
RESPONSE

PROPERTY AND THE NEW DOCTRINALISM: COMMENT

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In response to Henry E. Smith, *The Persistence of System in Property Law*, 163 U. Pa. L. Rev. 2055 (2015).

A colleague of mine has a simple piece of advice for any student planning to write on a private law topic: for clear analysis of the doctrinal issues, find an American law review article published before 1920. This pre-realist scholarship shares an important feature with much of the research currently undertaken in common law jurisdictions beyond the United States: the concepts used by the courts are taken seriously, and an attempt is made to see if those concepts form part of a coherent system. However, such contemporary research does not stubbornly proceed as if the realist revolution had never occurred. Instead, it is possible to adopt a “new doctrinalist” approach by accepting some important points made in realist critiques and using those insights to inform a careful inquiry into the nature and operation of legal concepts. This brief response considers some of the key features that might be possessed by such a “new doctrinalist” account of property law.

In locating a particular approach on a doctrinal–realist spectrum, it is useful to consider the relative importance of means as opposed to ends, concepts as opposed to contexts, and rights as opposed to value. Those three pairs will be considered here in relation to the nature and operation of legal property rights; of equitable property rights; and of choses in action.

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I. LEGAL PROPERTY RIGHTS

A legal property right, such as ownership of a car, can be seen as the core example of an *in rem* right. It is also a classic example of a concept laid bare by realist critiques. It is certainly true that an owner of a car has not the car itself but, rather, a particular right. It is just as true that this right consists of a set of rights against other legal persons. There is a danger, however, in taking the further step of regarding ownership as merely a bundle of individual rights that may be disaggregated. This danger can be seen, indeed, by adopting the same analysis used to challenge the concept of a right *in rem*.

Examining the nature of the individuated claim-rights held by an owner of a car shows that the physical thing—the car itself—plays a central role in determining the content of the correlative duties owed by strangers to that owner.¹ The orthodox common law position is that no liability arises where a stranger simply impairs the use or value of a thing without interfering with the physical thing itself.² This principle is reflected, for example, in the rule that, in the absence of any special relationship between the claimant and the defendant, there can be liability in negligence for damage to a physical thing, but not for pure economic loss.³

One might object that the focus should instead be on the rights of an owner to use a thing. Such rights are, however, liberties, and they do not distinguish the position of an owner. *B*, an owner of a car parked in the street outside my office, has a liberty against *X* to drive the car. I too, however, have such a liberty against *X*. The difference between my position and that of *B* is that I have no liberty *against B* to drive the car; but that is simply a different way of saying that I am under a duty to *B* not to drive the car. So, to clarify the distinctive nature and operation of *B*'s legal property right, we must focus on the nature of that duty, which is determined by the physical thing itself. The common law thus takes advantage of the physical nature of the thing to set the duties owed to an owner. Common law determines the liberties of such an owner simply: if we are not under a duty not to act in a particular way, we have a liberty to do so. As Henry Smith

¹ See Simon Douglas & Ben McFarlane, *Defining Property Rights* (“[T]he distinctiveness of property rights is best understood, not by looking at the positive uses available to *A*, but rather the negative duties owed to *A* by the rest of the world.”), in *PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW* 219, 220 (James Penner & Henry E. Smith eds., 2013).

² For a memorable example, see *Club Cruise Entertainment v. Department for Transport*, [2008] EWHC (Comm) 2794, [39]–[55] (Eng.).

³ See, e.g., *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308–09 (1927); *Spartan Steel & Alloys Ltd. v. Martin & Co.*, [1972] EWCA (Civ) 3, [1973] Q.B. 27 (Eng.).

points out, the centrality of the physical thing as an organizing module is crucial to understanding the means by which property law performs its key role of regulating complex interactions between strangers.⁴

To understand legal property rights, it is therefore necessary to focus on means rather than ends, and on rights rather than value. A valuable insight of realist critiques of property—the need to look behind the simple idea of property as thing—can thus be used as a springboard for a clearer analysis of the concept of a legal property right.

II. EQUITABLE PROPERTY RIGHTS

The realist preference is for small categories, and “property” is a clear example of a label applied so broadly as to be no more than a “euphonious collocation of letters.”⁵ This insight can, again, be used to sharpen our understanding of the relevant legal concepts. For example, a holder of an equitable property right is often treated in the same way as a holder of a legal property right.⁶ Certainly, a beneficiary of a bare trust can be seen as entitled to the value inherent in the subject matter of the trust, and the trust mechanism is therefore simply a means to the end of securing that value.

