoint that 'he who owns may do as he pleases with what he owns' had given way to a perception which 'hesitatingly embodies an ingredient of stewardship'.<sup>187</sup> Thus, for Mosk J in *Agricultural Labor Relations Board v Superior Court of Tulare County*,<sup>188</sup> property rights must be 'redefined in response to a swelling demand that ownership be responsible and responsive to the needs of the social whole'.<sup>189</sup> Donald Large was able to point in 1974 to 'a growing attitude that there exists an inherent public right in property that transcends the technicalities of title'.<sup>190</sup> The way was amply prepared for a broader endorsement of the philosophy of environmental trust.

In more recent years a number of related factors have conduced in the United States to a gathering recognition of the general social stake in property.<sup>191</sup> It has even become possible to suggest that all rights of land ownership should be commuted forthwith to 'socially derived privileges' of use.<sup>192</sup> Indeed,

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<sup>185</sup> This recognition was itself far from novel. Drawing strength from an essentially Jeffersonian vision of private ownership, American courts have long accepted that 'all property...is held under the implied obligation that the owner's use of it shall not be injurious to the community' (*Mugler v Kansas*, 123 US 623, 665, 31 L Ed 205, 211 per Harlan J (1887)). Accordingly the US Supreme Court had no difficulty in 1934 in postulating that 'neither property rights nor contract rights are absolute...Equally fundamental with the private right is that of the public to regulate it in the common interest' (*Nebbia v New York*, 291 US 502, 523, 78 L Ed 940, 948f (1934)). The approach defined in *Nebbia* was later to play a significant role in guiding the US Supreme Court to its decision in *PruneYard Shopping Center v Robins*, 447 US 74, 84f, 64 L Ed 2d 741, 754 (1980).

<sup>186</sup> R.R.B. Powell, *The Relationship between Property Rights and Civil Rights*, 15 Hastings LJ 135, 149 (1963-64). See Professor J.E. Cribbet's assertion that 'traditional property rights must now be seen through the prism of an expanded public interest in land use' ((1986) U Ill L Rev 1, 25).

<sup>187</sup> *State v Shack*, 277 A2d 369, 372 (1971).

<sup>188</sup> 128 Cal Rptr 183, 190 (1976).

<sup>189</sup> Mosk J emphasised that property rights 'cannot be used...to cloak conduct which adversely affects the health, the safety, the morals, or the welfare of others'.

<sup>190</sup> D.W. Large, *This Land is Whose Land? Changing Concepts of Land as Property*, (1973) Wisconsin L Rev 1039, 1074. See eg *Marks v Whitney*, 491 P2d 374 (1971).

<sup>191</sup> See J.E. Cribbet, (1986) U Ill L Rev 1, 40.

<sup>192</sup> L.K. Caldwell, *Rights of Ownership or Rights of Use? -- The Need for a New Conceptual Basis for Land Use Policy*, 15 William and Mary Law Rev 759, 766 et seq (1973-74)). See also E.T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 Stan L Rev 1529, 1530 et seq (1988-89).



with the proliferation of zoning law and the remorseless intrusion of regulation following the National Environmental Policy Act 1969,<sup>193</sup> the fee simple estate in land may already have been stripped back to a mere usufructuary title heavily conditioned by the public interest.<sup>194</sup> Such developments are readily understood as exemplifying a 'principle of stewardship, under which ownership or possession of land is viewed as a trust, with attendant obligations to future generations as well as to the present.'<sup>195</sup> The steady infiltration of this notion of stewardship inevitably impresses on land tenure a range of social obligations which effectively create a public beneficial entitlement in respect of ecologically critical assets.<sup>196</sup> Meanwhile the advent of this new civic property in strategic environmental resources merges quite harmoniously with other contemporary American social and intellectual themes. The community-oriented aspect of the new environmental property confirms and complements the insights of the ecofeminist movement<sup>197</sup> and also blends easily with the communitarian vision of property advanced in much recent economic and philosophic theory.<sup>198</sup> Additional intellectual sustenance for the current socialisation of property relationships can be derived from the modern rediscovery of the 'land ethic' first proposed by Aldo Leopold over four decades ago.<sup>199</sup> Leopold's call for the adoption of a cooperative 'land ethic' was aimed at enlarging 'the boundaries of the community to include soils, waters, plants, and animals, or collectively: the land.'<sup>200</sup> For Leopold it had become imperative to bring about 'the extension of the social conscience from people to land'.<sup>201</sup>

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<sup>193</sup> 42 USCA ss 4321-4335 (1977).

<sup>194</sup> According to James Karp, all land is 'owned subject to the implied servitude of the police power' (J.P. Karp, 23 Env'tl L 735, 750 (1992-93)). For a recent review of relevant American environmental legislation which effectively converts real rights to mere usufructs, see R.J. Lazarus, 77 Iowa L Rev 1739, 1750 (1992).

<sup>195</sup> L.K. Caldwell, 15 William and Mary Law Rev 759, 766. Cf J.E. Cribbet, (1986) U Ill L Rev 1, 38 ('All land would be a public trust...'). See also D.B. Hunter, *An Ecological Perspective on Property: A Call for Judicial Protection of the Public's Interest in Environmentally Critical Resources*, 12 Harv Env'tl L Rev 311, 319 (1988).

<sup>196</sup> Alison Rieser has pointed to the way in which federal statutes have 'codified the idea that the public has property rights in the non-commodity values of natural resources' (see *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 Harv Env'tl L Rev 393, 432 (1991)).

<sup>197</sup> See eg E. Diamond and G. Orenstein (ed), *Reweaving The World: The Emergence Of Ecofeminism* (1990); R. Delgado, 44 Vand L Rev 1209, 1222 (1991).

<sup>198</sup> See eg A. Etzioni, *The Moral Dimension: Towards A New Economics* (New York 1990), p 237 et seq; C.M. Rose, 'Property as Wealth, Property as Propriety', in J.W. Chapman (ed), *Nomos XXXIII: Compensatory Justice* (New York and London 1991), p 240; G.S. Alexander, 9 Const Comm 259, 260 et seq (1992).

<sup>199</sup> See 'The Land Ethic', in A. Leopold, *A Sand County Almanac* (New York and Oxford 1987 (first published 1949)).

<sup>200</sup> Ibid, p 204.

<sup>201</sup> Ibid, p 209.

