MERCHANT OF VENICE – REASONING WITH LAWS – THE LAW HATH YET ANOTHER HOLD OVER YOU.

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Introduction

In Act IV of the Merchant of Venice, Portia said "the law hath yet another hold over you".

The idea that the law has a hold over anything suggests that law is associated with power, but many attempts to provide an analytical framework for both law and power have required modification over time, and many of them have attempted to understand the contemporary society of their authors, rather than provide a perspective that would allow comparison with other cultures. There has long been an assumption that the societies that contemplate law and power are superior to those that do not.

Some people will naturally assume that law is concerned with a logical system, involving the application of logical syllogisms, with reference to rights and principles. Yet law can be understood as part of a discourse that describes whole societies, and institutions of government, politics and power. We can talk about the sources of law, and how law is made, and the rules or principles of law.

What does it signify when disciplines or institutions like Law and Science become singular nouns given personal agency over people? What is the law and how are we supposed to reason with it? Do we apply 'the law' to the facts or do we apply 'knowledge' about law to the facts? Are we supposed to take the elements of laws as merely an introductory structure, and then bring knowledge about how social reality is structured into elements of the structure embodied by the rule? Should we pretend that law is merely logic, when to engage in that logic at all we must inhabit a social world, with social concepts and power structures that require humanist knowledge structures? Should we bring a knowledge of sociology and anthropology to questions about what laws are, and to whom they are important?

Legal educators like Nadolski have suggested that some of the complexity of legal education can be tackled by segementation of the problem-solving process, which can be facilitated by ICT[1] In my experience, however, the ability to reason well in law is enhanced by the cognitive orientation that needs to be brought to the task of distilling the facts and the law. That perspective, or orientation results in the appropriate focus of attention to enable dominant concepts to be identified and selected from background information. This is a cognitive process that requires a broader appreciation of cognition than is gained in response to the external taxonomies of law.

The idea that law is defined by socially constituted facts is not novel in itself: others have suggested that law is ultimately a matter of social fact, and that this is even what H.L.A Hart would have agreed to.[2] For this reason, teaching law should also equip students with an analytical framework for understanding social reality, regardless of their educational or social backgroud. Our social reality is not a superficial set of rules and principles, but a set of customs and conventions that are influenced by politics, economics and social projects that have been centuries in development.

1 Nadolski,R. & Wöretshofer, J. (2010) Use of ICT in the training of legal skills, *The Law Teacher,* 39:1, 29-42

2 Coleman, J. (1991) Rules and Social Facts. *Faculty Scholarship Series (Yale Law School).* Paper 4194. (14) 703 at 717. See also Coleman's draft paper 'Rethinking Legal Positivism' about the Social Facts Thesis (available at URL: https://gould.usc.edu/centers/clp/papers/documents/Coleman.pdf)

Some of the entry level awareness that students or early career practitioners will need includes the following:

- *Law permits the encoding of ideas in thoughts, and also for ideas to flow from encoded rules.*
- *Behaviours, beliefs, values and conventions can find expression in rules;*
- *Rules can imply, and give direct expression to different behaviours, beliefs, values and conventions. Different rules can focus on different aspects.*
- *Useful legal concepts (for the dominant social and political objectives) are retained. The concept of ownership is an important concept in this regard.*
- *Social or political forces that drive particular results across different areas of law.*
- *The order and priority of the application of rules requires structured thought, but some of the structure and agency of those rules has been determined by the broader forces at work in society.*

This raises questions about how students can acquire this understanding, which they must internalise as part of a more prolonged learning process that will ultimately involve the distillation of rules and facts from more complex material. In law school, the back-end of this process is faciltiated by the preparation of tutorial questions that are similar to decided cases (where much of the distillation of law and facts has already occurred, but the mental distance between these tutorial problems and an unconstrained set of facts can be large. The educational and professional goal is to train students to navigate these unstructured representations of the world using appropriate perspective, orientation and focus. This can be done, as a minimum, by raising these cognitive steps explicitly in a legal curriculum. With further thought and discussion, it may be that they can be developed using ICT. In this paper, I have described the acquisition of the relevant knowledge structures for better legal reasoning as a form of 'priming', in which students are encouraged to pay explicit attention to the focus of their thinking, the orientation of their thinking, and to measure that against social norms. Having done so, they are then in a position to encounter legal rules as a subset of an internal knowledge structure, rather than the first point of superficial contact with a concept or idea.

It may be that educational techniques such as 'attendion directing' will be useful, as will the development of tutorial problems which are not subject specific, or can cater for more than one legal subject, so that students have an opportunity to elaborate on how they might switch focus of attention, orientation or perspective in order to deal with different legal issues or subjects.

For familiarisation purposes, the framework I have chosen for introducing the relevant cognitive ideas to an audience of legal educators is as follows:

- Focus of attention
- Knowledge Structures
- Shifts in Perception
- Hegemony/Priviliged viewpoints in social reality

PART 1 – FOCUS OF ATTENTION (THE PSYCHOLOGY OF LAW AND FACTS)

1.1 The psychology of law

One of the essential elements for the appreciation of laws is that they are a refined product of the mind. In order to give the appearance that rules are able to be independently stated, refined into propositions within a closed system, and may be dealt with as logical propositions, there is a process of progressive exclusion or diminution of 'other concerns', until all that is left are specific rules for a specific problem. To do this, the mind must be primed, prepared or conditioned to accept certain details as background context, structure or environment, and then to focus attention only on the elements of the rules as the foreground. This is related to the idea that we use certain concepts

to think, by giving certain ideas primacy in our conscious attention. When this mental priming has been done, it is possible to use laws in a simple 'question' and 'answer' framework. The simplicity of communication and reasoning with laws is enabled by the preparatory work done to create internal knowledge systems that do not need to be continuously referred to or adjusted, but provide a baseline for consistency.

We can acquire such internal knowledge systems subconsciously – restructuring information subconsciously to provide more efficient access to it, or to ensure it is consistent with the laws. In this way, dominant ideas can be acquired and repeated without explicit attention to every detail. However, this does not mean it is impossible to unpack those dominant ideas and assumptions. To do so gives us master of our unconscious thoughts and a better appreciation of how society works.

From an educational perspective, it makes sense to learn about law with explicit attention to the mental priming that occurs, and also to consider the direction(s) of the mental map between social, political and economic context and the rules themselves. In legal education it may seem that the mental structure is capped by rules at the top, because the forces driving the rules can be put in the background. Anyone attempting to 'apply the law' by looking at the elements of legal rules is, in effect, searching for the right question, expressed in the correct terms, in order to match it to an appropriate answer. The initial facts are not usually in the form of the appropriate question or answer: the iterative process that follows requires accessing both law and facts simply because the person must acquire an understanding of the perceptual scheme in which both question and answer are written. In that respect, we can reverse the direction of the mental map. If social, economic and political factors are placed in the foreground, then a top-down approach can result in the distillation of laws from those broader ideas.

Another important observation is that there is not one system of perception that maps rules to broader concepts. Applying laws involves shifting between different 'question' and 'answer' frameworks. Laws can be immersive, progressive, sustained, significant and socially constituted by different thoughts and beliefs. The only reason we or legal philosophers might be able to generalise about the subject matter of laws or what they are is that we have restricted our attention to a certain culture at a certain time, with a certain view about the world, and a particular set of priorities. Laws may be concerned about the superiority of certain individuals, groups or institutions because that is the current state of a particular society. Equally, there may be hierarchical ideas about law and power that have been sustained for long periods of time, and these are important to note. We can no more ignore these immersive ideas in law than we can ignore the speeding signs on a highway. One of these ideas is the idea of private ownership of land and control of territory.

1.2 The psychology of facts

The legal education that is intended to provide an appreciation of how factual matters are dealt with also benefits from an appreciation of facts as a distillation of ideas about the world. We cannot map evidence to legal ideas in one direction as if that evidence were the top of the mental map (though the law of evidence attempts to do this, poorly, by saying things like 'evidence of a fact is that which tends to prove it'[3]). As it turns out, we need concepts as much as facts, in order to describe and undertand what a fact is, and we also need to store information as part of knowledge structures. A fact can be part of a knowledge structure, and it may also be part of a belief system, rather than an isolated element of information in our mind. We do not construct understanding from a logical, linear annexation of one piece of information to another.

A significant matter is that the knowledge structures that we used to distil or apply the law remain current for our ability to structure information of a detailed nature. If there is a priority or belief system in a person's mind, that influences their ability to adopt a certain perspective, and may

3 Cross on Evidence, about 6th Ed.

enhance or limit that person's ability to adopt a different perspective. Legal norms representative of social norms therefore influence the concepts and terminology that come to be used to describe the facts.

Even conclusions about historical facts involve the construction of a knowledge structure, not merely a list of facts, events, or a 'chronology'. To accept a person was responsible for something requires the fact finder to accept that it was possible for them to have committed the acts, and that they were a significant part of the contributing causes. The fact-finder must believe this is possible, and must also be able to determine the relative contributing factors. The internal knowledge structure, or mental model of the world, is just as important as the recording of any isolated fact.

Innocent people are sometimes convicted. This requires us to conclude that in some cases the fact-finder cannot distinguish between a belief unreasonably held and a sound explanation unreasonably rejected. The knowledge structure and belief systems in which the decision were made were faulty, but not one could see that. A person who did not commit a crime could not have a motive, yet if convicted, the judge/jury has accepted (and believed) that not only did the person carry out the acts alleged, but was motivated to do so. The finding of motive when there was none is a particularly revealing aspect of legal reasoning, in that it reveals the judicial capacity for prejudice.

The element of structure in our representation of knowledge is often overlooked. There is an appropriate metaphor for perceptual changes in the scales of justice, even though the metaphor does not convey the kind of internal mental re-arrangement that causes the scales to shift. It is unlikely, for example, that it is the mere accumulation of more information that tips the scales towards diffeernt conclusions. In many judicial cases, and in public life, the majority of facts are able to be described in a way that are objectively neutral to a legal conclusion. Rather, it is a specific revelation that requires all the existing information to be perceived differently. It is more likely that the scales tip (the conclusions change) because of something similar to the 'paradigm shift' that Thomas Kuhn referred to in the context of scientific revolutions. It is not that there is a slow accumulation of more information that gradually centres and then moves the other way. It is more likely that there is some some new information which has a quality capable of shocking the existing perceptual system, requiring the internal knowledge representation to be completely altered. In this respect, the examples of Lance Armstrong (cycling), Bernie Madoff (Ponzi schemes) and Elizabeth Holmes (blood testing technology) involved significant re-appraisal of the public attractiveness and acceptability of the individuals mentioned, but only when aspects of their true behaviour and motivations was revealed. Some of that re-appraisal can take place by the public outside a Courtroom, or through journalism, or as a result of whistle-blowers, independently of judicial process.

The process of reaching any kind of judgment is particularly affected by the role of belief systems and knowledge structures. Even though an innocent person may accurately describe the correct conclusion, if the decision-maker or fact finder has another belief system they are unwilling to drop, and has reinforced that belief by obejctively neutral facts, then the conclusion can be maintained. An interesting question is whether the fact that two alternative conclusions can be maintained on the same set of evidence is something that can be easily identified as giving rise to 'reasonable doubt'. It might be, for example, that the second contention is dismissed because the person is not believed: there is then no 'alternative' contention to be considered. A decision-maker who holds to a particular belief may not be easily persuaded to modify that perception, and the knowledge structure it works with.

