Notes

Introduction

1 C. Harding, U. Kohl and N. Salmon, Human Rights in the Market Place: The Exploitation of Rights Protection by Economic Actors (Aldershot: Ashgate, 2008) at 2. The authors also emphasise in n 30 that this basis for the extension of human rights subjectivity to corporations is not limited to Europe.

Chapter 1

7 B. De Sousa Santos, Toward a New Legal Common Sense, above n 6 at 166.

11 Paragraph 20 of the UN Document ‘Norms on the Responsibilities of Transnational Corporations and other Business Enterprises with regard to Human Rights’ (2003) UN doc E/CN./4/Sub.2/2003/12/Rev.2 defines a TNC as ‘an economic entity operating in more than one country or a cluster of economic entities operating in two or more countries – whatever their legal form, whether in their home country or country of activity, and whether taken individually or collectively’.

12 B. De Sousa Santos, Toward a New Legal Common Sense, above n 6 at 167.


16 Ibid, at 50.


18 See, for example, the conception of ‘counter-hegemonic globalisation’ offered by B. De Sousa Santos, Toward a New Legal Common Sense, above n 6.


21 U. Beck, Power in the Global Age, above n 17 at 52.

22 Ibid, at 75.


26 B. De Sousa Santos, Towards a New Legal Common Sense, above n 6 at 168.


33 B. De Sousa Santos, Towards a New Legal Common Sense, above n 6 at 260.


36 See B. De Sousa Santos, Towards a New Legal Common Sense, above n 6 at 263.

37 Ibid, at 266.


39 B. De Sousa Santos, Towards a New Legal Commonsense, above n 6 at 267.


41 See B. De Sousa Santos, Towards a New Legal Common Sense, above n 6 at 263–265, where he lists violations in Europe, the Americas, Africa and the Middle East – commenting that the ‘global panorama of human rights practices is very sinister, and gives little room for optimism’ (at 265).

42 Ibid, at 268.


46 U. Beck, Power in the Global Age, above n 17 at 117.


50 U. Beck, Power in the Global Age, above n 17 at 118.

51 S. Gill, ‘Constitutionalizing Inequality’, above n 15 at 47.

52 Ibid, at 48.


58 See the discussion of this offered by S. George, ‘The End of Neoliberalism’, above n 14.

59 U. Beck, Power in the Global Age, above n 17 at 123. An example of this and its attendant human rights tensions, is starkly illustrated by the case of the Bolivian water privatisation scheme, discussed in Chapter 8.


61 U. Beck, Power in the Global Age, above n 17 at 120.


U. Baxi, *The Future of Human Rights* (2006), above n 1 at 256–257. For example, the right to health is thought best served by the over-protection of the research and development rights of the pharmaceutical and diagnostic industries and various forms of progress in female reproductive autonomy, sustainable development and the management of environmental challenges are all though best served by, among other things, the protection of corporate property interests in various technologies.

U. Baxi, *The Future of Human Rights* (2006), above n 1 at 258. There is a notable parallel here between market-friendly rights interpretations and national security discourse in that, post 9-11, human rights are frequently recast as obstacles to be overcome in the name of their own protection.


Ibid, at 223.


Under Article 25 of its founding document, the ICC only has jurisdiction over natural persons.


82 D. Kinley and R. Chambers, ‘The UN Human Rights Norms for Corporations: The Private Implications of Public International Law’ (2006) 6 Human Rights Law Review 447–497 at 448–449. Kinley and Chambers point out that ‘in response to the promulgation of the Norms, business leaders were quick to reiterate and highlight both the benefits that corporate enterprise bring to all societies, and their voluntary efforts to regulate the few instances where corporations are responsible for bad business practices and human rights abuses. It was on these bases that business leaders mounted critiques, not only of the Norms document itself, but also of any expansion of the concept of corporate liability for human rights responsibilities that went beyond the current model of self-regulation through codes of conduct, social responsibility policies and the like’ (at 449).


87 B. De Sousa Santos, Towards a New Legal Common Sense, above n 6 at 267.


90 See, for example, Awas Tingni Community v Nicaragua, case no. 79, Inter-Am CHR (Judgment of the Inter-American Court of Human Rights of 31 August 2001).

91 Article 28 declares that ‘Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realised’, while Article 30 declares that nothing in the UDHR ‘may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms’ set forth in it.


95 Ibid, at 11.

With 1,100 companies signing across the globe by 2004 (this now stands at 4,000 ‘businesses’ around the world) http://www.unglobalcompact.org/ParticipantsAndStakeholders/index.html (last accessed 03 June 2008).

O.F. Williams, ‘The UN Global Compact’, above n 96 at 757.

See, for example, the text of a letter sent to Kofi Annan, the proposer of the Global Compact, by a group of leading scholars and activists – available at <http://www.commondreams.org/news2000/0725-08.htm> (last accessed 22 June 2007).


Apart from Baxi’s work, see also the rather briefer account in R. McCorquodale and R. Fairbrother, ‘Globalization and Human Rights’, above n 10. See also M. Monshipouri et al., ‘Multinational Corporations and the Ethics of Global Responsibility’, above n 81.

See, for example, the discussion of this increasingly pressing question in C. Gearty, Can Human Rights Survive? (Cambridge: Cambridge University Press, 2006).

Chapter 2


10 Ibid.

11 Ibid, at 3.

12 Ibid, at 50.

13 Ibid, at 51.

14 Ibid, at 42.

15 Ibid.

16 Ibid, at 10, n 35.


18 Ibid, at 1113.


20 Ibid, at 198.

21 Ibid.


23 Through a detailed analysis of the court’s reasoning in each of the following cases: with regard to corporate commercial protection under Article 10(1), ECHR, *Autronic AG v Switzerland A 178* (1990); (1990) 12 EHRR 485; with regard to corporate business premises being regarded as a ‘home’ within the meaning of Article 8(1), ECHR, in cases concerning searches and seizures, *Société Colas Est SA and Others v France* 2002-III 421; (2004) 39 EHRR 17; and with regard to corporate entitlement to monetary compensation for immaterial loss (Article 41, ECHR), *Comingersoll SA v Portugal* 2000-IV 355; (2001) 31 EHRR 772.


26 Ibid, at 199.

27 Ibid, at 200.


31 118 US 394 (1886).