Civic claims in respect of the environment have received further significant enforcement in the continuing evolution of the American version of historic doctrines of 'public trust'. In its original formulation the American public trust doctrine confirmed merely the state ownership of navigable waters and tidelands on behalf of all citizens.<sup>202</sup> More recently courts and state agencies have seemed willing to oversee important extensions of both the character and the coverage of the doctrine.<sup>203</sup> It is now clear that the purposes of the public trust doctrine extend no less to the protection of environmental and recreational values than to the preservation of commercial navigation and fishery.<sup>204</sup> It is increasingly apparent that the ultimate role of the public trust doctrine may lie, not in its traditional function as justifying state taking, but rather in promoting a public beneficial ownership which is opposable against government itself.<sup>205</sup> Even more radically there is now strong reason to believe that the doctrine of public trust can relate to objects far beyond its initial scope,<sup>206</sup> thereby extending to such resources as wild country and parkland,<sup>207</sup> wildlife,<sup>208</sup> and perhaps even areas of general recreational utility<sup>209</sup> or historic interest.<sup>210</sup>

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<sup>202</sup> See J.L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich L Rev 471 (1969-70); C.F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U C Davis L Rev 269 (1980-81).

<sup>203</sup> See A. Rieser, 15 Harv Envtl L Rev 393 (1991).

<sup>204</sup> *Marks v Whitney*, 491 P2d 374, 380 (1971); *National Audubon Society v Superior Court of Alpine County*, 658 P2d 709, 712, 719 (1983).

<sup>205</sup> See R. Ausness, *Water Rights, The Public Trust Doctrine and the Protection of Instream Uses*, (1986) U Ill L Rev 407, 435 (The doctrine 'regards the public, not the government, as the beneficial owner of trust resources'). See also the insistence of the Supreme Court of California in *National Audubon Society v Superior Court of Alpine County*, 658 P2d 709, 724 (1983) that the public trust doctrine is 'more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands'.

<sup>206</sup> This possibility was originally indicated by J.L. Sax, 68 Mich L Rev 471, 556 et seq (1969-70). See eg *Matthews and Van Ness v Bay Head Improvement Ass'n*, 471 A2d 355, 365ff (1984).

<sup>207</sup> *Paepcke v Public Building Commission of Chicago*, 263 NE2d 11, 18 (1970).

<sup>208</sup> *Wade v Kramer*, 459 NE2d 1025, 1027ff (1984). See G.D. Myers, *Variations on a Theme: Expanding the Public Trust Doctrine to Include Protection of Wildlife*, 19 Envtl L 723 (1989).

<sup>209</sup> *Van Ness v Borough of Deal*, 393 A2d 571, 574 (1978). See E. Pitts, *The Public Trust Doctrine: A Tool for ensuring Continued Public Use of Oregon Beaches*, 22 Envtl L 731 (1991-92). See also *State ex rel Thornton v Hay*, 462 P2d 671 (1969); M.C. Blumm, 24 U San Francisco L Rev 385, 397 (1989-90).

<sup>210</sup> *Commonwealth v National Gettysburg Battlefield Tower, Inc*, 311 A2d 588, 591 (1973).

The reinvigorated notion of public trust has clearly become a vital weapon in the battle for environmental protection currently being waged in the United States courts.<sup>211</sup> As Alison Rieser has indicated, the theory of public trust now provides an immensely significant doctrinal vehicle for subordinating both private and government ownership to a 'property interest held by the "unorganised public" in the ecological integrity of natural resources.'<sup>212</sup> Similarly Richard Lazarus has predicted that the likely outcome of modern environmental legislation will be the creation of 'modified property rights' for the citizen in many forms of natural resource not hitherto regarded as susceptible to communal proprietary claims.<sup>213</sup> Even in the vexed area of American 'takings' jurisprudence some commentators have begun to discern the 'hidden influence' of the idea that 'land and natural resources are common property'.<sup>214</sup> It has suddenly become realistic to envisage the creation of a 'new property' which consists, not of individual private property rights, but of 'new collective private property rights' in respect of the common pool resources of the national land base.<sup>215</sup>

Although neither uniform nor free of controversy, the American experience provides strong modern evidence of a substantial reintegration of ownership and obligation within the deep theory of property. The advancement of a generalised public interest in the utilisation of environmental resources appears to have engrafted community obligation as an implicit qualification on title. In turn the gradual infiltration of property by notions of social responsibility has made it feasible to claim, on behalf of all citizens, an 'equitable property' in the 'ecologically imperative' resources of the environment.<sup>216</sup> In effect a novel form of civic ownership is in the process of being created behind a trust of environmentally significant assets.<sup>217</sup> Certain resources are simply perceived as conferring such

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<sup>211</sup> J.E. Van Tol, *The Public Trust Doctrine: A New Approach to Environmental Preservation*, 81 W Virginia L Rev 455 (1978-79); J.S. Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U C Davis L Rev 195 (1980-81). Compare, however, R.J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L Rev 631 (1986); R. Delgado, 44 Vand L Rev 1209 (1991).

<sup>212</sup> *Ecological Preservation as a Public Property Right: An Emerging Doctrine in Search of a Theory*, 15 Harv Envtl L Rev 393, 426 (1991). See also the reference to 'social property in the resource commons', in W. H. Rodgers, *Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resources Law*, 10 Ecology LQ 205, 230 (1982-83).

<sup>213</sup> R.J. Lazarus, 77 Iowa L Rev 1739, 1759 (1992). See also Lazarus, 71 Iowa L Rev 631, 698 et seq (1986).

<sup>214</sup> See T.N. Tideman, *Takings, Moral Evolution, and Justice*, 88 Col L Rev 1714, 1728 (1988).

<sup>215</sup> See R.H. Nelson, *Private Rights to Government Actions: How Modern Property Rights Evolve*, (1986) U Ill L Rev 361, 373.

<sup>216</sup> J.P. Karp, 23 Envtl L 735, 745 et seq (1992-93).

