

© AJ van der Walt 2007. First draft not be copied, distributed or cited without the author's prior approval. To be submitted for publication in *Cornell LR*.

Property and Marginality

A J van der Walt

[Directives:

Paper 20-25 minutes (5-6 pp)

Article / chapter 10 000 words (25 pp)

Abstract by December 2006 (1 page) (done)

Conference paper by 1 July]

Professor AJ van der Walt
Department of Public Law
Stellenbosch University
Private Bag X1
7602 Matieland / Stellenbosch
South Africa

Fax 021-883 9656

E-mail ajvdwalt@sun.ac.za

Property and Marginality*

A J van der Walt**

1 Introduction

Participants in this conference were invited to reflect on “techniques of ownership”, described as “social or institutional practices that are taken for granted in many analyses of ownership”, so as to “encourage explorations of the diverse kinds of sociality in which ownership might be involved and which might in some sense be seen as contingent products of ownership.” I will use the opportunity to reflect on a widespread practice in our analyses of property, both as a social institution and as an organising concept in property law and theory, which I will describe as acceptance of

* Paper presented at the conference entitled “Techniques of Ownership” presented by Cornell Law School and London School of Economics, at LSE, 20-21 July 2007. Research for a larger project on property theory, of which this paper forms part, was made possible by financial assistance from the National Research Foundation (NRF, grant number GUN 2050532) and Stellenbosch University. The views set out in the article are those of the author and should not be attributed to any of these institutions. Thanks to Greg Alexander and Alain Pottage for advice and comments, to Elmiën du Plessis for excellent research assistance, to Louise Viljoen for helpful discussions on Afrikaans literature and to Johan van der Walt, Henk Botha, Karin van Marle and Wessel le Roux for comments on the draft and for a standing debate over many years that gave shape to the ideas in this paper. I take full responsibility for remaining errors and misconceptions.

** B Jur et Art, Honns (BA) (Philosophy), LLB, LLD (Potchefstroom), LLM (Witwatersrand). Professor, Stellenbosch University.

centrality or presence as a fundamental characteristic of property.¹ My hypothesis is that we, both as lawyers and as owners and users of property, habitually and unthinkingly assign this quality of presence and centrality to property (and ownership) because we accept that property as an institution naturally assumes a central place in our society just as ownership as an organising concept naturally plays a central role in property law and theory. My hypothesis is that this way of thinking about property and ownership represents what the organisers describe as “a technique of ownership”, a contingent practice that relies on unthinking intellectual habits; my argument is that these habits and the practices they support require critical analysis and consideration.²

I cannot indulge in an *Ideengeschichte* of centrality or presence in law here, interesting as that might be. Suffice to say that presence and centrality remain a problem in legal thinking – generally, not just in property – although we have started moving away from it at least a hundred years ago. When Oliver Wendell Holmes gave his famous lecture on “The Path of the Law”³ on 8 January 1897 he already indicated a double decentring of and in the law; first a shift of the law to the margins of our focus and second a shift of our focus to the margins of the law.⁴ Holmes was

¹ Although many aspects of the problems I consider are specific to the narrow notion of ownership I will, for purposes that will become clear, mostly refer to the wider notion of property. For the moment it is sufficient to state that the centrality of property in society and in the law is repeated by the centrality of ownership in property law and theory, insofar as the two concepts are assigned different meanings.

² Without arguing the point too strenuously I will assume in what follows that the intellectual habits I refer to pertain not just to ownership or property but to the law as such and, in fact, to scientific endeavour in general.

³ OW Holmes “The Path of the Law” (1897) 10 *Harvard LR* 457-478; republished (1997) 110 *Harvard LR* 991-1009.

⁴ There is a certain sympathy between these two decentrings of law and what Allan Hutchinson describes as the two “mutually supportive” fronts on which Critical Legal Studies has operated, namely the “external” and “internal” fronts respectively: AC Hutchinson “Introduction” in AC Hutchinson (ed) *Critical Legal Studies* (1989) 1-11 at 3-6. Hutchinson refers to the “external” work of CLS as a

remarkably accurate on both scores, although the first of these decentrings has had much more direct effect in law than the second (and albeit that the success of the first has backfired on us to a certain extent, proving as it did that what originally looked like a decentring of law eventually involved merely shifting the focus of scientific endeavour to another kind of positivism).

2 Holmes and Decentring of Legal Thinking

The first decentring predicted by Holmes involves a shift away from “pure legal analysis” towards empirical and economic analysis of the law: “For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.”⁵ This shift away from formal doctrinal reasoning based on abstract legal axioms illustrates the growing impatience with metaphysics and formalism⁶ and the increased emphasis on empiricism that would eventually inform the Realists’ critique of classical legal

wholesale rejection of “the very basis of contemporary legal theorising”, discrediting and dismantling “the whole liberal tradition of rational epistemology” (at 5), which relates to the decentring of the Formalist tradition of classical legal reasoning. The “internal” work of subjecting conventional legal reasoning to a rigorous critical application of its own “standards of rationality and coherence” and the concomitant uncovering of the indeterminacy thesis and its attendant renunciation of liberal legitimisation strategies relate to the decentring of the legal subject.

⁵ (1997) 110 *Harvard LR* 991-1009 at 1001.

⁶ In “The Path of the Law” Holmes explained his preference for an empiricist rather than the formal mathematical model of science: “The danger of which I speak is ... the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct”; (1997) 110 *Harvard LR* 991-1009 at 993 at 998. A striking illustration of the decentring of law in Realism is F Cohen “Transcendental Nonsense and the Functional Approach” (1935) 35 *Col LR* 809-849. In *Critical Legal Studies* an important legacy of this decentring is the indeterminacy thesis and the notion of reification; see e.g. D Kairys “Introduction” in D Kairys (ed) *The Politics of Law: A Progressive Critique* (3rd ed 1998) 1-20 at 4; AC Hutchinson “Introduction” in AC Hutchinson (ed) *Critical Legal Studies* (1989) 1-11 at 4.

reasoning.⁷ The decentring of legal science predicted by Holmes meant that “The Law” would lose its central position in legal consciousness as our focus moved towards empirical, inductive and statistical methodologies adopted from other anti-metaphysical disciplines in favour at the time, such as sociology and economics.⁸ The path of the law that Holmes described logically had to terminate at a point where the law, in its classical guise as a formal system of rules based on abstract axioms and held together by formal logic, would become marginal in the scientific or intellectual analysis of law as a social and economic institution. As we know, this decentring of law as a science has indeed taken place to a very large degree, albeit that the economic, social or interpretive principles upon which so much of legal thinking was subsequently based resulted in a new formalism that is vulnerable to the same criticism that Holmes and the Realists raised against classical legal thinking. The first move of modernism away from metaphysics and “transcendental nonsense” did not really succeed in decentring scientific thinking; it merely replaced deductive