34 M. Emberland, *The Human Rights of Companies*, above n 2 at 206.


37 Ibid, at 27.

38 Ibid.

39 See, for example, H. Guradze, *Die Eurpaische Menshcenrechtsconvention. Konvention zum Schutze der Menshcenrechte und Grundfreiheiten nebst Zusatsprotokollen. Kom-
41 Ibid, at 31–32.
42 Ibid, at 31.
44 Ibid, at 187.
46 Ibid, at 187–188.
47 Ibid, at 188.
48 Indeed, Emberland comes close to conceding something similar at the very end of his book when he suggests that ‘[c]orporate human rights issues may be judged trivial when compared with alleged violations of an individual human being’s dignity, security, or participation in political life’ (See *The Human Rights of Companies*, above n 2 at 208). This triviality, it is suggested, rests upon the differences in the order of harms that living human beings and corporations are capable of suffering. It is the argument of this book that this difference should have decisive implications for the normative acceptability of corporate human rights claims – but that conclusion rests on arguments yet to be made.
49 M. Addo, ‘The Corporation as a Victim of Human Rights Violations’, above n 43 at 188.
52 Ibid, at 85.
53 Ibid, at 86.
54 Ibid.
55 Ibid, at 88.
56 Ibid, at 107, emphasis added. (It will also, however, be argued in this book that human rights themselves contain conflicting moralities.)
60 *Allan Singer v Canada*, above n 58 at paragraph 11.2 (emphasis added).
64 Ibid, at 188–189.
65 Ibid, at 188–189 at 196.
66 Ibid, at 188–189 at 192.
67 Ibid, at 193 [emphasis added].
Chapter 3

1 This was also intimated in the last chapter when we noted Emberland’s response to the fact that human rights and human beings share such an intimate conceptual and linguistic bond that the idea of ‘corporate human rights’ seems oxymoronic.


7 V. Seidler ‘Embodied Knowledge and Virtual Space’, n 4 above at 17.


9 P. Halewood, ‘Law’s Bodies’, above n 5 at 1340, emphasis original.


11 P. Halewood, ‘Law’s Bodies’, above n 5 at 1341.

12 C. Smart, Feminism and the Power of Law (London: Routledge, 1989). See her chapter ‘Law, Power and Women’s Bodies’ for a fuller account of this argument.

13 For more on this, see Chapter 7 below, which links embodied vulnerability to the drafting process of the UDHR. The chapter also briefly introduces the historical role of the body in the generation of the empathy that underlay the birth of rights discourse in the eighteenth century – a point often overlooked but fully discussed by L. Hunt, Inventing Human Rights: A History (New York: W.W. Norton and Co, 2007).

14 P. Halewood, ‘Law’s Bodies’, above n 5 at 1337.


21 Ibid, at 56.


24 C. Douzinas, *The End of Human Rights*, above n 23 at 183, emphasis added.


27 This has long been the case. The law has a remarkable history of, and facility for, personification: See W.W. Hyde, ‘The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times’ (1916) 64 *University of Pennsylvania Law Review* 696–730. The imputation to animals of a form of criminal intent is surely a warning against the perils of anthropomorphism in the attribution of legal responsibility.


29 C.D. Stone, *Should Trees Have Standing?* Above n 22.


31 Post-human discourse already proclaims the impossibility of this: See D. Haraway, *Simians, Cyborgs, and Women: The Reinvention of Nature* (London: Free Association Books, 1991). Haraway concludes that ‘we are all chimeras, theorized and fabricated hybrids of machine and organism: in short we are cyborgs’ (at 150). However, this figuration does not and cannot detract from the fact that, as yet, most of us have a visibly human embodiment, and
a concomitant vulnerability, distinguishable in important ways, from the
machines with which our lives are lived as ‘hybrids’. Metaphorical hybridity
takes nothing essential from our embodied vulnerability as human beings.
Actual cyborgs certainly qualify the term ‘human’ in the term ‘human
rights’, as Baxi argues (in Human Rights in a Post-human World, above
n 28 at 204) but there is no reason why a nuanced post-human rights
theory could not carefully calibrate any ethically and conceptually rel-
evant distinctions between actual and metaphorical cyborgs and their
characteristics.

32 A. Nekam, The Personality Conception of the Legal Entity (Boston: Harvard University
Press, 1938).


34 ‘The subject is a creation of the law, an artificial entity which serves as the
logical support of legal relations. Right and subject come into life together’:
C. Douzinas, The End of Human Rights, above n 23 at 233.

35 The term ‘person’ has almost inseparable links with the idea of the human
person and related theories of human personality. Their intimate convergence
has caused considerable complexity in the theory of legal personhood and
explains, to some extent, the assumption that, to extend legal subjectivity,
is to extend the definition of humanity, discussed above. For a range of dis-
cussions on the theory of persons and personality see A. Peacocke and
G. Gillett, Persons and Personality: A Contemporary Inquiry (Oxford: Blackwell,
1987).

36 D.P. Derham, ‘Theories of Legal Personality’ in L.C. Webb (ed.) Legal Personality
and Political Pluralism (New York: Cambridge University Press, 1958) at 7, adopt-
ing a distinction drawn by A. Kocourek, Jural Relations (Indianapolis: Bobbs-
Merrill, 1928) at 291–292.

37 N. Naffine, ‘The Nature of Legal Personality’ in M. Davies and N. Naffine, Are
Persons Property? Legal Debates about Property and Personality (Aldershot: Ashgate,
2001) at 52. See also R. Tur, ‘The “Person” in Law’ in A. Peacocke and G. Gillett
(eds) Persons and Personality, above n 35 at 123.

38 D. Derham, ‘Theories of Legal Personality’, above n 36 at 5.

Personality’, above n 37 at 55.

40 See M. Davies and N. Naffine, Are Persons Property? above n 37, for an extended
discussion of the mutually constituting relationship between personhood and
property in law.

41 M. Davies and N. Naffine, Are Persons Property? above n 37 at 5.

42 See below at page 65 ff.

43 See P.W. Duff, Personality in Roman Private Law (Cambridge, Cambridge University
Press, 1938) at 3.

44 M. Radin, ‘The Endless Problem of Corporate Personality’ (1932) 32 Columbia

45 G.W. Keeton, The Elementary Principles of Jurisprudence (London: Sir Isaac Pitman
and Sons, 1930) at 117, cited by N. Naffine, ‘The Nature of Legal Personality’,
above n 37 at 57.


