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Abstract
Tracing is conceptualized as the "following" of an object through an exchange transaction and into the product of that exchange. Why is this so and what are the consequences? This article argues that the presentation of tracing in the metaphysical language of transmutation allows the doctrine to be depicted as consistent with axiomatic notions of property that understand it as pre-political and that preclude judicial readjustment of proprietary rights. However, the metaphysical conceptualization of tracing gives the remedy a conceptual structure that has resulted in the doctrine developing dysfunctionally when compared with the normative justifications that motivated its initial development. The reformation of the law of tracing necessitates understanding property as a social construct-the type of shift in perception that took place in the United States in the first half of this century. Signs of this understanding are apparent in the recent proprietary remedies jurisprudence of the Supreme Court of Canada.

THE METAPHYSICS OF TRACING: SUBSTITUTED TITLE AND PROPERTY RHETORIC©

BY CRAIG ROTHERHAM*

Tracing is conceptualized as the "following" of an object through an exchange transaction and into the product of that exchange. Why is this so and what are the consequences? This article argues that the presentation of tracing in the metaphysical language of transmutation allows the doctrine to be depicted as consistent with axiomatic notions of property that understand it as pre-political and that preclude judicial readjustment of proprietary rights. However, the metaphysical conceptualization of tracing gives the remedy a conceptual structure that has resulted in the doctrine developing dysfunctionally when compared with the normative justifications that motivated its initial development. The reformation of the law of tracing necessitates understanding property as a social construct—the type of shift in perception that took place in the United States in the first half of this century. Signs of this understanding are apparent in the recent proprietary remedies jurisprudence of the Supreme Court of Canada.

Tracing, qui est le droit prévu en equity de rechercher la trace de quelque chose, est défini comme le fait de "suivre" un objet à travers une transaction d'échange et à l'intérieur du produit de cet échange. Pourquoi est-ce le cas, et quelles en sont les conséquences? Cet article soutient que la présentation de *tracing* dans le langage métaphysique de la transmutation effectue une présentation de la doctrine qui est compatible avec des notions axiomatiques de la propriété comme étant pré-politique, et qui empêchent le rajustement judiciaire des droits de la propriété. Cependant, la définition de *tracing* donne au recoursune structure conceptuelle qui a promu le développement dysfonctionnel par rapport aux justifications normatives qui ont été à l'origine de son développement initial. La réforme de la loi de *tracing* exige une compréhension de la propriété comme construction sociale - le genre de changement de perception qui a eu lieu aux Etats-Unis au cours de la première moitié de ce siècle. Des signes de cette approche sont évidents dans la jurisprudence récente de la Cour suprême du Canada à l'égard des recours propriétaires.

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I. INTRODUCTION

B misappropriates thing 1 owned by A and gives it to C in exchange for thing 2. Instead of bringing an action based on his title to thing 1, A may assert title to thing 2. That we give property rights in substitutes is itself of interest. Civil law jurisdictions, in contrast, do not provide such a remedy.[1] However, more striking is the way in which rights to substitutes are explained in our legal discourse. According to our law, as stated in *Taylor* v. *Plumer*, the plaintiff has rights in a substitute because "if the property in its original ... form was [owned by the plaintiff] no change of ... form can divest it of that [interest]."[2] What is more, the process of asserting rights to a substitute is described using the metaphoric language of "tracing" and "following." This article asks: First, why does our legal culture favour a metaphysical account of this

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[1] A. Gambaro, "Property" in A. Gambaro, A. Candian & B. Pozzo, *Property, Propriété, Eigentum* (Padova: Cedam, 1992) 1 at 7-9.

[2] (1815), 3 M. & S. 562 at 575, 105 E.R. 721 at 726, Lord Ellenborough [hereinafter *Taylor* cited to M. & S.].

remedy, rather than a more prosaic description? And second, and perhaps more importantly, what are the consequences of this approach?

Tracing discourse can be understood only if one grasps the problems that are central to the justification of the remedy. In particular, an understanding of the work being done by "tracing" rhetoric requires an appreciation of the predominance in our legal culture of a conception of property as the enforcement of pre-existing and inviolable rights in a single thing.[3] Functionally, tracing can only properly be regarded as a remedy which gives rise to new property rights—an understanding that cannot easily be reconciled with traditional notions of property. This, I argue, explains the rather bizarre conceptualization of tracing in our legal discourse. The traditional analysis of tracing as the following of things is imbued with metaphysical rhetoric which serves to obscure the dissonance between a doctrine that provides for the creation of new property rights and the orthodox paradigm of property.

Is there really any harm in this? Fictions and related devices have often been praised for assisting legal development. According to this view, deceit in the form of the law is seen as a small price to pay for positive change in the law's substantive effect. In fact, form and substance are too interdependent to support this conclusion. The obfuscatory concepts developed in this area have their own logic that will at times demand results which diverge from sound normative justifications for the doctrine. In attempting to mediate the apparent incongruity of tracing doctrine and axiomatic notions of property rights, our judges and jurists have failed to address fundamental issues of desert. The primary advantage of tracing is that it confers priority in bankruptcy[4]—an effect which is not easily justified.[5] However the property rhetoric employed in this area to suppress the redistributive nature of "tracing" has discouraged the courts from seeking to mould a

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[3] For an account of the development and continuing influence of these ideas, see P. Stein, "The General Notions of Contract and Property in Eighteenth Century Scottish Thought" (1963) 8 Jurid. Rev. 1.

[4] Tracing in equity provides that the defendant holds the asset in question as a constructive trustee for the plaintiff, who is the beneficial owner of the asset. Common law tracing allows plaintiffs to bring personal actions for conversion, detinue, or money had and received. It is generally thought that if the plaintiff can show that assets subject to a tracing claim passed into the hands of the representative of the insolvent, a personal right of action lies against the representative—effectively giving the plaintiff priority over general creditors; see M. Scott, "The Right to 'Trace' at Common Law" (1966) 7 West. Aust. L. Rev. 463 at 480.

[5] For a review of priority-creating proprietary remedies, see S. Walt & E.L. Sherwin, "Contribution Arguments in Commercial Law" (1993) 42 Emory L.J. 897 at 934-67.

remedy which allocates entitlements within limits dictated by some defensible normative rationale. In particular, the metaphysical rhetoric of tracing encourages judges and jurists to ignore the consequences of proprietary relief on third parties and rely instead on the ultimately circuitous assertion that the plaintiff is entitled to proprietary relief because the contested asset *is* his or her property.

Finally, I shall examine changing understandings about property in the United States and Canada. First, I briefly explore the way in which the meaning of property has changed quite markedly in American legal discourse in the last sixty years. Second, and more specifically, I take account of developments in Canadian jurisprudence on proprietary remedies in the last two decades. Both examples suggest a move away from the traditional paradigm—a move which I suggest is necessary if we are going to address the dysfunction in the positive law of tracing. What is required is a more open legal discourse. This can only follow a move beyond our commitment to a paradigm of property as being the absolute ownership of things. Beginning with an acknowledgement of the reality that our law already provides numerous instances where property rights are readjusted, we might begin to develop principles justifying divergences from the orthodox understanding of property—a jurisprudence building the basis upon which new property rights can legitimately be created and existing rights qualified.

II. THE ORTHODOX PARADIGM OF PROPERTY

This article advances the view that much which is perplexing in tracing discourse can be understood when we appreciate the constraints imposed upon us by understandings of property that we treat as axiomatic. The law in this area cannot be explained without first comprehending the meaning ascribed to and the function performed by "property" in our legal discourse.[6] One particular difference in the use of the term "property" is crucial in this context. On the one hand, "property" can be understood as simply being those rules making up the "law of property;" rules established as the consequence of relatively specific deliberations concerning the entitlement to resources. According to this view, "property" refers simply to those rules which

[6] In this context, I can offer no more than a sketch of our understanding of property and its role in our legal culture, along with a few examples of how this understanding manifests itself in practice. Ultimately, it is only through case studies such as those presented here—explorations of property discourse in the context of particular problems of resource allocation—that we can build an understanding of the role of property in our legal culture.

deal with a particular area of social life—this use does not imply the existence of some fundamental unitary conception of property. If, however, a relatively coherent conception of property exists, it is to be found through a process of induction, by examining the more concrete rules of our legal system. On the other hand, "property" can be perceived as a concept which has a fundamental normative role in a legal system; a concept from which can be deduced the more particular rules of a given legal system.[7] According to this view, we do have an abstract conception of "property" from which can be deduced the rules governing the allocation of resources in more specific instances. Which of these understandings better characterizes "property" in common law thinking? Is it true, as Jeremy Waldron suggests, that a given legal culture's "particular conception of ownership [is] constituted by the property rules of the legal system?"[8] Or, to the contrary, is it the case that a legal culture's conception of ownership constitutes its system's property rules? It is central to the thesis developed in this article that the latter view is closer to the truth than is generally thought.

It has long been a feature of our legal tradition that property has been associated with the notion of the enforcement of pre-existing and inviolable rights over distinct things. Property is understood as a set of established entitlements delimiting the bounds of legitimate state power and thus providing a sphere of freedom for the individual. The notion of a judiciary concerned only with the protection of pre-existing entitlements relies on the image of property as a boundary.[9] This understanding of property is central to many of the predominant strains of modern English political theory.[10] It is an ideal enshrined in constitutional provisions which provide that the legislatures may not deprive individuals of their property rights without giving compensation. Similarly, for the citizen, the restrictions which property imposes on the judiciary serve to delineate a zone of personal freedom from other

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[7] The distinction can be described as reasoning from the "top down" (deductively) or from the "bottom up" (inductively): see generally R.A. Posner, "Legal Reasoning from the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights" (1992) 59 U. Chi. L. Rev. 433. For a discussion of the level of abstraction in the context of property, see M.J. Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993) at 98.

