Response to the Commentators

MARGARET DAVIES AND NGAIRE NAFFINE

As we noted in our Authors' Introduction, our aim in *Are Persons Property?* was to ask some fundamental questions about the nature of the relationship between persons and property. The questions we posed have many dimensions: analytical, sociological, historical and political. Within the space of one book, it was simply not possible to provide detailed analysis of every part of our enquiry. Our more modest goal was to illustrate, rather than fully expound and explain, the richness, diversity and open-ended nature of our topic. We are pleased therefore that the commentators have each identified a different aspect of our subject, critically examining and extending it from a range of theoretical perspectives.

Three of our four commentators – Drahos, Atherton, and Thornton – engage with what we regard as the *raison d'etre* of our book: the critical study of the exercise and denial of power within legally-legitimated norms and institutions. In different ways, our commentators consider how relations between persons are mediated and defined by the concept of property, ensuring that some persons exercise power over others.

Ros Atherton even suggests that, in concentrating on the concepts of 'person' and 'property', we have unduly limited our inquiry, neglecting the extensive 'zones of influence' or 'control spheres' which characterise human societies. As Peter Drahos and Margaret Thornton show us, these power relationships are frequently not confined to individuals, but are pervasive and structural. They are defined and reinforced by members of social groups who already hold some socially-privileged and legally-sanctioned position.

In his influential article, 'Property in Thin Air', Kevin Gray said that property is essentially about power over others. To Gray, this was the 'challenge' and the 'danger' confronting property law in the twenty-first century – to ensure the responsible deployment of this power.[1] When property slides into the concept of persons, when there is an elision of two concepts which have conventionally been kept apart, there seem to be heightened dangers of human exploitation and abuse of power.

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1 Kevin Gray 'Property In Thin Air' (1991) 50 *Cambridge Law Review* 252, 299.

We have considered in some detail the philosophical and legal notion of the self-owner and have found that some formally legally-recognised 'persons' are not practically afforded property in self. The notion seems to work for some but not for others. We also observed the increasingly inventive ways in which personal characteristics such as our image or our genetic profile may be made into valuable resources. The challenge for legal institutions is to respond creatively and fairly to such developments in the concepts of person and property while preserving human dignity. Any extension of the notions of property and person must not be at the expense of social equality. The danger is that those who derive a benefit from existing structural inequalities will be able to increase their access to, and control over, such 'personal' resources at the expense of individuals and of groups, whose collective identity remains largely unrecognised. The matter of power - who is to exercise it, and how law is to regulate and contain it - is at the heart of our work

We begin, however, with a brief response to Tony Connolly, who has taken rather a different approach from his co-respondents, one that is squarely within the tradition of analytical jurisprudence.

Reply to Connolly

Tony Connolly has rightly noted our sympathies with a good deal of what we take to be the positivist account of legal personality. We agree with those who say that the legal person is a stipulated or posited concept; that it is a legal construction, a creation or fabrication of law. We agree also with those who say that in order to understand legal concepts such as the person, or property, we must consider precisely how *law* goes about its task of concept creation. We further agree that the concept of person, as with the concept of property, is legally constructed in a manner that makes it essentially relational, and therefore potentially very malleable.

A person comes into legal being by dint of their ability to participate in legal relations: they exist because of their legally-constituted ability to bear legal rights and duties that always exist in relation to other such legal persons. They are made by law. The person in law is therefore a function or 'effect of relationships or a system of signs, not an already-existent category'.[2] As the legal relations that constitute 'person' or 'property' are subject to constant change, so too is the content of each concept. We may say, therefore, that the positive content of person, as with the content of property, 'derives from negative legal relations' which are shifting and so variable.[3] And in this we are with Hohfeld who discoursed famously on the

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2 Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (2001) 37.

3 Ibid.

relational nature of such fundamental legal conceptions as person and property.

Our quarrel with what we have called positivist jurisprudence on personality is partly with its failure to do more than it has with its analysis. Positivists have largely confined themselves to the study of the formal and abstract relational nature of the concept; moreover they have insisted that the concept is comprehensible in such purely legal terms and as purely a device of law. They have insisted on law's conceptual autonomy.