⁷ I use the term “classical legal reasoning” to refer to American Formalism, but it equally applies to the continental European version of Formalism, namely German Pandectism, which influenced the development of modern Dutch and South African law more directly. JWG van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005) 2 points out that American Realism’s critique of formalism was influenced by von Jhering’s critique of German Pandectism, as indicated by extensive references in F Cohen “Transcendental Nonsense and the Functional Approach” (1935) 35 *Col LR* 809-849 to R von Jhering “Im juristischen Begriffshimmel” in *Scherz und Ernst in der Jurisprudenz* (1909). See G Minda *Postmodern Legal Movements: Law and Jurisprudence at Century’s End* (1995) 13-23 on American Formalism; F Wieacker *Privatrechtsgeschichte der Neuzeit* (2nd ed 1967) 430-458 on German Pandectism. See H Botha “Democracy and Rights: Constitutional Interpretation in a Postrealist World” (2000) 63 *THRHR* 561-581 563-567 on the implications of postrealist tendencies in constitutional law; compare AJ van der Walt “Ownership and Personal Freedom: Subjectivism in Bernhard Windscheid’s Theory of Ownership” (1993) 56 *THRHR* 569-589 on the effects of Pandectism in private law.

⁸ What Holmes could not foresee was that this decentring of law would, much later, extend even further to methodologies adopted from disciplines that were not grounded in empiricism, such as literary criticism and aesthetics.

with inductive formalism and shifted the law's reliance for truth and certainty from metaphysical to empirical foundations.

Between 1950 and 1970 scientific thinking experienced a further and much more dramatic and incisive decentring, sometimes described as the linguistic turn, because of unexpected outcomes of the very same empirical and experimental methodology embraced so enthusiastically by the Realists.⁹ This development need not detain us here, but social scientists like Labov and Geertz gave us even stronger reason than Holmes did to accept that formal, abstract reasoning and even empirical, experimental scientific reasoning cannot be the source of truth and certainty. Legal

⁹ The linguistic or interpretive turn in the social and human sciences, based on observation of the mutual dependency of language and thinking and the impossibility of describing the outside world objectively from a neutral Archimedes point, was influenced by developments in the natural sciences, particularly the realization that even the most stringent scientific experiment and observation were subject to limitations deriving from the observer's double or biased position. The notion of uncertainty caused by observer position had its origin in the so-called Heisenberg uncertainty principle, formulated by Werner Heisenberg in 1927: the more precisely the position of a subatomic particle is determined, the less precisely its momentum is known at the same instant, and vice versa. Heisenberg's uncertainty principle does not imply that every scientific observation is uncertain, but rather indicated the limits of certainty in observing subatomic events from a particular position. By electing to observe either the wave or the particle picture, the observer "disturbs untouched nature" and renders it impossible to observe nature "as it really is", inducing Heisenberg to conclude that the "path" of a subatomic particle comes into existence only when we observe it. I am indebted to my colleague JHS Hofmeyr for this information. In sociolinguistics, the same principle is known as the "(language) observer's paradox", referring to the researcher's double role of participant in the conversation(s) that she uses as data and as a posteriori observer or interpreter of the same data. The term "observer's paradox" is from Labov *Language in the Inner City: Studies in the Black English Vernacular* (1972). I am indebted to Christa van der Walt for this information. See further in this regard RJ Coombe "'Same As It Ever Was': Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603-652 at 606, with reference to T Kuhn *The Structure of Scientific Revolutions* (1962) and P Feyerabend *Against Method: Outline of an Anarchistic Theory of Knowledge* (1978). The link between post-structuralist developments in the social sciences and earlier developments in the natural sciences has been related to legal methodology in the South African context before by DP Visser "The Legal Historian as Subversive or: Killing the Capitoline Geese" in DP Visser (ed) *Essays on the History of Law* (1989) 1-31, especially at 11, 14; see further AJ van der Walt "Legal History, Legal Culture and Transformation in a Constitutional Democracy" (2006) 12 *Fundamina* 1-47.

reactions to and acceptance of the linguistic turn and associated postrealist sensibilities vary and of course pockets of formalism and abstract or positivist legal reasoning survived the onslaught of modernity, but by and large our scientific techniques have been decentered, at least to a degree. However, for my purposes it is not necessary to dwell on Holmes' first decentring and the resulting shifts in legal method.

I am more interested in the second decentring within the law that Holmes described, whereby our attention shifts from the centre to the margins of the law as an institution of social ordering: "If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict".¹⁰ On this score we have not followed Holmes as enthusiastically, trained as we are in law to focus on the holders of rights, the essential, the principle, the normal case. Because of its provocative style and unusual representation of what the law is about, the "bad man" image was destined to attract criticism from the mainstream, although much of its critical sting was lost in that this decentring was soon interpreted as an attention-grabbing illustration of the pragmatism that Holmes was advocating in describing the law as nothing more complicated than prediction of outcomes.¹¹ However, apart from pragmatism the example presaged a more general decentring of the subject of law, a shift that would become visible indirectly in some of the most influential work of the Realists,¹²

¹⁰ (1997) 110 *Harvard LR* 991-1009 at 993.

¹¹ In (1997) 110 *Harvard LR* 991-1009 at 994 Holmes explained that law was about prediction of outcomes, something that the "bad man" is more aware of than anybody else: "prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law". The law-as-prediction aspect of the "bad man" example epitomised Holmes' pragmatism. JP Diggins *The Promise of Pragmatism* (1994) 342-359 points out that Holmes was a pragmatist, although he personally thought that most pragmatists "lacked tough-mindedness and allowed sentiment to do the work of thought."