[8] J. Waldron, *The Right to Private Property* (Oxford: Clarendon, 1988) at 52.

[9] See, generally, J.N. Nedelsky, *Private Property and the Limits of American Constitutionalism: The Madisonian Framework and its Legacy* (Chicago: University of Chicago Press, 1990).

[10] H.T. Dickinson, *Liberty and Property: Political Ideology in Eighteenth-century Britain* (London: Weidenfeld & Nicolson, 1977) at 310; and P. Stein & J. Shand, *Legal Values in Western Society* (Edinburgh: University of Edinburgh Press, 1974) at 207-11.

individuals.[11] It explains the understanding that property in a particular object can be redistributed only through consensual transfer.[12]

This understanding of property has also provided a basis in Anglo-American common law for delimiting the power of the judiciary and thereby distinguishing the province of the courts from that of the legislature. According to this vision, the judicial role involves the enforcement of a pre-existing set of entitlements—the maintenance of a natural order. The judiciary's function is to implement corrective justice. Distributive justice is the preserve of the legislature.[13] As long as the judiciary keeps within the framework of corrective justice provided by the principles of private property and freedom of contract, its decisions are understood to be legal rather than political. This conception of property has enabled the common law to be conceived of as apolitical and allowed the Anglo-American legal culture to maintain its faith in the rule of law despite the presence of a judiciary with law-making powers. While, this understanding of property still dominates English law, it has lost much of its power in American legal thought. Canadian law, too, is moving away from the traditional paradigm of property as absolute thing-ownership. However, in order to understand tracing discourse, one must study it in the context of the paradigm of property that shaped its development.

The conventional understanding of property as the absolute ownership of particular objects can best be witnessed at work in cases where the judiciary is asked to readjust proprietary entitlements in a manner that conflicts with the orthodox paradigm. Here courts will often invoke axiomatic notions of property to provide normative guidance in the resolution of a dispute over rights to possess and use

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[11] This may be contrasted with the limits that property is seen to impose on the legislature, which are understood to mark the boundary between the citizen and state.

[12] See, for example, Sir W. Blackstone, *Commentaries on the Laws of England* (facsimile of first edition 1765-1769, reprinted 1979) (Chicago: University of Chicago Press, 1979) vol. 2 at 200-01. Similarly, modern jurists regard immunity from expropriation as a fundamental feature of property. See, for example, A.M. Honoré, "Ownership" in A.G. Guest, ed., *Oxford Essays in Jurisprudence: A Collaborative Work* (London: Oxford University Press, 1961) 107 at 119; and R.A. Epstein, *Takings: Private Property and The Power of Eminent Domain* (Cambridge, Mass.: Harvard University Press, 1985) at 304.

[13] See M.J. Horwitz, *The Transformation of American Law: 1780-1860* (Cambridge, Mass.: Harvard University Press, 1977) at 256, for a discussion of this understanding in American constitutional law. For a contemporary defence of such a vision of the common law as apolitical, see E.J. Weinrib, "Legal Formalism: On the Immanent Rationality of Law" (1988) 97 Yale L.J. 949 at 985-1000.

resources.[14] In *Shelfer* v. *City of London Electric Lighting Co.*,[15] the English Court of Appeal was asked to refrain from enjoining the defendant's electricity generating operation which was interfering with the plaintiff's use and enjoyment of his land. The defendant asked that the plaintiff instead be limited to an award of damages to compensate him for his loss. The widespread use of the injunction in nuisance cases was still less than a century old and the scope of the remedy had yet to be decisively determined.[16] The Court rejected the defendant's plea, concluding that limiting the plaintiff to damages would amount to a taking of property rights—an impermissible result. Lindley L.J. concluded that "[e]xpropriation, even for a money consideration, is only justified where Parliament has sanctioned it."[17] It is apparent that the Court of Appeal reached its conclusion that what was asked involved an imposition on the plaintiff's property rights by starting from the premise that those rights were absolute.

More recently, in *Gissing* v. *Gissing*[18] the House of Lords rejected a wife's claim for a proprietary interest in the matrimonial home. Lord Morris argued that "[a]ny power in the court to alter ownership must be found in statutory enactment."[19] Once again the nature of "property" and its role in delimiting the province of the judiciary from that of the legislature was assumed without discussion. A few years later, in *Moorgate Mercantile Ltd.* v. *Twitchings*,[20] the House of Lords considered whether the defendant, the owner of a motor vehicle actually in the possession of another person, under a hire-purchase agreement, might lose his title to the vehicle after failing to register its interest and the hirer had sold the car to the plaintiff. Lord Fraser, in denying the plaintiff's claim for the car, argued that "an owner of property is entitled to be careless with it if he likes."[21] According to this view, from the fact of ownership certain conclusions inexorably follow. In this instance, in Lord Fraser's view at least, it was axiomatic that

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[14] See also G. Samuel, "Property Notions in the Law of Obligations" (1994) 53 Cambridge L.J. 524 at 539.

[15] [1895] 1 Ch. 287 [hereinafter *Shelfer*].

[16] J.P.S. McLaren, "Nuisance Law and the Industrial Revolution—Some Lessons from Social History" (1983) 3 Oxford J. Legal Stud. 155.

[17] *Shelfer*, *supra* note 15 at 316.

[18] [1971] A.C. 886 [hereinafter *Gissing*].

[19] *Ibid.* at 898.

[20] [1977] A.C. 890.

[21] *Ibid.* at 925.

property could pass only with consent. Once again, the meaning of property as the absolute ownership of a thing was assumed as fixed.

Herein lies the problem with tracing and other doctrines which provide for the readjustment of proprietary rights and so run counter to the conventional paradigm of property. How do we account for the presence of such doctrines when the understanding of property that runs deep in our legal culture should preclude their existence? The answer lies in an understanding of the rhetorical strategies pursued in conceptualization of these doctrines. It is for this reason that this article now turns to an examination of tracing discourse.

III. TRACING DISCOURSE

A. *Tracing as a Property-Creating Remedy: A Functional Analysis*

Jurists frequently suggest that tracing is not remedial in any real sense.[22] Rather, the argument goes, tracing and the constructive trust "are not so much remedies as part of the process of establishing the substantive rights of the parties."[23] The dichotomy upon which this argument relies is misconceived. Tracing is a remedy that establishes substantive rights or, to put it another way, its remedy is substantive rights. The remedy conferred in the exercise of tracing is ownership (legal or equitable). We normally think of the institution of property in terms of the vindication of existing rights. For this reason, we are inclined to infer that tracing is not essentially remedial. Thus, jurists conclude that tracing is a way of "establishing" the plaintiff's property rights, in the sense of adducing facts to *prove* that he or she has particular rights. According to this view, tracing is not a remedy but an evidential principle.[24] However, tracing also entails to the plaintiff "establishing" rights, in the sense of *creating* a new legal relation. Tracing is the exercise by the plaintiff of a power to change his or her legal position and, in so doing, that of the defendant. This process

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22 Thus the constructive trust and tracing were described as "spurious equitable remedies": R.E. Megarry & P.V. Baker, eds., *Snell's Principles of Equity*, 27th ed. (London: Sweet & Maxwell, 1973) at 572.

23 *Ibid.*

24 Thus one commentator argues of tracing: "It is a preliminary evidential step by which the plaintiff proves the elements of a cause of action. It allows him to establish facts which will entitle him to enforce a right conferred by some rule of substantive law": D. Fox, *Tracing Money at Common Law* (Ph.D. Thesis, Cambridge University, 1995) at 2 [unpublished].

allows the plaintiff to enjoy those rights conventionally associated with the institution of ownership.[25] It is this process that gives tracing its remedial character.

How then might it be said that the exercise of the power to trace, which results in a new legal relationship, is not remedial in some important sense? Much of the discussion of the issue turns on the question of when the plaintiff's proprietary interest arises. There is a tendency to regard the title conferred through the tracing exercise as arising automatically at the time of the exchange in question.[26] Rather than envisaging the right in question as one requiring the courts to impose a legal relationship on the parties, jurists generally prefer to regard this relationship as commencing from the time that the events give rise to the tracing claim. Nothing much should turn on the distinction. Perhaps it arises from a rather romantic picture of the law—a picture that emphasizes that the courts are enforcing our subsisting rights rather than using their power to intervene in our lives. The idea that a legal relationship arises automatically gives the reasoning a rather metaphysical quality, suggesting that the legal relationship at issue is almost a natural state of affairs—one somehow not involving the courts. However, ultimately the debate is a rather arid one. The proprietary interest conferred by tracing is a legal construct; as such, it arises when the courts say it does. Characterizing the interest as arising automatically does not indicate that it is not a remedy. All that it means is that the courts have stipulated that the remedy is effective as soon as the particular events that precipitate the cause of action occur. An automatic right nonetheless implies a remedy.[27]

If the title conferred in the tracing process is to be regarded as not being remedial in any meaningful sense, it must be because the plaintiff's interest in the assets in question existed prior to the facts giving rise to the cause of action. Thus, a distinction may be made between causes of action that enforce and causes of action that establish a legal relationship between the plaintiff and an asset. The crucial distinction is that, while in the first category the cause of action arises out of the legal relationship, in the second the legal relationship arises

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[25] This is most obvious in the two-stage process involved in common law tracing. The plaintiff must first trace to establish a proprietary relationship with the substitute. Thereupon, on the basis of this relationship, the plaintiff is entitled to bring common law actions such as trover, money had and received, and conversion.

[26] *Cave* v. *Cave* (1880), 15 Ch.D. 639 (Ch.).