47 M. Radin, ‘The Endless Problem of Corporate Personality’, above n 44 at 646,
who suggests (at n 8) that the ‘instances cited under persona in the Forcellini
Lexicon make the uses of the word clear enough’.
54 A. Nekam, *The Personality Conception of the Legal Entity*, above n 32 at 49.
56 Ibid, at 67, emphasis added.
57 N. Naffine, ‘Who are Law’s Persons?’, above n 25.
58 Ibid, at 347.
60 Ibid, at 357.
61 Ibid, at 362.
63 Ibid, at 351. See also n 20 where she attributes the phrase ‘defined into existence’ to Natalie Stoljar.
65 Ibid.
69 Ibid, at 650.
71 M. Radin, ‘The Endless Problem of Corporate Personality’, above n 44 at 651.
74 Ibid, at 69.
75 Ibid.
78 N. Naffine, ‘Who are Law’s Persons?’ above n 25 at 357.
79 Ibid, at 358.
80 Ibid, at 362.
81 Ibid, at 362.
82 Ibid, at 365. Interestingly, it has been drawn to my attention by Alice Belcher that an analogous ‘rational economic man’ can be regarded as interior to economics, functioning in a similar way to P3 in law, as an ideal actor, irrespective of how real people make their economic decisions.
83 N. Naffine, ‘Who are Law’s Persons?’ above n 25 at 365.
84 Ibid.
87 Ibid, at 357, n 56.
89 M. Radin, ‘The Endless Problem of Corporate Personality’, above n 44 at 643.
91 D. Derham, ‘Theories of Legal Personality’, above n 36 at 10.
92 S.A. Schane, ‘The Corporation is a Person’, above n 90 at 565.
94 (1819) 17 US (4 Wheat) 581 at 636.
96 D. Derham, ‘Theories of Legal Personality’, above n 36 at 8.
98 See D. Derham, ‘Theories of Legal Personality’, above n 36 at 10.
99 Ibid, at 11.
100 S. Schane, ‘The Corporation is a Person’, above n 90 at 566.
102 D. Derham, ‘Theories of Legal Personality’, above n 36 at 11.
103 F. Hallis, Corporate Personality above n 97 at 139.
104 Ibid, at 140.
105 S. Schane, ‘The Corporation is a Person’, above n 90 at 567.
107 Ibid.
112 L. Moran, ‘Corporate Criminal Capacity’, above n 93 at 375.
113 The corporation cannot suffer the same order of harms as an embodied human being, and this point is implicitly acknowledged by Addo when he notes that corporations have no inherent capacity to ‘suffer harms associated with human rights violations’: M. Addo, ‘The Corporation as a Victim of Human Rights Violations’ in M. Addo (ed.) Human Rights Standards and the Responsibility of Transnational Corporations (Hague: Kluwer, 1999) at 188.


117 For a fascinating discussion of how this ideological gender tilt emerges at the level of internalised social power relations within the corporate managerial contexts, suggesting a strong patriarchal control of corporate culture, see A. Belcher, ‘Gendered Company: Views of Corporate Governance at the Institute of Directors’ (1997) 5 Feminist Legal Studies 57–76.


119 D. Derham, ‘Theories of Legal Personality’, above n 36 at 1.

120 Ibid, at 11.


122 S. Schane, ‘The Corporation is a Person’, above n 90 at 568.

123 Ibid.

124 Ibid.


127 M. Davies and N. Naffine, Are Persons Property? above n 37 at 1.

128 M. Davies and N. Naffine, ‘Persons as Property: Legal and Philosophical Debates’ at 1, fn 1, in Are Persons Property? above n 37.

129 M. Davies and N. Naffine, Are Persons Property, above n 37 at 2.

130 P. Halewood, ‘Law’s Bodies’, above n 5 at 1333.
See for example the oft-quoted ‘every man has a property in his own person; this nobody has any right to but himself. The labor of his body and the work of his hands, we may say, are properly his. Whosoever then he removes out of the state that nature has provided and left it in, he has mixed his labor with, and joined to it something that is his own, and thereby makes it his property’. J. Locke, *Second Treatise* (edited by T. Peardon) (Indianapolis: Bobbs-Merrill, 1952) at 17.


D. Davies and N. Naffine, *Are Persons Property?*, above n 37 at 5.


Ibid, at 3.

Chapter 4


Baxi, for example, argues that the paradoxes of human rights are so profound as to produce, in essence, two competing notions of human rights: modern and contemporary – distinguished, among other things, by their differing relationship to logics of inclusion and exclusion and to the imposition of human suffering. See, in relation to this, the discussion in Chapter 5 below and U. Baxi, *The Future of Human Rights* (Oxford: Oxford University Press, 2006) at 27–35.