¹² Arguably the most visible feature of this decentring in Realism is the focus on poverty and welfare issues, with particular attention for the social origins of poverty, as embodied in the political

although its philosophical implications would only become clear much later under the auspices of postmodernism.¹³

With the “bad man” example Holmes shifted our focus away from the centre and towards the margins of the law, where the law does not feature as guarantor of the rights of the upright citizen, the WASP family man or the owner of forty acres and a mule. Here, the legal cast is made up of an unfamiliar and often rather unsavoury bunch that do not normally feature prominently in legal discourse, at least not as far as principles are concerned: criminals, outlaws, the homeless, the sick, the poor, the elderly, the immigrant, the ex-slave, the handicapped, women and whoever else is vulnerable and weak or unusual and ill-fitting in the face of the law. On the margins, the law mostly shines in its absence, its shortcomings, its inability to include, to safeguard and to protect those who do not themselves occupy central positions in law because of their status or possessions. The “bad man” example shifted our attention away from the strong and powerful who are most likely to influence the making and enforcement of law, towards those who have least influence on the law

programme of the Realism-inspired New Deal. For post-Realist continuation of this interest in welfare and poverty issues see e.g. LA Williams “Welfare and Legal Entitlements: The Social Roots of Poverty” in D Kairys (ed) *The Politics of Law: A Progressive Critique* (3rd ed 1998) 569-590; W Simon “The Invention and Reinvention of Welfare Rights” (1985) 44 *Maryland LR* 1-37; W Simon “Rights and Redistribution in the Welfare System” (1986) 38 *Stan LR* 1431-1516. However, critical theorists did not simply accept the Realist critique unquestioningly; see e.g. Alexander GS “The Concept of Property in Private and Constitutional Law: The Ideology of the Scientific Turn in Legal Analysis” (1982) 82 *Col LR* 1545-1599 for a significant critical assessment of the “scientific turn” that accompanied the shift of focus to poverty and welfare issues in Realist thinking.

¹³ The theoretical potential of the decentring of the subject anticipated by Holmes was unveiled by E Lévinas *Totality and Infinity: An Essay on Exteriority* (1969), pointing out that traditional Western notions of knowledge proceed from the presence and identity of the self and thus reduce “the Other” to that identity. Lévinas steered postmodern legal theory further along the “path of the law” anticipated by Holmes’ “bad man” example when he insisted upon the priority of confrontation with the Other. I am indebted to W le Roux & K van Marle “Postmodernism(s) and the Law” in C Roederer & D Moellendorf (eds) *Jurisprudence* (2004) 354-381 at 368 for this explanation of Lévinas.

and who mostly experience it from a position of weakness, vulnerability and suffering.¹⁴

The two decentrings anticipated by Holmes can be related, in one way or another, to most debates and developments in legal thinking since the Realists. Without arguing the merits or otherwise of changes brought about by Holmes or Realism I will simply accept, for purposes of this paper, that in the postrealist world decentring is at least always on the table, not only in the first but also in the second meaning alluded to before. On that basis I will highlight a particular implication of postrealist decentring in law, namely that in the margins the law inevitably acquires a liminal quality, as Ruti Teitel described it.¹⁵ As I understand it, this liminal quality of law, in as far as we recognise it, means that we are compelled to work on and deal with the limits, the margins, the fringes of the law and whatever we find there. We

¹⁴ The most striking illustration of the resulting decentring of the legal subject in Realism is RL Hale “Coercion and Distribution in a Supposedly Non-Coercive State” (1923) 38 *Pol Science Q* 470-494, pointing out the effect and role of power and coercion in a legal regime supposedly based on equality and liberty. In Critical Legal Studies a significant legacy of this decentring is the development of Critical Race Theory and Critical Feminist Theory, which further developed the critique of mainstream legal theory from the perspective of the marginal legal subject; see e.g. PJ Williams *The Alchemy of Race and Rights* (1991).

¹⁵ RG Teitel *Transitional Law* (2000) describes law in transition as both settled and unsettled, restrained and restraining, historically and politically contingent (at 6), partial, provisional, limited and symbolic in nature, and best understood in its liminal quality as law “in between regimes” (at 215, 220). Teitel uses the term “liminal” to refer to the forward- and backward-looking quality of transitional law that renders it separate from its predecessor but also informed by prior injustice in forming a notion of what is just (at 6-7, 196). When JWG van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005) refers to the understanding of law as sacrifice he has something similar in mind, particularly in so far as his analysis focuses on the blurring of the boundaries of law (at 5); on the destructive effect of presence and representation in law (at 8, 24); and on plurality and its decentring effects (at 8-11). See also RJ Coombe “‘Same As It Ever Was’: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603-652 for a critical analysis of the notion of “normality” in law; see further AJ van der Walt “Modernity, Normality, and Meaning: The Struggle between Progress and Stability and the Politics of Interpretation” (2000) 11 *Stellenbosch LR* 21-49; 226-243.

cannot simply accept (as classical legal thinking did) that law is about the essential, the central, or the normal.¹⁶

Inevitably, this requires recognition of the fact that property law is not primarily about owners and holders of rights, but about those who do not own property and whose lives are shaped and affected by the property holdings of others; those who are required to respect property and who are owned as or through property. On the margins, property law is deeply concerned with absence of property; no-property; not-property.¹⁷ In the terminology of contemporary legal theory, the best context within which to discuss ownership is not condominium development or ownership of valuable urban air space, but ownership as it appears in confrontation with poverty, slavery or unlawful occupation – property in the margins.¹⁸

¹⁶ During the 1970s and 1980s neo-Marxism and post-structuralism resulted in the same decentring thinking that Holmes and the Realists inspired in American CLS circles; a forceful example is to be found in the pages of the leftist legal journal *Recht & Kritiek* published by Dutch legal academics and activists between 1975 and 1997. An article on squatting illustrates the marginalisation thesis I am presenting perfectly: GE van Maanen “Balanceren op de Grens van de Rechtsorde” (Balancing on the margins of the legal order) (1982) 8 *Recht & Kritiek* 467-471 at see 469: “Met andere woorden ik veronderstel een mogelijkheid tot grensverlegging binnen de rechtsorde, bijvoorbeeld veranderingen in het denken over het eigendomsbegrip. [...] Of je het nu leuk vindt of niet, je bevindt je *in* deze rechtsorde. Je kunt hooguit proberen de grenzen te verleggen door te balanceren op de grens van de rechtsorde. Maar je kunt er niet uit.” (In other words, I presuppose the possibility of a certain shifting of boundaries within the legal order, for example changing thinking about ownership. Whether you like it or not, you find yourself within this legal order. You can at most try and shift the boundaries by balancing on the margins of the legal order, but you cannot escape from it.)

¹⁷ According to Hohfeldian analysis, the correlative of a claim-right is a duty and the opposite a no-right; the correlative of property would therefore be the duty to respect others’ property and the opposite would be no-property. Because of restrictions I cannot enter into a discussion of Hohfeld here, but his analysis of the fundamental conceptions of law illustrates the issues beautifully; see W Hohfeld “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 59 *Yale LR* 16-59; “Fundamental Legal Conceptions as Applied in Legal Reasoning” (1917) 63? *Yale LR* 710-770.