[27] C. Rotherham, "The Redistributive Constructive Trust: 'Confounding Ownership with Obligation'?" (1992) 5 Cant. L. Rev. 84.

out of the cause of action. An example of the first type of action is trespass. There the cause of action is grounded upon a pre-existing right to exclude others from entering onto the land in question. Tracing, by contrast, must fall in the second category, given that the plaintiff's interest in a substitute can arise, at the earliest, only at the time of the event conferring the right to trace (that event being the exchange transaction).[28]

In fact, it is implausible to regard tracing as involving the vindication of a fully fledged property right—even one that arises only at the time of the exchange transaction. This is because of the problem Birks has termed the "geometric multiplication of the plaintiff's property."[29] An advantage of tracing claims is that they allow plaintiffs a cause of action against more than one defendant. Plaintiffs may assert their title against anyone holding assets which were taken from them. Alternatively plaintiffs may "trace" their title into the exchange product of subsequent transactions. Consider an example where a car owned by A is stolen by B and then sold to C, who is aware of A's interest. A may assert his or her title against C in respect of the car. However, A cannot simultaneously assert title against more than one defendant. Plaintiffs must elect against whom they will proceed.[30] Because A cannot be simultaneously the owner of both the original thing and the substitute, it cannot be plausibly argued that, prior to A's election to trace, a full-blown proprietary interest arises in respect of the proceeds of sale held by B. Prior to tracing, B has a defeasible title to the proceeds of the sale—a title that he is liable to lose if A elects to claim title to those proceeds. If A has an interest arising automatically, at the most it can be characterised as an "inchoate" property right—what is termed a "mere equity" rather than a full proprietary interest.[31] Hence the problem faced in the context of tracing. It involves the creation of a property right and, as a corollary, contemplates the qualification of existing property rights. As such, it is difficult to reconcile with the understanding of property which has long dominated our legal culture.

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[28] See, for example, *LAC Minerals Ltd.* v. *International Corona Resources Ltd.*, [1989] 2 S.C.R. 574 at 676-77, La Forest J. [hereinafter *LAC Minerals*], discussed in text accompanying *infra* note 116.

[29] P. Birks, *An Introduction to the Law of Restitution*, rev. ed. (Toronto: Oxford University Press, 1989) at 92 and 394.

[30] See A. Burrows, "Introduction" in A. Burrows, ed., *Essays on the Law of Restitution* (Oxford: Clarendon, 1991) 1 at 66.

[31] See, for example, A.R. Everton, "'Equitable Interests' and 'Equities'—In Search of a Pattern" (1976) 40 Conv. & Prop. Law. 209.

B. *The Metaphysics of Tracing: The Denial of the Remedial Nature of Tracing in Formal Legal Discourse*

While, functionally, tracing can only be understood as giving rise to, rather than enforcing, a proprietary relationship between the plaintiff and the asset in question, the conventional description of the doctrine is rather different. In *Taylor*,[32] the respondent had given his broker money to buy Exchequer bills. The broker instead used the money to buy bullion and securities for his own purposes and then absconded. The Court held that Plumer could claim title over the bullion and securities. Lord Ellenborough explained the matter in the following way:

> It should seem that if the property in its original state and form was covered with a trust in favour of the principal, no change of that state or form can divest it of such trust, or give the factor or those who represent him in right any more valid claim in respect of it, than they respectively had before such change.
>
> The property of a principal entrusted to him by his factor for any special purpose belongs to the principal, notwithstanding any change which that property may have undergone in its point of form, so long as such property is capable of being identified and distinguished from all other property.[33]

One particular ambiguity in the use of "property" in legal discourse has long been noted.[34] As in common speech, often the term is used in legal discourse to indicate not the juridical relationship, but the object of that relationship—the thing which is owned. Lord Ellenborough uses "property" in this sense, while he refers to the legal relationship using the concepts of trust and belongingness. Accordingly, Lord Ellenborough's conclusion that the plaintiff's "property" persists through exchange transactions is somewhat bizarre as it contemplates that it is not the legal relationship but the object of that relationship—the "thing" itself—that transcends substitutions.[35] In this way, tracing is explained on the basis that substitutions *are* the property of the plaintiff, rather than as a rule that alters the parties' rights and obligations in relation to the asset in question. Lord Ellenborough's metaphysical explanation for property rights in substitutes is difficult to reconcile with the fact that the plaintiff continues to have property rights

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[32] *Supra* note 2.

[33] *Ibid.* at 575.

[34] See, for example, J. Bentham, *An Introduction to the Principles of Morals and Legislation*, J.H. Burns & H.L.A. Hart, eds., (London: Methuen, 1982) at 211.

[35] Tracing is still generally analyzed in these terms: see, for example, A.J. Oakley, "Proprietary Claims and Their Priority in Insolvency" (1995) 54 Cambridge L.J. 377 at 378-79.

over the thing originally owned and that the defendant has title to the asset in question until the plaintiff elects to trace.

In an important twentieth-century tracing decision, *Re Diplock's Estate*,[36] the English Court of Appeal similarly explained tracing in transcendental terms. Delivering the judgment of the Court, Lord Greene M.R. reasoned that where a plaintiff claims property purchased out of a fund into which the plaintiff can trace: the availability of "equitable remedies presuppose[s] the continued existence of the money ... as latent in property acquired by means of such a fund."[37] Quite how that which was originally owned by a plaintiff comes to be "latent" in another thing, or even—where there has been a chain of transactions—in a number of things, is obscure to say the least.

C. *The Reconciliation of Tracing with Axiomatic Notions of Property Rights*

How are we to understand the manifest dissonance between a functional understanding of tracing as a property-creating right and the description of the device in formal legal discourse? Exploring the function which various obfuscatory devices perform in western legal culture, Lon Fuller concluded that fictions and similar devices serve to reconcile legal rules and decisions with the premises to which a legal culture is committed.[38] Where a decision diverges from a fundamental premise, rather than questioning the validity of the premise, judges and jurists will manipulate the formal expression of the decision so as to suppress the reality of that divergence. Tracing may readily be understood in these terms.

Thus it may be understood that the law often maintains consistency with the conventional paradigm of property in form rather than in substance. If the need to provide for a readjustment of proprietary interests is felt sufficiently strongly it will be achieved through a mode of conceptualization which does not advert to that readjustment. This may be done through legal fictions, such as implied contract. Often it will be done through evidential devices. Thus, the doctrine of prescription incorporated the notion of a "presumed lost

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[36] [1948] Ch. 465.

[37] *Ibid.* at 521.

[38] L.L. Fuller, *Legal Fictions* (Stanford: Stanford University Press, 1967) at 51-53. For an account of academic views on the legal fiction from Bentham to Fuller, see L. Harmon, "Falling off the Vine: Legal Fictions and the Doctrine of Substituted Judgment" (1990) 100 Yale L.J. at 1-16.

grant" which suggested that it was essentially concerned with the consensual transfer of property.[39] Estoppels may be used to prevent owners from relying on their rights without requiring that those rights be formally qualified.[40] Obfuscatory devices will even be piled upon one another if needed to preserve the formal integrity of the law. Thus, the law will presume that, quite contrary to reality, a fiduciary who has received a bribe did not intend to benefit personally, but rather intended to hold the property in trust for his or her principal. The law will additionally use the equitable maxim that "equity treats as done that which ought to be done" in order to find that the assets in question are the property of the principal.[41]

Viewed functionally, tracing is obviously difficult to reconcile with the conventional paradigm of property.[42] The power to create new property rights, which tracing provides, runs contrary to orthodox notions of property. This explains the obfuscatory analysis favoured in tracing jurisprudence. The traditional conceptualization of tracing suppresses the reality of a divergence from axiomatic understandings of property rights. Lord Ellenborough's conception of things transmuting through exchange transactions serves to obscure the fact that legal rights are altered when something is traced. The word "tracing" itself provides a suggestive metaphor which implies that the plaintiff has an unproblematic claim to relief. The metaphors of "following" and "tracing" suggest there really is something being "traced"—some essence to which title attaches. These metaphors operate "to treat as fixed and natural things which are historically contingent and for which human agents are responsible."[43] In this way, what is transitory is eternalized.[44] More than mere rhetoric, they serve the important function of maintaining the pretence of law's autonomy from politics. A

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[39] See Blackstone, *supra* note 12 at 263-66. See also A.W.B. Simpson, *A History of the Land Law*, 2d ed. (Oxford: Clarendon, 1986) at 109.

[40] See J. Nicholson, "Owning and Owing: In What Circumstances Will the Responsibilities of Ownership Preclude or Postpone the Assertion of the Rights of an Owner?" (1988) 16 Melbourne Univ. L. Rev. 784.

[41] *A.G. Hong Kong* v. *Reid*, [1994] 1 A.C. 324 (P.C.) [hereinafter *Reid*]. See also C. Rotherham, "Proprietary Relief for Enrichment by Wrongs: Some Realism About Property Talk" (1996) 19 U.N.S.W. L.J. 378 at 390-97.

[42] See *supra* notes 9-21 and accompanying text.

[43] D.E. Cooper, *Metaphor*, Aristotelian Society Series, vol. 5 (Oxford: Basil Blackwell, 1986) at 42.

[44] See R. Barthes, *Mythologies*, trans. A. Lavers (Hammersmith, U.K.: Paladin, 1973) at 129 and 142, discussed *ibid.* at 41ff.

departure from the conventional paradigm of property that suggests a shift from corrective justice (the province of the judiciary) into distributive justice (the province of the legislature) is obscured by "tracing" reasoning which presents the process as involving the observance of existing entitlements rather than as a redistribution of the parties' rights and obligations.