1.3 Definitions of law have led to overly restrictive ideas about legal reasoning

The historical attempts to define what 'the law' is, or the nature of law, have been heavily influenced by their novelty and the popular ideologies of the time. A very brief survey of ideas,

including antecedents to legal philosophers (or schools of analytical jurisprudence), will usually include the following authors and concepts:

- Locke[4] (1690) (Life, Liberty, Estate i.e. liberties irrespective of sovereign domination and divine right)
- Hume, 1739 (Logical Positivism; facts vs relations of ideas)
- William Blackstone (1765) (Commentaries)
- U.S. Declaration of Independence (1776), US Bill of Rights (1789): borrowed from Locke's ideas[5].
- Jeremy Bentham (1781)[6] An Introduction To the Principles of Morals and Legislation.
- John Austin[7] (1832) (law as command by a sovereign; law is separate to morality; no moral choice in deciding what the law *is*)
- Weber[8], 1922 (Three Types of Legitimate Rule: Legal Authority, Traditional Authority, Charismatic Authority: a sociological perspective)
- de Montmorency (1927)[9] (social anthropology; laws requiring 'loyalty' and affirming survival in environment)
- United Nations Declaration of Human Rights (1948)[10] Article 17 borrows from Locke (the right to property)
- Hart, 1958[11] (1st ed) (primary rules; secondary rules (recognition, change, adjudication of primary rules: to give finality, closure); internal/external views)
- Dworkin[12], 1973 onwards (rules, hard cases, best fit, moral aspects of law).
- Kennedy and Unger (Critical Legal Studies[13])
- recognised laws outside English civilisation (e.g. Milirrpum v Nabalco Pty Ltd[14], Mabo (No 2) and Wik)
- Kirby (2004). Human rights[15], HCA.
- Searle[16] (institutional facts; social reality).
- Keenan[17] (2010) (a network of belonging).

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4 Locke, J. The Two Treatises of Civil Government. John Dent & Sons (orig edition 1690; London, 1943 reprint). Available from URL: https://archive.org/details/ofcivilgovernment00lock (Last accessed 13 June 2018).

5 http://www.globalization101.org/human-rights-vs-natural-rights/

6 Bentham, J. *An Introduction to the Principles of Morals and Legislation.* Available at URL: http://www.econlib.org/library/Bentham/bnthPML.html (Last accessed 13 June 2018). See also URL: https://www.utilitarianism.com/jeremy-bentham/index.html (Last accessed 19 June 2018).

7 Austin, J. (1832). The Province of Jurisprudence Determined. London: John Murray. Available from URL: https://archive.org/details/provincejurispr02austgoog (Last accessed 13 May 2018).

8 Three Types of Legitimate Rule. Originally published in the journal Preussische Jahrbücher 187, 1-2, 1922, an English translation, translated by Hans Gerth, was published in the journal Berkeley Publications in Society and Institutions 4(1): 1-11, 1958. See also Gephart, W. Law as Culture.

9 de Montmorency, J.E.G (1927) The Custodian of Tradition. *The Journal of the Royal Anthropological Institute of Great Britain and Ireland* (57) 235.

10 http://www.ohchr.org/EN/UDHR/Pages/UDHRIndex.aspx

11 See also H.L.A. Hart. (1994). The Concept of Law, Oxford : The Clarendon Press.

12 Dworkin, R. (1986) Law's Empire. See also Dworkin, R. (1977) Taking Rights Seriously. Cambridge: Massuchusetts Harvard University Press; cited by Bello, P (2012). The Controversy About The Essence of Law: A Dispute Between Hart and Dworkin. *Indonesia Law Review (Year 2, Vol 1)* 45 at 49-50.

13 Duncan Kennedy and Karl E. Klare, "A Bibliography of Critical Legal Studies," Yale Law Journal, Vol. 94 (1984): 461.

14 Milirrpum v Nabalco Pty Ltd (1971) 17 FLR 141

15 http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx. Ishay, M. The History Of Human Rights (2008). University of California Press is recommended. See Also Rhoda E. Howard-Hassmann (2013) Reconsidering the Right to Own Property, Journal of Human Rights, 12:2, 180-197, DOI:10.1080/14754835.2013.784667

16 Searle, John R. (1964). "How to Derive 'Ought' From 'Is'". Philosophical Review. 73 (1): 43–58. JSTOR 2183201. Searle, John R. (1995). The construction of social reality. New York: Free Press. ISBN 0-02-928045-1. See also https://plato.stanford.edu/entries/chinese-room/

17 Keenan, S. (2010) *Subversive Property: Reshaping Malleable Spaces of Belonging.* Social and Legal Studies. 19 (4) 423 at pp427-429.

Many of these thinkers engaged in self-reflection on the European customs or norms of the day and motivated to consider the source of those norms (e.g. subject to the whims of a sovereign, slavery, cruelty to animals, position of women) and this led to some, like Bentham, recommending separation of state governance from religion, for example. Some terminology or reasoning (the "natural rights" of Locke) was a rhetorical device for encouraging the adoption of norms for societry. Legal positivists rejected attempts to find purpose to law outside of the laws as written, but this view has been again questioned by the modern proponents of "human rights".

The history of legal and political philosophy in the 17th to 19th centuries was largely dominated by privileged white men who were busy describing not merely the basis for the legal system, but their views on how life should be lived. Increasingly, since the late 20th century, the implicit attention to psychology, sociology, anthropology and theology apparent in some of the early writings could be unpacked within legal and non-legal disciplines and subjected to critical examination.

In the past, these different definitions of law (express or implied) have provided different definitions of legal reasoning itself. For example, a narrow definition leads to legal reasoning being defined in terms only of rules and logic, or a theory of adjudication or what judges do[18]. This may be motivated by the role for secondary rules requiring 'adjudication' in Hart's analysis (correspondence to the verification aspect of logical positivism). It often focusses on the difficult cases where judges must decide what the law is, and determine what the facts are, having regard to common law, precedents and other aspects of the judicial role. These points were explained by McHugh J in Wilcock Street Investments Pty Ltd v CDG Pty Ltd [2004] HCA 16; (2004) 216 CLR 515[19]:

> The common law distinguishes between the holding of a case, the rule of the case and its ratio decidendi. The holding of a case is the decision of the court on the precise point in issue for the plaintiff or the defendant. The rule of the case is the principle for which the case stands although sometimes judges describe the rule of the case as its holding. The ratio decidendi of the case is the general rule of law that the court propounded as its reason for the decision [59].

Hart's own analysis seems to accept that law as a whole is both a social and cultural phenomenon, not merely rules; he merely chooses to describe in other rules how operative legal rules are recognised, or signified, and that this may be a specific cultural phenomenon.[20] Hart supposed that law was part of a system that had evolved so that law was self-contained in rules, and the set of rules could be defined.

The more that we open up the topic of norm-creation to disciplines other than law, the more we must consider topics like psychology, sociology and anthropolgy and ecology when deciding what is an appropriate way to live. From a non-European perspective, we can also say that we must question the assumptions in the normal relation between humans, the world and the entities within it.

18 see Parker, Tradition and Change , Chp8: Tradition and Change in Legal Reasoning, p193; Lupton v FA & AB Ltd [1972] AC 634 at 658-9.

19 See also Cardaci v Filippo Primo Cardaci [2018] WASC 100 at para [31].

20 Coleman, J. (1991) Rules and Social Facts. *Faculty Scholarship Series (Yale Law School).* Paper 4194. (14) 703 at 717.

PART 2 – LAW AND FACTS AS DISTILLED KNOWLEDGE STRUCTURES AND BELIEFS

2.1 Law as the embodiment of specific knowledge structures and beliefs

Law is inevitably concerned with knowledge structures and beliefs. It seems too large an assumption to assume that the content of the rules guarantees any kind of completeness or comprehensiveness. There are relevant results from science and maths that suggest systems might not be self-consistent, and may only represent intermediate paradigms of thought (see Godel[21], Kuhn[22]). Some authors have advanced this argument in relation to law, for example Carlson has stated : "In effect, we cannot say in advance what law is. The set of primary rules cannot be reduced to a determinate rule of recognition. We can only compile incomplete sets of individual laws."[23]

The law is ultimately defined by what exists and is maintained by a variety of social practices, rather than any specific kind of authority. The perception of the universe within a group influences how they create and apply law. For example, some attribute their laws to an earthly and divine 'ruler'. This occurred, for example, in the Hammurabi Code and the Ten Commandments. The Code of Hammurabi[24], uncovered in 1901, understood in contemporary times as a legal 'code', is a long list of specific propositions[25], encapsulated in massive form of a 'finger-shaped black stone', with attribution of the origins of the rules to a God.[26] A similar set of significations appears in the Ten Commandments of Moses. These are rules that not only appear in the Bible, a book of religious significance to several faiths, but they are described as having been written and delivered by a God. In the attributed source of the Ten Commandments there is, therefore, signification upon signification that these are 'essential norms'. Moses may have been considered a cultural leader, and custodian of these laws, but it is far from clear he was personally considered a sovereign, or to be wielding sovereign power over any particular territory that he personally laid claimed to.

Although many attempts at classifying the law have been made, they all seem to met with the difficulty of adopting one system that can deal with the complexity of facts and legal ideas. These sorts of difficulties are a function of our thinking, and not necessarily related to the nature of law. Difficulties in explaining meaning are functions of general human problems, in which explanations are situation or context specific (see Heidegger, Wittgenstein[27]).

There is also the inherent difficulty that different cultures having different knowledge structures and belief systems. Twining has suggested "A more cosmopolitan discipline of law needs to confront problems of generalisation – conceptual, normative, interpretive and empirical – across jurisdictions, levels of ordering, legal cultures, and traditions."[28].

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21 As argued recently by Carlson, D. (2013). Legal Positivism and Russell's Paradox. *Washington University Jurisprudence Review* (5) 257. Available from: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1048&context=law_jurisprudence

22 Kuhn, T. The Structure of Scientific Revolutions. INTERNATIONAL ENCYCLOPEDIA of UNIFIED SCIENCE. University of Chicago Press (2nd Ed, 1970).

23 Carlson, D. (2013). Legal Positivism and Russell's Paradox. *Washington University Jurisprudence Review*. (5) 257 at page 259. Available from: https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=1048&context=law_jurisprudence

24 http://avalon.law.yale.edu/ancient/hamframe.asp ; nb the English translation uses the word 'chattels' which is indicative of the preferences of the translator for a word to convey meaning.

25 Language; sentences; "rules" – actually, what looks like a lot of 'if...then' statements. The are conditional statements; they are also able to be considered premises in propositional logic; they contain conditions and actions.

26 In Austin's Province, at (vii) he expressly refers to the laws of God as one of the four categories of laws defined as 'commands'. Austin, J. (1832). The Province of Jurisprudence Determined. London: John Murray. Retrieved 31.05.18 https://archive.org/details/provincejurispr02austgoog

27 *Philosophical Investigations, para 87*

28 Twining, W. (2005) Have Concepts Will Travel: Analytical Jurisprudence in a Global Context. *International Journal of Law in Context*, 1,1 pp. 5–40 Cambridge University Press at page 33.

If we reflect on that problem, then the solution to organising law requires us to acknowledge that in creating laws, we adopt different modes of *perception*, and create different *concepts* that enable us to simplify the facts to use in reasoning about that mode of perception.

2.2 Knowledge structures in general

Teachers of law will be familiar with some attempts to work with legal knowledge structures. Whenever ideas are put on a whiteboard with boxes and lines, there is some attempt to structure legal information. This does not necessarily draw upon social, political or economic concepts directly, but there is some attempt to use concepts which achieve consistency through stability.