Although it may well be the case, as Connolly maintains, that positivists concede, and even presuppose, the social and historical connections between abstract legal relations (which constitute persons and property) and real human beings, the same jurists have displayed precious little interest in the nature of this link between legal concepts and real people; they have treated it as peripheral to their proper work, as conceptually uninteresting. As Connolly rightly points out, Kelsen recognised the social and moral influences on law. From an historical perspective, social facts do determine the content of legal norms. For Kelsen, however, the conceptual understanding of legal norms such as personality *could* be purified of such content. From his juristic point of view, it is the legal norm that has priority and gives significance to worldly events and behaviour.[4] It is the project of legal sociology or legal history to trace the lines of influence between law and society. It is the project of legal science or theory to exclude such considerations from its enquiries about the nature of law. Central to positivism, more generally, is the belief that legal criteria determine which normative principles are law, and which are not.[5] To paraphrase Hart, the analytical question is whether morality enters into the *definition* of law.[6] The aspiration that we should all be possessive individuals is simply one of the social facts behind the law which are not of immediate concern to positivist jurists. It is an *ought*, not an *is*.

We disagree with this exclusion of social fact (apart from those social facts which constitute the definitional basis of law) from the conceptual understanding of law. In our view, such fundamental legal concepts as person and property can not be adequately understood independently of their social and historical contexts. Indeed we maintain that such conceptual understanding utterly depends on some appreciation of social and historical contexts. As we say in the book, 'It is therefore important to consider the interrelationship of a law constituted as autonomous and the social environment in which it is situated, not only because law is a culturally-

4 H Kelsen, *The Pure Theory of Law* (1967) 3-4.

5 See, eg, Tony Honoré, 'The Necessary Connection between Law and Morality' (2002) 22 *Oxford Journal of Legal Studies* 489, 489.

6 H L A Hart, *Law, Liberty and Morality* (1963) 2.

specific institution, but also because it is necessarily read and interpreted in the context of social relationships and presuppositions.'[7]

Further still, *pace* the positivists, we are also saying that the concept of the person has little meaning outside its actual empirical uses, in real social settings; that it is barely intelligible in a non-applied sense, and that as soon as legal persons materialise, as soon as they become 'me' or 'you', they do so in the ways we depict in the book. We observe throughout that a particular social view of the legal subject - as possessive individual - has strongly influenced judicial interpretations and applications of the concept of the person and a particular social view of property - as dominion - has guided judicial understandings and applications of property. The influence of these socio-legal views of persons and property has been to limit the development of their formal legal counterparts, to diminish their malleability, to close off legal relations, and in our view to make them less responsive to justice. For justice always demands a fresh approach to each one who comes before the law, untainted by prejudice; that is uninfluenced by any one template of the person. It should not operate with any single stereotype of humanity.

We have observed positivists to be saying that the concept of the person is 'an empty slot', formally available to anyone or anything. Although this may be read as no more than a claim on the part of positivists about the formal properties of the concept, it is also easily read as an empirical claim about how the concept actually works and, as we report throughout our book, the concept does not operate in practice in this ecumenical way. It has not been open to anyone. Rather it has operated with profound gender and class biases.

The other part of our quarrel with what we have called the positivist reading of persons is with the scholarly and political effects of this jurisprudence. Precisely because positivists have not concerned themselves with the empirical workings of the concept, they have failed to discern the effects of possessive individualism on legal thought; and so they have largely left it in place, unanalysed and undisputed, even naturalised. 'By persisting with the view that the legal person is just a formal concept, an empty slot, [they] have demonstrated a wilful blindness to the legal subject and his character'.[8] They have contributed to the poverty of theory on personality and helped to de-politicise, de-historicise and de-socialise the subject. They have contributed to an inherently conservative position which has it that the concept of person is politically neutral, when it so patently is not.

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7 Davies and Naffine, above n 2, 40.

8 Ibid 68.

The study of such fundamental legal concepts as person and property outside of the societies which give birth and meaning to them is vacuous. It produces little of interest and may even be positively misleading.

Reply to Thornton

Margaret Thornton both accepts the thesis of the book and extends it in ways we find highly acceptable and fruitful. She agrees with our thesis that possessive individualism has shaped the development of the legal concept of person. To be a full and flourishing person in law, to be an effective legal person, is to be an owner of things in the world and an owner of self. Thornton further agrees that this guiding legal idea of the person as proprietor has had particularly unfortunate consequences for women, who have not only been denied property in things in the world, with the law's active complicity, but who have also often been denied property in self, also with the law's accord.

In our book, we focus on just some of the ways law has denied women property in self, concentrating on the case of heterosexual and pregnant women. We observe that law's self-owner is usually characterised by his integrity, individuation and the ability to exclude others from his physical person. We observe also that pregnant women are thought to lack these vital attributes of the sovereign legal actor, the self-owner. Pregnant women are not properly integrated, and individuated; they lack the sort of bodily integrity law can rely on in a heterosexual never-pregnant man. Because their very physical form is deficient – as law constructs its self-owning subject – such women are rendered defective legal persons. We see this denial of female personality whenever the State asserts the fundamental importance of the right of bodily integrity and simultaneously asserts its interest in the foetus (through abortion laws and forced medical intervention during child-birth).