IV. THE CONSEQUENCES OF TRACING DISCOURSE ON THE SUBSTANTIVE LAW

Should we be concerned that there is something nonsensical or even fraudulent about much of "tracing" discourse? Does it do any harm? Many of those who have examined fictions and related obfuscatory devices have done so with a benevolent eye.[45] The following section suggests that in fact there are dangers inherent in the use of obfuscatory devices generally, and it can be seen that the notion of "tracing" has affected the way in which we think about the problems associated with the distribution of entitlements in this field. Considering the normative rationale for allowing an owner to claim the exchange product of a transfer involving his assets, and asking whether the constraints imposed upon the tracing remedy by virtue of treating it as the following of things through transactions are in harmony with this rationale, I conclude that there is a substantial dissonance between the substantive law of tracing and any plausible justification for the remedy. Finally, a brief consideration of the judicial enforcement of consensually created tracing rights is offered to emphasize the way in which "tracing" discourse encourages the development of the doctrine in dysfunctional directions.

A. *The Dangers of the Metaphysics of Tracing*

The suppression of the divergence between the law in action and premises to which a legal culture pays lip service means that the question of whether that divergence is legitimate is never addressed. Thus, when the court is asked to extend the institution of property to a novel situation one might expect a normative argument—a justification of why the advantages of proprietary protection should be conferred in this

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[45] A notable exception is Jeremy Bentham: see G.J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon, 1986) at 271-75; and Harmon, *supra* note 38 at 3-5.

context. Instead, the use of metaphysical justification—the argument that something simply *is* property—stifles any comprehensive consideration of how the interest in question *ought* to be protected. The elevation of obfuscatory notions such as "tracing" to the "heaven of legal concepts,"[46] encourages the interpretation and development of doctrine in terms of the logic of abstract legal concepts rather than instrumentally. Useful as they might be in allowing the courts to achieve desired outcomes in particular cases, formal concepts such as "tracing," when employed to obscure, have a logic of their own. Accordingly, when applied in future cases, these concepts are liable to dictate results which cannot be reconciled with the normative considerations that motivated their initial use. The consequence is dysfunctional law.[47]

How then has thinking about substituted title in terms of "tracing" affected the substantive law? Two approaches to tracing have competed for acceptance. "Form-to-form tracing" (also known as "exchange-product tracing" and "transactional tracing") provides for title to be "followed" into the product of a transaction in which the thing originally owned was exchanged. Thus the right to trace depends on the ability of plaintiffs to point to an unbroken transactional chain between their original asset and the particular asset in respect of which proprietary relief is sought. This can be contrasted with the "swollen assets" or "causal" approach to tracing,[48] which focuses on giving a plaintiff priority in bankruptcy to the extent that it can be proven that an insolvent's estate is "swollen" by an enrichment gained at the expense of the plaintiff. Proponents of swollen assets tracing are not concerned with identifying the particular product of exchanges involving a

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[46] Compare R. Von Jhering, "In the Heaven of Legal Concepts" trans. E. Lowenstein in M.R. Cohen & F.S. Cohen, eds., *Readings in Jurisprudence and Legal Philosophy* (Boston: Little, Brown, 1951) at 678.

[47] On the prevalence of this phenomenon, see A. Watson, "Legal Change: Sources of Law and Legal Culture" in A. Watson, ed., *Legal Origins and Legal Change* (London: Hambledon, 1991) 69 at 82. For a discussion of this problem in relation to property discourse, see F. Cohen, "Transcendental Nonsense and the Functional Approach" (1935) 35 Colum. L. Rev. 809 at 815; and D. Stevens, "Restitution, Property and the Cause of Action in Unjust Enrichment: Getting By With Fewer Things" (1989) 39 U.T.L.J. 258 at 277-78. For an illustration in the context of the development of the constructive trust, see J.P. Dawson, *Unjust Enrichment: A Comparative Analysis* (Boston: Little, Brown, 1951) at 26-33.

[48] For a good account of swollen assets theory and for references to the extensive literature on tracing theory prior to the victory of orthodoxy in the *Restatement of Restitution* § 202 (1937) [hereinafter *Restatement of Restitution*], see D.A. Osterle, "Deficiencies of the Restitutionary Right to Trace Misappropriated Property in Equity and in UCC § 9-306" (1983) 68 Cornell L. Rev. 172 at 189.

plaintiff's property and are thus more willing to grant a charge over an insolvent's assets generally.

The analysis of tracing as the following of a thing through changes of form inexorably leads to the assumption that the swollen assets justification for tracing is illogical. Thus, opposing a swollen asset approach to the determination of entitlement to proprietary relief, Andrew Burrows argues that "without the ownership link, the personal remedy only is justified."[49] The writer appears to assume that a transactional link, in itself, somehow indicates ownership in some pre-legal sense. Yet the "ownership link" is provided by the law; it is not an independent social fact. Why would a causal link between the asset originally owned by the plaintiff and the defendant's net wealth not provide just as valid an "ownership link?" The revision of property rights implicit in tracing was motivated by functional reasons—largely to confer priority. While justice might demand limitations on form-to-form tracing as a basis for recovery,[50] the effort to portray tracing as the following of title has led to the ignoring of the normative rationale of tracing. Where this occurs, and the right to trace is explained in terms of a reified "ownership link," form-to-form tracing is inevitably regarded as a necessary and sufficient basis for asserting title, while swollen assets tracing theory is considered arbitrary.[51] David Paciocco, for instance, concludes,

> So long as the constructive trust is a remedy attaching to particular property and creating rights to that property in the plaintiff, it would be arbitrary to select simply a particular item of property and impose upon it a constructive trust. Why that property and not

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[49] See Burrows, *supra* note 30 at 44.

[50] *Infra* notes 79-81 and accompanying text.

[51] This can be seen in a recent article on tracing, where Lionel Smith criticizes Dale Osterle's promotion of swollen assets tracing: see Osterle, *supra* note 48. Smith states that, "[t]his unorthodox view appears to be based on a misunderstanding ... [since] proprietary rights must have a specific subject matter": see L. Smith, "Tracing Into the Payment of A Debt" (1995) 54 Cambridge L.J. 290 at 296. He cites the Privy Council decision in *Re Goldcorp Exchange* [1994] 3 W.L.R. 199 [hereinafter *Re Goldcorp*] as authority; see *infra* note 72. Smith's criticism is misconceived. Whether proprietary rights need to have a specific subject matter is the very issue of this debate. Osterle's argument is a normative one and does not claim to be based on an interpretation of the positive law. Consequently, this argument can be countered only by reason, not precedent. Osterle's argument that proprietary rights should indeed be available over a defendant's assets generally cannot be shown to be "based on a misunderstanding" by a Privy Council decision holding that they should not. Smith's view that "proprietary rights must have a specific subject matter" suggests a commitment to an orthodox, physicalist conception of property. Clearly this understanding is directly challenged by swollen assets theory. In reality, however, this understanding of property is compromised even by form-to-form tracing.

> other property? There is an undeniable allure in ensuring that a plaintiff who is given a claim to particular property as a matter of remedy, has a claim as a matter of fact.[52]

Paciocco does not pay sufficient regard to the function of tracing. He fails to appreciate that, without a theory of moral desert for priority, it remains arbitrary to award a proprietary interest on the basis of a transactional link. Why does a transactional link give a claim as "a matter of fact" while a causal link focusing more directly on the defendant's wealth does not?

The metaphysical approach to tracing results in a vicious circularity in jurists' attempts to justify the doctrine. An example is a defence of conventional tracing doctrine by Austin Scott, commentator for the *Restatement of Restitution*.[53] Scott argued that "[i]t is immaterial that the wrongdoer is insolvent, for his creditors, not being purchasers for value, are not entitled to any interest in the claimant's property or product."[54] This is a *non sequitur*; the argument leaves one of its premises unstated. The claims of the creditors can only be ignored if one assumes the very matter at issue—that the claimant has a proprietary interest in the product of his property. Thus Scott's argument is circular—the court recognizes the product of the exchange as the plaintiff's property because it is the plaintiff's property.[55] Some sixty years ago, the American legal realist Felix Cohen characterized such reasoning as "transcendental nonsense."[56] In the absence of prior recognition, there is nothing that gives a particular relationship a quality

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52 D.M. Paciocco, "The Remedial Constructive Trust: A Principled Basis for Priorities over Creditors" (1989) 68 Can. Bar Rev. 315 at 333.

53 Scott's preference for transactional tracing over the competing theory of swollen assets tracing found its form in *Restatement of Restitution*, *supra* note 48.

54 A.W. Scott & A.W. Scott Jr., *The Law of Trust: Select cases and other authorities on the law of trusts*, 5th ed. (Boston: Little, Brown, 1966) § 508, para. 3573.

55 This sort of circularity is pervasive in tracing jurisprudence. An example of this is Burrows' "ownership link" justification for form-to-form tracing: see Burrows, *supra* note 30, and text accompanying *supra* note 49. Similarly, R.M. Goode, "Property and Unjust Enrichment" in Burrows, *supra* note 30, 215 at 220, argues that the approach which he advocates, requiring the plaintiff to have a "proprietary base" in order to be entitled to an automatic property interest, is "not only logical but responsive to policy considerations, for to require D to make over that which never belonged to him but was always beneficially owned by P does not diminish D's estate and thus has no impact on his creditors ... ." Once again, property is presented as having normative force when it is in reality a conclusion. See also R.M. Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 L.Q. Rev. 433 at 439-41. For similar reasoning, see Oakley, *supra* note 35 at 377.

56 See Cohen, *supra* note 47 at 814-17. For a similar view, in the context of equitable proprietary rights, see E.J. Weinrib, "The Fiduciary Obligation" (1975) 25 U.T.L.J. 1 at 10-11.

of "propertyness" which requires its recognition as property.[57] The concept of property has to be constructed; it has no natural bounds.