¹⁸ This insight was first brought home to me, quite forcefully, some years ago when I read Robert Cover’s outstanding book on slavery and realised that it was about property as much as slavery: RM

3 Noticing the Margins

Progressive theorists reacted to the decentring predicted by Holmes' "bad man" example by questioning the very notion of rights, one of the strongest centripetal forces in law. Under the influence of Marxist thinking, the critique of rights initially gravitated towards what became known as needs-based theory,¹⁹ focusing legal analysis on the needs of weak and marginalised people instead of on the rights of the rich and powerful. These theories emphasised the obligations that accompany and are implicated by property, instead of simply relying on the entitlements enjoyed in terms of it. The obligations of ownership, in particular, were said to include social responsibility in the sense of not using property anti-socially or irresponsibly, but also ethical obligations in the sense of making allowances for the needs of the poor, the socially weak and those who are in need of support and care.²⁰

Needs-based theories met with strong criticism: liberals claimed that they misrepresented rights talk,²¹ activists on the left said that they ignored the strategic

Cover *Justice Accused: Antislavery and the Judicial Process* (1975); for my reaction see AJ van der Walt "Rendition / Eviction: a Post-Apartheid Reflection" (2005) 15 *Law & Critique* 321-344.

¹⁹ The original anti-rights essay was M Tushnet "An Essay on Rights" (1984) 62 *Texas LR* 1363-1403. A more nuanced early needs-based analysis based on constitutional notions of self-government is FI Michelman "The Supreme Court 1968 Term – Foreword: On Protecting the Poor through the Fourteenth Amendment" (1969) 83 *Harvard LR* 7-59. On Michelman's theory of social justice see AJ van der Walt "A South African Reading of Frank Michelman's Theory of Social Justice" (2004) 19 *SA Public Law* 253-307.

²⁰ For a much later exploration of needs discourse in the South African constitutional context see D Brand "The 'Politics of Need Interpretation' and the Adjudication of Socio-Economic Rights Claims in South Africa" in AJ van der Walt (ed) *Theories of Social and Economic Justice* (2005) 17-36; S Liebenberg "Needs, Rights and Transformation: Adjudicating Social Rights" (2006) 17 *Stell LR* 5-36.

²¹ J Waldron "Rights and Needs: The Myth of Disjunction" in A Sarat & TR Kearns *Legal Rights: Historical and Philosophical Perspectives* (1997) 87-109.

benefits of rights-talk for racial minorities and women²² and that they reflected and helped to entrench a paternalistic and insulting attitude towards poverty and the poor.²³ On the positive side, the needs-based approach to social justice shifted the focus from the “normal” subject of the law, who enjoys rights and therefore is empowered by law, to those on the margins, who have no rights and are powerless because they do not qualify for the rights-defined syllogism of legal power. By actively engaging in theoretical analysis and practical lawyering in support of workers, the homeless, receivers of state welfare and other marginalised groups in society, needs-based theories succeeded in shifting the attention of lawyers, lay people and policy makers alike towards the fringes of society. That in itself was a laudable and worthwhile exercise, but it did not succeed in dislodging the rights-based centring of law. Needs-based discourse retained an air of exceptionalism; social justice appeared as something that ethical and responsible property owners had to do in addition to enjoying their powerful and privileged position.

A second, related shift that contributed to the decentring of property was the critical tendency to emphasise the social origins (and hence contingency) of property as a social artefact.²⁴ The idea that a property regime protects individual holdings while at the same time exposing them to (even severe) limitation has become trite in

²² E.g. PJ Williams “Alchemical Notes: Reconstructing Ideals from Deconstructed Rights” (1987) 22 *Harvard CR-CL LR* 401-433; K Crenshaw “A Black Feminist Critique of Antidiscrimination Law and Politics” in D Kairys (ed) *The Politics of Law: A Progressive Critique* (3rd ed 1998) 356-380.

²³ T Ross “The Rhetoric of Poverty: Their Immorality, Our Helplessness” (1991) 79 *Georgetown LJ* 1499-1547; see also GS Alexander “Socio-Economic Rights in American Perspective: The Tradition of Anti-Paternalism in American Constitutional Thought” in AJ van der Walt (ed) *Theories of Social and Economic Justice* (2005) 6-16. In the postmodernist version of Holmes’ second kind of decentring (see fn 13 above on Lévinas) one could say that the needs-based theories tend to approach poverty and need as marginal positions from the central position of self-presence, taking the sufficiency of the self as the standard by which “the Other” is characterised as needy and marginalised.

²⁴ JW Singer & JM Beerman “The Social Origins of Property” (1993) 6 *Can J of Law & Jur* 217-248.

the wake of Hohfeldian rights theory and acceptance of the notion that property rights are accompanied by certain obligations, particularly the social responsibility not to use property in an anti-social way. Most theorists and courts now accept that properly authorised, constitutionally justifiable and lawfully implemented exercises of the police power and the power of eminent domain are not in conflict with the state's duty to protect property.²⁵ Initially, this theoretical shift in constitutional law merely acknowledged that limitations of property are justified when they protect public health and safety.

Subsequently the social origins theories extended the decentring to instances when the limitations are specifically designed to accommodate the particular needs and circumstances of non-owner groups and individuals; considerations that are traditionally relegated to the margins of the law for being irrelevant.²⁶ By focusing on the paradox that property simultaneously protects individual security and privilege and serves (or at least has to take account of) the public good, social origins theories established that property is not only inherently limited by social obligations, but that those obligations could extend beyond the requirements of public health and safety to embrace the (even conflicting) interests (and needs) of others.²⁷ Theorists thinking

²⁵ This is the interpretation nowadays attached to most constitutional property clauses, almost regardless of their exact phraseology. See e.g. AJ van der Walt *Constitutional Property Law* (2005) 132-137 regarding the police-power principle.

²⁶ In *Brisley v Drotsky* 2002 (4) SA 1 (SCA) paras [42]-[46] the South African Supreme Court of Appeal decided that sec 26(3) of the Constitution (nobody shall be evicted from their home without a court order and a court shall only grant an eviction order having considered all the circumstances) did not grant the courts the discretion to deprive a landowner of an eviction order based on the personal circumstances of the occupier and her family; in the absence of explicit statutory provisions, the personal circumstances of the occupier are not "relevant circumstances" and an eviction order is granted purely with reference to proof of ownership and possession (the classic requirements).