I have alluded to the fact that the way in which we represent knowledge is important for forming conclusions and judgments. It is not merely the way in which rules are structured, with elements of those rules, but the way in which social reality is structured too. This is because laws may also represent distillations of that social reality: in that case, it follows that the elements of rules are not axioms that need to be defined in a never-ending process of reduction, but for the purposes of the rule, are to be treated as *pre-existing* concepts. Some of the concepts may only exist in certain knowledge representations, or social power structures, but for the purposes of the rule, they are accepted as the basis for the rule. Indeed, Keenan has noted that Locke's subject is already in possession of property, but in Hegel's 'proper subject', the notion of property is essential to human personhood: will and freedom is obtained through appropriating property[29]. In both cases, neither women nor non-white races are considered proper subjects.[30] Keenan goes on to say that if law is conceived as belonging, then the networks of belonging in which property was situated for Locke's purposes were networks of "whiteness, class, ability and masculinity" and these became the ideas for property that spread with colonization, therebing 'wiping out indigenous networks of belonging'.[31]

There are intellectual disciplines concerned with the ways in which knowledge can be represented. Some of these do have similarity to using boxes and lines, particularly those that define knowledge by its associations. However, merely using images of boxes for concept representation does not convey all the meaning we may need : sometimes there has to be some additional meaning incorporated by paying conscious attention to the structure of the boxes and connections (semantic networks[32]).

There are several different ways in which structured representations of knowledge have been investigated and modelled. An extension of the semantic network idea is what are called 'concept networks'[33] These insert additional nodes (boxes) into the network to represent an idea and then connect it to other concept boxes (a form of association, encapsulation etc). Sometimes what are called 'mind maps' resemble this approach. Another related area is called frame representation[34] Marvin Misky[35] was one of the pioneers of this research, closely related to knowledge representations for the purpose of artifical intelligence research. In the frame representation, there is a stereotype situation, sometimes called a schema, that is then compared to inputs or a particular reality. Minsky said : "The basic frame idea itself is not particularly original–it is in the tradition of the "schema" of Bartlett and the "paradigms" of Kuhn {1970}; the idea of a frame-system is

29 Keenan, S. (2010) *Subversive Property: Reshaping Malleable Spaces of Belonging.* Social and Legal Studies. 19 (4) 424.
30 Keenan, S. (2010) *Subversive Property: Reshaping Malleable Spaces of Belonging.* Social and Legal Studies. 19 (4) 425.
31 Keenan, S. (2010) *Subversive Property: Reshaping Malleable Spaces of Belonging.* Social and Legal Studies. 19 (4) 423 at 428.
32 Colton, Simon (2005) Knowledge Representation. *Department of Computing, Imperial College, London, Artificial Intelligence, Course V231, Lecture 4* URL: http://www.doc.ic.ac.uk/~sgc/teaching/pre2012/v231/lecture4.html
33 See http://www.doc.ic.ac.uk/~sgc/teaching/pre2012/v231/lecture4.html
34 Minsky, Marvin (1974) A Framework for Representing Knowledge. *MIT-AI Laboratory Memo 306, June, 1974.* http://web.media.mit.edu/~minsky/papers/Frames/frames.html
35 See Marvin Minsky Homepage at MIT: http://web.media.mit.edu/~minsky

probably more novel."[36] Frames are similar to kinds of database records, with additional functions, and are similar to both the 'prototype' concept in cognitive science[37] and the idea of 'objects' in object orientated programming.[38] In Minsky's own words, reflecting his computer science and data structures interests:

> "When one encounters a new situation (or makes a substantial change in one's view of the present problem) one selects from memory a structure called a Frame. This is a remembered framework to be adapted to fit reality by changing details as necessary.
>
> A frame is a data-structure for representing a stereotyped situation, like being in a certain kind of living room, or going to a child's birthday party. Attached to each frame are several kinds of information. Some of this information is about how to use the frame. Some is about what one can expect to happen next. Some is about what to do if these expectations are not confirmed."

The significance of the frame-system, for legal education, is that perceptual changes can occur which invoke different, but already familiar representations. A person that adopts a different classification scheme for facts, but which involves the application of a different legal rule or legal source, is effectively shifting from one frame to another.

Law teachers are already participating in this mode of thought when creating summary diagrams on the teaching board. Any teacher who has drawn a box and lines diagram on the board, that attempts to represent ideas as a kind of relationship-model, rather than a rule per se, has ventured into the area of knowledge representation by associations and concepts drawn from our social reality.

Some of these prototype ideas are used in legal reasoning, not only in analogies for arguments but in the law itself. For example, a Court in Western Australia dealing with a 'de facto' relationship is required to determine if it is 'marriage-like'.[39]

2.3 Are facts meaningless without knowledge structures, beliefs and concepts?

There have been many different expressions used for describing or defining facts, and none may be exclusive or complete.

These include:

(a) bare facts or 'brute facts'
(b) institutional facts (Searle)
(c) generalised facts (Stone)
(d) general concepts (see, for example, Dietrich[40])
(e) "socially constituted fact" (see the majority in Yanner v Easton,[41] when discussing native title).
(f) legal fictions (corporations, trusts, partnerships etc) which may also be institutional facts

Most of these are references to human/cognitive concepts, and not things that exist independently of human thought. In fact, most representations of facts in human language will involve some concept that helps distinguish the idea from the world external to the mind. It is very difficult to talk about

36 Minsky, Marvin (1974) A Framework for Representing Knowledge. *MIT-AI Laboratory Memo 306, June, 1974.* http://web.media.mit.edu/~minsky/papers/Frames/frames.html
37 Goldstone, R. L., Kersten, A., & Carvalho, P. F. (2017). Categorization and Concepts. In J. Wixted (Ed.) Stevens' Handbook of Experimental Psychology and Cognitive neuroscience, Fourth Edition, Volume Three: Language & Thought. New Jersey: Wiley. (pp. 275-317) at page 285.
38 See http://www.doc.ic.ac.uk/~sgc/teaching/pre2012/v231/lecture4.html
39 Miller v Taylor [2018] WASC 75 at 13 Aper Curthoys J; s13A Interpretion Act 1984 (WA).
40 *Dietrich, J. (2005) Giving Content to General Concepts. M.U.L.R. 29*, 218
41 See Yanner v Eaton [1999] HCA 53 at [38].

facts, even within these categories, without deciding what is the focus of our thinking, or our way of thinking, or our mode of perception. In many respects, the concept of property dominates the social, political and economic landscape because it is so central to social relationships; the right of exclusion not being merely a dry legal right but a fundamental ordering concept in society.[42]

Concepts are the building blocks of thought;[43]a form of mental encapsulation. This is demonstrated experimentally in cognitive science and through philosophy in the humanities and critical studies. In an article in the context of cognitive science, Goodman et all (2008) referred to the intuitive idea that 'Concepts are mental representations that are used to disciminate between objects, events, relationships and other states of affairs'.[44] In the context of communication studies, Hall referred to the fact that reality existed outside language, but was constantly mediated and encoded through language.[45] The importance of classification from an early stage of human development has been put this way: "Without any categorization an organism could not interact profitably with the infinitely distinguishable objects and events it experiences."[46]

2.4 Do we "apply" rules or do we "apply" knowledge structures?

A simple but naive view is that this means using logical propositions, in which the elements of a rule are systematically tested and compared to the facts. If they exist, then the rule 'applies'. In this sense, it is a simple process of comparison. It is the kind of thing that some people imagine a computer can do.

However, if we admit that some of the elements of rules are actually concepts, founded on a particular perception of social reality, then the process of applying the law to the facts always involves a degree of mental priming, prior to engaging in any logical process. That 'priming' requires the person adopting something similar to the same perspective as the law requires. This becomes a textual interpretation exercise, because the evidence the Court considers is the language used in the rule of law under consideration. Any conflicting or oppositional frame of mind has to be excluded with reference to that language. There are some judges, for example former High Court Judge, Michael Kirby who have suggested that they will try and reach interpretations consistent with international standards of human rights wherever possible, but sometimes this is prevented by the content of a particular law or statute they are concerned with. Michael Kirby made these remarks extra-judicially during an event filmed at the Festival of Dangerous Ideas, at the Sydney Opera House on Sunday 4 October 2016[47]. The topic was "The Quality of Mercy" and it concerned Shakespeare's play "The Merchant of Venice". He was referring to earlier judicial decisions he had made, including one in the High Court in which, despite his desire to do so, he could not construe the Migration Act as applying the provisions for mandatory detention to adults only and not children.[48]

We may become conditioned to acting consistently with laws and the way of perceiving the laws, so that we apply the law unconsciously, without explicit attention to logic or reasoning. We can appreciate that laws themselves may become an unconscious medium for ideas. In a civilised society, like in any society with peaceful social norms, people are accustomed to accepting laws

42 For a discussion about property as a relationship between subjects, see Keenan, S. (2010) *Subversive Property: Reshaping Malleable Spaces of Belonging.* Social and Legal Studies. 19 (4) 425.

43 Goldstone, R. L., Kersten, A., & Carvalho, P. F. (2017). Categorization and Concepts. In J. Wixted (Ed.) Stevens' Handbook of Experimental Psychology and Cognitive neuroscience, Fourth Edition, Volume Three: Language & Thought. New Jersey: Wiley. (pp. 275-317) at page 280.

44 Goodman et al, "A Rational Analysis of Rule-Based Concept Learning", Cognitive Science 32 (2008) 108-154 at 108.

45 Hall, Stuart "Encoding/decoding." In Stuart Hall, Dorothy Hobson, Andrew Love, and Paul Willis (eds.), Culture, Media, Language, pp. 128–38. London: Hutchinson, 1980.

46 Mervis, C.B. & Rosch, E. (1981). Categorization of natural objects. *Annual Review of Psychology, 32,* 89-115 at page 94.

47 Access to the video is provided at Michael Kirby's website, URL: https://www.michaelkirby.com.au/content/mercy-exploration-justice-and-law-inspired-shakespeares-merchant-venice (Last accessed 13 June 2018).

48 Minister for Immigration and Multicultural and Indigenous Affairs v B [2004] HCA 20 at [158].

peacefully rather than with violent opposition. Some of our most significant legal concepts like ownership and property have existed for millenia in European societies. Gray has suggested that the language of property, for example, involves "half-conscious perception"[49]. In this sense the laws represent the dominant hegemony. Even authors concerned with dominant social ideas and hegemony in the context of law[50] have looked for the independent existence of social elements outside law, without analysing the embedded structure of legal concepts themselves.

An important observation is that propositional logic about the world may not be all that it seems: we don't actually apply the law to the facts. As Waddams said:

> "The selection of legally relevant facts is a matter not of empirical investigation but of judgment, and not wholly separable from the formulation of the applicable legal rule."[51]

Waddams also said, in relation to traditional reasoning, that "Legal decision-making requires the statement of relevant facts, the identification of a legal issue, and the formulation and application of a legal rule. These steps are interrelated, and each requires the use of judgment."[52]

The important mental process of employing judgment needs to be unpacked. In my view, all judgments require internal knowledge structures to be created, and this seems to be reflected by Waddams' statement that empirical investigation alone is not sufficient to determine what facts are of importance to a legal question. The second aspect he mentions, namely the formulation of a legal rule, is said to be related to the selection of relevant facts. This observation also reminds us that things beyond the rule, which I suggest are the social power structures and other elements of social reality, will give rise to the rules, and so must be considered when attempting to use the rules. We must, in effect, carry out our own knowledge structures of social reality in order to perform the internal distillation process that results in the definition of rules or the application of the law to the facts. These knowledge structures cannot be something of our own making, and they must enable us to interpret specific events over time and space with reference to a mental blueprint in which we assume the continuity of the relevant aspects of social reality.

