

PROPERTY LAW REVIEW

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SPECIAL ISSUE – RESEARCH METHODS IN PROPERTY LAW

Editors' introduction and survey findings – *Sarah Blandy and Susan Bright*

In this Introduction, Guest Editors Sarah Blandy and Susan Bright explain the background and inspiration for this Special Issue of the *Property Law Review* journal. They present the results of their 2013 cross-jurisdictional survey on property law scholarship, which sought to discover which methods of research are most common and to explore whether dominant approaches vary between jurisdictions, revealing a diversity of property law research approaches. This diversity is reflected in the articles featured in the Special Issue. 139

ARTICLES

A theoretical approach: The lens of progressive property – *Laura S Underkuffler*

A theoretical approach to property law attempts to determine what property is (beyond its stated doctrinal content); why it is what it is; and (explicitly) what it should be. The fundamental point of the progressive property school of thought is that we cannot look at property entitlements and rules apart from the complex values that give rise to them. We cannot reduce the broad values that property rules serve to a narrow metric, such as “efficiency” or “stability”. In addition, we must acknowledge that property is rivalrous; the granting of property rights in physical resources to one person necessarily denies claims to those resources by others. We are compelled to consider the distributive consequences of property laws not because they are some kind of supplementary afterthought, but because they are inseparable from the core idea of property. 152

A doctrinal approach to property law scholarship: Who cares and why? – *Martin Dixon*

There is a perception that “doctrinal scholarship” is about rules and little else. In property law, this often translates into a challenge to the value of such scholarship and a misunderstanding of its role in the broad field that is property law scholarship. This article seeks to explain what doctrinal property law scholarship seeks to do; why it is regarded as essential by many researchers; and how it connects with other approaches to property law scholarship. A doctrinal approach, it is suggested, is necessary but not sufficient for a proper understanding of property law in a complex world. 160

Socio-legal approaches to property law research – *Sarah Blandy*

This article addresses the “what”, “how”, “what to be wary of”, and “why” questions about socio-legal approaches to researching property law. As will become clear, it is not possible to talk about “the” socio-legal approach. This article starts with these definitional difficulties and then discusses the range of research which can be labelled as socio-legal. Following an overview of the challenges faced by the socio-legal researcher, the article concludes by assessing the unique perspective provided by this research approach. 166

The empirical approach to research in property law – Lisa Whitehouse and Susan Bright

This article offers an account of the unique characteristics, challenges and benefits of empirical legal research. The authors explain that empirical legal research involves the collection and observation of data through a variety of research techniques, such as interviews, observation and surveys, and how it differs from some of its close neighbours, in particular socio-legal research. While the challenges posed by empirical legal research are acknowledged, this article argues that it enriches property law scholarship by enabling researchers to weave together the law learned in books with the law understood and applied in practice. 176

Critical legal studies and the politics of property – Brenna Bhandar

In this article, the author considers a number of themes and concepts that lie at the core of critical legal engagements with Indigenous rights, but are also of importance to wider and more disparate contexts: forms of legal knowledge that constitute and reproduce unequal relations of power between marginalised and dominant communities; the relationship between property, ownership and subjectivity; the constitution of property as a mutable and changing vehicle for emergent forms of value; and how property functions as a legal technique of fabrication, as an index of law's intervention into the constitution of persons and things. The author raises essential questions, both political and epistemological, for scholars concerned with the power of property to dispossess and expropriate public goods and spheres of life. 186

Serendipity and care: Cultural and social history in property law – Kali Murray

This article outlines the basic methods of cultural, social, and socio-cultural history and considers how such methods may be useful to the property law researcher. 195

The comparative method in property law – Bram Akkermans

Property lawyers can approach differences between property law systems with different methods. One of these methods is the comparative method, of which the functional method of comparative law is the most well known and used. That method is, depending on the “agenda” of the comparative lawyer, used to find similarities or to find differences. Generally the method is used to (i) improve the comparative lawyer's own national legal system, (ii) to provide an overview of systems, (iii) to understand vertical dynamics, such as the influence of European Union law on national property law, or (iv) to provide the basis to develop something completely new, such as a Common European Sales Law. Comparative lawyers compare equivalents in the systems they are investigating. They find these equivalents generally by looking for functionally similar concepts or institutions. To avoid misunderstanding, it is especially important for the comparative lawyer to make his or her intentions explicit. 203

The law and economics approach to property – Daniel H Cole

Property rights (and duties) structure economic relations and, in turn, are influenced by economic considerations. This article examines various economic functions served by legal property, and how property doctrine itself has been shaped by considerations of economic efficiency and commerce. Among the topics canvassed are: (a) property as a functional “institution” that not only facilitates exchange but also supports resource conservation (via the right to exclude); (b) Coasian comparative institutional analysis as a research method based on transaction costs; (c) property conflicts as joint- or social-cost problems; (d) the law and economics of property remedies; and (e) the under-explored variety and complexity of property regimes. The article concludes with the obvious point

(but one too often ignored by legal scholars) that a thorough understanding of property law (including public and common property, as well as private property) requires attention to the vital economic functions it serves in virtually all societies. 212

Applied property research: A transactional approach – *Robin Paul Malloy*

An applied approach to property research focuses on understanding the way that lawyers assist their clients in accomplishing specific goals. These goals might involve buying a home or building a shopping centre. Whatever the goal, the applied property lawyer develops a strategy for best achieving the desired outcome; and, the applied property scholar is interested in understanding the process (method) that lawyers use in developing these strategies. Doing applied property research, therefore, involves the study of strategic lawyering. 222

Property, law and space – *Nicholas Blomley*

This article aims to provoke interest in thinking about the spatial dimensions of property (particularly in land). This reflects the burgeoning interest in the geographies of law more generally. While there are many ways in which one can “think spatially”, it is important to begin by noting that “space” itself is capable of at least two meanings. An “absolute” view regards space as both a priori and asocial, and calculable and geometric. A relational view, conversely, regards space as meaningful only in relation to practices. Both these views of space, it is suggested, can be discerned when thinking about property. Indeed, they often collide in important ways. 229

Law and anthropology: The unhappy marriage? – *Simon Young*

Law and anthropology have long been collaborators – intellectually, and more recently professionally. These disciplines had found each other by the late 1800s, and the ensuing conversation has been a productive one. The notion of “property” is a key concern of both camps, and in this context the law has benefitted greatly from a maturing anthropological input. Perhaps the most important contribution of this collaboration is the path it helped to clear for meaningful recognition of Indigenous land rights. Yet in that context, as the Australian example particularly shows, the interdisciplinary partnership can be a troubled one. This article reviews the origins of the “law-anthropology” collaboration and its ongoing relevance in the development of property law. It then turns to the workings of the collaboration in the important contemporary context of Aboriginal (or “native”) title, drawing from the Australian, North-American and New Zealand experiences. 236

Feminist approaches to property law research – *Helen Carr and Simone Wong*

In this article, the authors explore the distinctive characteristics of a feminist approach to property law, stressing its importance in exposing the gendered dimensions of what is an apparently neutral project. They illustrate their argument by focusing on two particular themes. First, the authors look at how feminist legal scholarship has interrogated the liberal assumption that the home should provide a domain free from state or commercial interference. Second, they consider feminist scholarship which has analysed United Kingdom judicial responses to claims upon the family home made by cohabitants following relationship breakdown. It is suggested that feminist approaches to property law have a particularly important role to play in exposing the gendered consequences of the contemporary redistribution of property which is a direct consequence of the dominance of neoliberal ideology. 247

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