<sup>217</sup> 'We should all have a right to a safe, clean, and intact natural environment, a right to be free from toxic threats, a right to participate in the management decisions concerning the public domain. Pollution of the ocean, lumbering of the ancient forests, or commercial development of the natural parks should be held to involve "new property rights" because these actions have a direct impact upon

intrinsic public utility that, regardless of nominal title, their benefits must be retained within some version of the commons. By reason of their irreplaceable moral or social character these assets are ultimately 'non-excludable'.<sup>218</sup> Following an assertion of private exclusory control over them there would not, in Locke's famous phrase, be 'enough, and as good left in common for others'.<sup>219</sup>

The acknowledgement of an environmental trust relationship has, of course, many implications. The entitlements recognised under such a trust include not only rights of appropriate beneficiary access to the environmental goods held on trust, but also the right of each beneficiary to require the orderly administration of the trust conformably with the land ethic mandated by its terms. Such quality assurance is in practice indistinguishable from the guarantee of reasonable access. Any meaningful notion of reasonable access must involve not the mere provision of factual or physical access but also the preservation of the wholesomeness of the environment to which this access relates.<sup>220</sup> Inevitably the infusion of trust terminology also requires some remodelling of popular ideas of 'ownership'. In the broader perspective of environmental trust the earth belongs to none absolutely except in the fiduciary sense in which, by analogy, our own Settled Land Act of 1925 grants fee simple ownership temporarily to the tenant for life on trust for the remaindermen.<sup>221</sup> From an environmentalist viewpoint all nominal ownership of land is effectively qualified by a trust to preserve, share and improve an extremely precious and easily depleted pool of ecological resource. Claims of exclusory 'property' are always bounded by juxtaposed claims of public access to those utilities and amenities which are fairly regarded as the 'common heritage of humankind'.<sup>222</sup> Furthermore the environmental trust is incapable of being discharged without a consultation of the interests of its beneficiaries, thereby reinforcing the truism that participation in the allocation or 'prioritisation' of goods is the very stuff of 'property'.

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the quality of our lives and are part of each person's share in the commonwealth' (see C.A. Reich, 100 Yale LJ 1465, 1468 (1990-91)).

<sup>218</sup> On the concept of 'non-excludability', see *Property in Thin Air*, [1991] Cambridge LJ 252, 268 et seq.

<sup>219</sup> See John Locke, *Two Treatises of Government* (2nd critical edn by P. Laslett, Cambridge 1967), *The Second Treatise*, s 27 (p 306).

<sup>220</sup> The first beneficiary of an environmental trust was surely Adam. According to *Genesis* the man whom God had formed was given access to all the fruits (bar one) of the garden which He had planted 'eastward of Eden' and in which grew 'every tree that is pleasant to the sight, and good for food'. God saw everything that He had made and 'behold, it was very good' (*Genesis*, 1:31, 2:8,9, 16, 17).

<sup>221</sup> See Gray, *Elements of Land Law* (2nd edn 1993), pp 617, 637. It was Thomas Jefferson who contended that '[e]ach generation has the usufruct of the earth during the period of its continuance. When it ceases to exist, the usufruct passes on to the succeeding generation, free and unincumbered, and so on successively, from one generation to another forever' (see P.L. Ford (ed), *The Works of Thomas Jefferson* (1904), p 298 (letter to J.W. Eppes, 24 June 1813)).

<sup>222</sup> Gray, *The Ambivalence of Property*, in *Threats without Enemies* (1993), p 161. See also the reference in *National Audubon Society v Superior Court of Alpine County*, 658 P2d 709, 724 (1983) to the state's duty to protect 'the people's common heritage' in natural environmental resources.

Environmental rights are essentially participatory or democratic rights of purposeful access,<sup>223</sup> not exclusive rights of destructive consumption.

The advantages conferred by this trust model may be substantial indeed. For the first time it becomes meaningful to claim on behalf of the citizenry a 'property' interest comprising enforceable access to such inherent public goods as clean air, unpolluted rivers and seaways, ozone regeneration, recreational enjoyment of wild country, and the sustainable development of land and marine areas. The moral parameters which have come to delimit the exclusory dimension of 'property' thus go some way towards converting green politics into relatively good communitarian law.<sup>224</sup> The environmental trust also generates rather less tangible -- though perhaps ultimately more important -- public benefits. The equitable property conferred by the new trust includes shared rights of access to the regenerative socialising dimensions of public environmental goods.<sup>225</sup> The spiritual quality of exposure to wild country is, for instance, a commonplace of Anglo-American literature over the last two centuries.<sup>226</sup> There is some deep sense in which the mountain-top experience makes us more decent human beings: high and open places lend a certain moral elevation. Whether the venture involves a walk up some country lane or a summer's day amble over Haystacks or an airy ascent of the Buachaille's Curved Ridge in snow, there exists a powerful connection between recreational access and the 'contemplative faculty'.<sup>227</sup> Many have attested to the civilising and educative influence -- the 'primordial vitality'<sup>228</sup> -- imparted by contact with the natural environment. '[I]n Wildness', Thoreau delighted to say, 'is the preservation of the World.'<sup>229</sup> John Muir captured the seductive intimacy of wild places in a

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<sup>223</sup> See, in this context, the call for '[e]xtensive participation in the process of formulating the goals and criteria of stewardship', in J.P. Karp, *A Private Property Duty of Stewardship: Changing Our Land Ethic*, 23 *Env'tl L* 735, 759 (1992-93).

<sup>224</sup> *Property in Thin Air*, [1991] Cambridge LJ 252, 297. See also J.P. Byrne, *Green Property*, 7 *Const Comm* 239 (1990).

<sup>225</sup> Carol Rose has confirmed that we should expect 'socialising activities' to 'give rise to inherently public property insofar as those activities require certain specific locations' (53 *U Chi L Rev* 711, 777 (1986)).

<sup>226</sup> See generally R. Nash, *Wilderness and the American Mind* (New Haven and London, 1967). There is evidence that vivid perceptions of ecological and spiritual harmony were even more strongly present in an older tradition of Celtic Christianity. See W.P. Marsh and C. Bamford (ed), *Celtic Christianity: Ecology and Holiness* (Edinburgh 1986), p 10 and *passim*.

<sup>227</sup> In the words of Aldo Leopold, '[t]o promote perception is the only truly creative part of recreational engineering' ('Conservation Esthetic', in *A Sand County Almanac*, p 173).

<sup>228</sup> R. Nash, *Wilderness and the American Mind*, p 88. See, for example, Henry Thoreau's statement that 'Life consists with wildness. The most alive is the wildest' ('Walking', in H. Thoreau, *Excursions* (London 1914), p 179).

<sup>229</sup> 'Walking', in *Excursions*, p 177. This theme formed the basis of one of Henry Thoreau's favourite public addresses. First published in 1862, Thoreau's essay on 'Walking' was destined to become one of the pioneer documents of the American conservation and national park movement (see W. Harding, *The Days of Henry Thoreau* (New York 1967), p 286).

journal entry in which he recorded that he 'only went out for a walk, and finally concluded to stay out till sundown, for going out, I found, was really going in'.<sup>230</sup> Such highly committed personal engagements with nature reveal not merely an empathy with the earth in its unspoilt state, but also a profound tolerance and humility in the face of a larger unknown.