²⁷ The theoretical basis in CLS is Duncan Kennedy's notion of the fundamental contradiction; see D Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 *Harvard LR* 1685-1778 at 1713-1724 ("sense of contradiction"); D Kennedy, "The Structure of Blackstone's *Commentaries*" (1979) 28 *Buffalo LR* 209-389 at 211-213 (notion of the fundamental contradiction); P Gabel & D

along similar lines, but inspired by a more radical Hohfeldian departure from liberal rights theory, produced a version of rights theory that still functions within the discourse of rights but places stronger emphasis on social relationships and care.²⁸

The decentring of legal focus based on social justice considerations even enjoys some support in constitutional law -- provisions that explicitly prescribe or justify social justice limitations of property are uncommon in constitutional property clauses, but they do occur and they have been given effect. The Constitution of Ireland 1937 states in Article 43.2.1⁰ that property rights ought, in civil society, to be regulated by the principles of social justice.²⁹ These principles have been employed to justify statutory limitations of property designed to bring about greater equity in

Kennedy, "Roll over Beethoven" (1984) 36 *Stanford LR* 1-55 at 15-16 (abandoning the fundamental contradiction). On the paradoxical nature of property, which relates to the notion of a fundamental contradiction but is not necessarily identical to it, see JW Singer *Entitlement: The Paradoxes of Property* (2000); RW Gordon "Paradoxical Property" in J Brewer & S Staves (eds) *Early Modern Conceptions of Property* (1996) 95-110; GS Alexander *Commodity and Propriety – Competing Visions of Property in American Legal Thought 1776-1970* (1997). The most consistently worked out theoretical notion of property that attempts to "internalise" the paradox was worked out (not in CLS terms) by Laura Underkuffler, see LS Underkuffler "On Property: An Essay" (1990) 100 *Yale LJ* 127-148; LS Underkuffler-Freund "Takings and the Nature of Property" (1996) 9 *Can J Law & Jur* 161-205; LS Underkuffler *The Idea of Property: Its Meaning and Power* (2003).

²⁸ J Nedelsky "Reconceiving Rights as Relationship" (1993) 1 *Rev Const Studies* 1-26 proposed the theory of rights as relationship; an idea that ultimately relies on Realist thinking and that goes beyond Tushnet's rights critique in that it redefines rights instead of abandoning rights discourse for needs discourse. For strong property-related work in the same vein see JW Singer *The Edges of the Field: Lessons on the Obligations of Ownership* (2000); most recently JW Singer "After the Flood: Equality and Humanity in Property Relations" (2006) 52 *Loyola LR* 243-343.

²⁹ Art 43.2.1⁰: "The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice." The Directive Principles of Social Policy in Article 45 require the State to promote social justice, ensure a fair distribution of essential commodities and safeguard the economic interests of the weaker sections of society. The Directive Principles have a limited effect in adjudication because they are not open for judicial pronouncement or application. It is not entirely clear what the Courts may consider or decide with reference to the Directive Principles, but a constitutional challenge to legislation cannot be based upon them: G Hogan & G Whyte *Kelly: The Irish Constitution* (4th ed 2003) at 2085.

property relations, for instance by allowing certain tenants to purchase the fee simple interest from their landlords at a fixed price.³⁰ The German Basic Law also provides that property entails obligations and that its exercise and enjoyment should serve the public interest.³¹ Once again, this provision has been employed to justify limitations of property aimed at promoting social justice, for example by restricting the rights of landowners in favour of security of tenancy or limiting the rights of shareholders to promote the interests of employees.³² The South African Constitution contains several provisions, both inside³³ and outside³⁴ the property clause, that explicitly promote social welfare and justice.³⁵ In each of these cases, the constitution goes

³⁰ See *John E Shirley and Others v AO Gorman and Others* [2006] IEHC 27.

³¹ Art 14.2: "Property entails obligations [imposes duties]. Its use should also serve the public interest." Art 14.1 stipulates that the content and limits of property rights are determined by the laws.

³² Respectively *BVerfGE* 89, 1 [1993] (*Besitzrecht des Mieters*); *BVerfGE* 50, 290 [1979] (*Mitbestimmung*).

³³ Sec 25(4)(a): "the public interest includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources"; see further sec 25(5)-(9), authorising various aspects of land reform.

³⁴ Sec 26 (right of access to housing), specifically 26(3) (restricting the right to obtain an eviction order); sec 24 (environment), sec 27 (health care, food, water and social security), sec 28(1)(c) (children's right to basic nutrition, shelter, basic health care services and social services).

³⁵ Each of these provisions has authorised legislation that must give effect to it. In the case of sec 25(5)-(9) the most important legislation regulates restitution of property dispossessed under apartheid in terms of sec 25(7); promotes greater and more equitable access to land in terms of sec 25(5) and improves the security of tenure of those whose security of tenure is legally insecure because of apartheid laws or practices: sec 25(6). Other laws regulate the provision of housing and social services. The most striking new laws, for purposes of this paper, are the National Water Act 36 of 1998 and the Mineral and Petroleum Resources Development Act 28 of 2002, both of which abolished existing property regimes with regard to specified categories of property that are particularly sensitive in the larger scheme of national social justice values (water and mineral resources respectively) and replaced them with closely regulated licensing schemes in terms of which previously existing individual property rights had to be re-applied for and re-awarded in a significantly more precarious form. Important case law that reflects the same attitude includes *Government of the Republic of South Africa and Others v Grootboom and Others* 2001 (1) SA 46 (CC) (state housing policies that merely establish a waiting list and do not provide special remedies for those in extreme housing needs are not reasonable and do not satisfy the requirements of section 26(1)); (*President of the Republic of South Africa and Another v Modderklip Boerdery (Pty) Ltd (Agri SA and Others, Amici*

further than simply recognising the postrealist truth that property is limited and that lawful exercises of the police power and power of eminent domain are therefore “inherent” to constitutional protection of property; adding that property implies social responsibility towards the needs of others, which means that individual property interests might justifiably be subjected to the promotion of social justice and the needs of others.

In addition to constitutional obligations, social justice legislation has been promulgated in a number of countries to limit the rights of property holders by subjecting them, in one way or another, to restrictions prescribed by the personal needs or circumstances of non-owners. Examples can be multiplied here; in many instances they bear a family resemblance. For the moment I will merely refer to section 26(3) of the South African Constitution 1996,³⁶ a provision that plays an important role in reversing the apartheid legacy of forced removals and preventing it from recurring, as well as the various land reform laws in which the anti-eviction principle has been fleshed out for different circumstances.³⁷ In the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act 18 of 1998, a law intended

Curiae) 2005 (5) SA 3 (CC) (weakening the landowner’s right to evict temporarily so as not to render people homeless, while at the same time pressurizing the state to provide access to housing and to compensate the landowner for his losses); *Jaftha v Schoeman and Others*; *Van Rooyen v Stoltz and Others* 2005 (2) SA 140 (CC) (established statutory principles regarding attachment and sale in execution of poor people’s homes for minor and extraneous debts must be authorized by court order, having taken into consideration all circumstances, including the justifiability of eviction); *Port Elizabeth Municipality v Various Occupiers* 2005 (1) SA 217 (CC) (property rights in terms of sec 25 and occupiers’ rights in terms of sec 26 must be weighed up against each other in a fair manner to reach an equitable balance).