Example

For example, if a 9th century law permitted or required people to expel wizards from the land, the the concept of 'wizard' itself is revealing of a particular kind of social reality. The concept of a wizard at that time may have been so natural and obvious that it didn't require further definition. In that society, perspective could still shift from wizards as merely part of the general membership of society, to wizards becoming the focus of attention. This can be one of the functions of law, in naming the person to whom a law is directed. There could be one perspective in which wizards simply exist among the population. The existence of the concept in a law can produce a general discriminatory effect when previously it existed, if at all, on a personal level. In attempting any kind of logical reasoning ('applying the law'), a person is forced to adopt the same sort of perspective and knowledge structures. If that proves problematic, it is still expected that the person will try and obtain sufficient information to understand the perspective of the lawmaker.

Since we can switch attention in this way, the way that we write and reason with laws will change to fit different modes of participation. The way we mentally construct knowledge structures and facts in each case is different.

Example 2

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49 Gray, K. (1991) Property in Thin Air. *The Cambridge Law Journal* 252 at 306.
50 Litowitz, D. (2000) Gramsci, Hegemony and the Law. *BYU L. Rev* 515, 2000(2)
51 Waddams, S. (2003). Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning. Cambridge University Press (2003). p14
52 Waddams, S. (2003). Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning. Cambridge University Press (2003). p18.

We can also unconsciously accept a 'company' as an artificial legal person for some purposes, but then shift to a different mode of perception for other purposes.

Since the mid 19th century in Australia, most of the States in Australia adopted their own version of the United Kingdom company legislation.[53] In Australia, the recognition of these artificial entities, as a consequence of lawmaking by governments in a Federal system, came under constitutional scrutiny because of confusion about the souce of the power, and of conflict between State and Commonwealth governments. However, this has now been resolved and there is a national system of recognition, continuous since the Corporations Act 2001 (Cth).

As a consequence of this development, the representation of a corporation as an owner within the concept of ownership is possible. This focusses on its external conceptualisation. Matters 'internal' to the corporation and encapsulated within the concept, such as its directors, shareholders and constitutional legal documents can be unpacked as and when they need to be, but in characterising the facts, the legal acts of corporations are often described by reference to its capacity to hold property and enter into legal agreements.

2.5 Can we generalise about knowledge structures for social reality?

There are many familiar concepts in our social reality that seem to become factual (institutional facts) because of their familiarity – corporations, banks, employers. These are cultural and society-based norms. There is some appeal in trying to discern a base unit of reasoning that underpins the legal reasoning process: an atomic unit or concept that can form the base for other ideas. It is something to bear in mind when distilling legal problems into elements that can be represented on a whiteboard, for example.

Some of the concepts used as a base classification for the world, including those now used in civil codes, arose in the Roman era[54]. This historical legacy can discourage further questions about how those concepts are actually used. These included persons, actions and things, and some authors have called these 'social institutions'.[55] According to some authors, these three institutions are the key elements in law as a system, since they link social facts, legal categories and legal concepts.[56] On the other hand, the same authors use unfortunate terms like 'virtual facts'[57] for what seem to be more commonly known as concepts.

As long ago as 1925, at least one academic author[58] noted that laws could be organised around the most important elements of society (socially and politically) – e.g Roman law around things and English law around land (law of real property). In regard to the place of the property concept in the law, Waddams summarised some of the present dillemas regarding the nature of property this way:

> "This fact has led some writers to subordinate property to obligations by suggesting that property is a 'bundle of rights' and so a shorthand term for describing obligations of many persons. On the other hand, some writers have moved in the opposite direction by seeking to explain obligations in terms of property. Some others again have pointed out that there is an in-

53 https://law.unimelb.edu.au/centres/cclsr/resources/history-of-australian-corporate-law/key-documents-in-the-history-of-australian-corporate-law

54 Edelman, J. (2005) Property Rights to our Bodies and Their Parts. *University of Western Australia Law Review 39 (2)* 47 at 56.

55 Taekema, S; van Klink, B, de Been, W. (eds) Facts and Norms in Law: Interdisciplinary Reflections on Legal Method, Edward Elgar (2016) at 55.

56 G. Samuel, The Foundations of Legal reasoning (Maklu, Antwerp, 1994), 172-180; Taekema, S; van Klink, B, de Been, W. (eds) Facts and Norms in Law: Interdisciplinary Reflections on Legal Method, Edward Elgar (2016) at 58.

57 Taekema, S; van Klink, B, de Been, W. (eds) Facts and Norms in Law: Interdisciplinary Reflections on Legal Method, Edward Elgar (2016) at 59-62.

58 Radin,M. (1925). Fundamental Concepts of the Roman Law, 13 Cal. L. Rev. 207 at 208.

> extricable circularity in legal language, because it is frequently impossible to say whether the law protects property, or whether 'property' is the name given to what the law protects. Another suggestion is that property is not so much a source of rights as a legal response to events that constitute the source. "[59] *(footnotes omitted)*

As I will explain, the solution to these issues lies in recognising that property is a central part of the knowledge structures and social reality. If property ultimately becomes an element of legal reasoning (or within a larger unit of reasoning, namely ownership), then that is because there has been mental priming and conditioning that allows it to be distilled in this way. At the time of its use, it already reflects a mode of perception of reality, and not merely a way of classifying legal rules. We need to focus not only on concepts, but on knowledge representation and priorities in the concepts used.

These issues have occupied legal philosophers for the last few hundred years. There is a partial answer to these issues, and that is to recognise that logical thought exists within modes of perception, and these are socially derived from dominant ideas from domains including politics and economics. These can be considered other dimensions of legal reasoning, but they are often systematically excluded from conscious attention. The fact we are engaged in logical reasoning of some kind may require us to admit it is only possible having prepared the mind in a particular way to do so. Usually, the preparation that is required in a traditional law course involves only familiarity with the Western culture. However, we can prepare the mind for comparative analysis by making explicit the knowledge structures and belief systems that underpin Western culture, so that the comparison is made at an appropriate conceptual level.

The modes of thinking explain what concepts have the focus of attention when we intepret factual situations, and how laws are written, and therefore how they must be applied. To apply the law to the facts we have to shift our mode of perception, and then use the concepts in that frame. It becomes more difficult to see this if we only use a few different shifts in mode of perception, and they start to become unconscious.

2.6 The relevance of beliefs

The English legal system included laws that referred directly to beliefs, or matters that we would now classify as beliefs or superstitions. In 9th Century Laws of Edward, comprising treaties with the Danes, the English Kings ensured there was a law requiring only a belief in one God[60] and a duty to expel 'wizards' and 'sorcerers' from the land, or ensure they were 'utterly destroyed in the land'.[61] There were recognised holidays for Christmas (but not in favour of slaves).[62]

The laws of England in the 13th century expelled Jews from England. As Smith said "On 18 July 1290 every professing Jew in England was ordered out of the Realm, for ever, by King Edward I. Between sixteen and seventeen thousand Jews had to flee, and none dared return until four hundred years later."[63]. This is not merely a matter of deciding what constitutes a 'law', but there is a clear overlap between the receipt of Christian doctrine and decisions about how to keep the culture homogenous in England. In deciding what should be an acceptable custom, it is impossible to say that what is within the contemplation of the law only consists of facts, and not beliefs.

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59 Waddams, S. (2003). Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning. Cambridge University Press (2003). p173.

60 Attenborough, F. L. (ed) (1922) The laws of the earliest English kings. Cambridge [England] : University Press Retrieved 31.5.18 URL:https://archive.org/details/cu31924070153519 page 103.

61 Attenborough, F. L. (ed) (1922) The laws of the earliest English kings. Cambridge [England] : University Press Retrieved 31.5.18 URL:https://archive.org/details/cu31924070153519 page 109, Rule 11.

62 Attenborough, F. L. (ed) (1922) The laws of the earliest English kings. Cambridge [England] : University Press Retrieved 31.5.18 URL:https://archive.org/details/cu31924070153519 page 85, rule 43.

63 Smith, G. The Edict of Expulsion of 1290. Chp: The Settlement of Jews in England. Retrieved 31.5.18. URL: https://archive.org/stream/TheEdictOfExpulsionOf1290

The central role of belief systems within the concept of law in the 19th century is illustrated by the second chapter in Austin's book[64] with its strong emphasis on explaining the concept of God's laws. That Austin included the laws of God[65] as part of the concept of law illustrates this as one of the natural ideas of the dominant group at the time (the hegemonic, natural state of things). This is a reflection of English thought at the beginning of the English colonies in Australia (and even closer to the start of the colony in Western Australian).

2.7 The relevance of time

It should seem natural for legal reasoning to be concerned with time and space, since that is how many people navigate their lives and the social reality. However, it is less common to see time being used as a dimension of analysis in legal reasoning. It is certainly relevant when dealing with the order of events, and the necessity of one event preceding another if it is to be attributed as a cause of another.

There is another way in which time beomes relevant, and that is to examine what concepts are inherently durable over time. Adopting a socio-legal approach, Keenan[66], has noted that if there is an embedded network of relations of belonging, property can be recognised, and instance of property can be of any duration, but tend to be long-lasting (in terms of the object if not the subject).

2.8 Examples of application

To understand reasoning with laws created in the Western culture, we have to provide some examples and look for some generally useful patterns.

The first analytical step is to decide what is the focus of attention. For example, if I begin to describe a home to you, then you may be picturing the home as the centre of the scene and the focus of the discussion. You may think about who owns it, and who lives there and whether they are the owner or are renting. You may be interested to now how long the person has been there, what they paid for it.

Now, I might say to you that the a body has been found in the home and there is a murder investigation. The home now takes on the appearance of a crime scene. The forensics staff will invade the home, looking for evidence. At some point a person will be identified as a suspect and this accused person will then become the focus for the prosecution. The person is the focus and the home is part of the context, or background: the scene of the crime.

This example and the switch in attention neatly illustrates how the facts are going to differ, and the focus is going to differ, depending on what we are interested in.

64 Austin, J. (1832). The Province of Jurisprudence Determined. London: John Murray. Pp31-60. (Last accessed 31 May 2018). https://archive.org/details/provincejurispr02austgoog

65 In Austin's Province, at (vii) he expressly refers to the laws of God as one of the four categories of laws defined as 'commands'. Austin, J. (1832). The Province of Jurisprudence Determined. London: John Murray. Retrieved 31.05.18 https://archive.org/details/provincejurispr02austgoog

66 Keenan, S. (2010) Subversive Property: Reshaping Malleable Spaces of Belonging. *Social and Legal Studies.* 19 (4) 423 at 433.

PART 3 – PERCEPTUAL SHIFTS IN KNOWLEDGE REPRESENTATION

3.1 Shifts in perception that upset knowledge representations

One of the fundamental triggers in our legal system and society for shifting and focussing attention is the concept of ownership, and the related concept of property. As Keenan has noted, instances of property tend to orientate social relations and networks of relations of belonging, over long time periods.[67] This may be so familiar it tends to be unconscious. When it does receive explicit attention, it is more often for academic interest rather than descriptive reasons. Although there has been much debate about the true nature of property, and whether it is a bundle of rights and so on, ownership is by far the most useful insight into how perceptions are altered. Ownership brings the owner, the thing owned, and any other people into a particular frame of perception. It often brings with it an interest in security, money, property and wealth.