There are, however, crucial conceptual differences between the two types of property rights.⁷ Ownership of a physical thing may be the core of a legal property right, but the subject matter of a trust, for example, is more likely to be an intangible right, such as a bank account, held by the trustee. In the case of a trust, strangers owe no duty to the holder of the equitable property right not to deliberately or carelessly interfere with a physical thing. If the subject or organizing module of a legal property right is a physical thing, the subject of an equitable property right is, instead, another right. In the case of a trust, for example, the right of the beneficiary relates not to any physical thing, but instead to the rights held by the trustee.

Regarding an equitable property right as a right in relation to another right has a number of analytical advantages. First, it can assist in explaining why different rules apply to the acquisition of such rights and the acquisition of legal property rights. A declaration of trust, for example, makes no immediate difference to the position of strangers: both before and after the

⁴ See Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1693–94 (2012).

⁵ Walton H. Hamilton & Irene Till, *Property*, in 12 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 528 (Alvin Saunders Johnson & Edwin R.A. Seligman eds., 1937).

⁶ See e.g., *Shell U.K. Ltd. v. Total UK Ltd.*, [2010] EWCA (Civ) 180, [132], [2011] Q.B. 86 (Eng.) (criticizing the “legalistic” principle that distinguishes between the liability of a stranger carelessly damaging property to an unencumbered legal owner and a beneficiary of a bare trust).

⁷ See Ben McFarlane & Robert Stevens, *The Nature of Equitable Property*, 4 J. EQUITY 1, 4–5 (2010).

declaration, any duties of non-interference are owed to the party declaring the trust.⁸ It is therefore no surprise that the rules relating to the acquisition of an equitable property right are more relaxed than those applying to the acquisition of legal property rights. Second, it shows that the creation of an equitable property right does not involve any fragmentation of property rights. If, for example, *A* declares a trust in *B*'s favor, *A*'s right, and the duties it imposes on others, remains intact. Third, it can help to explain the orthodox position that an innocent donee of trust property, who no longer holds that property or its traceable proceeds, is not liable to the beneficiary of the trust, even if that donee has made a gain by his or her use of the trust property.⁹ Even if value in the broad sense can be said to have thus passed from the beneficiary to the donee, there is no specific right that the beneficiary can identify in the hands of the donee.

III. CHOSSES IN ACTION

As noted by Smith, Tom Grey argued that any view of property which prioritizes physical things overlooks the modern importance of intangible assets.¹⁰ The potential of an assignment for value seems to be the chief reason why a purely contractual right may be thought of as property, and hence worthy of the same protection as a legal property right.¹¹ Where *A* makes an equitable assignment of a chose in action to *B*, the traditional position is clear: *A* must be joined by *B* in any proceedings to enforce that chose in action.¹² The need for joinder may be seen as a technicality, but it has a clear rationale. The equitable assignment does not alter the fact that the debtor's duty is owed to *A*. It is *A*, and only *A*, who can enforce that duty. Joinder is necessary as two claims are made, albeit in the same proceedings. First, a claim by *B* that *A* must enforce the chose in action against the debtor. Second, the claim by *A* to enforce. An equitable assignment is not the same as a novation; without the consent of the debtor, and

⁸ RESTATEMENT (THIRD) OF TRUSTS §§ 107-108 (2003); see, e.g., *Leigh & Sillavan Ltd. v. Aliakmon Shipping Co.*, [1986] A.C. 785 (H.L.) at 2 (appeal taken from Eng.) (considering a particular case involving a buyer and transporter of goods).

⁹ See, e.g., *Farah Constrs. Pty Ltd. v. Say-Dee Pty Ltd.* [2007] HCA 22 (Austl.); *Bank of Credit & Commerce Int'l Ltd. v. Akindele*, [2000] EWCA (Civ) 502, [2001] Ch. 437 (Eng.). No authority is cited in support of the contrary position adopted by the RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 17 cmt. c, illus. 9 (2011).

¹⁰ See Thomas C. Grey, *The Disintegration of Property*, in *PROPERTY: NOMOS XXII* 69, 70 (J. Roland Pennock & John W. Chapman eds., 1980).

¹¹ *OBG Ltd. v. Allan*, [2007] UKHL 21, [2008] 1 A.C. 1 (H.L.) [309] (appeal taken from Eng.).