For Justice William Douglas, too, the encounter with nature had a deeply transcendental aspect. It is interesting to observe that Douglas's descriptions of the wilderness experience are no less powerfully religious in character than, say, the sense of spiritual harmony induced by the Australian Aboriginal's ritual relationship with a very different landscape. A survivor of childhood polio, Douglas had learned to love the high country of his adopted Washington State. Douglas wrote that '[o]ne cannot reach the desolate crags that look down on eternal glaciers without deep and strange spiritual experiences'.<sup>231</sup> Douglas knew that in 'the silence and solitude of the mountains in wintertime...man comes closer to God...He finds the inner harmony that comes from communion with the heavens. He can draw strength from the austere, majestic beauty around him'.<sup>232</sup> Nor, perhaps, are the social dividends of such experience merely spiritual in quality. Douglas was well aware of the 'citizenship of the mountains' where '[p]overty, wealth, accidents of birth, social standing, race [are] immaterial'.<sup>233</sup> For Douglas the earthscape of mountains, forests and lakes called forth and epitomised the American ideals of freedom and equality.<sup>234</sup> If it is true that wilderness experience 'nurtures the democratic character', then, as Charles Reich noted later, the cutting down of ancient forests may 'properly be seen as a civil liberties issue'.<sup>235</sup>

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<sup>230</sup> R. Engberg and D. Wesling, *John Muir: To Yosemite And Beyond -- Writings from the Years 1863 to 1875*, p 23.

<sup>231</sup> W.O. Douglas, *Of Men And Mountains* (London 1951), p 308 ('If he ever was a doubter, he will, I think, come down a believer. He will have faith. He will know that there is a Creator, a Supreme Being, a God, a Jehovah').

<sup>232</sup> *Of Men And Mountains*, p 278. For Douglas, standing on the summit of Darling Mountain in the Washington Cascades, it was possible to say that '[e]very ridge, every valley, every peak offers a solitude deeper even than that of the sea. It offers the peace that comes only from solitude. It is in solitude that man can come to know both his heart and his mind' (ibid, p 90).

<sup>233</sup> *Of Men And Mountains*, pp 293, 211.

<sup>234</sup> *Of Men And Mountains*, p 211. Douglas often spoke of wilderness encounters as promoting cherished qualities of freedom, courage and strength. 'When man knows how to live dangerously, he is not afraid to die. When he is not afraid to die, he is, strangely, free to live. When he is free to live, he can become bold, courageous, reliant...A people who climb the ridges and sleep under the stars in high mountain meadows, who enter the forests and scale the peaks, who explore glaciers and walk ridges buried deep in snow -- these people will give their country some of the indomitable spirit of the mountains' (ibid, p 328). See also M. Sagoff, *The economy of the earth: Philosophy, law, and environment* (Cambridge 1988), p 128.

<sup>235</sup> C.A. Reich, 100 Yale LJ 1409, 1445 (1990-91). See also Reich, *The Public and the Nation's Forests*, 50 Cal L Rev 381 (1962).

Strong connections can, of course, be made between heightened recognition of the public values conferred by 'worthwhile human experience'<sup>236</sup> and the appeal made by Professor Macpherson for property rights of access to the 'full and free life'.<sup>237</sup> Access rights promote human fulfilment. Increasingly frequent reference is nowadays made to the need to preserve collective entitlements to the 'non-commodity values' or 'option values' inherent in the resources of the natural environment -- irrespective of whether such resources are nominally held in private ownership.<sup>238</sup> Some resources are simply unique or irreplaceable and, on this ground alone, should never be subject to private 'holdout'.<sup>239</sup> For Joseph Sax, a leading commentator on American public trust doctrine, certain interests are 'so particularly the gifts of nature's bounty that they ought to be reserved for the whole populace'.<sup>240</sup> Likewise certain amenities have 'a peculiarly public nature that makes their adaptation to private use inappropriate'.<sup>241</sup> Sax accordingly viewed it as the central purpose of public trust doctrine to prevent the 'destabilizing disappointment of expectations held in common but without formal recognition such as title'.<sup>242</sup> Foremost among such expectations, for Sax, was the 'diffuse public benefit' derived from protection of the ecosystem.<sup>243</sup>

It is important to note (and equally easy to forget) that a concern not to destabilise community expectation often plays a potent role in generating what may be called the 'customary law' of the natural environment.<sup>244</sup> In 1990, for instance, the Letterewe estate of Wester Ross in North West Scotland, comprising some 68,000 acres of Europe's last wilderness country, was subjected by its private owner to severe restrictions on public access. These restrictions threatened for a time to place the entire estate -- an area of incomparable beauty and mountainous isolation -- out of bounds to the

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<sup>236</sup> See D. Linder, *New Directions for Preservation Law: Creating an Environment Worth Experiencing*, 20 Env'tl L 49 (1990).

<sup>237</sup> See C.B. Macpherson, 'Capitalism and the Changing Concept of Property', in E. Kamenka and R.S. Neale (ed), *Feudalism, Capitalism and Beyond* (Canberra 1975), p 116 et seq.

<sup>238</sup> See A. Rieser, 15 Harv Env'tl L Rev 393, 423, 429 et seq (1991). See also J.V. Krutilla, *Conservation Reconsidered*, 57 Am Econ Rev 777, 780 (1967); M. Sagoff, *The economy of the earth*, p 50 et seq.

<sup>239</sup> See eg Carol Rose, 53 U Chi L Rev 711, 780 (1986) ('unique recreational sites ought not to be private property').

<sup>240</sup> 68 Mich L Rev 471, 484 (1969-70).

<sup>241</sup> 68 Mich L Rev 471, 485.

<sup>242</sup> *Liberating the Public Trust Doctrine from Its Historical Shackles*, 14 U C Davis L Rev 185, 188 (1980-81).

<sup>243</sup> 14 U C Davis L Rev 185, 193. For a highly persuasive defence of 'public property rights in ecological integrity', see A. Rieser, 15 Harv Env'tl L Rev 393 (1991).