The metaphors of "tracing" and "following" provide a structure for our thought about substituted title.[58] We have become so used to thinking about this issue in terms of "tracing" that it is difficult for us to consider the matter outside this structure. It limits our imagination and directs us toward particular results.[59] Thus form-to-form tracing has come to be regarded as natural while causal tracing—because it does not involve the following of a particular asset and its exchange product—has come to be seen as unprincipled. The examination of the underlying normative justification for substituting title presented below suggests that this perception is ironic.

Those who have spoken favourably of legal fictions and related obfuscatory devices have emphasized the role of such in developing the law prior to the invention of more sophisticated justificatory concepts.[60] Fuller likened fictions to scaffolding: they are necessary in construction but should be discarded after the erection of the building as they serve only to obscure.[61] Yet Fuller's own emphasis on the relationship of fictions to axiomatic premises underlying the law suggests that there is liable to be real reluctance to eliminate such devices. Contrivances of this type allow a legal culture to avoid the rejection of values which it at times violates and yet holds to be fundamental.[62] They will not be lightly cast aside and in the long term their effects may be pernicious.

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57 See, for example, A. Ross, "Tû-Tû" (1957) 70 Harv. L. Rev. 812 at 822-25.

58 See G. Lakoff & M. Johnson, *Metaphors We Live By* (Chicago: University of Chicago Press, 1980) at 3-9, for a discussion of how the manner in which we think about particular problems can become structured by a habitually used group of related metaphors.

59 Compare J.H. Merryman, "Ownership and Estate" (1974) 48 Tulane L. Rev. 916 at 924. See also Harmon, *supra* note 38 at 68-71, for an account of how the fiction of substituted judgment "seduced" judges and so shaped the development of the law.

60 See, for example, O.R. Mitchell, "The Fictions of the Law: Have they Proved Useful or Detrimental to its Growth?" (1893) 7 Harv. L. Rev. 249.

61 Fuller, *supra* note 38 at 70.

62 Compare Calabresi's observations on strategies for dealing with clashes of ideals through subterfuge in American law: G. Calabresi, *Ideals, Beliefs and Attitudes and the Law: Private Law Perspectives on a Public Law Problem* (Syracuse, N.Y.: Syracuse University Press, 1985) at 87-114.

B. *The Normative Basis for Substituted Title*

Consider the following fact situation.[63] A advances money to B to invest in securities on A's behalf. Instead, B uses the money to buy gold and absconds. Following B's capture, A seeks civil redress. B is now bankrupt and has substantial debts to unsecured creditors. A seeks a court order declaring that the gold is his property and requiring the trustee in bankruptcy to deliver it over to A. What is the rationale for the doctrine of tracing? Why allow a plaintiff to assert a title over something that he or she had neither owned previously nor purchased from its former owner? Why not simply give personal relief? As the example suggests, the principal reason is insolvency.[64] Plaintiffs limited to personal relief have to line up with other unsecured creditors competing for an insolvent's estate. In contrast, granting a proprietary interest has the effect of removing the assets in question from the pool available to general creditors.[65] Thus, the primary issue is not the plaintiff's claim against the defendant. Rather, it concerns the plaintiff's claim relative to other claimants seeking a share of the defendant's assets in bankruptcy. This points to the importance of property, not just for holders of proprietary rights, but also for third parties. Accordingly, the readjustment of rights to particular assets requires a consideration of interests beyond those of the parties to the dispute.

What then could be the justification for allowing a plaintiff priority through tracing? It has long been noted that the restitution interest is the most compelling of private law claims.[66] Where a claim is based upon the defendant's being enriched as a result of a subtraction from the plaintiff's wealth, restitution returns the parties to the position they enjoyed before the enrichment. This was, in Aristotle's view, the aim of corrective justice.[67] This feature of unjust enrichment suggests a

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[63] This example is based on the facts of *Taylor*, *supra* note 2.

[64] See R. Goff & G. Jones, *The Law of Restitution*, 4th ed. by G. Jones, ed. (London: Sweet & Maxwell, 1993) at 83; and F.H. Lawson with H. Teff, *Remedies of English Law*, 2d ed. (London: Butterworths, 1980) at 149.

[65] A principle now found in the *Insolvency Act 1986* (U.K.), 1986, c.11, s. 283(3)(a) and (5).

[66] L.L. Fuller & W.R. Perdue, "The Reliance Interest in Contract Damages" (1936) 46 Yale L.J. 52 at 56.

[67] Aristotle, *Nicomachean Ethics*, § 5.52, 1132b. It was an indication of the intuitive appeal of the restitutionary claim that Aristotle attempted to force claims for compensation for injury within the restitutionary paradigm. Modern scholars, however, recognize that such claims do not share the correspondence of loss and gain which characterises restitution claims: see, for example, J.L. Coleman, "Corrective Justice and Wrongful Gain" (1982) 11 J. Legal Stud. 421 at 425.

basis for giving those bringing restitution actions priority over other claimants in the event of the defendant's insolvency. The argument is that according unjust enrichment claims priority will effect corrective justice between the plaintiff and unsecured creditors. Where the plaintiff's loss is matched by a corresponding gain in the insolvent defendant's pool of assets available for distribution, to give the plaintiff priority to the extent of that gain will do no more than return all the interested parties (*i.e.*, the plaintiff, the defendant, *and* the creditors) to the situation that they would have enjoyed were it not for the defendant's enrichment.[68] Thus the *Restatement of Restitution* justifies tracing on the basis that creditors "are not entitled to profit because of the wrongful acquisition of property by their debtor through the use of the claimant's property."[69] Similarly, in *Re Hallet*, Sir George Jessel M.R. argued that this should not defeat the legitimate expectations of the general creditors for, "no human being ever gave credit to a man on the theory that he would misappropriate trust money and thereby increase his assets."[70]

The swollen assets rationale for tracing adverted to by Jessel M.R. implicitly recognizes the need to justify priority vis-à-vis general creditors. It effectively asks whether such creditors would be unjustly enriched were they able to share in a distribution of the assets in question.[71] However, it can provide a justification only as long as it is true that the enrichment in question has resulted in an increase in the wealth available for distribution in bankruptcy.

C. *Dissonance Between Tracing's Normative Foundations and the Positive Law*

1. The limitations of form-to-form tracing

As mentioned, two bases for giving title to substitutes have competed for attention. English courts have proved reluctant to entertain the possibility of awarding proprietary relief in the absence of

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[68] E.L. Sherwin, "Constructive Trusts in Bankruptcy" (1989) 2 U. Ill. L. Rev. 297 at 364; and R.H. Maudsley, "Proprietary Remedies for the Recovery of Money" (1959) 75 L.Q. Rev. 234 at 244-45.

[69] *Restatement of Restitution*, *supra* note 48, comment (e).

[70] (1880), 13 Ch.D. 696 at 730 (C.A.).

[71] See Sherwin, *supra* note 68 at 364.

the identification of specific assets.[72] Similarly, while the swollen assets theory has its supporters, form-to-form tracing has generally been favoured in the United States.[73] The appeal of swollen assets theory is easy enough to understand if we engage in a simple thought experiment. Imagine that we were invited to design a system of priority for private law claims in a world where there were no practical impediments to swollen assets tracing. Why would we ever choose a form-to-form tracing approach? A causal link in the swelling of the assets available for distribution in insolvency identifies a plausible basis for elevating the claim of the plaintiff (a rationale firmly rooted in unjust enrichment theory). In contrast, it is difficult to see that, in itself, evidence of a transactional link indicates any ground for priority.[74]

Considered in light of the swollen assets rationale for giving priority in bankruptcy, form-to-form tracing does not appear well designed to effect justice. It is under-inclusive—denying a remedy when underlying considerations of justice suggest that it is merited.[75] The defendant's assets might have been increased as a result of a deprivation of the plaintiff despite the plaintiff's inability to point to a transactional link between his or her property and assets currently forming part of the defendant's estate. An example is the use of traceable assets to pay a due debt. The net effect of this transaction is that the defendant continues to be enriched at the plaintiff's expense. Moreover, if the debt would, in any event, have been paid using other assets, the pool of assets available for distribution in bankruptcy continues to be swollen as a result of the defendant's unjust enrichment. Nonetheless, because subsequently the plaintiff will be unable to point to a transactional link between the plaintiff's property and any particular asset held by defendant, the use of traceable assets to discharge a debt extinguishes the plaintiff's tracing claim. Form-to-form tracing is also over-inclusive—giving a remedy when it is unmerited. For example, this method tends to give inadequate recognition to the efforts of the

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[72] The recent Privy Council decision in *Re Goldcorp*, *supra* note 51, provides a restatement of the orthodox position. The majority judgment delivered by Mustill L.J. suggests that the controversial *obiter dictum* of Templeman L.J. in *Space Investments Ltd.* v. *Canadian Imperial Bank of Commerce Trust Co.*, [1986] 1 W.L.R. 1072 (P.C.), favouring a less rigid approach to proprietary relief will not gain authoritative approval. For a discussion of the English law on this question, see Goff & Jones, *supra* note 64 at 99.

[73] See Osterle, *supra* note 48 at 189.

[74] See Walt & Sherwin, *supra* note 5 at 951.

[75] The analysis and terminology derives from P.S. Atiyah & R.S. Summers, *Form and Substance in Anglo-American Law: a comparative study of legal reasoning, legal theory, and legal institutions* (Oxford: Clarendon, 1987) at 13.

defendant in acquiring the new asset.[76] Thus form-to-form tracing provides for proprietary relief even though the defendant may have dissipated wealth or labour in order to acquire the assets in question so that, in net terms, it cannot be said that his or her estate is enriched at the expense of the plaintiff.[77] For these reasons form-to-form tracing appears to provide a rather blunt instrument with which to implement legitimate policy objectives.