Other commercial and economic activities also pick up on this mode of perception and extend its consequences. The relative strength of ownership or wealth positions affects the roles of people in commercial transactions (e.g. as employer, employee in an economic situation), which in turn provides the common labels we apply to describe our social reality. It is often at this level of generality that whiteboard representations of legal situations as boxes and lines appear.

3.3 Examples

3.3.1 Example 1

We can take the example of focussing on a popular tourist destination site as an example of a place that has attracted attention for its own sake. These sites may be designated national parks and perceived as of value for both preservation and economic activities. They are areas that can attract visitors, economic activity and therefore provide amenities such as shops, toilet facilities, road access, historical information and safety barriers. The construction in these places often includes ‘interpretation centres’, meaning that they are intended to foster a particular perception of the place. If the site is popular enough there may even be accommodation and recreational facilities. The legal mind, interested in how these sites are perceived through law, will use the concept of ownership and its characterisation as a territory will influence conservation or heritage legislation. Through these concepts, representation of the site within private ownership or public ownership will define who has responsibility or opportunity to control the site. This legal view uses the idea of land or things *belonging to* someone (see Blackburn J in Milirrpum), perhaps to the State.

There is yet another switch in perception that might occur. Instead of perceiving the site as a tourist attraction, or a murder scene, we might live in a traditional community where a geological feature at the ‘tourist site’ dominates the landscape. This may be perceived to be a mother figure, ancestor, being or group of beings looking over the community and the environment, and will often be named as such. Through this perception, a certain reverance, care and responsibility or deference to the environment may exist. Other cultures may not immediately recognise that this perceptual system is one which involves a maintainable social system and way of living with purpose and structure.

There is no reason, in theory, why similar perceptual schemes of this kind cannot be imagined by the Western mind. There is not much difference to asking: “What then, in my place of living, is my ancestral guide to whom I show reverence?” to asking “Who then, in law, is my neighbour, to whom I owe duties?”. In one society, the connection to the environment is accommodated by reverance, in another, only foreseeability of harm to a person or their property within a different mode of perception.

67 Keenan, S. (2010) Subversive Property: Reshaping Malleable Spaces of Belonging. *Social and Legal Studies*. 19 (4) 423 at 433.

It can never be said that the question of what the law ought to be is separate from what the law is. Even asking the question of what the law ought to be might involve perceptual shifts which will alter the kinds of laws that are followed or written.

The Anglo-Australian legal system has been less accommodating of the ability of others to perceive the universe in a different way. For example, in Milirrpum v Nabalco in 1971, Blackburn J could only discuss concepts within a limited part of the Anglo-Australian legal system. He could only take identify and attach significance to the indigenous customs, habits or laws which were recognisable to property law. In that way, it forced him to only admit those aspects which represented an individualistic, exclusionary character. Later, even though Mabo (No2) decision of the High Court permitted common law native title, it was still only introduced into the Western civilised system with reference to rights of exclusion, rather than as part of a broader legal system. Keenan has referred to this aspect of indigenous entitlement to land being interpreted through the Anglo-Australian paradigm.[68]

3.3.2 Example 2

Even in relation to conventional notions of property, shifts in perception or perspective can occur. For example, in the rules of the common law, wild animals had a limited period of non-legal status, but would be recognised as property if captured or killed. Since they were not property there was no 'owner', though they existed within the Crown's territory. The untamed nature (including wild animals) is generally not brought within the notion of things that can be 'owned', even in Australia.[69] If wild animals were killed on the private land they then became property, and they became the property of the land owner[70].

The Blades case[71], cited by all judges in the High Court in Yanner v Eaton, involved the question of who was the owner of rabbits (once called 'coneys') given the rabbits had been killed by a poacher on someone else's land. The untamed, live rabbits were classified as being 'wild', and were not traditionally not considered property (in keeping with theme of lack of domestication). It is interesting that the Court was able to identify the animal as property before attempting to identify the owner. The relationship of ownership was necessarily implied by recognising the animal as property. The social status protected by the law in this context was the entitlement of the land owner in which the killing took place. Thus, the concept of ownership of land paved the way for the law to confirm, in the case of slain wild animals, the existing wealth and entitlements of land owners.

What is also of general interest are the more expansive comments of Callinan J and McHugh J about the social context for these property laws. In each case the judgments illustrate how the concept of property (and ownership) is a reflection of social reality and entitlements. Significantly, however, the judges differ remakably in their willingness to suggest that the concept applies to the conditions in Australia. Callinan J suggested that this attitude toward wild animals, and the law of property in this regard, was a persective of fedual times not shared in Australia, and not relevant. He said:

> "The law which Lord Westbury LC summarised owes its origins no doubt to many 19th century and earlier, now outdated, historical, indeed feudal conditions of questionable relevance to Australia at any time: for example, the ownership by a few of vast hunting estates, aristocratic preoccupations with the Chase, hound, horse, lure, snare, falconry, gun and dogs[146], uncertain agricultural yields, the poverty suffered by many which might

68 Keenan, S. (2010) Subversive Property: Reshaping Malleable Spaces of Belonging. *Social and Legal Studies*. 19 (4) 423 at 428, citing Kerruish, V. & Purdy, J. (1998). He 'look' honest – Big white thief. *Law/Text/Culture* 4(1): 146-71.

69 See Yanner v Eaton [1999] HCA 53 at [34], citing the texts of Blackstone for the common law (1st ed 1765).

70 Yanner v Eaton [1999] HCA 53 at para 24 (per the majority).

71 Blades case, referred to in Yanner v Eaton [1999] HCA 53 at .

> tempt them to poach, the partial domestication of game birds to enable them to be more vulnerable to the landowner's fowling piece, Royal privilege in respect of certain animals, and competition between wealthy people to collect and keep for ornamental purposes and as curiosities exotic animals."[72]

Whereas McHugh J said that not only did it apply, but it was something that could have benefitted the aboriginal population, in that it could have been associated with a right to possession of the kind associated with native title (something quite different to the feudal conditions). He said:

> "At common law, the only right of property in wild animals was "the exclusive right to catch, kill and appropriate such animals which is sometimes called by the law a reduction of them into possession."[64] That right arose from the possession of land on which the animals happened to be or from a Crown grant to enter another's land for the purpose of catching, killing or appropriating wild game. No doubt in Australia, the existence of common law native title rights meant that Aboriginals had similar rights over fauna."[73]

It is extremely unlikely that McHugh J's perspective on this issue would have been shared or contemplated by any judge prior to the High Court decision in Mabo (No 2) in 1992. In any case, these comments serve as a convenient illustration of how the concept of ownership and property is associated with a particular perspective of social reality, and the law's protection of a certain state of being. We can see in Callinan J's observations that the concern of the property law is with a certain preoccupation, giving it focus. It is this centering of attention that I referred to earlier.

The further comments of Callinan J illustrate how the Western, European attitude appears to have been influenced by scientific progress and in particular the 19th century theories of Charles Darwin. Callinan J said:

> "But times and views about ecology and the environment of which wild creatures are now indubitably taken to be part[147], change. Darwin's On the Origin of Species which raised the consciousness and sensitivity of Western Society to the importance and significance of the natural world, was published in 1859[148]. By 1907 this consciousness was manifesting itself by statements and endeavours by concerned and informed people such as Dudley Le Souef of the Australasian Ornithologists Union who said in that year "[t]he wild birds do not belong to us to treat as we like"[149]. The most effective way to ensure the survival and protection of wild creatures, particularly as the means of taking and destroying them became more efficient, was for the State to legislate in the most comprehensive way possible to obtain absolute dominion over them and this I am satisfied the legislature of Queensland did in enacting the Act. The Queensland Parliament meant exactly what it said when it used the word "property" in s 8A of the Animals and Birds Act 1921 (Q)[150] and when it repeated that word in each subsequent enactment[151]."[74]

3.4 Perceptual shifts regarding the facts in criminal cases

Another possible perception, through events, is that the tourist site becomes a crime scene, and is then perceived in that way. The location becomes the background for the event, and the victim, suspect and accused become the focus.

Ultimately, in a criminal matter, it is the accused that has the focus. The accused person, if charged, will become the centre of attention at a legal trial. In the Northern Territory, for example, if someone is accused of a murder in a tourist site, then the caravans, barbecues, geological features and wild animals will generally take secondary importance; they will be part of the background information.

72 Yanner v Eaton [1999] HCA 53 at para [142] per Callinan J.
73 Yanner v Eaton [1999] HCA 53 at para [46] per McHugh J.
74 Yanner v Eaton [1999] HCA 53 at para [143] per Callinan J.

It can be extremely difficult to change this mode of perception and focus, because it requires a differnt mental mode of perception, and a person has to agree to do it, even with the same evidence before them. It may seem strange to some people to accept totally different accounts of events.

The phrase 'beyond reasonable doubt' might be interpreted as one in which a person has doubts within a particular mode of perception, or one in which they are saying there is no other mode of perception. is not able to shift their mode of perception, because there is no 'reason' within that frame of evidence to doubt it. Yet, if there is a reason to shift frames, and mode of perception, then there may be no reasonable doubt within the other frame either.

I suspect some miscarriages of justice, in which a person is innocent, yet convicted, arise because a person was originally suspected of a crime and there were plausible, reasonable explanations given. To a jury, it might seem 'reasonable' for the original suspect to be involved. If it is later suggested to a jury that, for example, a wild animal was responsible for the death of the victim, the jury is being asked to switch frames and change the focus. This can be difficult for them to do[75]. They must change the way the evidence is perceived. What was a rational explanation, involving a set of 'facts' in one mode of perception also has to be accepted in another. The information is largely the same, but the agent in the murder is quite different. This internal re-organisation of thoughts might be difficult to achieve once someone has settled on one other explanation. There is general interest in how juries get things wrong and convict innocent people: some of this focusses on belief updating using brain activitation studies[76]:

"We often form beliefs based on information that is incomplete, uncertain, ambiguous, and that changes with time. There's an incredible amount of variability in how people interpret information and integrate it into their belief systems, and beliefs often form the basis of decisions that have far reaching consequences. (Take for example the fact that jurors' beliefs that a defendant is guilty can send an innocent person to jail, which has happened in at least 353 cases.)"[77]

I think a more general perception/conceptual model is helpful.

3.5 Percecptual shifts for ownership and property concepts

The idea that it is important to think about ownership for political and social reasons, and not merely within a legal context is not new, but it bears repeating. There are arguments that private ownership ensures that only what is important to the efficiency of the owner is accounted for, and the wellbeing of others is thereafter someone else's problem. As Noam Chomsky said in 2011[78]:

> "...That world, in fact the whole world, is of course always changing, but there are significant continuities and they're worth bearing in mind. One continuity is that those who control the economic life of a country also tend to have overwhelming influence over state policy. That should be a truism taught in elementary school. It was formed succinctly by Adam Smith in words that I've quoted before but are important enough to repeat. He, speaking of Britain of course, wrote that the principle architects of policy are the owners of the society, in his day the merchants and manufacturers, "the masters of mankind" as he called them. And they insure that state policy serves their interest, however grievous the effect on others, including the domestic population, but primarily the victims of what he called their savage injustice abroad, and India was his prime example. That was early in the days of the destruction of India.