<sup>244</sup> For a salutary reminder of the extreme importance of customary law even in the context of crystalline property regimes, see R. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 Stan L Rev 623, 671 et seq (1985-86).

walkers and climbers who for decades had been accustomed to roam within it.<sup>245</sup> Public opposition to this exclusion was mobilised by a community of outdoorsmen, whose protests were symbolised in the statement of the Earl of Cromartie, a keen mountaineer himself, that 'You can't own a mountain: it belongs to everybody.'<sup>246</sup> The dispute was eventually resolved with the conclusion in December 1993 of the 'Letterewe Accord', a document now being hailed as one of extreme importance in the world of wilderness conservation.<sup>247</sup> The Accord, drawn up by the good offices of the Earl of Cromartie between the private owner, the Mountaineering Council of Scotland, the John Muir Trust and the Scottish Wild Land Group, sets out an accommodation of interests designed to reconcile the principle of reasonable public access with the landowner's particular objective of ecologically sound management of red deer. Underpinning the Accord is a recognition of the need to 'maintain, expand and enhance the area's biological diversity and natural qualities'. Consistently with this aim, climbers are asked to visit the estate only singly or in small groups, to use minimum impact camping techniques and to accept the principle of the 'long walk in' across arduous terrain.<sup>248</sup> The Accord, now available for adoption elsewhere, embodies not only an enlightened approach to wild country access<sup>249</sup> but also a remarkable demonstration of the proposition that collective rights of reasonable access to wild land are ultimately non-excludable.<sup>250</sup>

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<sup>245</sup> For a fuller account of the Letterewe access dispute, see Gray, *The Ambivalence of Property*, in *Threats without Enemies* (1993), p 153 et seq.

<sup>246</sup> *The Independent*, 20 September 1991, p 8.

<sup>247</sup> For the detailed contents of the Accord, see 136 *High Mountain Sports* (March 1994), p 24.

<sup>248</sup> A recurring emphasis in access issues rests upon the point that public or civic rights of access must be limited by an overriding principle of reasonableness applied with reference to the particular terrain or context in question. The provision of access and the preservation of ecological integrity are not necessarily or always compatible. Excessive or unreasonable exercise of access rights may pose a substantial menace to environmental conservation. In extreme circumstances the sheer numbers of those who seek environmental access may sometimes jeopardise or sterilise a natural amenity. It may therefore be necessary to impose management strategies on environmental goods (see Carol Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, (1991) Duke LJ 1). Some far-reaching solutions include the abolition of guides or maps indicating scenic or wilderness areas (see R.H. Nelson, (1986) U Ill L Rev 361, 372) or, as is the general practice on Scottish hills, a conscious decision not to signpost the terrain.

<sup>249</sup> It is to be hoped that a similarly enlightened approach will prevail in the interpretation of the Criminal Justice and Public Order Bill 1994, cl 52, should this provision reach the statute book. Clause 52, which would introduce a criminal offence of 'aggravated trespass', is directed against the activities of such persons as hunt saboteurs, but there seems to be some danger that it may also catch walkers and ramblers who are found to have intended to obstruct 'any lawful activity' (eg farming or sheep rearing?) on the land over which they walk. English law has not hitherto conferred a general right to ramble over open country, but by long tradition the courts have never granted any substantial remedy in respect of nominal and innocent trespass in an area of scenic amenity (see eg *Behrens v Richards* [1905] 2 Ch 614 at 622f).

<sup>250</sup> Access difficulties threaten to become increasingly acute with the privatisation of water authorities and the sale of Forestry Commission lands. Vast areas of open land traditionally available for the walker and ramble may become subject to substantial prohibitions on public access. Even



There is increasing evidence on all sides that we are slowly recognising some concept of social trust in relation to the natural environment. This gathering perception of stewardship emulates something of the greater humility expressed in the Australian Aboriginal's orientation towards land resources. We may be starting to have a more cogent sense of obligation than of ownership, and this realisation is, of course, the necessary precursor of a new equilibrium with our environment. But a law of ecological responsibility which confirms civic property rights in natural resources would certainly impart a new environmental twist to the Lockean notion of a person's 'property' in his 'life, liberty and estate'. Are we really beginning to acknowledge some form of trust relationship which confers public rights of reasonable access and due administration in respect of environmental assets? Inevitably there will remain some who cannot, even in their wildest dreams, envisage such 'equitable property' vested in the community.<sup>251</sup>

Yet there is today one set of institutions which, in this and many other contexts, may convert even your wildest thoughts into present reality. These institutions are, of course, the institutions of the European Community or European Union.<sup>252</sup> It is salutary to remember that the European Court's decision in 1991 in *Francovich v Italian Republic*<sup>253</sup> now imposes on member states a civil liability to compensate individuals for damage suffered by reason of a member state's failure to implement a Community directive. This liability will arise where the result laid down by the relevant directive involves the conferment of rights on the individual, and in many instances the *Francovich* ruling -- if it remains good law -- offers the individual citizen of Europe a broad and effective means of enforcing Community law.

In this context it is instructive to cast another glance at the litigation in *Commission of the European Communities v Federal Republic of Germany*<sup>254</sup> which also came before the European Court in 1991. Here the Court eventually upheld a complaint that Germany had failed to secure legislative implementation of Community directives aimed at curbing air pollution caused by lead and sulphur

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more alarming is the prospect that the shareholders in newly privatised concerns might be given preferential access rights to such areas. Increasing concern over public access to the countryside prompted the recent introduction in the House of Commons of Mrs Margaret Ewing MP's Freedom to Roam (Access to Countryside) Bill. See House of Commons, Parliamentary Debates, *Weekly Hansard* (Issue No 1649), Col 137-139 (22 March 1994).

<sup>251</sup> See, however, Sir Harry Woolf, *Are the Judiciary Environmentally Myopic?*, (1992) 4 J of Env Law 1.

<sup>252</sup> It may be significant in this context that continental law (and particularly German law) has always been more sensitive to the social limitations of ownership. Article 14(2) of the German Grundgesetz provides that '[p]roperty imposes duties. Its use should also serve the welfare of the community'. See W. Leisner, *Sozialbindung des Eigentums nach privatem und öffentlichem Recht*, NJW 1975, 233; A.J. van der Walt, *The Fragmentation of Land Rights*, (1992) 8 SAJHR 431, 442.

<sup>253</sup> Cases C-6/90 and 9/90, [1993] 2 CMLR 66.