2. Form-to-form tracing as a second-best solution

Some commentators have defended form-to-form tracing by focusing on the limited capacity of the law to implement the policy goals being pursued in this area.[78] According to this view, in such a context the question should be whether the particular link required to establish ownership is an effective means of securing the policy objective in question. From this perspective, some argue that courts do not have effective means of identifying causal links between a plaintiff's loss and a defendant's pool of assets. In practice, causal tracing is liable to be too arbitrary and unpredictable. Consequently, in an imperfect world, form-to-form tracing may be the best substitute for swollen assets tracing.

There is undoubtedly something to this argument. Yet, as a defence to the law as it now stands, it is ultimately unconvincing. While it is probable that a full-blooded swollen assets approach would be too difficult to administer, we could graft certain modifications onto the present transactionally driven approach, in order to make our law better correspond with convincing normative justifications for giving priority in bankruptcy.[79] Two relatively straightforward modifications might include:

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[76] See G.E. Palmer, *The Law of Restitution*, vol. 1 (Boston: Little, Brown, 1978) § 2.12 at 157-66.

[77] Consider the following situation: B steals thing 1 from A and exchanges it with C for thing 2. C then exchanges thing 1 for thing 3 in a transaction with D. Tracing potentially allows A equitable proprietary remedies against B and C and the right to assert her original title against D. If A sues C and traces into the product of C's exchange with D, it is clear that C's wealth will not have been increased to the value of thing 3, for C had to expend wealth in order to buy thing 1 from B. In these circumstances, to give A property in thing 3 cannot be justified in swollen assets terms.

[78] See, for example, Sherwin, *supra* note 68 at 333.

[79] While the swollen assets concept was initially developed to increase the availability of proprietary relief in situations where form-to-form tracing was not possible, in this context it would be used to limit relief.

(1) The award of equitable liens instead of equitable title over proceeds. These liens would be limited to the value of the asset originally owned by the plaintiff.[80]

(2) The reduction of the extent to which priority is given to the plaintiff in recognition of any expenditure that the defendant has made in the purchase of the asset in question.[81]

More controversially, the law might impose further limitations on tracing, based on certain presumptions regarding causation. Such an approach might, at first sight, appear rather arbitrary. Yet form-to-form tracing can itself be justified only on the ground that it provides a reasonable basis for an evidential presumption that the defendant's assets available for distribution in bankruptcy are swollen by the enrichment in question. We should, therefore, welcome further presumptions that, by restricting the scope of form-to-form tracing, better enable tracing doctrine to effect justice. Such additional presumptions might involve:

(3) Chronological considerations: just as the law of preferences in bankruptcy pragmatically determines which transactions are voidable depending on the time at which they were made, the courts might be more reluctant to allow substitution of title to confer priority when a good deal of time had passed. This would reflect a reasonable assumption that the greater the period that has passed, the less probable it is that the enrichment in question has increased the assets remaining available for distribution in bankruptcy.

(4) A consideration of the background of the insolvency: if the insolvency was due to bad financial management or frivolous personal spending it will be relatively difficult to infer that the value of the defendant's estate available for distribution in bankruptcy has been increased as a result of the enrichment gained at the plaintiff's expense. On the other hand, if the individual or enterprise was otherwise in a good financial state when insolvency was brought on by a single event, such as a large tort action or a natural disaster, the case may be different. In this instance, it may be reasonable to infer that the value of the pool of assets available for distribution has been increased and that the claimant has a sound basis for prevailing over general creditors.

Thus, even if considerations of expediency dictate that form-to-form tracing ought to remain a precondition for proprietary

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[80] See Goff & Jones, *supra* note 64 at 97.

[81] *Supra* note 76 and accompanying text.

relief, additional restrictions should be imposed where they can efficiently mitigate the failings of a rigid form-to-form approach.

D. *An Illustration of the Dangers of Formalism: The Enforcement of Consensually Created Tracing Rights*

Concepts utilized in legal discourse to hide the dissonance between the functional law and axiomatic premises concerning property do affect the substantive law. This is apparent when one considers the jurisprudence on tracing into proceeds in the context of reservation of title agreements. In *Aluminium Industrie Vaassen BV* v. *Romalpa Aluminium Ltd.*,[82] it was held that the seller could, utilizing tracing principles, reserve title, not only to goods in the possession of the buyer, but also to the proceeds of those goods. The courts have suggested that, if the terms of the contract are such that the buyer is a fiduciary in respect of the proceeds, then the seller may assert ownership over them pursuant to normal tracing principles. Reservation of title clauses effectively allow sellers to have security in sales transactions, without having to register.[83] "Proceeds" clauses allow what is in effect an even more comprehensive security interest. Despite the function of these agreements, English jurists are reluctant to characterize them as unregistered securities.[84] This may have significant consequences for the

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[82] [1976] 1 W.L.R. 676 [hereinafter *Romalpa*].

[83] See R.J. Adhar, "Romalpa's Empire, the Reception of Reservation of Title Clauses in New Zealand" [1993] L.M.C.L.Q. 382 at 384.

[84] This can be contrasted with the approach taken by Article 9 of the Uniform Commercial Code of the United States, which provides that reservation of title clauses are security interests and limits their effect to providing security: see *ibid.* at 384. The question as to whether the reservation of title is a security under English law has seen various authors providing their own definitions of what a security interest is and then announcing whether or not these agreements fit the definition: see F. Oditah, *Legal Aspects of Receivables Financing* (London: Sweet & Maxwell, 1991) at 5. Oditah, at 90-94, taking a functional approach, cogently argues that these agreements can quite reasonably be regarded as security agreements under English law. However, most English commentators disagree. Goode argues that, because a security must be conferred and not retained, reservation of title is not such a device: see R.M. Goode, *Legal Problems of Credit and Security*, 2d ed. (London: Sweet & Maxwell, 1988) at 5. Generally functionalism is resisted: see M.G. Bridge, "Form, Substance and Innovation in Personal Property Security Law" (1992) J. Bus. L. 1. A striking example of this is Gerard McCormack's comment that "the 'Crowther Committee on Consumer Credit' observed that distinctions between one type of transaction and another are drawn on the basis of legal abstractions rather than on the basis of commercial reality" in the context of a defence of a formalist approach: see "Reservation of Title—Past, Present and Future" [1994] Conv. & Prop. Law. (n.s.) 129 at 135. McCormack is apparently unperturbed by the fact that the Committee's comment was intended as a criticism.

buyer's creditors, providing that goods and proceeds which are the subject of such clauses are not available for distribution in the event of the buyer's bankruptcy.

The acceptance of tracing in this context follows from the perception that it involves the following of a continuing title rather than a remedy for unjust enrichment. This perception encourages a "proprietary" analysis of the retention of title issue according to which the parties are free to make what provisions they will for the passing of title. According to this analysis, if the parties provide that title is retained in the proceeds, so be it.[85] The reified notion of a continuing title results in the conclusion that these agreements involve the seller retaining a single title, rather than the buyer granting an interest that will crystallize when the proceeds are obtained. This may be contrasted with German jurisprudence which concludes that any attempt to provide for ownership over proceeds must be treated as a charge.[86]

Title can be retained on various terms. Often these will go beyond the mere provision of security over the goods sold. Indeed, terms providing that title only passes when all debts due to the seller are met ("all moneys" clauses) have been accepted by the House of Lords.[87] More controversial are "proceeds" clauses which purport to allow sellers to assert title over the proceeds of sale. Where the buyer is a retailer, such proceeds will of course generally be greater than the price at which the seller supplied the goods. Moreover, the effect of the recognition of "all moneys" clauses is that this title may be asserted and the proceeds thus removed from the insolvent's estate, even when substantial payments have been made on the purchase price so that the money owed by the buyer is considerably less than the sum of the proceeds. Thus, the effect of the reservation of title contract may actually exceed that of a security.[88] The enforcement of these contracts represents a recognition

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[85] R.M. Goode, *Proprietary Rights and Insolvency in Sales Transactions*, 2d ed. (London: Sweet & Maxwell, in association with Centre for Commercial Law Studies, 1989) 101; and R. Bradgate, "Retention of Title in the House of Lords: Unanswered Questions" (1991) 54 Mod. L. Rev. 726 at 728.

[86] R. Serick, *Securities in Moveables in German Law: an outline* (Deventer: Kluwer, 1990) at 3, 61, and 137. It is, however, worth noting that German law does not demand the registration of personal property security interests.

[87] *Armour* v. *Thyssen Edelstahlwerke AG*, [1990] 3 All E.R. 481 (H.L.).

[88] Ironically, where parties make efforts to limit the effect of the contract to security so that, for instance, the extent of the seller's title is limited to the contract price, or title is transferred as the price is paid, may increase the likelihood of a court holding that they have created an unregistered security. Thus a formalist approach encourages reservation of title agreements which maximize injustice to third-party creditors. See, for example, *Re Weldtech Equipment Ltd.*, [1991]

of the right of buyers and sellers to make terms prejudicing the buyer's general creditors.[89] Little thought has been given to the issue of whether this prejudice is legitimate. At the moment, the authorities on this question are in a state of disarray, generally turning on the issue of whether the contract creates a charge.[90]

Further philosophical meditation on the question of what amounts to a charge could be avoided if it were recognized that there is no legitimate reason for allowing tracing in this context. It has been assumed that the capacity to transcend exchange transactions and continue in substitutes is a natural feature of title, the alienation of which the owner is at liberty to control. A different conclusion would result if substituted title was understood to be an unusual remedy designed to fulfil particular objectives. As the interest conferred by tracing has been reified, some jurists have lost sight of the normative rationale for the practice. A consideration of sound policy justifications for allowing substituted title indicates that allowing sellers unlimited power to "retain title" over proceeds is unsatisfactory.