11 Ibid, at 206.

12 Ibid.

13 Ibid, at 208, emphasis original.
14 C. Douzinas, *The End of Human Rights*, above n 7 at 59.
15 Ibid, at 60.
16 Ibid, at 61. He writes that ‘Freedom and equality, not justice, will be the rallying cries of modern natural law’.
17 J. Finnis, *Natural Law and Natural Rights*, above n 10 at 206–207, citing F. Suarez, *De Legibus* ii 5. For more on the historical steps leading to this shift see R. Tuck, *Natural Rights Theories* (Cambridge: Cambridge University Press, 1979), and B. Tierney, *The Idea of Natural Rights* (Atlanta: Scholars Press, 1997) Chapter 1. It has been argued that such formulations reflect late-medieval controversies over ‘the rightful (required or permitted) control, ownership or use of persons and things’ sparked by dilemmas produced by the Franciscan doctrine of renunciation: M. Freeman, ‘Beyond Capitalism and Socialism’, above n 6 at 7–12.
18 J. Finnis, *Natural Law and Natural Rights*, above n 10 at 207.
19 Ibid.
22 For a fascinating account of this process see C. Douzinas, *End of Human Rights*, above n 7 at 61–68.
23 Ibid, at 65.
24 B. De Sousa Santos, *Towards a New Legal Common Sense*, above n 20 at 37.
27 Ibid, at 34.
29 Ibid, at 65.
30 B. De Sousa Santos, *Towards a New Legal Common Sense*, above n 20 at 37.
31 Ibid.
33 C. Douzinas, *The End of Human Rights*, above n 7 at 70.
34 Ibid, at 73.
35 Macpherson argues that the state of nature in Hobbes is not about ‘natural man’ as opposed to ‘civilised man’ but is ‘about men whose desires are specifically civilised [and] the state of nature is the hypothetical condition in which men as they now are, with natures formed by living in civilised society, would necessarily find themselves if there were no common power to overawe them all’: C.B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Oxford: Oxford University Press, 1962) at 19.
38 B. De Sousa Santos, *Towards a New Legal Common Sense*, above n 20 at 33.
39 C. Douzinas, *The End of Human Rights*, above n 7 at 76.
40 Ibid, at 78. This is not to argue, however, that Hobbes should be read through the lens of contemporary legal positivism and its sustained analytical attempt to distinguish the normativity of law from morality. Hobbes’ explanation of the authority and distinctiveness of law, as is implied in the account of his position here, rests on his ‘reflections about political necessity’: S. Coyle,
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41 B. De Sousa Santos, Towards a New Legal Common Sense, above n 20 at 34.
42 Ibid.
44 B. De Sousa Santos, Towards a New Legal Common Sense, above n 20 at 34.
46 Ibid, at 84.
47 Ibid, at 86.
48 Ibid.
49 Ibid, at 96.
50 C. Douzinas, The End of Human Rights, above n 7 at 80–81.
52 C. Douzinas, The End of Human Rights, above n 7 at 81.
54 Ibid.
55 See C. Douzinas, The End of Human Rights, above n 7 at 81–82.
56 B. De Sousa Santos, Towards a New Legal Common Sense, above n 20 at 32.
57 Most famously by Macpherson. See C.B. Macpherson, The Political Theory of Possessive Individualism, above n 35. Macpherson’s work has been criticised by historical contextualists (such as Dunn, Laslett and Skinner) who argue that Macpherson mistakenly attributes to Locke a conscious ideological support for liberal capitalism. However, Macpherson addressed this critique by explaining that his target was not Locke’s intention but rather his operative ‘unstated assumptions’: See J. Townshend, C.B. Macpherson and the Problem of Liberal Democracy (Edinburgh: Edinburgh University Press, 2000) at 68.
59 B. De Sousa Santos, Towards a New Legal Common Sense, above n 20 at 35.
60 J. Dunn, The Political Thought of John Locke (Cambridge: Cambridge University Press, 1969) at 222. But note Macpherson’s defence of his approach, arguing that his critique is aimed at the operative assumptions, the unstated reasoning, in Locke’s theory, rather than Locke’s intentions: See J. Townshend, C.B. Macpherson and the Problem of Liberal Democracy, above n 57 at 68.
63 See his discussion in ‘Locke, the Political Theory of Appropriation’ in The Political Theory of Possessive Individualism, above n 35 at 194–222.
64 Ibid, at 199.
65 Ibid, at 209.
66 J. Locke, Second Treatise, above n 58 at section 36.
68 B. De Sousa Santos, Towards a New Legal Commonsense, above n 20 at 36, and C.B. Macpherson’s discussion of Locke’s overcoming of the initial limitations on property in The Political Theory of Possessive Individualism, above n 35 at 203–220.
70 Ibid, at 209.
71 Ibid, at 221. Emphasis added.
72 C. Douzinas, *The End of Human Rights*, above n 7 at 83.
75 See, for more, J.L. Richardson, ‘Contending Liberalisms: Past and Present’ (1997) 3 *European Journal of International Relations* 5–33.
76 A. Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law* (London: Butterworths, 2001) at 17. Norrie points out that although in England this new vision of the social order was expressed in the language of possessive individualism, in Germany, at around the same time, liberal individualism reflected a slightly different emphasis, taking the form of the metaphysical philosophies of Kant and Hegel and conceptualised in terms of right and reason.
77 A. Norrie, *Crime, Reason and History*, above n 76 at 20.
78 See again, J.L. Richardson, ‘Contending Liberalisms’, above n 75 at 7–9. See also, for example, Macpherson’s discussion of the Levellers: C.B. Macpherson, *The Political Theory of Possessive Individualism*, above n 35 at 154 where Macpherson notes that the Levellers saw ‘riches and power as concomitant, and they denounced both’ and that they were particularly opposed to the ‘concentration of wealth and the consequent practical inequality of the right to acquire’ (*ibid*). Wood suggests that, although such forces of resistance may have ultimately ‘lost the battle against capitalist landlords’, they nonetheless left a legacy of radicalism, ‘still alive today in various democratic and anticapitalist movements’ (E. Wood, *The Origins of Capitalism: A Longer View* (London: Verso, 2002) at 120.
80 Ibid, at 40.
83 B. De Sousa Santos, *Towards a New Legal Common Sense*, above n 20 at 41.
84 A. Norrie, *Crime, Reason and History*, above n 76 at 8.
85 Ibid, at 10.
86 Ibid, at 10, emphasis added.
90 A. Norrie, *Crime, Reason and History*, above n 76 at 20.
91 Ibid, at 18.
92 Ibid, at 20.
93 Ibid, at 21.
94 Ibid, at 21.
95 B. De Sousa Santos, *Towards a New Legal Commonsense*, above n 20 at 44.
96 See, for more, the discussion in W. Chambliss and R. Seidman, *Law, Order and Power*, above n 2.
97 A. Norrie, *Crime, Reason and History*, above n 76 at 23.
99 Ibid.
101 C. Douzinas, *The End of Human Rights*, above n 7 at 238.
103 C. Douzinas, *The End of Human Rights*, above n 7 at 238.
105 C. Douzinas, *The End of Human Rights*, above n 7 at 234.
106 A. Norrie, *Crime, Reason and History*, above n 76 at 23.
110 Ibid, above n 109 at 63.
114 C. Douzinas, *End of Human Rights*, above n 7 at 236.
118 The 1844 Act drew a distinction between joint stock companies and private partnerships, provided for full publicity, and provided for incorporation through the act of registration alone (for new companies with more than 25 members or transferable shares). The latter two Acts introduced limited liability, which could be attained by seven persons signing and registering a memorandum of association.
119 [1897] AC 22.
123 Ibid, at 156.
124 Ibid, at 156.
125 Ibid, at 157.
126 Ibid, at 157, emphasis original.
127 Ibid.
132 118 US 394 (1886).
133 117 US 241 (1886).
137 Ibid, at 181.
144 Ibid, at 589, citing Connecticut General Life Insurance Company v Johnson 303 US 77, 90 (1938) (Black, J. Dissenting). Mayer cites Black as insisting that ‘[n]either the history nor the language of the fourteenth amendment justifies the belief that corporations are included within its protection’ (at 85–86) – Mayer, n 61.
For example, Mayer discusses the case of First National Bank of Boston v Belotti 435 US 530 (1978), a case in which a consortium of Boston corporations raised a first amendment challenge to legislation that forbade corporate expenditure on a referendum on gradated income tax. Despite rulings in the Massachusetts legislature and Supreme Judicial Court holding that the tax did not materially affect the corporations, the Supreme Court nonetheless held that corporate political speech was protected speech, and struck down the legislation. See C.J Mayer, ‘Personalising the Impersonal: Corporations and the Bill of Rights’, above n 143 at 615–618 for further discussion on this and other first amendment cases.