<sup>254</sup> Joint Cases C-361/88, [1991] ECR I-2567 and C-59/89, [1991] ECR I-2607.

dioxide emissions.<sup>255</sup> The German defence had been in part that German practice was already in substantial conformity with the thrust of the relevant directives: there was in fact no air pollution in Germany in excess of the limit values prescribed in these directives. The European Court rejected this defence, pointing out that true implementation of a directive requires not merely de facto compliance but also that each member state must actually set in place a specific legal framework relevant to the directive's subject matter, containing provisions sufficiently precise, clear and transparent to enable individuals to ascertain their rights and obligations.<sup>256</sup> The Advocate General emphasised that the relevant directives were intended to give 'individuals, ordinary citizens...the right that the air which they breathe should comply with the quality standards which have been laid down.' Individuals, he said, have the right under Community law 'to rely on those quality standards when they are infringed, either in fact or by the measures adopted by the public authorities'.<sup>257</sup> The Court agreed that without the actual transposition of the directives into specific provisions of the national legal system individuals would not be 'in a position to know with certainty the full extent of their rights in order to rely on them where appropriate'.<sup>258</sup> Only the enactment of 'mandatory rules' by the member state would enable citizens to assert their rights.<sup>259</sup>

Viewed from the objective distance of this side of the Channel, such an approach begins to resemble, as perhaps nothing else, the recognition of a beneficiary's right to insist that trust assets are not merely conserved by chance or fortunate practice but are instead fully subjected to governance in accordance with the terms of the relevant trust instrument. The European Court has come close to conceding the existence of an individual right to the effective and structured management of the ecosystem on behalf of all citizens.<sup>260</sup> Taken in conjunction with the *Francovich* ruling, the stance of the Court in *Commission of the European Communities v Federal Republic of Germany* seems to recognise something which looks awfully like a right in the citizen to demand the proper and conscientious

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<sup>255</sup> See Lord Slynn of Hadley, *The European Community and the Environment*, (1993) 5 J of Env Law 261.

<sup>256</sup> [1991] ECR I-2567, 2601. It is significant that, in enforcing environmental standards, the Court has consistently stressed that environmental protection directives are intended to create rights for *individuals*, not least in order that the persons concerned 'can ascertain the full extent of their rights' (see eg Case C-131/88, *Commission of the European Communities v Federal Republic of Germany* [1991] ECR I-825, 867).

<sup>257</sup> [1991] ECR I-2567, 2591.

<sup>258</sup> [1991] ECR I-2607, 2632.

<sup>259</sup> [1991] ECR I-2567, 2601. For further reference to the increasing importance assigned by the European Court to the interest of environmental protection, see M. Zuleeg, *Umweltschutz in der Rechtsprechung des Europäischen Gerichtshofs*, NJW 1993, 31.

<sup>260</sup> For similar advocacy in the European context of an emerging 'right to environment' (ie a 'right to the protection of the environment'), see American Society of International Law, *Proceedings of the 75th Anniversary Convocation* (1981), p 41f (A. Kiss, President of the European Council for Environmental Law).

administration of a public trust in which he is regarded as having enforceable rights of a beneficial character.

#### 4. Conclusion

In certain respects we have dared in this paper to give expression to the unthinkable. But then again it is worth remembering that almost every legal development is, by definition, just a little unthinkable.<sup>261</sup> It is over 40 years since, in one of the earliest addresses published in the *Current Legal Problems* series,<sup>262</sup> Lord Justice Denning called for the advent of a 'new equity'. Interestingly, he thought that 'the new spirit which is alive in our universities' might have a role to play in pointing the way to what he was to term 'a new age and a new equity.'

The task of the immediate future is, in part, to reconceive the law of property for the 21st century. It must be highly improbable that our current perceptions of property will retain a wholly undiminished relevance in the days to come. This paper has therefore tried to suggest some ways in which wider notions of 'equitable property' are in the process of being impressed on a number of resources to which increasing community value is attached. In a number of legal regimes across the world a more socially oriented vision of entitlement is starting to emerge from the dialectic of property. This new equitable property constitutes a sort of 'meta-property', arising in the historic pattern of equity in order to supplement and fulfil the rules of the law.<sup>263</sup> The new equity seeks exactly what the old equity achieved, and aims to engraft a different or corrective image of entitlement on to pre-existing legal estates. As always equity operates in response to demands of conscience, the sole difference being that the doctrinal force which drives equity here is more palpably the conscience of *community*. Although its full scope has yet to be elaborated, the new equitable property is more heavily committed to the articulation of a civic or social morality relating to the goods of life. In respect of certain publicly defined goods it strongly endorses claims of access in preference to those of exclusion.

The move towards this communitarian vision of property relationships is, of course, both controversial and far from complete.<sup>264</sup> By imposing collectively perceived limitations on the exclusory control

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<sup>261</sup> See eg *Tulk v Moxhay* (1848) 2 Ph 774, 776, 41 ER 1143, 1144, where counsel pleaded unsuccessfully that the ground on which Lord Cottenham was eventually to base his decision was 'unknown to the principles of law' and therefore vitiated by novelty.

<sup>262</sup> *The Need for a New Equity*, (1952) 5 CLP 1, 10.

<sup>263</sup> See F.W. Maitland, *Equity* (2nd edn revd by J. Brunyate, London 1936), p 17.

<sup>264</sup> The recent decision of the United States Supreme Court in *Lucas v South Carolina Coastal Council*, 120 L Ed 2d 798, 112 S Ct 2886 (1992) appeared to strike a stance both anti-communitarian

exercised over important resources, the regime of equitable property points up the intensely correlative nature of rights and responsibilities as incidents of 'property'. The language of 'property' begins to disclose a deep subtext of social 'propriety' in opposition to its once more common connotation of appetitive economic power. The concept of 'property' reveals an inner morality founded upon what, in another context, Paul Finn has called 'two characteristic and inter-related concerns: the first, respect for self; the second, regard for others.'<sup>265</sup> When entitlement and duty intersect, property ceases to operate merely as a vehicle for individual preference-satisfaction and begins to carry 'the authority, but also the responsibility, of a trust to the larger community.'<sup>266</sup>

There is nevertheless nothing quite so dangerous as a vested right, since *any* subsequent contraction of its scope -- however justified -- inevitably appears as unlawful deprivation. The proposal of any social curbs on private autonomy in the control and exploitation of resources is often apt to be considered an unpleasant communist perversion. There is, accordingly, a need for constant reminder that the operation of equitable property is distributive rather than *redistributive*. The claims of civic property endorsed by the new equity comprise merely the assertion of latent human entitlements which have long been submerged by superficial allocations of formal title. Charles Reich wrote recently of the new property that it does not represent 'value transferred to the needy from another group in society', but represents instead the 'birthright of every individual' and is, as such, 'inseparable from citizenship and personhood'.<sup>267</sup> Those who entertain dark fears of left wing subversion lack the clarity of vision -- or perhaps the wit -- to realise that the truly conservative option is in fact the more radical and that, ironically, it is only the more radical vision of property which will preserve the conventional desiderata of an ordered society characterised by justice, tolerance and the rule of law.<sup>268</sup>

It is, moreover, a constant of communitarian philosophy that the reinforcement of collectively oriented perceptions of 'property' promotes, rather than inhibits, the preconditions of personal autonomy and

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and anti-environmentalist. In the view of some observers, however, the case is not as far-reaching as its rhetoric might initially suggest (see J.L. Sax, *Property Rights and the Economy of Nature: Understanding Lucas v South Carolina Coastal Council*, 45 Stan L Rev 1433, 1437 (1992-93)). See also R.J. Lazarus, *Putting the Correct "Spin" on Lucas*, 45 Stan L Rev 1411 (1992-93).