V. RETHINKING PROPERTY: BEYOND THE CONVENTIONAL PARADIGM

A. *The Transformation of Property in American Legal Thought*

The notion that private law was based on immutable principles of property and freedom of contract exercised great influence in American legal thought in the latter part of last century and up until the New Deal. The notion of the common law being based on legal principles rather than the pronouncements of particular courts found

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B.C.C. 393 (Ch.D.), where Hoffman J., at 395, in striking down a clause, placed emphasis on the statement "this transfer takes place only for securing our claims against the purchaser."

[89] Problems arise when it is assumed that the common law should allow a *laissez-faire* approach despite the existence of interventionist regulation in the form of the institution of bankruptcy. In this context, bankruptcy creates a strange set of incentives for the parties. Solvent buyers may be relatively unconcerned as to how their estate might be divided in the event of their bankruptcy. A buyer may be unperturbed that certain third party creditors will be prejudiced, as the institution of bankruptcy ensures that the buyer's liability to them will be suspended. Consequently, buyers are likely to be prepared to give effective priority away for very little consideration. Thus it cannot be assumed that the cost of such agreements to the creditors will be reflected in the price asked by the buyer, and that the creditors are not prejudiced in the long run. In order to protect the interests of third parties, we should be prepared to place restraints on parties' ability to negotiate the retention of title.

[90] McCormack, *supra* note 84 at 132-35.

expression in Story J.'s judgment in *Swift* v. *Tyson*.[91] Story J. concluded that, when resolving a commercial dispute, the federal judiciary was not bound by determinations on the common law made by the judiciary of the state in which the action arose. Instead, the federal courts were to apply "general principles of the common law."[92] That the inviolability of private property and the freedom of contract were fundamental constitutional rights was made apparent in the "substantive due process" jurisprudence of the Supreme Court in cases such as *Lochner* v. *New York*.[93] This edifice was crumbling just as the *Restatement of Restitution* emerged in 1937, presenting its formalist vision of tracing.[94] That year the Supreme Court, in *West Coast Hotel* v. *Parish*,[95] retreated from its vision of substantive due process. The following year *Swift* was overturned in *Erie RR* v. *Tomkins*.[96]

Indeed, property had already been stretched beyond the breaking point in both constitutional and common law. The creation of new forms of intangible property and the characterization of contractual rights as property encouraged a move beyond the paradigm of property as rights in a particular object.[97] The objects of property increasingly came to be understood as everything that had exchangeable market

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[91] 41 U.S. 1 (1842) [hereinafter *Swift*].

[92] See Horwitz, *supra* note 13 at 245.

[93] 198 U.S. 45 (1905) [hereinafter *Lochner*]. In *Lochner*, the Supreme Court concluded that a statute restricting working hours in bakeries was in breach of the Fourteenth Amendment as a violation of the liberty of contract. In the other landmark decision of this era, *Adkins* v. *Children's Hospital*, 261 U.S. 525 (1923), a minimum wage for women was struck down for the same reason. See, for example, J.W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (New York: Oxford University Press, 1992) at 101-118; and M.J. Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy*, (New York: Oxford University Press, 1992) at 145-51.

[94] *Supra* note 48.

[95] 300 U.S. 379 (1937).

[96] 304 U.S. 64 (1938).

[97] K.J. Vandevelde, "The New Property of the Nineteenth Century: The Development of the Modern Concept of Property" (1980) 29 Buff. L. Rev. 325. According to the New Hampshire Supreme Court, "[a] refusal to pay a debt is an injury to the property of the creditor": see *Thompson* v. *Androscoggin River Improvement Co.*, 54 N.H. 544 at 552 (1874). Property reasoning was also used to overcome the third party beneficiary rule: see *Lawrence* v. *Fox*, 20 N.Y. 268 (1859)—making the defendant promisor a constructive trustee of the benefit of the promise for the third party beneficiary. See also A.J. Waters, "The Property in the Promise: A Study of the Third Party Beneficiary Rule" (1985) 98 Harv. L. Rev. 1109 at 1196.

value.[98] However these developments were difficult to reconcile with the traditional premise that property implies the absolute protection of a thing. The equation of property and value meant that a person who had title over something might lose exclusive right to that thing if another added value to it. Yet this would not always be the case. Entitlement would depend upon a moral assessment of the behaviour of the parties—a fact which emphasised that entitlement did not result from value alone.[99] Moreover, it was often implausible to regard the protection conferred in respect of intangibles as absolute.[100]

Something similar was occurring in "takings" jurisprudence. Here, the Supreme Court extended the notion of property by embracing the concept of "regulatory takings," whereby a claimant was entitled to compensation because the value of his or her land had been reduced, even where that land remained physically unchanged.[101] However, at the same time, the Court recognized that, unless it was going to tie the hands of the state completely, not every regulation which impacted on the value of someone's land could be categorized as a taking.[102] Yet, there was no obvious place to draw the line. What constituted a taking was, in the words of Oliver Wendell Holmes, "a question of degree;" a matter of policy rather than law.[103]

The role of property in formalist legal thought was attacked by the legal realists.[104] Influenced by Hohfeld's analysis of property, not as a unitary concept of absolute ownership but as a bundle of divisible rights,[105] the realists accelerated a process which has since been

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[98] See, for example, Swayne J. dissenting in the *Slaughterhouse Cases*, 83 U.S. (16 Wall) 36 at 127 (1872); *Chicago, M. & St. P. Ry* v. *Minnesota*, 134 U.S. 418 (1890); and Pitney J.'s majority opinion in *International News Service Ltd.* v. *Associated Press Inc.*, 448 U.S. 215 (1918). See generally Horwitz, *supra* note 93 at 145 and 203.

[99] See, for example, Vandevelde *supra* note 97 at 339 (discussing development in the law of accession).

[100] *Ibid.* at 341.

[101] See *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922).

[102] *Ibid.* at 416, Holmes J.

[103] *Ibid.* For a more recent statement of this understanding, see Brennan J.'s judgment in *Penn Central Transportation Co.* v. *New York (City of)*, 438 U.S. 104 at 128 (1978).

[104] See, for example, R. Hale, "Rate Making and the Revision of the Property Concept" (1922) 22 Colum. L. Rev. 209 at 213; A.A. Berle & G.C. Means, *The Modern Corporation and Private Property* (New York: Macmillan, 1962) at 333-39; Cohen, *supra* note 47 at 814-17; and K. Llewellyn, "Through Title to Contract and a Bit Beyond" (1938) 15 N.Y.U. L. Rev. 159 at 165-72.

[105] W.N. Hohfeld, "Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale L.J. 16, continued in (1917) 26 Yale L.J. 710. For the importance of Hohfeld's analysis to the American concept of property, see Vandevelde, *supra* note 97, and Horwitz, *supra*

characterised as the "disintegration of property."[106] That the classic understanding of property has lost much of its hold in American legal culture is apparent when one examines decisions which raise the issue of the redistribution of property rights. In contrast to the English Court of Appeal in *Shelfer*,[107] the New York Supreme Court in *Boomer* v. *Atlantic Cement*,[108] despite finding an actionable nuisance, was prepared to refuse an injunction and limit the plaintiff to damages. The Court was not perturbed by the notion that by so doing it was expropriating the plaintiff's property rights. Similarly, in contrast to the approach of the House of Lords in *Gissing*,[109] a number of states have developed remedies for the reallocation of property upon the breakdown of relationships akin to marriage.[110] Once again, these courts have not regarded this as a usurpation of the legislative function. A New Jersey Supreme Court decision, *State* v. *Shack*,[111] provides an example of the modern American attitude toward property. There, adopting a view previously expressed by an academic, Weintraub J. commented: "[a]n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for who these organs also operate as protective agencies."[112]

While the classic understanding of property still exerts an influence on the American legal imagination,[113] its force is muted in comparison with its role in English law. It has long since become obvious in American law that property need not involve rights to a specific material object nor necessarily be absolute.

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note 93 at 145.

106 T.C. Grey, "The Disintegration of Property" in J.R. Pennock & J.W. Chapman, eds., *Property* (New York: New York University Press, 1980) 69 at 81. See also B.A. Ackerman, *Private Property and the Constitution* (New Haven: Yale University Press, 1977) at 26-27.

107 *Supra* notes 15-17 and accompanying text.

108 257 N.E.2d 870 (N.Y. 1970).

109 *Supra* notes 18-19 and accompanying text.

110 See, for example, *Marvin* v. *Marvin*, 557 P.2d 106 at 112 (Cal. 1976); and *Pickens* v. *Pickens*, 490 So.2d 872 (Miss. 1986).

111 277 A.2d 369 (1971).

112 *Ibid.* at 373, citing a passage from R.R. Powell, *The Law of Real Property*, vol. 3 (Albany, N.Y.: M. Bender, 1949), para. 493-94.

113 See Nedelsky, *supra* note 9 at 244; J.W. Singer, "The Reliance Interest in Property" (1988) 40 Stan. L. Rev. 611 at 634. A good example is *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). In *Loretto*, the Supreme Court held that all physical invasions of property, no matter how minor, amounted to takings. The case involved the installation of a television cable on the plaintiff's roof.