75 As dramatically illustrated by the case of R v Chamberlain.
76 https://nikkimarinsek.com/about/
77 https://nikkimarinsek.com/about/
78 Chomsky, N. (2011) The State-Corporate Complex: A Threat to Freedom and Survival. Lecture given at the The University of Toronto, April 7, 2011. Transcript available at URL: https://chomsky.info/20110407-2/ . Excerpts of video available at https://www.youtube.com/watch?v=UikhLJNLFK4 (Last accessed 17 June 2018)

> Today the masters of mankind are multinational corporations and financial institutions, but the lesson still applies and it helps explain why the state-corporate complex is indeed a threat to freedom and in fact even survival. By now there are important elaborations of Smith's truism applied to the modern world."

Ownership has been one of the concepts that has underpinned European civilisation and expansion for hundreds of years. It is difficult for people who are in a capitalist economic situation to question it or depart from it. From a psychological perspective, private ownership has very often formed the basis for how the world is perceived by the dominant group in society. Private ownership, for example, not only forms the basis for what is criminal behaviour, but it gives dominant control to the owner of a thing, in preference to every other human who has claims to it. The dominant view is that exclusion of others is a good thing, because that is what the law protects.

It is possible for academic discussion of property to navigate within traditional legal areas without ever considering that there might be different ideas about space, and property. The academic consideration of the perspective of non Europeans to space and land was absent for the early period of British colonisation of Australia. Only in recent times do we read that 'contradictory understandings of property existed within the same space'[79].

International law in the era of territorial expansion contained concepts as to how new laws came to be applied to new territories by nation-states. The basic idea, borrowed from Roman Law, was the 'finders keepers' metaphor, or, as expressed more formally in Roman Law, the rule that permitted someone who discovered an object with no owner to keep it (*res nullius*). The application of this idea to new land was termined *terra nullius*[80]. In the common law, the domestic description of the principle was similar but the terminology was different – a territory could be 'settled' with inherited English law applying to the new territory, so long as it was 'desert and uncultivated'.[81] The ultimate conceptual distinction that had to be drawn was between a place that had 'no owner' and one with settled inhabitants or settled law.[82] As a principle it reflects a certain degree of pragmatism by a country wanting to have a civilised law of *some kind* in place. This was reflected in Lord Watson's observation that there was no 'land law' or 'tenure existing in the Colony of New South Wales at the time of its annexation to the Crown'.[83]

Historian Harry Reynolds[84] who with barrister Barbara Hocking once suggested that the conclusion there was no deemed legal owner of Australia should be a conclusion reached only if the territory was 'not uninhabited', the English Crown had intended to settle Australia as if the entire territory had no owner. Ritter, who described the terra nullius concept as a 'straw' man argument, has described the implementation of power structures in this way as part of the 'discourse of power'.[85] The confirmation of this approach in the common law courts of New South Wales did not occur until 1836[86], but in that context, there was a perception too that the "Aboriginal people" were uncivilised and not putting the land to good use, as the English intended.[87]

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79 Keenan, S. (2010) *Subversive Property: Reshaping Malleable Spaces of Belonging.* Social and Legal Studies. 19 (4) 425 at 428.
80 Ritter, D. (1996) The "Rejection of Terra Nullius in Mabo". *Sydney Law Review (18) 5 at 7.*
81 Ritter, D. (1996) The "Rejection of Terra Nullius in Mabo". *Sydney Law Review (18) 5 at 8,* citing Blackstone, W. *Commentaries on the Laws of England* (18th Ed), vol 2 (1823) at 106; see also Lavery, D (2017) ibid.
82 Cooper v Stuart (1889) 14 App Cas 286 at 291; cited by Ritter (1996) at 9.
83 Cooper v Stuart (1889) 14 App Cas 286 at 292.
84 Reynolds, H. *The Law of the Land* (1982); (1987), cited by Ritter, D. (1996) The "Rejection of Terra Nullius in Mabo". *Sydney Law Review* (18) 5 at 29.
85 Ritter, D. (1996) The "Rejection of Terra Nullius in Mabo". *Sydney Law Review (18) 5 at 9.*
86 R v Murrell (1836) 1 Legge 72; cited by Ritter (1996) at 10.
87 R v Murrell (1836) 1 Legge 72; cited by Ritter (1996) at 12; see also Watson, I. (2005) Illusionists and Hunters: Being Aboriginal in this Occupied Space, *Australian Feminist Law Journal*, 22:1, 15-28 at 17.

PART 4 – A RELATIONAL, SPATIAL CONCEPT OF PROPERTY

4.1 An evolving spatial and relational concept of property in Australia

The introduction of a legal system for each of the English colonies was a mental conception (or 'illusion of equality'[88], as Wood says) of enormous significance for the existing population, (the now non-dominant culture[89]), which they had no say in, but were expected to accept. The lack of awareness of the legal regime that was imposed meant they would naturally encroach upon settled areas, fail to conform and break the rules. The colonists applied the English criminal law to the inhabitants and punished them. At the same time, the coastal origins of the colonies expanded into inland areas so the frontier extended past the areas where the original inhabitants were living. At the edges of the frontier legal notions of "Aboriginals" being British citizens ended and there were violent killings.[90] They tried to have them perform labour, or sent them or their children off to missions to teach them the ways of God.

When Australia was colonised, the philosophical outlook for dispossession and private property reflected ideas already 400 years old in the British intellectual history. The Courts and government in Australia have since continued to promote cultivation and exclusion of land. As Kate Galloway said, summarising the position of property law and its conception:

> "The discourse of Blackstone
> and Locke represents 'highest use' in terms of
> individual (human) utility. It is this understanding of the
> nature of property that enabled Europeans to justify
> dispossession of traditional owners of Australian lands.
> Such an understanding conflated ownership or property
> in land with cultivation in the European way - the
> investment of labour putting land to its 'highest use'."[91]

Keenan has also referred to the fact that property-as-spatial-relations evolves to facilitate a future that links to the orientations of the past. That is, if a space is orientated for a particular person and purpose, then it tends to remain there.[92] We could equally think of this in the sense of the progressive orientation of Australian territory, away from the natural state of the land, inhabitants, flora and fauna, and toward the aspirations and goals of British colonists. There is progressive structure, and life adapts to the new infrastructure, so that the shape of space becomes more rigid. Keenan suggests that this produce a sense of irreversible, linear progression of moments.[93]

In the article by Galloway cited above, Galloway suggests, like Keenan, a more relational definition of property, one which is not merely concerned with human conceptions of utility, but one in which ecosystems and human roles within them are seen as a whole. She said: ""perceiving land as an ecological system would avoid its compartmentalisation in terms of different resources - minerals, water, trees, animals. As a legal concept, 'ownership' of 'land' would be considered in terms of a

88 Watson, I. (2005) Illusionists and Hunters: Being Aboriginal in this Occupied Space, *Australian Feminist Law Journal*, 22:1, 15-28 at 17.
89 Ritter (1996) at 12.
90 Reynolds, H. *The Other Side of the* Frontier (1982); (revd ed) (1990), cited by Ritter, D. (1996) The "Rejection of Terra Nullius in Mabo". *Sydney Law Review (18) 5 at 11*.
91 Galloway, K. (2012). Landowners' vs Miners' Property Interests: The Unsustainability of Property as Dominion, 37 *Alternative L.J.* 77
92 Keenan, S. (2010) Subversive Property: Reshaping Malleable Spaces of Belonging. *Social and Legal Studies.* 19 (4) 423 at 433.
93 Keenan, S. (2010) Subversive Property: Reshaping Malleable Spaces of Belonging. *Social and Legal Studies.* 19 (4) 423 at 434, citing Greenhouse, C. (1996). *A Moment's Notice: Time Politics Across Cultures.* London: Cornell University Press.

unified whole. Use of the land would, therefore, operate without competition for various resources embodied within it."[94]

One aspect of the British 'orientation' that may not be consciously noticed is the extent to which modes of mapping or visualising the world influence the manifestation of the world constructed according to the same perceptions. The existence of certain technologies, perspectives and priorities in Western European culture can have a significant influence on the way in which social reality is defined. For example, mapping is a technique for visualising territory that arose out of a concerns for control over territory. The earliest exploratory voyages to Australia were concerned to map the territory – creating a sense of perspective that was 'above' the earth, even though flight had not yet been mastered. The knowledge representation system gave rise to a point of view that was elevated, covered space that would have represented weeks if not months of travel by foot, and was with a view to control and domination. Consequentially, the same media and technology became associated with the planning for the granting of entitlements and power, on a scale at which daily human activity seemed insignicant. Decisions were made about where land grants would be made after activity had been carried out to map and draw boundaries along rivers or other indications of an edge. So even at this early stage, the perception of water courses being edges, rather than the central concern of life had been set.

Western Culture, including British colonists, has often characterised its accumulation of new territory with maps and visual references that help give meaning to the taking of territory. Here, for example, is a map of the colony of New South Wales, indicating the extent to which the colony was divided into counties[95], which were spaces within which grants of land and occupation would occur at that time. The boundaries followed natural features, but would be progressively subdivided into Parishes and lots, consisting of more regular areas, in the years to come:

94 Galloway, K. (2012). Landowners' vs Miners' Property Interests: The Unsustainability of Property as Dominion, 37 *Alternative L.J.* 77 at 80.

95 See URL http://www.scone.com.au/history/historical-places/county-of-brisbane/ (Last accessed 18 June 2018).

Source: National Library of Australia.[96]

Another aspect of these maps is that they are intended to give certainty, and define a single state of existence. Such a map encodes the superior claims of the colonists to the land, and identifies with certainty who they are. To produce such a map implies a certain degree of permanence worthy of its creation. It is a document that is related to what is officially recognised.

Without the benefit of these maps, or being privy to the European schemes except where there was contact, it must have been difficult for the indigenous people to comprehend the systematic appropriation of the land by the colonists, its scale, and the diversity of private owners. The demand for new land often caused colonists and squatters alike to express outrage toward the local inhabitants. Despite the meting out of justice on some occasions[97], the basic context for the conflict was the colonisaton process. And for all the rhetoric of equality before the law, the British did not see the indigenous inhabitants as having 'equality' in the sense of an entitlement to retain any prima facie rights to possession of the land. The reality, if not the legal perspective, was that the inhabitants were supplanted by each new land grant. They were never considered subjects who would be holding property in the future.

Even the initial phase of colonisation was subject to even more changes when Australia decided to become a nation and this altered the way in which control over territory was conceptualised. In 1901, the common law concept of property was incorporated into the Australian constitution, and the government retained a power in respect to "the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws".[98]

4.2 Recent (20th and 21st century) perspectives on property

The perspective of non Western culture and how it might influence local law can be difficult to adequately explain to those who are not accustomed to switching perspectives, or even identifying 'ownership' as a trigger for a particular kind of focus and legal attention.

The sense in which indigenous culture was said to involve the idea of people "belonging to the land"(Blackburn J in Milirrpum) is a reminder that the ethos and belief system, as well as the cosomology of different cultures is relevant to both their culture and the law. The sense of belonging extends to all of the acts which are permitted and freely enjoyed because there is no challenge to the priorities or orientation of the group toward the space in which they live. A group that doesn't have to adopt the European perspective or orientation toward the land may record, live and communicate its culture, inclusive of laws, through physical performances, song, artwork, artefacts, customary journeys and interaction with the local environment.[99] Given those possibilities, the law itself may be adopted through memory, practice, training, and experience within one or more cultural contexts.