There is a vast and complex range of theories concerning the nature of the body and processes of embodiment. Profound challenges to the simple Cartesian opposition between body and mind present new and invigorating ways of conceptualising the body – even doing away with the notion of a body as a discrete and identifiable form at all – perhaps most (in)famously in the work of Deleuze and Guattari. However, it is my own conviction that the experiential reality of an identifiable, material body that can be made to suffer harm and death is an important reality that needs to be fully accounted for on ethical grounds. This argument will be developed more fully later in this book.

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Interestingly, although the possibility of prosecution for corporate manslaughter has existed for some time cases often foundered but for one man, or very small companies where the ‘controlling human mind’ could easily be identified. In the UK, a recent attempt to move beyond the limitations of the discredited ‘identification doctrine’, a doctrine under which before a company
could be convicted of manslaughter an individual had to be identified as ‘the embodiment of the company itself’ (A. Belcher, ‘Imagining How a Company Thinks, above n 158 at 3) demonstrates the genuine and ongoing complexities involved in constructing corporate criminal liability. The Corporate Manslaughter and Corporate Homicide Act 2007 has recently brought a welcome symbolic validation of the notion of corporate manslaughter in the United Kingdom, but the Act contains many deficiencies and, significantly, it has been noted that, just as was the case under the identification doctrine, the concept of causation operative in the Act will disproportionately advantage TNCs or other large corporations with diffused command structures: J. Gobert, ‘The Corporate Manslaughter and Corporate Homicide Act 2007’, above n 158 at 419. See his general discussion of the Act, and also, A. Belcher, ‘Imagining How a Company Thinks’ above n 158.


169 C. Douzinas, The End of Human Rights, above n 7 at 109.


171 C. Douzinas, The End of Human Rights, above n 7 at 109–110.

Chapter 5

1 G.A. res. 217A (III) UN Doc. A/810 at 71 (1948).


3 C. Douzinas, The End of Human Rights, above n 2 at 183, emphasis added.


6 See, for example, C. Douzinas, The End of Human Rights, above n 2 at 23–84.


8 See above, Chapter 4. See also, M. Ishay, The History of Human Rights: From Ancient Times to the Globalization Era (Berkeley: University of California Press,

9 See C. Douzinas, *The End of Human Rights*, above n 2 at 96–100.


13 Ibid, at 5.

14 Ibid. Emphasis added.


18 Ibid, at 10.


21 Ibid, at 111.


23 Ibid, at 108.

24 Ibid.


32 L. Hunt, *The French Revolution and Human Rights*, above n 8 at 3. The text of the American Declaration of Independence (1776) declares ‘all men’ to be ‘created equal, [and] endowed by their Creator with certain unalienable Rights, [and] among these are Life, Liberty and the pursuit of Happiness’.
33 This claim will be more fully discussed in Chapter 7.
34 C. Douzinas, *The End of Human Rights*, above n 2 at 96.
36 C. Douzinas, *The End of Human Rights* above n 2 at 96.
37 As Kennedy has pointed out, this critical gaze extends beyond rights beneficiaries to a range of related concerns: ‘Attention is routinely given to previously under-represented rights, regions, modes of enforcement, styles of work’: D. Kennedy ‘The International Human Rights Law Movement: Part of the Problem?’ (2001) 3 *European Human Rights Law Review*, 245–267 at 250.
39 This concept will be more fully discussed in Chapter 7.
43 Ibid.
44 Ibid, at 321.
46 The Brussels Declaration Concerning the Law and Customs of War, Brussels, 27 August 1874 (esp Art XXXVIII); Manual of the Laws and Customs of War on Land, Oxford, 9 September 1880 (esp Art 49); Convention Respecting the Laws and Customs of War on Land, 29 July 1899, 32 Stat 1803, Art XLVI; Conventions Respecting the Laws and Customs of War on Land, 18 October 1907, entered into force 26 January 1910, 36 Stat 2277 (esp Art XLVI); Preamble to the Constitution of the International Labour Organisation, as contained in the Treaty of Peace Between the Allied and Associated Power and Germany, Versailles, 28 June 1919, in force 10 January 1920, 2 USTS 43; Convention Concerning the Employment of Women during the Night, Washington,

54 Ibid, at 235.
56 Ibid.
60 Mackinnon, for example, writing in 1993, argues that ‘[w]omen are violated in many ways that men are not, or rarely are; many of these violations are sexual and reproductive … [T]his abuse occurs in forms and settings and legal postures that overlap every recognised human rights convention but is addressed, effectively and as such, by none. What most often happens to women escapes the human rights net. Abuses of women as women rarely seem to fit what these laws and their enforcing bodies have in mind’: C. Mackinnon, ‘Crimes of War, Crimes of Peace’, above n 38 at 85, cited by F. Beveridge and S. Mullally, ‘Body Politics’, above n 38 at 255.
65 ‘[T]he underlying assumption of ...[CEDAW’s] definition of discrimination is that men and women are the same’: H. Charlesworth, C. Chinkin and S. Wright, ‘Feminist Approaches to International Law’, above n 38 at 631.
67 Ibid, at 258.
69 CEDAW, Art 1.
70 CEDAW, Art 4(1).
71 Art 1 defines discrimination in such a way as to include the ‘political, economic, social, cultural, civil or any other field’, and is relatively comprehensive in its potential scope. Art 2 (e), additionally, requires State Parties to ‘take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise’ – a requirement arguably open to interpretation as embracing private as well as public actors. The injunction, in Art 2 (f), to ‘take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women’ also has the potential to reach beyond the public sphere into the more private recesses of traditional custom and practice.
74 Ibid, at 343.
75 C. Bunch, ‘Women’s Rights as Human Rights’, above n 38.
76 CEDAW was criticised for the relative invisibility of gender specific violence in its concerns, but the CEDAW Committee did address the issue: General Recommendation No 12 (eighth session, 1990) GAOR, 44th Session, Supp. No 37, UN Doc A/44/38, 1989.
81 Ibid, at 350.
83 Ibid, at 29.
84 Ibid, at 32.
85 Ibid, at 33.
86 Ibid, at 32, n 17.
Chapter 6


5 See Chapter 5 above, especially the discussion of feminist critique of international human rights law and the gender of the human rights universal. References for further reading can be found in that chapter.


7 See Chapters 3 and 4 above.


10 G. Lakoff, Women, Fire and Dangerous Things, above n 9 at 174.

11 Ibid, at 175.


13 ‘We never cease living in the world of perception, but we go beyond it in critical thought – almost to the point of forgetting the contribution of perception to our idea of truth... The perceiving mind is an incarnated mind’: M. Merleau-

14 ‘The perceived world is always the presupposed foundation of all rationality, all value and all existence. This thesis does not destroy either rationality or the absolute. It only tries to bring them down to earth’: M. Merleau-Ponty, The Primacy of Perception, above n 15 at 13.