Thornton's important and legitimate point is that there are other social and economic ways in which women's personality continues to be diminished by law and with the law's imprimatur. Her interest is in the presumption of the indivisibility of the personalities of husband and wife, which prevents women from insisting on a fully contractual relationship. Thus they cannot assert their separation form their husbands. We agree that this is a further way in which law detracts from the persons of women.

Thornton however perhaps misunderstands important aspects of our analysis of personality when she suggests that our wish is to replace the legal concept of the bounded autonomous possessive legal individual, operating at a distance, with a more relational and communitarian understanding of persons, one which emphasises care and proximity. To be sure, we question the view that society is, or should be, regarded as nothing more than a collection of atomistic and possessive individuals. But our

interest in the relationality of legal persons is not confined to a concern with social atomism and how law supports it. In certain respects our work has tended to be more formal and analytical than sociological. In other words, we are saying that the legal concept of person can be treated as a bundle of rights of duties that exist only within *legal* relations (as can the concept of property). Persons can be understood in a Hohfeldian sense as a series of rights and corresponding duties arising from legally-recognised relations. Certainly many positivists regard the concept in just this formal analytical manner. Thus understood, the concept does not have to describe a fixed being (or object).

Although we have expressed disquiet about the tendency of this formal legal rational view of the person to abstract the concept from its social and historical context, we have also found value in this legal relational, rather than essentialist, account of the person. Its virtue is that it accommodates change, precisely because it emphasises the importance of legal relations and they are so variable and shifting. (In fact the reason that law actually works reasonably well for much of the time, and can accommodate the demands of so many different types of people, is that it does not commit each individual before it to a singular legal personality.) Human beings do not have to be possessive individuals to be persons, as positivists have been at pains to stress and as we have insisted throughout our book.

As we conclude in the final chapter, 'although we accept that persons depend upon some relationship with things as well as with other persons, this does not of itself tie the person to property in the way that we know it and which we do indeed regard as highly problematic.'[9] The characterisation of the legal subject as possessive individual is a specific historical invention; it is not essential or necessary to the legal concept. By paying greater attention to the formal relationality of legal being we may therefore help to free up the concept.

Reply to Atherton

Atherton poses a fundamental challenge to the book as a whole by suggesting that perhaps we might be asking the wrong question. She wonders whether it is useful and constructive to ask 'Are persons property?' She suggests that this very question may serve to calcify the two concepts we examine in the book and foreclose debate from the outset. Is she right? Does our central question put 'a construct – legal, theoretical, solid – in the way of the real questions' which are in her view 'ones of control – the zones of influence over people, things'?

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[9] Ibid 185.

Atherton poses a most interesting epistemological and legal question to which there is no easy answer. One defence of our eponymous question is that it is not of our own invention. The question has a considerable history and has if anything gained potency with the recent flourishing of bio-technology and information-technology. The question still presses on us as lawyers, demanding a response. And in order to provide a thoughtful and reflective answer, we are obliged to explore the nature of the concepts of property and person, and their relationship with one another, as we do in the book.

Atherton identifies as the central question of the law of property 'who can enforce what against whom? A further reason for asking *our* question in the stark manner that we have is to bring into sharper focus the manner in which persons can informally and indirectly become objects of property: how they can become the objects or the 'what' enforced, rather than the 'who' or 'whom' holding the property right or obligation. Our intention has been to acknowledge and highlight the relationship between power or what Atherton terms 'zones of influence' and property.

Because the subjects and objects of property law can assume such a startling variety of forms, it has been impossible to draw a clear line between persons and property. Rather we have found persons shading into property and property shading into persons. We accept that the question we ask is clearly not the only important question to be posed about how persons relate to one another, but it is nonetheless a significant one because it confronts the myth that the liberal separation between persons and property is legally and culturally respected.

Does the question itself compel us to think in certain ways about the relationship between persons and property? Does it congeal our thinking as well as the very concepts we wish to pull apart, analyse and deploy? We have endeavoured throughout the book to recognise and avoid this problem of hypostatisation. We have highlighted the relationality of both concepts, their dependence on rights and duties arising from fluid legal relations. We have identified the risks inherent in the search for an essence of either concept, be it possessive individualism or dominion. We have therefore also taken issue with the very idea of 'thingness', which Atherton herself invokes as a fundamental indicator of property. Both person and property are usefully treated as fictions, as abstractions. It is their distillation down to an essence which renders then less useful to lawyers and which leads to the sort of abuses we have identified in the book. When people have been found wanting as persons, often it has been because they have been found wanting in an essential quality of personness.