The concept of 'belonging' is not merely something related to ideas about family, or property, but also invokes a kind of orientation toward nature and beliefs inclusive of natural power systems as well. This has serious implications when attempting to translate from one legal system to another. An accurate translation may not be possible without recognising the role of belief systems and cosmology, for example. It is extremely important to accommodate the possibility that different legal systems involve different perceptions. It may not be adequate to attempt to translate non-

96 Dower, John (~1838). URL: http://nla.gov.au/nla.obj-232675810/view (Last Accessed 13 June 2018).
97 See details of the Myall Creek Massacre, 1838. URL (SBS): https://www.sbs.com.au/nitv/explainer/explainer-what-was-myall-creek-massacre (Last accessed 13 June 2018).
98 Australian Constitution, section 51(xxxi) ; available at URL http://www8.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/coaca430/s51.html
99 See Lynne Kelly, The Memory Code.

Western ways of existence into property law (ownership-based) concepts, or to reduce an entire capacity for existence to reliance upon ownership-based perception. The reverence for the environment that is essential to certain ways of living cannot be shown if that environment is under constant attack from a different culture with different values.

Nonetheless, because international human rights, and European thought for the last 400 years or so has conceptualised someone's control over their own land (as against a sovereign, but not necessarily as against an invader or dictatorship) as a 'right to property' (see Article 17 of UN Declaration of Human Rights, and Locke (1682)), it seems that this idea is invoked by claimants, even in traditional cultures, as a means of attempting to fit the idea of self-determination into the European conception of control over territory. Keenan has referred to this aspect of indigenous entitlement to land being interpreted through the Anglo-Australian paradigm.[100]

Howard-Hassmann[101] has described the right to property as "strategic" because it may assist with preserving other human rights. In that sense, it is not only strategic, but a way of expressing the ability of humans to create their own culture without interference. Further, she said "All rights-protective societies have market economies based on private property " and cited Freeman[102] for the proposition that "capitalism is the only economic system that has so far been found to be compatible with the relatively effective protection of human rights." Whether this is respectful of indigenous ways and ensuring that Western traditions do not complicate matters further remains to be seen. For example, the recent introduction of corporate entities (legal fictions) to hold property and money on behalf of Aboriginal and Torres Strait Islander Groups has led to immersion in Western civilisation and litigation.[103] The CATSI Act, for example, requires directors to act in the interests of the corporation[104] , for example, and not the environment, community or the land directly.

In the 1999 High Court decision in Yanner v Eaton, the High Court majority endorsed the view that property involves the notion of a 'legally endorsed concentration of power over things and resources'[105]. Professor Gray, who was quoted in Yanner v Eaton by the majority of the High Court, has also written extensively on this subject, and has put forward the view that a claim to property in a resource is 'to assert a strategically important degree of control over that resource', as if that resource is " 'proper' to that person"[106], and reflecting an implicit power-relationship. He has noted its extensive use in the law and its function in providing both exclusion and demarcation of resources.[107]

It is said that the concept of property troubles academics seeking universal classifications "because it is frequently impossible to say whether the law protects property, or whether 'property' is the name given to what the law protects"[108] . In my view, this pessimism is unfounded because it is based on a false dichotomy. Property is often described as an elusive concept, but if it is understood

100 Keenan, S. (2010) Subversive Property: Reshaping Malleable Spaces of Belonging. *Social and Legal Studies*. 19 (4) 423 at 428, citing Kerruish, V. & Purdy, J. (1998). He 'look' honest – Big white thief. *Law/Text/Culture* 4(1): 146-71.

101 Rhoda E. Howard-Hassmann (2013) Reconsidering the Right to Own Property, *Journal of Human Rights,* 12:2, 180-197 at pages 186-187, DOI: 10.1080/14754835.2013.784667

102 Freeman, Michael. (2000) The Perils of Democratization: Nationalism, Markets and Human Rights. *Human Rights Review*, 2(1), 33–50 at page 44.

103 See for example oppressive conduct claims under the CATSI Act 2006 (Cth) in Sandy v Yindjibarndi Aboriginal Corporation RNTBC [No 4] [2018] WASC 124.

104 s265-5, CATSI Act 2006 (Cth); Sandy v Yindjibarndi Aboriginal Corporation RNTBC [No 4] [2018] WASC 124 at para [83].

105 Yanner v Eaton [1999] HCA 53 at para 28, citing paragraph 33 note to Jeremy Bentham's work *An Introduction to the Principles of Morals and Legislation* (available at URL: http://www.econlib.org/library/Bentham/bnthPMLNotes3.html).

106 Gray, K & Gray, S. The Idea of Property in Land, in Bright, S and Dewar, J (eds). Land Law, Themes and Perspectives, Oxford University Press, 1998, p15.

107 Gray, K. (1991) Property in Thin Air. *The Cambridge Law Journal* 252 at 306.

108 Waddams, S. (2003). Dimensions of Private Law: Categories and Concepts in Anglo-American Legal Reasoning. Cambridge University Press (2003). p173-4.

as a way of thinking (a mode of perception, and knowledge structures that reflect relations), and not merely a unit of reasoning, it becomes easier to understand how it operates in the human mind. Property is, as Professor Gray has noted, 'deeply embedded in the human psyche', and provides a baseline for "torts, trusts, commercial competition, the fiduciary principle, restitution, unjust enrichment, privacy, the preservation of confidence, and the reward of industrial and intellectual effort".[109] Professor Gray was speaking of the Anglo-Australian pysche, and it should be noted that references to the 'human psyche' as if it was a universal matter should be questioned. Indeed, at that time, Professor Gray suggested that much of what was written about property, beyond its function for exclusion and some simple demarcation of resources, was without substance.[110] I would go further and argue that it is not illusory, but it needs to be understood as a necessary *way of thinking, perceiving and structuring knowledge* when engaging with these other concepts.

Recently, however, academic authors like Sarah Keenan have proposed property as a concept is more akin to 'belonging in space'[111], with an explicit political agenda for suggesting changes to the status quo. This is a view in which property is examined by the way in which it physically and politically constructs the world that exists (predominantly with a concern for land use). The view questions the expectations of modernity, in which property is nothing more than a commodity, with no value as a place in which history unfolds and in which memories are stored. Keenan also noted the wide domain for application of her ideas: "While the tendency of law to uphold the dominant networks of belonging is particularly evident in a postcolonial context, it applies in any context in which there are competing networks of belonging."[112] An aspect of considering how property is formed is that it becomes orientated toward the 'whiteness' in the sense that it is orientated around (and therefore protects) what white bodies are to do within the space.[113] Where I find Keenan's approach helpful is that it establishes a focus on how law operates and affects what is possible, where, and by whom. It is an enquiry that does not just make statements about law where the protagonists and their political agendas are silent. Even though some judges and authors may suggest that laws are 'socially constituted', until that idea is taken back into the social and political realm, which can be done by examining how spaces are altered and used, it lacks transparency as to what our society prioritises and makes real.

4.3 Information and property

The concept of ownership with its element of property works well within civilised legal systems for ordering the human relation to the physical world, so much that it is thought extremely natural to want to continue its application to factual matters like information and knowledge, and so achieve the base level of order that by its very nature, gives owners certain protection by the law.

In Australia the traditional position is that knowledge and information (not protected by patent, trade mark etc) are not property: "Current and traditional legal analyses have repeatedly denied to information the status, quality and incidents of property."[114]

In some sense, information has the same unrecognised status as wild animals. Whether additional steps allow information to be brought within a concept of property, and therefore ownership, is still debateable.

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109 Gray, K. (1991) Property in Thin Air. *The Cambridge Law Journal* 252 at 306.
110 Gray, K. (1991) Property in Thin Air. *The Cambridge Law Journal* 252 at 306.
111 Keenan, S. (2010) Subversive Property: Reshaping Malleable Spaces of Belonging. *Social and Legal Studies.* 19 (4) 423-439.
112 Keenan, S. (2010) *Subversive Property: Reshaping Malleable Spaces of Belonging.* Social and Legal Studies. 19 (4) 423 at 429.
113 Keenan, S. (2010) *Subversive Property: Reshaping Malleable Spaces of Belonging.* Social and Legal Studies. 19 (4) 423 at 431-2, citing Ahmed,S. (2007). A phenomenology of whiteness. *Feminist Theory. 8(2): 149-68.*
114 Moorgate, Breen v Williams (1996) 186 CLR 71 at 81; referred to in Thomas, M. (1998) Information as Property QUTLawJl.

The discussion about whether information can or should be made amenable to the property concept raises a very common issue, namely whether some universal legal features of property are the basis for doing so. These legal features are often considered a bundle of rights, and this leads to property being described in this way, for example: "Conventional views of property, however, focus on concepts such as the right to posses, use and enjoy, exclusionary capacity and alienability."[115] This has led to inquiries into whether some or all of these rights are sufficient, and how exactly they explain the nature of property, which seems to depend on context.

There are obviously pragmatic and social, moral and political concerns in deciding whether the legal system will permit something to be subject it to human control and to give it legal protection. This has been recognised by academic authors as something the common law has often had the capacity and motivation to deal with.[116] Some authors, like Pendleton[117] and the Grays[118], have criticised the extent to which the ability of a thing to function as a commodity should be treated as the sole test of property.

Nonetheless, the courts of equity offered protection for a person's unauthorised use of confidential information, which may well demonstrate a very similar concern to the common law concept of ownership of property in that context.

115 Thomas, M. (1998) Information as Property QUTLawJl at 207.
116 Thomas, M. (1998) Information as Property QUTLawJl at 204-6.
117 M Pendleton "Intellectual Property, Information-based Society and a New International Economic Order - The Policy Options?" [1985] 2 EIPR 31; see reference in Thoma, M at 210.
118 Gray, K. and Gray, S. The Idea of Property.

PART 5 – THE MERCHANT OF VENICE

5.1 Introduction

In the Merchant of Venice, Portia's reasoning reflects not only an attention to different areas of law, but to different modes of perception that make analysis and reasoning within each of those different areas of law possible.

The breadth of Portia's reasoning is illustrated by several shifts in modes of perception; a conceptual journey undertaken in a very short literary space and time. In that respect, attention to Portia's sequence of reasoning is a useful examination of how perception shifts and change in orientation are required in legal reasoning, and also reflect different aspects of social reality. This analysis also shows that in order to address the concerns of the individual, the lack of explicit attention to human rights was partly accomodated by recourse to the criminal law.

5.2 Application of these ideas to analyse the reasoning of Portia in the Merchant of Venice

5.2.1 The broad, Western perceptual focus.

The territory is continental Europe, the source of law is Western and the dominant religious belief seems to be Christianity. These are all matters which enable the audience to relate to the subject at hand. However, this alone does not define the mode of perception, for even within this context, further shifts in perception can and do occur.

5.2.2 The focus on the loan agreement

Portia's initial focus is on the loan, which is the natural entry point for parties that have entered into a legal transaction. This narrow focus of attention, often self-interested, also tends to fix the language and concepts that are attracted to it. The description of 'moneylending' transaction seems natural, as does the positioning of related terms such as lender, borrower, security and bond in the immediate proximity to it. That is, the roles of the individuals are defined by the feature of interest, and the terms for 'security' characterise the assets that are owned by the borrower in a particular way, by putting them at the potential disposal of the lender.

In any private transaction, there is a particularly personal viewpoint, in which the focus is often on the most important needs of the individuals. This is often perceived not only through the traditional 'ownership' frame of reference, but at a secondary level by some further need arising out of economic inequalities.

One of the consequences of this mode of perception is that the transaction can take on a stereotypical legal character: the concepts and language reflect only what is needed by the law to specify the consequences of fitting the perceived social reality.

Within this mode of perception, the offer of security seems a natural commercial consequence. The fact that the participants chose an <u>unusual</u> form of security (from our perspective) is not something intended to have real consequences in the play (until it does!).

