

# Book Symposium

## Margaret Davies and Ngaire Naffine *Are Persons Property? Legal Debates about Property and Personality*

### Authors' Introduction

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*Are Persons Property?*<sup>1</sup> is a deceptively simple and straightforward question. In making it the subject of our book, however, we did not anticipate a straightforward answer. We were well aware that property and personality are both highly-debated legal concepts that have undergone considerable change and are still undergoing transformation. Both legal categories are philosophically controversial and legally difficult to define. Both have long and complex histories; both possess a very particular relation to social life.

We noted, from the outset, that while there are profound moral and legal objections to the very idea of a person becoming the property of another, there is also considerable legal sympathy with the idea that we are the property of ourselves. Indeed it might be said that self-ownership or possessive individualism is a central motif of our liberal jurisprudence. We are quintessentially autonomous self-possessing legal subjects. We observed therefore an interesting jurisprudential tension in the legal relation between persons and property, which demanded further exploration.

On the one hand, there has been a powerful and long-standing legal desire to keep the concepts apart. Since the abolition of slavery, the concepts of property and person have been deliberately and consistently separated by philosophy and law. It is absolutely central to the modern liberal idea of what constitutes a human person that she or he is not property. Some legal persons, such as corporations, may be property, but that category of legal person which is the natural human being cannot be property. To make someone the property of another is said to enslave them and this is utterly antithetical to modern liberal understandings of a law which is for and available to all. According to all of our legal, philosophical, and cultural definitions, persons are *not* property.

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<sup>1</sup> Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (2001).

On the other hand, the principle of self-ownership has been endorsed by liberal philosophy, and also employed as an important metaphor, as a way of expressing our autonomy as legal actors, in our liberal legal theory. In different ways, both Hegel and Locke argued that ownership of the self was an attribute of personality, and was needed to maintain the freedom of human subjects. According to these thinkers, and others, ownership of the self provides protection against ownership by others. For Locke, self-ownership provides a justification for ownership of external resources, while for Hegel it is the ownership of external resources which allows a person to be able to say truly that they own themselves. Within the liberal tradition, self-ownership is also one important foundation of the public/private distinction, in that the protection afforded by ownership of the self is protection against interference by the state.

So there is an interesting paradox to be observed here: although the person is defined in liberal legal thought as the antithesis of property, there is a strong tendency in liberal philosophical and legal thought to regard property as foundational to the concept of person: to be a person is to own oneself.

Our book examines the extent to which these two foundational propositions of our jurisprudence – that we can never be the property of others but that we can and must be the property of ourselves, if we are to be free – are actually reflected in our law. Does the rhetoric find its way into legal doctrine?

### **Can persons become the property of others?**

We discovered that when a ‘person’ is understood to refer to an adult, competent, autonomous, and complete biological human being and ‘property’ is understood to encompass a full set of the incidents of ownership, including alienability and the right to control over access, then there can be said to be a clear separation of the concepts. And yet the basic principle of separation is undermined by the fact that the concepts of person and property are not necessarily defined in such absolute terms, and that there are circumstances where humans do seem to acquire some of the incidents of property. The foetus, we found, is clearly neither one nor the other, neither person nor property, and the legal status of the human corpse is similarly undecided. On a more abstract level, genetic information derived from one person may in certain circumstances become the object of another’s property. Thus while it may, with some confidence, be asserted that persons treated as live whole human beings do not own others, the flexibility of the concepts means that some aspects and attributes of humans may be the object of some form of property (if not full ownership).

## Can persons own themselves?

The second proposition, that persons *do* own themselves, proved more problematic to establish or refute. We discovered that while self-ownership is invoked repeatedly as a means of asserting our legal freedom, it has never been explicitly and formally recognised by law. When the matter has been explicitly addressed, for example in the context of ownership of body parts, it has been rejected. Similarly when persons have sought to assert property rights in their whole live bodies, the law has been reluctant to accede. When we considered the legal situation of pregnant women seeking to refuse medical treatment, for example, it was far from clear that such women could necessarily rely on the most basic proprietary rights to possess themselves and to exclude others. However in the field of intellectual property law, a form of self-ownership has been recognised in many parts of the United States and Canada, where a person is said to have a proprietary interest in their image and personality. The examples we considered in the book were not exhaustive, but were selected to indicate the nature and complexity of the legal relation between persons and property.

Although the notion of possessive individualism has the potential to commodify the person, if fully recognised, it does nevertheless tend to strengthen the claims to autonomy of those who are disempowered in some way. There seem to be good arguments on both sides – for and against the formal recognition of the possessive individual. This is why we remain ambivalent about whether the concept of self-ownership should find its way into formal law. Indeed we have not even endeavoured to settle this question. Our intention has been to open rather than close debate, and to demonstrate that the relationship between persons and property is probably one of the most pressing ethical and legal problems of the twenty-first century.