³⁶ Sec 26(3): “No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.”

³⁷ See AJ van der Walt “Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Model to Evaluate South African Land-Reform Legislation” 2002 *TSAR* 254-289 on these provisions; compare AJ van der Walt “Exclusivity of Ownership, Security of Tenure, and Eviction Orders: A Critical Evaluation of Recent Case Law” (2002) 18 *SAJHR* 371-419.

to prevent arbitrary eviction of specifically unlawful occupiers of land, section 4 specifies that a court should only allow eviction of occupiers who have been in occupation for longer than six months after having considered all the relevant circumstances, including the needs of elderly persons, children, disabled persons and households headed by women. The Act takes the decentring anticipated by Holmes' "bad man" example a step further by subjecting a landowners' normal right to have unlawful occupiers evicted to considerations that bear no relation to and are completely out of the control of the landowner, namely the personal circumstances and needs of persons who are in fact trespassing on the owner's land. A right, and especially ownership of land, is thereby subjected to the needs and the personal circumstances of people who "normally" feature only in the margins of the classical legal picture of eviction.³⁸ Similar examples occur in English, Dutch and German legislation that allows certain tenants to strengthen their tenancy or to renew or prolong it after termination or that protects the tenants (or their families once the primary tenant dies) against summary eviction.³⁹

The combined result of developments described so far is that the focus of legal thinking has shifted away from rights and those who hold and enjoy rights, towards individuals and groups who do not have rights (or strong rights) because of their marginal social, economic or legal-political position. To a large degree this shift has concentrated legal focus on the needs of the weak and vulnerable, with the result that contextual social justice issues have started to penetrate traditional property

³⁸ See JW Singer *Entitlement: The Paradoxes of Property* (2000) 1-5 on the "normal" property picture where the right of the property owner is central; compare GS Alexander "Critical Land Law" in S Bright & J Dewar (eds) *Land Law: Themes and Perspectives* (1998) 52-78 at 55-56.

³⁹ I do not rehearse the examples here, but they are discussed in various chapters of *Property in Transition* (forthcoming, Hart Publishing). L Fox *Conceptualising Home: Theories, Laws and Policies* (2007) recently analysed some examples in English that relate to the unusual organising concept of "home" (as opposed to "property").

discourse. However, beneficial as this decentring process is for property law in general, it is nevertheless a limited process that does not really amount to a shift to the margins. Property lawyers have certainly noticed the margins, but we have not mastered the art of balancing on the edge of the legal order yet.

4 Exploring the Margins

The problem with decentring the focus of property law on the basis of its social origins or its foundation in relationship is that the decentring can focus too strongly on the social or ethical need to care for others, especially others in dire straits. The process can easily get stuck in a relatively modest position that does no more than remind the rich and powerful that they have a duty of conscience not to forget the needs of the less privileged. In this sense, decentring is no more than a side mirror that reminds the driver of the legal bus of the presence, somewhere on the edges of his vision, of moral duty and social obligation towards those who have been less fortunate. This danger is particularly worrying with reference to needs-based theories that focus exclusively or too strongly on poverty and the survival needs of the poor or those who find themselves in dire emergencies – important as it is to assist people in those circumstances, marginality manifests itself in other ways that also deserve attention if we are to avoid simply adding concern for the poor to mainstream thinking as an afterthought. The question remains, therefore, how do we conceptualise marginality or no-property as an organising principle that is relevant to property law and theory in a wider context and more forcefully than ethical or social concern for the weak and the poor? How do we conceptualise marginality in property or, stated differently, how do we balance on the very edges of property law?

If marginality is understood as any position that falls outside of the central focus, the presence, the “same as it ever was”⁴⁰ of mainstream property dogma, it is necessary to concentrate, in analysing marginality, on legal positions characterised by the absence of those features that would “normally” attract legal attention. In other words, it means focusing on legal positions not characterised or dominated by the presence of rights, possessions, privilege and power. Of course property law is not possible without attention, at some level, for property rights and the power that they entail; my quest is not to ignore property rights but to imagine a perspective on property that includes, in a meaningful way, the interests of those who are not “normally” considered part of the property elite. In this perspective, marginality is not limited to poverty, need, or even necessarily the absence of property. In the spirit of a first exploration I would say that embracing the decentring focus of marginality analysis in property theory has implications in at least the following areas.

Firstly, the focus of marginality affects our thinking about the foundations of law and our method of legal reasoning. The wider implications of Holmes’ “master of economics” argument and of the linguistic turn already eroded traditional foundational thinking in law to a large extent;⁴¹ what I have in mind here is related to that but also goes further. The decentring I am referring to is related to the linguistic turn in that it implies having greater patience with marginal and alternative methodologies borrowed from linguistic theory or aesthetics; it also builds on the decentring brought about by Realism in that it requires paying more attention to facts and unique circumstances and relying less on abstract principles and doctrine. However, it also implies acceptance that marginality has its own logic in that it will tend to look for the paradox and the contradiction rather than for broad theory and grand narrative, for

⁴⁰ With apologies to Rosemary Coombe; see RJ Coombe “‘Same As It Ever Was’: Rethinking the Politics of Legal Interpretation” (1989) 34 *McGill LJ* 603-652.

⁴¹ See further in this regard P Fitzpatrick *Modernism and the Grounds of Law* (2001).

diversity rather than uniformity, for dissent rather than consensus, for conflict and chaos rather than consent and order. In other words, it directs our attention to fault lines and disputes or historical breakdowns rather than concentrating on or searching for the golden thread of continuity. In a very real sense, a marginality perspective requires us to make a kind of Rorschach switch in our focus on what we regard as important or central in law.