Portia's initial interest in the loan resulted in her asking Shylock for confirmation he wanted to enforce it. It appears that she did so in order to commit him to a particular way of looking at the situation – to maintain his reliance on his bond, knowing that she would find some intention in that affirmation that would serve her purposes. This seems to reflect the usual role of an advocate rather than a judge.

With this in place, Portia shifted the mode of perception to the nature of the bond, which until then had not been of special interest to the parties, because its enforcement was not in issue.

5.2.3 The focus on the bond

It was left to Portia to shift attention to the nature of the bond because neither of the parties was willing or capable of doing so themselves. The bond was, from our perspective, a specific and unusual form of security, in that it was a part of the body of the borrower.

Portia turns to the precise terms of the agreement (as a positivist lawyer would), but her aim is to try and extract some appreciation of the consequences, and perhaps some moral sense out of the agreement. Arguably, she does so as a policy matter, without regard for what the parties actually thought. We might think that the law of England is more agreeable, but nonetheless whether the parties intended something or not does not free them from difficulties, and the law recognises that a contract cannot be made about an 'illegal activity'.[119] If we were to intepret this case throught the perspectives of English contract law developed later, we might have said that the Court would have been more concerned about what was in the reasonable contemplation of the parties. However, that doesn't seem to be a limitation Portia was subject to in this case.

One possible area for modern legal reasoning would be to focus on the bond as a kind of security that was invalid, in that it was effectively trying to work on 'ownership' of part of a person's body (the 'pound of flesh'). In our day, we might make that objection to the subject matter of the contract (not the loan itself, but the security aspect of the transaction).

Portia raises the terms for the security with another end in mind. She enlivens the same sort of issues that might, as a policy matter, have ruled out a person's body being available to form a secured assets. Her detailed questioning about what kinds of bodily tissues ar available as security invite further consideration about how any of those distinctions could actually be made. Here, it is dealt with philosophically and not as a matter of empirical enquiry. Portia concludes that a literal interpretation will suit her purposes, in that it has practical disadvantages for Shylock.

Portia takes these points of legal distinction to a ridiculous extreme. It cannot reasonably be suggested that the characters actually intended the security to be for one part of body tissue and not another: it seems hardly to have entered their minds. In this respect, Portia invites a closer consideration for what the bargain might have been about, but no one would seriously have entertained those distinctions without also being concerned for their own life. In this way, by tangentially referencing the topic of life and death, and even religious virtue, Portia indirectly invites some consideration of policy, and purpose and utility. For no distinction of this kind could be made without further reflecting on the value of the human body.

Is there are point to this? I argue that by this hyperbolic reasoning, Portia starts to form a bridge which will pave the way for a less abrupt switch into another, broader mode of perception. It is an example of illustration of the limits of the positivist philosophy in construing rules only within one perceptual context. By testing these boundaries, Portia opens a door to the reception of other ideas in other modes of thought, like human rights.

We can contrast these sort of matters with recent discussion in which there has been an interest in allowing parts of the human body to be treated as property. In most cases (body tissues) this has been addressed in contexts where the person has allowed that body part to be removed. In that respect, recognition of the tissue as property does not, directly, raise the same human rights issues about whether the whole person can be being characterised as property.[120] The discussion about this issue is directed to placing these body parts into the mode of perception as things capable of being owned, and as such is noticeably different to the discourse about something like slavery.

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119 Contract law:

120 See Edelman article, Roche, and Doodery cases

As Edelman J (writing extra-judicially) has observed, property is the antithesis of personhood.[121] This dichotomy is present in the concept of ownership. Within the ownership relation there is a dichotomy between the owners (people) and the partitioned units of the world controlled by them, that we call property.

Though Edelman J referred to the modern distinction between two primitive elements of ownership, it has not always been the case that being a person necessarily excluded someone from being treated as property. The historical protection of slavery in England is an example of the ownership concept being apply to classes of people, who constituted property that could be owned. Slavery therefore illustrates how legal concepts like ownership can be modified and extended, particularly if they are used as a base unit for reasoning about wealth, resources and economic activity. In Rome, as Bentham noted[122], even wives and children were considered property. The concept of ownership was extremely widely used as a foundation for legal thinking and regulation.

Our modern concern for human dignity (often called human rights) should ensure that people are not treated as items of property owned by another, but this does not mean that parts of bodies, taken from living persons, are not capable of being owned by that person or another person.

The Court of Appeal of England and Wales in the Yearworth case[123] formulated a further exception to the general principle that there can be no "property" in a body (this included deceased persons). Rather than examine the concept of ownership, the Court of appeal felt it necessary to introduce a new exception, using a range of factors designed to give a rule-based definition of the indicia of property. The unease with this approach (reflected in articles like those written by Edelman) is that it does not utilise a simpler notion of things that can be owned. Edelman has also suggested that the approach should be dealt with as a matter of principle (by widening the category of things that can be 'property'), he also expressed this as the 'principles over instrumentation' approach. He has said:

> "at common law the same principles of property law that we have known, developed, and adapted for two millennia should govern rights to tissue which is separated from human bodies, whether living bodies or deceased bodies. It is an argument, like that of Mr Lee and to use his description, for principle over instrumentalism."[124]

In my view, it is implicit in the discussion about tissue from human bodies that it has already acquired a separate nature which facilitates it being a unit of property. There is an assumption that the property cannot exist prior to its separation from the human body.

We can see how the positivist philosophy runs into difficulties with moral or human rights in this sort of situation. There is always the possibility that other laws or policies drawn from the same society, which are based on different ideas, or *perceptions*, will be invoked. It is not merely that the law represents a pluralist collection of different laws, but that individual members of society, incapable of representing reality in a single system, turn to discrete areas in which a different mode of perception can be exercised in each, and integrated when necessary.

5.2.4 "The Law Hath Yet Another Hold Over You"

With this turn of phrase, Portia's mode of reasoning moves out of the ownership and property frame and back into the frame where human life is valued. In effect, she opposes the idea that the human body is no better than a form of property, and turns to those parts of the law which recognised a human body as a person. In this frame, though it may initially be focussed on the victim of the

121 2015 UWA Law Review (partly in response to the decision in Yearworth v NHL Bristol case (UK).

122 Bentham, J. *An Introduction to the Principles of Morals and Legislation* (available at URL: http://www.econlib.org/library/Bentham/bnthPMLNotes3.html)

123 Yearworth v North Bristol NHS Trust [2009] EWCA Civ 37, [2010] QB 1.

124 Edelman, J. (2005) Property Rights to our Bodies and Their Parts. *University of Western Australia Law Review 39 (2)* 47 at 69.

proposed crime, both wrongdoer and crime victim function as human beings and not as items of property worthy of security. Indeed, the law in Venice operated to act on the intention to harm, well before any harm existed.

We can point to the fact that this law was itself prejudicial against Aliens, and might take a life as punishment for plotting to take another. I do not suggest that this was a model law that incorporated human rights. However, it was one that had surely moved out of the mode in which ownership was given priority. This does not mean that concept was abandoned, but merely that it was not the basis for the conclusions to be reached.

This deeper concerns of the law, for example the 'human rights' aspect, is always capable of being used as a threshold element of legal reasoning and cannot be successfully excluded by giving priority to a private agreement that has dictated the human body is no better than property.

The terminology of rights, which is often invoked in situations like an appeal to human rights, may be less useful as a way of defining concepts precisely (in a logical positivist sense) than it is as a call for the idea to become the focus of attention, thereby changing perceptions. The intention in using this language is to take something from the background of attention, at least by the dominant group, and to make it the focus.

In the context of considering both regular ownership and Indigenous land rights, the High Court has used the idea that property is a bundle of rights.[125] The earliest land rights cases were also framed as arguments about rights, rather than about translation of a customary state of being into the equivalent set of concepts in the Anglo-Australian legal system. For example, the plaintiffs (the Yolgnu people) in the Milirrpum case argued for entitlements that could be described as similar to English common law property concepts, and rights to property.[126] Justice Blackburn in Milirrpum could not conceive of any indigenous systems of law and customs to involve recognition of anything resembling a property right, and generally dimissed the claims of the Yolgnu people on the basis they were an inferior people.[127] The reasons included the fact that although there might be exclusion from some parts of sacred sites, there was not a general exclusion of even other clans from territory. Further, Justice Blackburn wrote:

> "The evidence seems to me to show that the aboriginals have a more cogent feeling of obligation to the land than of ownership of it. It is dangerous to attempt to express a matter so subtle and difficult by a mere aphorism, but it seems easier, on the evidence, to say that the clan belongs to the land than that the land belongs to the clan"[128]

The 'bundle of rights' approach to defining property is value-laden, because of the kinds of activities that are often associated with it, which in some cases (alienability) are clearly based on economic and civilised modes of thought. The use of the language of rights in the context of property focusses attention on ownership and a certain way of perceiving the relation between a thing and a human owner. Insofar as the Mabo case reflects the licence or motivations of the courts, it illustrates what Robert Van Kriekan has called the use of 'precedent and legal authority' for 'a responsiveness to surrounding community values'.[129]

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125 R v Toohey; Ex parte Meneling Station Pty Ltd (1982) 158 CLR 327, per Brennan J at 357-8.

126 Lavery, D. (2017) "Not purely of law' - The Doctrine of Backward Peoples in Milirrpum. [2017] JCULawRw 16; (2017) 23 James Cook University Law Review 53 at 55.

127 Lavery, D. (2017) "Not purely of law' - The Doctrine of Backward Peoples in Milirrpum. [2017] JCULawRw 16; (2017) 23 James Cook University Law Review 53 at 56.

128 Milirrpum at 167; Neate. G. Looking After Country (1993) 16 UNSWLJ 161 at 186.

129 Van Krieken, R. (2000). The High Court, Terra Nullius and Moral Entrepreneurship. *UNSW Law Journal.* 23(1) 63 at 75.

5.2.5 Punishment and perception

It could be argued that the punishment to be meted out to Shylock involves the kind of prejudice that also reflect the dominant group, and the affirmation of those group's values to outisders. In the punishment, there was a the return to the concerns of ownership, in that the law was to strip Shylock of his ownership of his property. There was also a concern to turn Shylock away from his Jewish religion and require him to adopt Christian ways.

We can draw attention to the fact that the law operates on Aliens in Venice in a prejudicial way, and that the forefeiture of property re-asserts state controls over property. These events in the play illustrate the proposition that law can be chiefly concerned with ensuring that those within a group adopt those important to the group's values and identity.

In modern times, the world has moved toward acceptance of differences, whilst still being recognisable a 'nation' of people. However, with this view should also come an appreciation that the diversity of views requires an ability to manage different modes of perception: that what is acceptable to society is a different viewpoint provided it does not contravene baseline conduct that is expected to dominate any individual belief systems. We still have a society that is dominated by the ownership concept and criminal law.

Conclusions

A useful survey of schools of legal philosophy that impacted on education, and the use of computers in learning was prepared in 1992 by Abdul Paliwala, who stated, inter alia:

> "There have been new influenes in legal education in this century. These have included the notion of law as a science, as well as insights derived from sociology, anthropology, economics, psychology and more recently linguistics".[130]

To fully appreciate the practical implications of these concerns, students must acquire an analytical framework for social reality which assists them to navigate factual problems by providing a useful internal knowledge structure to help with distillation of dominant ideas and concepts, most commonly found in laws. This does not mean that the student must agree with them, but by paying explicit attention to them, the student acquires an opportunity to depart from them, when appropriate or desirable, with deliberate and conscious intent.

130 Paliwala, A (1992) Transforming Legal Learning. *Computers Educ*. 19(1/2) pp113-124.