<sup>265</sup> See P.D. Finn, *Commerce, The Common Law and Morality*, (1989-90) 17 Melbourne UL Rev 87. If 'regard for others' translates broadly as communitarian and self-regarding as its opposite, Gregory Alexander has pointed out that the 'two visions -- self-regarding and communitarian -- lead to two different and incompatible understandings of the role of property rights' (see *Takings and the Post-Modern Dialectic of Property*, 9 Const Comm 259, 264 (1992)).

<sup>266</sup> See C.M. Rose, 'Property as Wealth, Property as Propriety', in J.W. Chapman (ed), *Nomos XXXIII: Compensatory Justice* (New York and London 1991), p 240.

<sup>267</sup> Reich, 100 Yale LJ 1465, 1468 (1990-91).

<sup>268</sup> It is on precisely this basis that Gregory Alexander has emphasised that communitarianism 'should not be understood as abandoning a commitment to individual property rights' (G.S. Alexander, 9 Const Comm 259, 273 (1992)).

individual fulfilment.<sup>269</sup> The controlled dispersal of access to a range of socially valued opportunities and life chances has, almost paradoxically, the effect of enhancing personal liberty. In so far as 'equitable property' contributes to a process of distributive justice, it consolidates both the dignity of the individual and some sense of the reciprocal responsibility which each citizen owes to his or her community. The best path for the future thus lies in a wider recognition of the heavily interdependent nature of our social and economic arrangements.<sup>270</sup> This is a realisation already reached, on the macro level, by the international community of states. In this context there has emerged, in both theory and practice, an acceptance of the long-term prudential value of the cooperative ideal. The contemporary outworking of the concept of state sovereignty reveals, incidentally, much the same ambivalence as currently affects the idea of 'property'. Günther Handl has pointed out, however, that 'sovereignty signals no longer a simple...legal basis for exclusion, but has become the legal basis for inclusion, or of a commitment to co-operate for the good of the international community at large.'<sup>271</sup>

Our own municipal law of property could usefully adopt something of this conceptual realignment from the 'arrogance of rights' towards the 'consonance of duties'.<sup>272</sup> Even if a heightened awareness of community operated at only a secondary or subliminal level, it would still exert a profound influence on the primary processes of decision-making about the allocation of goods. There is nothing either necessary or inevitable about Garrett Hardin's famous 'tragedy of the commons',<sup>273</sup> but it is quite certain that we shall play out our own tragi-comedy if we continue to desensitise ourselves to an aggressive materialism which ignores the structural interpenetration of individual rights and social obligations.

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<sup>269</sup> See eg Richard Lazarus's insistence that intensified environmental protection actually enhances individual liberty. By opening up new ranges of amenity for the purposive exercise of individual freedom, environmentalism 'seeks to reformulate, not reject wholesale, property law' (77 Iowa L Rev 1739, 1757f (1992)).

<sup>270</sup> Eric Freyfogle has pointed out that in the law of water rights in California '[a]utonomous secure rights of property have largely given way to use entitlements that are interconnected and relative'. Noting that water is, in many ways, 'the most thoroughly advanced form of property', Freyfogle predicts that 'property law future will be a version of water law present.' On this view, 'we should base property law as much on responsibilities as on rights, on human connectedness rather than on personal autonomy' (see E.T. Freyfogle, *Context and Accommodation in Modern Property Law*, 41 Stan L Rev 1529, 1530 et seq (1988-89)).

<sup>271</sup> *Environmental Security and Global Change*, (1990) 1 Yearbook of International Environmental Law 3, 32. As Philip Allott has said, the rights that emanate from the concept of sovereignty are not unfettered freedoms but 'are in reality *shared powers*, shared between the holder of the power and the community of states, in which regard for the interests of other states and of all states is of the essence' (*Power Sharing in the Law of the Sea*, (1983) 77 AJIL 1, 27). See also Allott, *Eunomia: New Order for a New World* (Oxford 1990), p 337.

<sup>272</sup> The phrases are those of Bertrand de Jouvenel. See *Sovereignty* (Cambridge 1957), p 202.

<sup>273</sup> See G. Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).

It may, of course, be asked why the interests represented in the new equitable property are not merely urged as human or civic rights. The answer must be the one given by Professor Macpherson: 'We have made property so central to our society that any thing and any rights that are not property are very apt to take second place'.<sup>274</sup> In adopting the terminology of equitable property we lock into the insidiously powerful leverage of the primal claim, 'it's mine', and we harness this claim for more constructive social purposes. When important assets of the human community are threatened, we are able to say, with collective force, 'You can't do that: these assets are ours.' When you pollute our air or our rivers or exclude us unreasonably from wild and open spaces, we can mobilise the enormous symbolic and emotional impact of the property attribution by asserting that you are taking away some of our 'property'.

A further interplay of concepts is inevitably opened up by this purposive adaptation of property language. Initially, of course, it will seem a little strange that property language should be chosen to express claims which have hitherto belonged largely within the public law domain. Politically conservative members of a former generation would doubtless find it unfamiliar that claims of civic or social right should nowadays be formulated in terms of the private law institution of property. But this merely goes to underline the fact that, in some important sense, all property rights enjoy an inherent public law character.<sup>275</sup> The constant imposition of social and moral limits on the scope of 'property' necessarily entails that private property can never be truly private. It has always been one of the fundamental features of a civilised society that exclusory claims of property stop where the infringement of more basic human freedoms begins. The history of slavery law provides ample demonstration of this last proposition. The law of property has always said much more than is commonly supposed about the subject of human rights.

Particularly in the modern era there is no unbridgeable gulf between public and private law. Indeed there are certain fairly striking parallels to be drawn, over exactly the same timespan, between developments in the field of public law and the elaboration of the new law of equitable property. The spectacular emergence of the discipline of administrative law during the past 30 years is directly attributable to the infusion of fresh perceptions of 'fairness' and 'reasonableness' in the conduct of civil governance.<sup>276</sup> It is nowadays recognised that there are no unfettered discretions in public law and that 'all power has legal limits'.<sup>277</sup> Principles of 'natural justice' have become applicable wherever

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<sup>274</sup> See *Human Rights as Property Rights*, (1977) 24 Dissent 72, 77.