In a recent article a South African law professor concluded that recent cases in neighbour law do not deviate from the traditional emphasis on the absoluteness of ownership.⁴² As far as it goes her analysis supports this conclusion, but the result of her study was predisposed by her focus on the “normal science” of reasonableness analysis in cases of nuisance and encroachment. In the area of neighbour law, legal development requires nothing more than small, incremental adaptations to clarify or expand upon the well-settled doctrinal explanation of the reasonableness standard by which neighbouring landowners’ rights are balanced. In balancing the rights of subjects who are equally privileged and powerful – as neighbours in privileged “white” residential neighbourhoods mostly are in South Africa – the issue is merely to establish the optimal balance, in any given case, between the roughly equal but competing rights of roughly equal parties. In the majority of cases it does not have any bearing on political conflicts about land, because both parties involved in neighbour disputes would normally have been favoured rather than marginalized by apartheid land law. In that sense Scott’s project was, at least as far as she explains it as an investigation into changing concepts of landownership, theoretically misconstrued from the outset. In order to get a theoretically interesting perspective on changes in landownership in South Africa it is necessary to take into account land

⁴² S Scott “Recent Developments in Case Law Regarding Neighbour Law and its Influence on the Concept of Ownership” (2005) 16 *Stell LR* 351-377 at 351-352.

relations that were marginalised by colonialism and apartheid. Scott missed the point about changes in landownership because she chose to gloss over the one area where neighbour law does hold some interest for a marginal analysis of property, namely “nuisance caused by squatters”, where the rights of landowners conflict with the no-rights position of individuals and groups who have been marginalized by apartheid politics and who occupy land unlawfully, in the process creating a “public nuisance” for owners of neighbouring land in formally established residential areas. Scott’s analysis highlights the futility of discussing transformation issues in terms of the traditional concepts and logic of property law and with exclusive reference to conflicts between equally privileged and powerful beneficiaries of apartheid land law. Formulated differently, it is true but also meaningless to state that, judged strictly between the privileged neighbouring landowners in former white areas, nothing much has changed in post-apartheid property law.

A second implication of marginality thinking in property theory is that it would focus our attention much more on the social position, economic status and personal circumstances of the parties involved in property relations or disputes and less on their legal status or property rights. Of course, this is exactly what Holmes and the Realists have urged us to do all along, but I want to push the point even further. Marginal people such as criminals (Holmes’ “bad man”), outlaws, the homeless, the weak, the poor, the elderly and the handicapped often have no rights and therefore they cannot enter the dogmatic syllogism to compete in a classic legal battle about property. The interests that they do have might either not be recognised by law or, if they are recognised, might be protected weakly because these interests enjoy lower status than mainstream rights. Recent property literature suggests that there is an increasing interest in the property status and the possible protection of people who

occupy land unlawfully, whether for economic, political or social reasons.⁴³ This clearly indicates a real shift towards marginal interests in property law. My aim is to strengthen the impulse of that shift.

Mainstream lawyers who focus too strongly on the golden thread of continuity in legal and social history often deny or forget that marginal property interests have, historically speaking, in certain instances become dominant property rights in the mainstream and vice versa, because of social, economic and political changes and developments. By reminding property lawyers of these often denied or forgotten events it becomes possible or easier to imagine or accept similar changes again, even though they might appear impossible or even unthinkable in the everyday slog of property practice. However, these shifts still occur. The *Shirley* decision of the High Court of Ireland,⁴⁴ dealing with the Landlord and Tenant (Amendment) Act 1984,⁴⁵ confirmed that the roles of landowners and tenants can, for historical reasons tied to broad social, political and economic changes, be reversed through interventionist

⁴³ Lorna Fox pointed out that the “home” interest of residential tenants or defaulting debtors is enormously important to them even if it is not always recognised or protected as strongly by the law as the investment interests of the landlord or the creditor; see L Fox *Conceptualising Home: Theories, Laws and Policies* (2007). See further on socio-political squatters in the Netherlands and Germany AJ van der Walt “De Onrechtmatige Bezetting van Leegstaande Woningen en het Eigendomsbegrip: Een Vergelijkende Analyse van het Conflict tussen de Privaat Eigendom van Onroerende Goed en Dakloosheid” (1991) 17 *Recht en Kritiek* 329-359; JF Bruinsma “Ongehoorzaam in en buiten de Rechtsorde” (1983) *NJB* 125-128; PH Bakker Schut, T Prakken & T de Roos “Politiek Protest in de Rechtszaal” (1984) 10 *Recht & Kritiek* 33-62. For a very interesting recent analysis of “property outlaws” see EM Peñalver & SK Katyal “Property Outlaws” (2007) 155 *Univ Pa LR* ____.

⁴⁴ *John E Shirley and Others v AO Gorman and Others* [2006] IEHC 27.

⁴⁵ The Act provides a price-fixing mechanism to determine the purchase price in instances where tenants who qualify under the broad scheme of the Act can acquire the fee simple interest held by their landlords by paying the landlord a prescribed percentage of the current value of the lease (as defined in the Act). The Court held that the broad scheme of the Act was justified by principles of social policy and that tenants who were not necessarily poor could also benefit from it, since the aim was to eradicate ancient remnants of “pyramid” landlord interests in land and not purely to benefit poor tenants.

social legislation, without the state acquiring the land compulsorily. Although feudal land relations have been abolished at different times and in varying ways by different jurisdictions, this case reminds us that similar reversals have taken place in the past, both in English law⁴⁶ and in civil law⁴⁷ and that it is again featuring in the postcolonial era; on the one hand to get rid of detrimental remains of outdated tribal land holdings⁴⁸ and on the other to eradicate the legacy of discriminatory apartheid land law.⁴⁹ A stronger focus on the margins of property and on the fault lines and breakdowns in historical continuity enables us to notice and remember these marginal but very important changes in legal status and, by remembering them, we are enabled to imagine their recurrence in future.

Furthermore, marginal property analysis must inevitably be aware that property rules and practices are vague and contested rather than clear and consensual. It therefore requires awareness of dissent and contention rather than just focusing on apparent consensus. An example is the point that Schnably made with regard to the supposed virtues of the private family home as a locus where property enables the fostering of personhood: when viewed from a more critical

⁴⁶ Compare the history of the *James* case: *James v United Kingdom* [1986] 8 EHRR 123.

⁴⁷ See W van Iterson "Beschouwingen over Rolverwisseling of Eigendomsverschuiving" in *Verlagen en Mededelingen van de Vereniging tot Uitgave van het Oud-Vaderlands Recht* (1971) 13 no 3 407-466, describing processes in post-feudal Dutch law where ownership "shifted" from feudal landlords to vassals by force of social and economic changes.

⁴⁸ See the US decision in *Hawaii Housing Authority v Midkiff* 467 US 229 (1984), dealing with the Hawaii Land Reform Act 1967, which created a land condemnation (expropriation) scheme whereby title in real property could be taken from lessors and transferred to lessees in order to reduce the concentration of landownership in a small number of hands.