And yet we are sympathetic with Atherton's suggestion that the problem of property in persons might usefully be reframed as one of control: what she terms 'the zones of influence over people, things,

whatever, that form the universe of the person, the individual, the community'. This manner of casting the problem serves to highlight its historical and political dimensions. It is true that the law of persons and the law of property have to a large extent been laws of control and that there are other laws which might achieve similar purposes. If we think of property laws as simply laws about relations involving rights to control and exclude, then as Atherton herself avers, we need be less alarmed at the prospects of human commodification anyway. If property is not a thing but a relation entailing control, then we might well regard the deceased human as property for some purposes, and as person for others.

Reply to Drahos

Having accepted the central thesis of the book, Peter Drahos goes on to ask two further related questions: 'why is self-possession not recognised by law, when it has such strong social and philosophical force?' and 'should self-possession be recognised?' *Are Persons Property* attributes the reluctance of law to recognise self-ownership to the ethical desire not to commodify persons or to allow any explicit overlap with the notion of property, even where that might enhance autonomy. This is coupled with the persistence of an absolute concept of property, meaning that there is a failure of the legal imagination to conceive of self-ownership other than as the reduction of the person to a fungible thing. Drahos suggests two other reasons why law might be reluctant to recognise, formally, the self-possessing subject: one based on economic analysis, the other based on structural power relationships.

The economic explanation of the reluctance of law to recognise self-ownership is essentially that self-ownership does not promote efficiency gains in any relevant markets. This is because the characteristics of the self which might be owned, such as genes, body parts, and so on, already exist: recognising self-ownership of these resources does not encourage anybody to go out and produce more. Copyright, patents, and other intellectual property rights are said to reward and therefore encourage creativity and research. Protecting a person's interests in their own genes can do no such thing, and is pointless as far as the economic argument is concerned. As Drahos comments, 'perhaps the majority in *Moore's Case* got it right, at least from an efficiency perspective'. That is to say, by refusing Moore's claim to self-ownership of his genetic material, the majority allowed its appropriation by the defendants who were involved in biotechnology research. Put crudely, the defendants were in a position to produce something useful from recognition of their property while the plaintiff was not.

It is true that recognition of self-ownership offers very little in the way of incentive to produce, and therefore no particular economic good

flows from its recognition. In our view, this cannot be regarded as the principal rationale of the law in this area (and we do not think that Drahos is suggesting it is). It is perhaps one of several co-existing rationales. Legal decision-makers do not follow solely an economic path in their reasoning, although some theorists might argue that they ought to do so. In some instances, especially those involving intellectual property, the economic perspective might be determinative. For instance in *Moore's Case* an efficiency argument certainly appeared to be highly influential as the majority was concerned to ensure that the creative effort put into the research was not wasted. In many other areas, we are of the view that the economic reason, if it exists at all, is subordinate to the more explicit ethical desire to keep apart the concepts of person and property in order to ensure that the person is never commodified in any way. This we believe is borne out in the approach of the courts in cases concerning the human body.

Drahos' second explanation of law's reluctance to recognise self-ownership is that it does not serve the interests of the current structure of capitalist economies – dubbed by Drahos and John Braithwaite 'information feudalism', the feudalism whereby a few powerful players control access to many forms of information through intellectual property rights. As Drahos says

> Roughly speaking, those capable of mobilizing different kinds of power ... to solve their particular externality and free-riding problems through the redistribution of property rights do so. Those without power are left without the benefit of a property rights solution.

Property rights therefore tend to accrue to those who already have power, for instance biotechnology companies rather than possessive individuals.

We would certainly agree that, in the end, the creation and enforcement of property rights has as much to do with power as anything. Abstract principle, legal tradition, and efficiency all play a role, but since property is in essence a relationship which brings power to one person or entity over another, it is not surprising that those with structural power are able constantly to reassert it through property law. This is most evident in intellectual property law, and in particular in its protection of computer technology and biotechnology. However, as Margaret Thornton has illustrated above, structural power is not confined to the 'technological elites' of Western capitalism. It is also distributed within social relations such as gender. *Are Persons Property?* does not provide an exhaustive account of the forms of structural power which are mediated and strengthened by the notion of property. Rather, by illustrating some of the ways in which the concepts of property and person are linked with various exercises of power, we hope to have provided some inspiration for further examination of these matters.