B. *Innovation in Canadian Law*

There are also signs that Canadian law is moving beyond the conventional paradigm toward a more dynamic understanding of property than can be found in English law. The best indication of this tendency is the willingness of the courts to consider awarding proprietary remedies in a wider set of circumstances, while at the same time suggesting that such relief should be used sparingly.[114] Thus, Canadian courts developed a doctrine providing for the redistribution of property rights on the breakdown of quasi-matrimonial relationships, a context in which proprietary relief has been very restricted in English law.[115]

What is more, Canadian legal discourse displays an openness about the nature of proprietary remedies that is not apparent in English jurisprudence. The rationale for proprietary relief is not disguised in a manner which obscures its substantive effect. An example of this openness can be found in *LAC Minerals*.[116] In that case, the Supreme Court of Canada was faced with the argument premised on orthodox understandings of property as absolute ownership. The defendant argued that a constructive trust could not be awarded over the profits of a breach of confidence because to do so would amount to creating a new property right. In rejecting the notion that the constructive trust could not be used in this manner, La Forest J. used tracing as an analogy to destabilize the conventional understanding.[117] He commented as follows:

> it is not in all cases that a pre-existing right of property will exist when a constructive trust is ordered. The imposition of a constructive trust can both recognise and create a right of property. When a constructive trust is imposed as a result of successfully tracing a plaintiff's asset into another asset, it is indeed debatable which the court is doing.[118]

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[114] See C.E.F. Rickett, "The Remedial Constructive Trust in Canadian Law: Discordant Notes in a Performance Better Forgotten?" [1991] Conv. & Prop. Law. (n.s.) 125.

[115] Compare *Pettkus* v. *Becker*, [1980] 2 S.C.R. 834 with *Lloyds Bank PLC* v. *Rosset*, [1991] 1 A.C. 107 (H.L.).

[116] *Supra* note 28.

[117] This approach is in stark contrast with that pursued by the Privy Council in *Reid*, *supra* note 41 and accompanying text.

[118] *LAC Minerals*, *supra* note 28 at 676, applied by Cory J. in *Peter* v. *Beblow*, [1993] 1 S.C.R. 980 at 1022.

Similarly, in *Rawluk* v. *Rawluk*,[119] McLachlin J. noted that "[t]he doctrine of constructive trust, as it has developed in Canada, is not a property right but a proprietary remedy for unjust enrichment."[120]

Abandoning the notion that proprietary relief is imposed in order to protect a pre-existing right has encouraged the Canadian judiciary to reflect on the need to mould the availability of proprietary remedies to meet with the dictates of justice.[121] Thus in *LAC Minerals*, La Forest J. concluded that "a constructive trust should only be awarded if there is reason to grant to the plaintiff the additional rights that flow from a recognition of a right of property."[122] The task now is to establish what amounts to a good reason for awarding proprietary relief. In her dissenting opinion in *Rawluk*, McLachlin J. noted that proprietary remedies may prejudice third parties and it may be that the debate will increasingly focus on those whose interests have long been neglected in the jurisprudence of proprietary remedies: unsecured creditors.[123] The groundwork has been laid for a reappraisal of the meaning of property in the contemporary Canadian common law.[124] This gives some hope for a critical re-evaluation of the legitimate limits of the tracing remedy.

C. *Taking Property Talk Less Seriously*

Tracing discourse serves to obscure the dissonance between the premise that property involves the enforcement of pre-existing, inviolable rights and the reality that tracing involves the creation of new rights and the concomitant readjustment of existing rights. This phenomenon reflects a desire to preserve the symbol of property as a neutral boundary delimiting the field of judicial action—a boundary between the legal and the political.

Tracing represents a decision to give a particular class of claimants priority in insolvency. Rather than being neutral, it has

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[119] [1990] 1 S.C.R. 70 [hereinafter *Rawluk*].

[120] *Ibid.* at 100.

[121] See, for example, *Sorochan* v. *Sorochan*, [1986] 2 S.C.R. 38 at 47, Dickson C.J.; *LAC Minerals*, *supra* note 28 at 678, La Forest J.; and *Rawluk*, *supra* note 119 at 103-08, McLachlin J. and 92-93, Cory J.

[122] *Supra* note 28 at 678.

[123] *Supra* note 119 at 111.

[124] An interest in both the meaning and normative foundations of property is apparent in recent Canadian jurisprudence: see for example Stevens, *supra* note 47; and A. Brudner, "The Unity of Property Law" (1991) 4 Can. J. Law & Jur. 3.

controversial distributive consequences. Yet these are obscured using the rhetorical power of property. The decision is justified on the basis that the plaintiff *is* the owner of the assets in question. Herein lies the paradox of tracing. It is the conventional paradigm of property as the absolute ownership of specific things which makes coherent the notion of property as a neutral boundary between law and policy. While tracing departs from this paradigm and thus threatens to undermine the orthodox understanding of property, the rhetorical strategy employed disguises this departure and draws upon the symbolic power of property to insulate the doctrine from controversy.

The notion of property as providing some natural boundary between law and politics is misconceived. The non-interventionist premises of the private-ordering paradigm gives it an appearance of neutrality. However, this is largely an illusion. A system based on absolute property rights and freedom of contract nonetheless relies on the use of coercive state power to enforce entitlements.[125] Moreover, notions of consent governing the transfer of entitlements must be constructed by the courts and reflect notions of distributive justice,[126] or at least an elaboration of a concept of autonomy, which must draw on a deeper understanding of the relationship between individual and state.[127] Far from being neutral, the private-ordering paradigm reflects a particular political ideology—a libertarian conception of the private law.

Tracing is just one example of the reality that in our law property does not always involve the enforcement of pre-existing legal relationships and that property is not always absolute.[128] Property rules

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[125] This understanding was central to the American realist movement. Seminal articles emphasizing this point include R. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State" (1923) 38 Pol. Sci. Q. 470; and M. Cohen, "Property and Sovereignty" (1927) 13 Cornell L. Rev. 8. The same argument was central to John Stuart Mill's political economy: see J. Riley, ed., "Introduction" in J.S. Mill, *Principles of Political Economy; and Chapters on Socialism* (New York: Oxford University Press, 1994) xvi; see also at 163.

[126] See A.T. Kronman, "Contract Law and Distributive Justice" (1980) 89 Yale L.J. 472.

[127] See M.J. Trebilcock, *The Limits of Freedom of Contract* (Cambridge, Mass.: Harvard University Press, 1993) at 101.

[128] Other examples include (1) the equitable defence of *bona fide* purchaser for value (see F.H. Lawson & B. Rudden, *The Law of Property*, 2d ed. (Toronto: Oxford University Press, 1982) at 58); (2) the prevention (by estoppel) of the owner of a good from asserting his or her rights as against a *bona fide* third-party purchaser (now codified in the *Sale of Goods Act 1979* (U.K.), 1979, c. 54, s. 21(1) (see Nicholson, *supra* note 40 at 785-99); (3) the awarding of a constructive trust over profits made from non-subtractive wrongs (see *Reid*, *supra* note 41, where it was held that assets obtained in breach of fiduciary duty become the property of the principal); (4) the subrogation of guarantors to secured claims which the creditor has against the principal debtor: see Burrows, *supra*

are socially constructed and contingent—whether they deviate from the private-ordering paradigm or adhere to it. It is better that this choice is openly acknowledged and exercised thoughtfully rather than obscured in the abstract conceptual rhetoric which at present characterizes the discourse of property in our law. Through a more open discourse, a justificatory theory of property rights capable of explaining departures from the traditional paradigm might be developed.[129]

VI. CONCLUSION

A survey of the law of tracing is likely to lead one to echo the unease Maitland experienced when reviewing the area a hundred years ago. He expressed

> great doubts of the convenience of all this. It may be hard that a *cestui que trust* should not have "his" property, but is also hard that creditors should go unpaid. Courts of Equity, which in this matter have had the upper hand, have thought a great deal of the *cestui que trust*, much less of the creditors.[130]

Maitland's use of inverted commas in referring to the cestui que trust's claim to "his" property suggests that he viewed the designation of property in the assets in question as somewhat arbitrary. Yet in tracing jurisprudence from Lord Ellenborough's judgment in *Taylor*[131] to the discussion of tracing in the context of *Romalpa* clauses,[132] one frequently encounters patently circular attempts to justify the positive law on the basis that the plaintiff should be permitted to substitute his title to the assets in question because they *are* his property. The conceptualisation of tracing employed to suppress the conflict between the function of the

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note 30 at 85); (5) the protection by means of an equitable lien of an insurer's rights, arising through subrogation, to settlement moneys paid to an indemnified plaintiff (see *Napier & Ettrick (Lord)* v. *Hunter*, [1993] A.C. 713 (H.L.), and the discussion by Burrows at 81-82); and (6) proprietary estoppel, at least insofar as it is available to remedy those expectations raised unintentionally by the defendant rather than those encouraged by promise. Relief in the former situation is contemplated by the broad approaches favoured by Oliver J. in *Taylor Fashion Ltd.* v. *Liverpool Victoria Trustees Co.*, [1982] Q.B. 133 at 147 (Ch.); Deane J. in *Commonwealth* v. *Verwayen* (1990), 95 A.L.R. 321 (H.C.) at 347-49; Richardson J. in *Gillies* v. *Keogh*, [1989] 2 N.Z.L.R. 327 at 344-47 (C.A.); and the *Restatement (Second) of Contracts* § 90 (1977).

129 An example of an effort to develop a conceptual theory for the qualification of rights of property using numerous examples found in existing law to support his argument can be found in Singer, *supra* note 113.

130 F.W. Maitland, *Equity: a course of lectures*, A.H. Chaytor & W.J. Whittaker, eds., 2d ed. rev. by J. Brunyate (Cambridge, U.K.: University Press, 1969) at 220.

131 *Supra* note 2, and text accompanying *supra* notes 32-35.

132 *Supra* notes 82-90 and accompanying text.

remedy and sacred axioms of property has had the effect of burying key normative issues. We are enslaved by concepts whose primary function is to obscure. As a result, tracing has never been based upon sound normative foundations.

What is to be done? It is time to accept that property is socially constructed and take responsibility for its content. This requires a willingness to engage in normative argument. The task ahead is to build on the new awareness apparent in the developments in the context of proprietary remedies in the last two decades. With a willingness to explore the legitimacy of departures from the orthodox property paradigm in the light of existing "anomalies," such as tracing, jurists could begin to develop what the common law has long lacked: a justificatory theory for the redistribution of property rights.