17 In M. Merleau-Ponty, The Primacy of Perception, above n 15 at 12–42.


19 See, for a fuller defence of his view, for example, the argument presented in M. Merleau Ponty, ‘Sense Experience’ in M. Merleau Ponty, The Phenomenology of Perception, above n 16 at 240–282.

20 M. Merleau-Ponty, The Phenomenology of Perception, above n 16 at 62.

21 Ibid, at 235.

22 Ibid, at 239.


25 Ibid.


28 M. Merleau Ponty, The Phenomenology of Perception, above n 16 at 500.


31 Ibid, at 139.

32 Ibid.


34 S.J. Williams and G. Bendelow, The Lived Body, above n 3 at 53.

35 M. Merleau-Ponty, The Visible and the Invisible, above n 29 at 134.


38 S.J. Williams and G. Bendelow, The Lived Body, above n 3 at 53, emphasis removed.


40 Ibid.


42 G. Lakoff and M. Johnson, Philosophy in the Flesh, above n 41 at 3.


44 It has, in fact, been argued that reason and emotion are inescapably interlinked and that emotion performs an essential role in reasoning: A. Damasio, Descartes’ Error: Emotion, Reason and the Brain (New York: HarperCollins, 1994).
47 M. Johnson, *The Body in the Mind*, above n 41 at xxxvii.
48 Ibid, at xxxviii.
51 G. Lakoff and M. Johnson, *Philosophy in the Flesh*, above n 41 at 5.
55 A. Hyde, *Bodies of Law* (Princeton: Princeton University Press, 1997). Hyde also discusses the construction of the legal penis and vagina, the construction of the racial body, of offensive bodies etc.
59 Ibid, at 8.
61 M.T. McGuire, ‘Moralistic Agression’, above n 60 at 32.
62 Ibid, at 36.
64 See the full range of contributions to *The Sense of Justice*, above n 52 and the references therein.
66 ‘Whatever its content during a particular period, the concept [of justice] has influenced the legal system and often set standards for judicial decisions. Why do humans want their laws to be just? Why do we evade, disregard, or disobey laws we consider unjust?’ M. Gruter, ‘An Ethological Perspective on Law and Biology’ in R.D. Masters and M. Gruter, *The Sense of Justice*, above n 52 at 95–105 at 96.
68 Ibid, at 97.
69 Ibid, at 98.
77 ‘Nature hath made men so equal, in the faculties of body, and mind... the weakest has strength enough to kill the strongest...’ T. Hobbes, Leviathan (R. Tuck (ed.)) (Cambridge: Cambridge University Press, 1996) at 86.
79 Ibid, at 195.
80 Ibid, at 196.
81 Ibid, at 195.
84 Since the early 1990 the term ‘vulnerability’ has been used to measure a range of impacts on social wellbeing, whether economic vulnerability, social vulnerability, financial vulnerability or environmental vulnerability: See P. Kirby, Vulnerability and Violence: The Impact of Globalisation (London, Ann Arbor: Pluto Press, 2006) at 4–23.
85 P. Kirby, Vulnerability and Violence, above n 85 at vii. Kirby has offered the first direct analysis of the meaning of the term vulnerability in the context of globalisation studies, pointing out its analytical power for the conceptualisation of the wide and complex range of changing social realities driven by the globalisation dynamic: Vulnerability and Violence, at 13. The most salient advantages of the notion of vulnerability explored by Kirby for the purposes of the present book concern its analytical attention to an account of human experience that moves beyond merely material accounts of quantifiable inequalities and risks to reflect notions of wellbeing that capture the concerns of the poor with vulnerability and powerlessness, the erosion of the ‘bonds of secure belonging’ (at 22) and dimensions of psychological or cultural poverty, as well as a focus on the risks of damage, not just a measurement of existing damage, to the wellbeing of people and communities. Kirby’s account pays analytical attention to issues of power by focusing on mechanisms for coping with risk, and it specifically emphasises violence as a dimension of vulnerability, in the sense that vulnerability is both the product of, and producer of, violence (at, for example, 3, 22, 27) that in the globalised world is increasing at a marked rate. For example, Kirby draws attention to the notion of ‘new wars’ and the privatisation of organised violence charted by Kaldor: M. Kaldor, New and Old Wars: Organized Violence in a Global Era (Cambridge: Polity Press, 2001).
86 M. Fineman, ‘The Vulnerable Subject’, above n 83 at 2.


89 A fact that even Addo (a key proponent of corporate human rights) acknowledges – see Chapter 2 above.

90 For more on the corporation as a moral person see P.A. French, ‘The Corporation as a Moral Person’ (1979) 16 American Philosophical Quarterly 207–215 and for arguments that the corporation is not a moral person, and should not be regarded as a legal person see E. Wolgast, Ethics of an Artificial Person: Lost Responsibility in Professions and Organisations (Stanford: Stanford University Press, 1992) and M. Moore, Law and Psychiatry: Rethinking the Relationship (Cambridge: Cambridge University Press, 1984).

91 B. Turner, Vulnerability and Human Rights, above n 82.


93 Ibid, at 127.

94 Ibid, at 3.

95 Ibid, at 6.


97 Ibid, at 95.


99 Ibid.

100 Ibid.

101 See Fineman’s argument concerning the substantive notion of equality that ripens on the foundation of the vulnerable subject as opposed to the autonomous liberal political subject: M. Fineman, ‘The Vulnerable Subject’, above n 83.


103 U. Baxi The Future of Human Rights, above n 6 at 198.


106 As Harding, Kohl and Salmon recently concluded, reflecting on the centrality of material vulnerability to human rights (referring to the argument of the author in A. Grear, ‘Challenging “Corporate Humanity”’, above n 82) ‘it may be argued that the “human” in “human rights” is a matter of material vulnerability, and that is a major element in the justification for some kind of special or higher regime of legal protection. Following that argument, it might then be the case that both human and non-human or organisational actors may assert basic rights, but that their respective rights may not be of exactly the same nature, and so may be said to have a different currency… a differing valuation for “real” (or perhaps “embodied”) basic human rights on the one hand, and corporate basic rights on the other hand’: C. Harding, U. Kohl and N. Salmon, Human

107 B. Turner, Vulnerability and Human Rights, above n 82 at 26 – ‘Such a theory of society embraces a set of Hobbesian assumptions in which life itself is vulnerable – that is, nasty, brutish and short’ and ‘in psychological terms, this shared world of risk and uncertainty results in sympathy, empathy, and trust, without which society would not be possible’.