<sup>275</sup> See *Property in Thin Air*, [1991] Cambridge LJ 252, 304.

<sup>276</sup> 'The principle of reasonableness has become one of the most active and conspicuous among the doctrines which have vitalised administrative law in recent years' (H.W.R. Wade, *Administrative Law* (6th edn Oxford 1988), p 398). See also Paul Craig's observation that natural justice is a 'manifestation of a broader concept of fairness' (P.P. Craig, *Administrative Law* (2nd edn London 1989), p 207).

<sup>277</sup> Wade, *Administrative Law*, pp 388, 399ff.

administrative action impinges on the citizen's legal rights, liberties or interests or where the citizen has a 'legitimate expectation' that he or she should be treated fairly. Public decision-making which affects the citizen's livelihood or life chances is exposed to an ever closer scrutiny against rigorous standards of both procedural and -- less directly -- substantive propriety.

Against this background it may not perhaps appear quite so strange that principles of 'fairness' and 'legitimate expectation' should begin more clearly to infiltrate the private law realm of property. On the contrary, it would seem rather odd that public power should be increasingly subjected to restraint, while private power -- supremely evidenced in the exercise of rights of property -- should substantially escape similar social control. After all, as Harold Demsetz once said, property rights 'derive their significance from the fact that they help a man form those expectations which he can reasonably hold in his dealings with others.'<sup>278</sup> The emerging law of equitable property is concerned precisely with the protection of the citizen's legitimate expectation to participate fully in the reasonable enjoyment of communally defined opportunities for the good life. Moreover, the idea that all should have a voice in the making of dispositive decisions concerning vital social goods is wholly consistent with the administrative law concept of entitlement to a fair hearing on matters which uniquely bear upon the citizen's rights, liberties and interests.

There need be nothing terribly shocking or revolutionary in the perception that the underlying philosophy of judicial review is percolating slowly into the law which regulates the discretionary exploitation of privately held resources. Abuse of discretion occurs no less frequently in the private than in the public arena and, paradoxically, its potential impact upon the larger community may be even more devastating. The private commercial enterprise which pollutes an entire community's water supply arguably dislocates legitimate expectations far more comprehensively than, say, the government department or licensing authority whose decisions operate capriciously on the rights of a single citizen.

If 'equitable property' has any meaning, it lies in the fact that a fundamental requirement of 'fairness' is beginning to penetrate the administration of the 'commonwealth' -- in both its political and its economic dimension. This now seems to be the message emerging simultaneously from the crowded shopping mall, from the deserts of outback Australia, from the battlegrounds of environmental conflict. That the conceptual apparatus of property should be used to fashion and to articulate legitimate expectations on behalf of citizens may in itself be no bad thing. In days when the individual seems ever more powerless in his confrontation with the faceless, effectively unaccountable organisations which order his life and control his destiny, he can assert his right to be treated *fairly* by using the only language which bureaucracies traditionally understand -- the language of concentrated economic entitlement -- the language of 'property'. In this sense the existence of property-based rights of *access* (in contradistinction to those of *exclusion*) may well go some distance towards providing the compromise

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<sup>278</sup> H. Demsetz, *Toward A Theory Of Property Rights*, 57 Am Econ Rev 347 (1967).

structure of 'fall-back' rights which, in Jeremy Waldron's terms, 'people can count on for organizing their lives'.<sup>279</sup>

As matters currently stand, the concept of 'property' -- such is its ambivalence -- currently offers both the greatest threat and the surest assistance to the survival of a sense of 'community'. In its exclusory dimension 'property' tends to accelerate the insensate rapaciousness of humankind at a cost virtually incalculable in terms of social division and lost social cohesion. In its access-promoting dimension 'property' tends in a contrary direction, endorsing a more communitarian form of participation in a range of publicly valued resources. Even enlightened self-interest points towards the same end as the more idealistic versions of communitarian thinking. The future of 'property' requires that there be a ready public access to the dispersed benefits of the earth's resources.<sup>280</sup> There is a rudimentary prudential utility in placing certain social curbs on soul-destroying greed in order to engineer a wider participation in the goods of life.

By engrafting the *conscience of community* on to existing property relations, notions of 'equitable property' can begin to reconstruct and reinforce a more fundamental *community of conscience*. Our own times have witnessed the steadily diminishing force of most traditional sources of teaching on conscientious obligation. It may be that Equity's greatest historic challenge now lies in preserving its original role as the conscience of a nation, keeping alive a socially diffused awareness that obligation is, and always has been, an intrinsic component of entitlement. The pressing call is for social education on a grand scale; the process of learning, osmotic; the ultimate lesson, that conscientious obligation takes priority over strict legal right. This, after all, is Equity's single most distinctive contribution to our own jurisprudence.

As we launch into the uncertainties of the next century, it may be that claims of 'equitable property' will begin to rival or outweigh the importance of property forms we have known hitherto. Constant recognition of the intensely interdependent character of property relationships may hold our only hope of averting a world overborne by aggressive material acquisition -- our only hope of creating a new commonwealth of dignity and equality. If this is the case, then there is assuredly more equitable property waiting to be claimed. If we fail, however, to endorse a broader collective participation in the

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<sup>279</sup> See J. Waldron, *When Justice Replaces Affection: The Need For Rights*, 11 Harv J L & Pub Pol'y 625, 634 (1988). Waldron argues that there is still a place for individual rights even in the context of the communitarian society or 'affectionate *Gemeinschaft*'. 'It matters to people that they and their loved ones have enough to eat, it matters to them that they have access to at least some of the resources necessary for the pursuit of their own projects and aspirations, and it is likely to go on mattering sufficiently for them to want some greater *assurance* of that other than merely the affections of their fellow citizens' (ibid, 639f).

<sup>280</sup> See J.W. Singer and J.M. Beerman, *The Social Origins of Property*, (1993) 6 Can Jnl of Law and Juris 217, 242 ('A property system only works if lots of people have some').



goods of life, then it seems quite likely that, from the safe distance of their own planet, my Martian colleagues will eventually observe a polarised society participating in its own disintegration.<sup>281</sup>

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<sup>281</sup> The author gratefully acknowledges the assistance given towards the preparation of this paper by Mrs Joycey Tooher of the Faculty of Law, Monash University and Mr Lawrie Tooher of the Department of the Premier and Cabinet, Melbourne, Victoria.