⁴⁹ Post-apartheid land reform law is too wide a topic to discuss here, even in broad outline. However, for present purposes the restitution procedures provided for in the Restitution of Land Rights Act 22 of 1994 (return of land dispossessed under discriminatory laws and practices) and the tenure reform processes foreseen in the Land Reform (Labour Tenants) Act 3 of 1996 (upgrading security of tenure of labour tenants and creating possibility of their purchasing the land) are most instructive. These laws are authorised by the 1996 Constitution in ssec 25(7) and 25(6) respectively.

perspective, the suburban family home is not just a heartwarming textbook example of all that is good and necessary about private property; it is also a contested space that entrenches and hides inequality, such as gender oppression, racial and class inequality and exclusion, bad town planning favouring the economic domination of the white middle class and others.⁵⁰ Because critical awareness of marginality requires awareness of the existence and effects of social or political disputes, hierarchies that privilege rights over marginal interests may often look normal or unproblematic.⁵¹ Marginal property interests often resemble or are even recognised as rights, but when assessed against their socio-political background they are weak and marginal because they do not fit into the mainstream hierarchy of rights, dominated by ownership. A good example is the residential permits granted to Blacks in urban white areas during apartheid; only political sensitivity will reveal the marginality and the fault line inherent in this land interest of the politically marginalised victims of apartheid.⁵² The position of modern travelers and urban squatters in situations dominated by urban decay and social unrest may resemble some of the post-apartheid security of tenure problems in interesting ways. In this context it will no doubt be useful to approach analysis of their property status from the perspective of what Johan van der Walt describes as alterity and plurality, which means that we cannot afford to see the hegemony of the normal, the everyday or the mass consensus as a norm; we have to leave room for otherness, for difference.⁵³

⁵⁰ S Schnably "Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood" (1993) 45 *Stanford LR* 347-407; in response to MJ Radin "Property and Personhood" (1982) 34 *Stanford LR* 957-1015.

⁵¹ See to the same effect RJ Coombe "'Same As It Ever Was': Rethinking the Politics of Legal Interpretation" (1989) 34 *McGill LJ* 603-652.

⁵² Compare AJ van der Walt "Property Rights and Hierarchies of Power: An Evaluation of Land Reform Policy in South Africa"(1999) 64 *Koers* 259-294.

⁵³ JWG van der Walt *Law and Sacrifice: Towards a Post-Apartheid Theory of Law* (2005) at 11-17.

In the same spirit we should realise that marginality does not necessarily imply weakness.⁵⁴ In this regard I would particularly like to focus our attention on marginal property positions that are founded on direct rejection of or confrontation with the dominant property regime. I particularly like the term “property outlaws” that was coined by Peñalver & Katyal,⁵⁵ referring as it does to the fact that no-property positions are sometimes founded in the quite powerful action of political activists, squatters and land invaders who sometimes later become folk heroes and national idols because they opposed and rejected social, legal and political structures or traditions – apart from the examples discussed by Peñalver & Katyal, the Western European politically-inspired urban squatters of the 1980s is a forceful and instructive case in point. Refusal to abide in the conventional property structures and roles of mainstream society could therefore be an important indicator of marginal property positions that deserve special attention from property theorists.

A marginal perspective on property further requires that more attention be given to marginal aspects of property law and to marginal fields in property law. Instead of focusing first and foremost on property (security) and contract (exchange) we should look at landlord and tenant law and squatting law, where the primary focus is not the position and the rights of the owner-landlord but the status and legal position of marginal people such as tenants and squatters. To put it coarsely: sometimes we should forget about the big property developments and focus our attention on the squatter huts and slave cottages that also represent powerful and significant property loci. During apartheid the South African property syllabus never

⁵⁴ In his inaugural lecture, Paul Cilliers argued convincingly, from the perspective of complexity theory, that relative positions do not necessarily have to be weak positions: FP Cilliers “Do Modest Positions have to be Weak? A View from Complexity” [details?].

⁵⁵ EM Peñalver & SK Katyal “Property Outlaws” (2007) 155 *Univ Pa LR* ____.

included apartheid legislation; that was seen as politics best left to the politicians. As a consequence, property law was always typically the white law of the business district and the suburbs; never the struggle law of the forcibly evacuated Black townships or the rural areas destroyed by migrant labour and political neglect. This situation is changing, not only in South African but elsewhere as well, as more and more journal articles and books focus on marginal property interests and positions.⁵⁶ However, property lawyers might also have to pay increasing attention to what was traditionally regarded as marginal issues in property law, such as environmental law, confiscation and forfeiture of property in terms of crime prevention legislation, social and economic regulation of the development and use of land, and patrolling the margins of supposedly established and accepted distinctions such as the private/public divide and the ownership/use rights hierarchy. What is the role or the doctrinal function of these concepts, distinctions, institutions, rules and practices in upholding and entrenching the property regime that is; how can they be used to undermine that regime and imagine an alternative that is less dominated and predisposed by its legacy of inequality, hierarchy, privilege and power?

5 Conclusion

I conclude with a brief by powerful story from the most recent work of Afrikaans novelist Eben Venter, entitled *Horrelpoot*.⁵⁷ When Marlouw, the principal character, revisits his erstwhile family farm in the Eastern Cape to convince the only remaining white family member to leave the farm, he finds that the former workers who now own the farm are living in part of the former homestead, but they do not sit in the chairs or sleep in the beds left in the house when the white family left. This curious

⁵⁶ See fn 42 above.

⁵⁷ Eben Venter *Horrelpoot* (2006) Tafelberg.

state of affairs reflects the general unease with which the former workers occupy their new position as owners of the farm – they obviously are not entirely at ease in the position of the white family whom they once served as labourers. In a sense, they remain marginalised even now that they own the farm. Koert, the only white family member left on the farm, could be seen as a metaphor for the lingering presence of the white family – hence the desire of the remaining former farm workers in the latter stages of the novel to exorcise the past by killing him and burning down the part of the house he occupied, with the remains of the family’s furniture and possessions stacked in it.

While it is no doubt possible to attach other readings to the novel, my reading allows us to see the former workers’ unease in their new position and their failure to sit on the former white owners’ chairs or sleep in their beds as a refusal, specifically a refusal to simply take over the former white owners’ position and to continue in it as if nothing much has happened. By extension, this could be seen as a refusal to be satisfied with a specific kind of transformation, where the previously oppressed cling to their marginalised position rather than simply take the place of the former oppressors. In it I see a refusal to accept an impoverished transformation that simply replace white owners with Black owners without ever critically questioning the justifiability and legitimacy of their roles in the established social and political hierarchies. In this perspective, being marginal is not a weak position at all – it is a powerful refusal to continue the “normal” trajectory of an inherently unjust tradition by simply stepping into the shoes of the former oppressors. Marginality becomes a powerful symbol of real transformation.

- o 0 o -