108 B. Turner, Vulnerability and Human Rights, above n 82 at 35.


112 Ibid, at 19.

113 B.S. Turner, Vulnerability and Human Rights, above n 82 at 36.

114 Turner argues, for example, that ‘a minimum level of good health is a material precondition for the enjoyment of human rights’ (Vulnerability and Human Rights, above n 82 at 111). This seems absolutely unassailable as a proposition. But this does not mean that embodied vulnerability will only support rights addressing survival/health questions – or a focus on ‘the rights of the body’ (health and social rights).

115 D.B. Morris, The Culture of Pain, above n 109 at 37.

Chapter 7


4 See the discussion in the last chapter. And for a detailed exposition of the dependency of reason on emotion see A. Damasio, Descartes’ Error: Emotion, Reason and the Brain (New York: Harper Collins, 1994).


6 L. Hunt, Inventing Human Rights, above n 3, Chapter 1 ‘Torrents of Emotion’.

7 Ibid, Chapter 3 ‘Bone of their Bone’.


9 Ibid, at 29.

10 Ibid, at 85–92.

11 Ibid, at 82.

12 Ibid, at 108.

13 Ibid, at 112.


16 Ibid, at 59.
18 See Hunt’s discussion of the genesis of the ‘self-contained person’ – with the felt need for control over bodily excretions and the lowering of the threshold of shame – changes signalling ‘the advent of the self-enclosed individual, whose boundaries had to be respected in social interaction’: L. Hunt, Inventing Human Rights, above n 3 at 82–85.
24 Sadly, many of the images are now so familiar that their shock, in an age of media exposure to continuing mass atrocities, is muted.
27 Rudolph Hess is attributed with saying that National Socialism was ‘nothing but applied biology’ in R.J. Lifton, The Nazi Doctors, above n 26 at 129.
31 Ibid.
34 A. Hitler, Mein Kampf, above n 33 at 398.
36 Ibid, at 358.
37 Ibid, at 397–398, n 216. Such was this lack of interest that the Commission decided not to circulate to its members a UNESCO report based on a
questionnaire to 150 philosophers and some organisations on ‘The Bases of an International Bill of Human Rights’ – evoking a concerned response from the UNESCO representative at the UN Commission of Human Rights. Morsink comments that there is no evidence that the concern expressed changed the Commission’s lack of interest in philosophical arguments.

38 Ibid, at 398.
39 Ibid, at 359.
40 U.N. GAOR, 3rd Sess, above n 22 at 54.
45 Ibid, at 365. (We also know, however, that the dominant abstract reading of the universal has, notwithstanding the inclusion of such strong anti-discriminatory language, produced hierarchies and exclusions based on precisely such grounds – as we saw in Chapter 5.)
46 ‘Information Concerning Human Rights Arising from Trials of War Criminals’ – in which the authors noted that the report was ‘designed to serve the specific purpose of contributing to the task of the Commission of Human Rights in preparing an international bill of human rights or international declaration or convention on civil liberties’: U.N. Doc. E/CN.4/W.20 at vi – cited by Morsink at n 54.
52 Ibid, at 375.
54 See the discussion, shortly to be introduced, of the nature of sovereign power and the nature of modern politics as bio-politics in G. Agamben, Homo Sacer: Sovereign Power and Bare Life (D. Heller-Roazen (trans)) (Stanford: Stanford University Press, 1995).
56 J. Morsink, ‘World War Two and the Universal Declaration’, above n 22 at 375.
58 Ibid, at 377.
59 G. Agamben, Homo Sacer, above n 54 at 132.
60 J. Morsink, ‘World War Two and the Universal Declaration’, above n 22 at 380.
61 B.S. Turner, Vulnerability and Human Rights, above n 58 at 2–5.
64 B. Turner, Vulnerability and Human Rights, above n 58 at 4.
65 J. Morsink, ‘World War Two and the Universal Declaration’, above n 22 at 381.
68 Ibid, at 383.
69 See the discussion of this in C. Douzinas, The End of Human Rights, above n 19 at 129–141.
70 C. Douzinas, The End of Human Rights, above n 19 at 9.
73 Ibid, at 114.
74 Ibid, at 114–115.
75 Ibid, at 120.
76 Ibid, at 121.
77 Ibid, at 128–130.
78 Ibid, at 134.


B.S. Turner, Vulnerability and Human Rights, above n 58 at 27–34.


The ICESCR does not explicitly distinguish between or categorise the rights within it as economic, social or cultural. No clear divisions can be drawn between the rights on the basis of these categorisations, and many of the rights evince more than one of these dimensions. See, for more H. Steiner, ‘Social Rights and Economic Development: Converging Discourses?’ (1998) 4 Buffalo Human Rights Law Review 25–42, at 27.

For example, the brief view expressed in A. Neier, ‘Social and Economic Rights: A Critique’ (2206) 31 Human Rights Brief 1–3.

B.S. Turner, Vulnerability and Human Rights, above n 58 at 37.

Ibid.

E. Scarry, The Body in Pain, above n 50.

Ibid, at 43.

Ibid, at 49.

B.S. Turner, Vulnerability and Human Rights, above n 58 at 1.

G. Agamben, Homo Sacer, above n 54 at 188.


Ibid.


C. Douzinas, The End of Human Rights, above n 19 at 349.

Ibid.

Ibid, at 348.

E. Levinas, Totality and Infinity, above n 103 at 50.


E. Levinas, Ethics and Infinity (R.A. Cohen (trans)) (Pittsburgh: Duquesne University Press, 1985) at 100.

See the discussion and evidence offered by P. Kirby, Vulnerability and Violence, above n 55 and also B.S. Turner, Vulnerability and Human Rights, above n 58.
Chapter 8


4 See, for more E. Bloch, Natural Law and Human Dignity (D.J. Schmidt (trans)) (Cambridge, Massachusetts: MIT Press, 1988) and R. Tuck, Natural Rights Theories (Cambridge: Cambridge University Press, 1979), Chapter 1 – cited by C. Douzinas, The End of Human Rights, above n 2 at 244.


6 This is an understandable assumption, since there are clear tensions between an exclusory reading of the property right and countervailing human rights interests in, for example, democratic inclusion. This theme forms the core of much of the excellent work by Gray and Gray, some of which will be discussed in this chapter.


10 M. Davies and N. Naffine, Are Persons Property? Legal Debates about Property and Personality, above n 1.


18 This section of the argument is based, in part, on the arguments offered in A. Grear, ‘A Tale of the Land’, above n 7.