¹² *Roberts v. Gill & Co. Solicitors*, [2010] UKSC 22, [2011] 1 A.C. 240 (S.C.) [54] (appeal taken from Eng.).

acting unilaterally, *A* cannot alter the content of the debtor's duty.¹³ It is, however, possible for *A* to retain the chose in action, and to come under a duty, by way of an equitable assignment, to enforce that right for *B*'s benefit.

A central feature of an equitable assignment, therefore, is that the assignee, who can be seen as entitled to the value of the chose in action, must rely on the assignor, who holds the right consisting of that chose in action, to bring the claim. The same point is true in a trust: any claim against a stranger interfering with the trust property must be brought by the trustee, even if the value of the property, and of that claim, is due to the beneficiary. It must, therefore, be an error to insist, as the minority in *Sprint Communications Co. v. APCC Services, Inc.* does,¹⁴ that a private litigant must show an "injury in fact" if his or her assertion of a right is to be within "the traditional concern of the courts at Westminster."¹⁵ The test should be whether the claimant has a right, not whether the claimant can enjoy any value inherent in that right. This point would not have escaped the author of an article, which eloquently draws the parallel between an equitable assignment of a chose in action and a declaration of trust, appearing in the very first volume of this journal.¹⁶ Students are not the only ones who benefit from reading American law reviews of the pre-realist period.

While an equitable assignment, like a declaration of trust, provides a mechanism by which value can be acquired, it also involves the creation of a new right, rather than the transfer of a pre-existing right. This focus on means rather than ends not only assists in understanding the operation of such assignments, it also removes the main plank of the argument for imposing strict liability on those who interfere with purely contractual rights. Such liability is far easier to justify where the existence of a physical thing both indicates to strangers the existence of a right and defines the extent of such a right. As there is no inherent limit on the content of purely contractual rights, a strict duty not to interfere with such rights would impose an undue burden on strangers. The supposedly technical distinction

¹³ See Chee Ho Tham, *Notice of Assignment and Discharge by Performance*, L.M.C..L.Q., 2010, at 38, 77-78.

¹⁴ 554 U.S. 269, 300 (2008) (Roberts, C.J., dissenting).

¹⁵ To adopt the words of Justice Frankfurter interpreting the Article III judicial power in *Coleman v. Miller*, 307 U.S. 433, 460 (1939).

¹⁶ *Voluntary Assignments*, 1 AM. L. REG. 385 (1853). For a more recent analysis of the same comparison, see James Edelman & Steven Elliott, *Two Conceptions of Equitable Assignment*, 131 L. Q. REV. 228 (2015).

between rights in tangible things and choses in action is in fact, as Smith suggests,¹⁷ an efficient conceptual means of managing information costs.

CONCLUSION

Smith makes the key point that the law of property has largely survived the realist assault.¹⁸ Our economic interconnectedness makes the stability provided by property law concepts more, rather than less, important. The system of property law is also deeply enmeshed with other legal principles, and it would be an error to think that we could painlessly reshape its fundamental aspects. The principle against negligence liability for pure economic loss, for example, is dependent on the *numerus clausus* principle. Otherwise parties to a contract would have the freedom to create new types of proprietary rights and thus recharacterize losses as infringements of such a right. Similarly, the high threshold for liability in the tort of procuring a breach of contract would be undermined if purely contractual rights, like legal property rights, were protected through the tort of conversion. Apparently technical distinctions, such as that between legal property rights on the one hand and equitable property rights on the other, can be seen, on further analysis, to be critical in justifying existing rules as to the different circumstances in which such rights can be acquired. The irony is that this deep interconnectedness of property law principles has given realist critiques a self-fulfilling aspect. If one, seemingly technical, aspect of a concept's operation is changed, other aspects of that concept—and aspects of other, connected, concepts—may quickly need of alteration as well.

The answer, it is suggested, consists neither of rejecting all the realist insights into property law, nor in attempting to reinvent the wheel by rethinking all of the core concepts of property law. A “new doctrinalist” approach can instead attempt to capture the benefits—both principled and, as Smith shows, functional—of using carefully defined and narrowly tailored concepts to assist in the law's impossibly difficult task of regulating the interactions of strangers.

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¹⁷ Henry E. Smith, *The Persistence of System in Property Law*, 163 U. PA. L. REV. 2055, 2082-83 (2015).

¹⁸ *Id.*