19 This is the major premise underlying Westra’s arguments concerning the environment and the human right to life – see L. Westra, ‘Environmental Rights and Human Rights’, above n 15. See also the range of relevant discussions relating human rights to the idea of ‘ecological integrity’ in L. Westra, K. Bosselmann and R. Westra, Reconciling Human Existence with Ecological Integrity (London: Earthscan, 2008).

20 ‘What space is depends on who is experiencing it and how. Spatial experience is not innocent and neutral, but invested with power relating to age, gender, social position and relationships with others. Because space is differentially understood and experienced it forms a contradictory and conflict-ridden medium through which individuals act and are acted upon.’: C. Tilley A Phenomenology of Landscape: Places, Paths and Monuments (Oxford: Berg, 1994) at 11.


24 This characterisation is reflected quite widely in the relevant literature – see for example, the work of Gray and Gray generally. It is also interestingly, as Gray recently remarked to me, reflected in the current judicial controversy in the jurisdiction of England and Wales concerning the degree to which the Human Rights Act 1998 should be viewed as having changed the legal landscape concerning the traditional conception of property rights in land, allowing the more ‘open textured secular morality of the EHCR’ to challenge traditional exclusory applications of property-reasoning. See K. Gray and S.F. Gray, Elements of Land Law


28 See K. Gray and S. Gray, ‘Civil Rights, Civil Wrongs and Quasi-Public Space’, above n 16 at 73.


30 Ibid.


33 ‘[I]t is increasingly the case that spaces to which the public have physical access are becoming the objects of heightened and more overt forms of private control. For example, the proliferation of closed circuit television cameras and other forms of private security in shopping malls, town centres and even residential areas’: B. Fitzpatrick and N. Taylor, ‘Trespassers Might Be Prosecuted, above n 16 at n 1. See also C.D. Shearing and P.C. Stenning, ‘Private Security: Implications for Social Control’(1982–1983) 30 Social Problems, 493.


35 J. Rowbottom, ‘Property and Participation’, above n 32.


38 Ibid, at 47.

39 Ibid.


41 Interestingly, the argument (rejected by the Court of Appeal: [1995] 2 EGLR 130 at 134E–J) in Rawlins employing the concept of an ‘equitable licence’ has since been hesitantly supported by the Court of Appeal in Porter v Commissioner of Police of the Metropolis [1999] All ER (D) 1129 though the Court considered itself bound to follow the precedent of Rawlins.

42 The implications of, and alternative to, this raw excluyory power are fully discussed in J. Rowbottom, ‘Property and Participation’, above n 32 and by Gray and Gray in ‘Civil Rights, Civil Wrongs’, above n 16. Whereas Gray and Gray favour the judicial development of a ‘right of reasonable access’ analogous to that developed in other common law jurisdictions, the English Court of Appeal
in *Porter v Commissioner of Police of the Metropolis* [1999] felt unable to follow that route. Rowbottom, by contrast, proposes the creation of a limited statutory right of reasonable access for the purposes of political expression and association.

43 We should note the deeply gendered nature of this link: it was only in 1928 in Britain that women were granted suffrage, and as late as 1944 in France.

44 K. Green, ‘Citizens and Squatters’, above n 16 at 230.

45 The memoirs of a woman born in 1907 reflect the ideological link and its hierarchies of exclusion with telling poignancy: ‘At this time Grandah as a property owner had two votes and Father had none. Father did get the vote when general male franchise was introduced, but Mother had to wait until after the First World War’: Mollie Prendergast, *My Memoirs* (Unpublished, 2000), at 6.

46 K. Green, ‘Citizens and Squatters’, above n 16 at 248.


48 Ibid, at 252.

49 Ibid.


52 Note that the Act concerns only access on foot (Countryside and Rights of Way Act 2000, Sch 2, para 1(a)). Access is subject to restrictions in relation to reasonable behaviour (Countryside and Rights of Way Act 2000, Sch 2 and s 2(1)(a)). Access rights only affect land designated as ‘access land’ by the Act.


55 K. Green, ‘Citizens and Squatters’, above n 16 at 230.


63 See the extensive discussion of the conceptually necessary elements of a property institution in J.W. Harris, *Property and Justice* (Oxford: Clarendon Press, 1996), especially his discussion of trespassory rules and the ownership spectrum. The notion of ‘excludability’ as discussed by Kevin Gray (see footnote above) is utilised more fully below.

64 ‘This right of exclusion has a strong foundation in English Law. It is used as the point of divide between leases (estates) and licences (non-estate, and not even proprietary). The right to exclude is still upheld as an essential right of landowners. Even owners of what Gray labels ‘quasi-public’ property have a
right to exclude particular individuals on a selective basis, for any (or no) reason, notwithstanding that the public generally is invited onto the property': S. Bright, 'Of Estates and Interests: A Tale of Ownership and Property Rights' in S. Bright and J. Dewar, *Land Law: Themes and Perspectives* (Oxford: Oxford University Press, 1998) above n 16 at 529–546.

65 See J.W. Harris, *Property and Justice*, above n 63 at 3.

66 The term is Gray’s. See K. Gray, ‘Property in Thin Air’, above n 62 at 268.

67 K. Gray, ‘Equitable Property’, above n 16 at 157. For further reading on the psychology of possession, see the references in ‘Equitable Property’, above n 16 at n 2.

68 Indeed, Nedelsky has argued from a critical perspective, that property depends upon a particular notion of the person as a ‘bounded self’ – an exclusionary and atomistic view of the human being that gives troubling ideological content to our embodied distinctness from other bodies. J. Nedelsky, ‘Law, Boundaries and the Bounded Self’, above n 1.


70 Societies without a concept of private property, moreover, could not have a notion of common property, because the concept of private property is logically prior to the notion of common property. Without a concept of private property, common property as ‘property’ makes no conceptual sense: J.W. Harris, *Property and Justice*, above n 63 at 15.

71 See, for example, *Milirrpum v Nabalco Pty Ltd* (1971) 17 FLR 141, at 270ff where Blackburn J suggests that the Aboriginals had ‘a more cogent feeling of obligation to the land than of ownership of it’, and that it was easier to say that ‘the clan belongs to the land than that the land belongs to the clan’. In that case, the lack of a concept of a right to exclude others was a decisive obstacle to the founding of a conventional common law property claim (272 ff). See the discussion of this case and native title generally in the context of considering ‘equitable property’ in traditional country in K. Gray, ‘Equitable Property’, above n 16 at 181–188.


73 Ibid, at 268.

74 Ibid.

75 Ibid, at 269.

76 Ibid.

77 Ibid.

78 *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

79 K. Gray, ‘Property in Thin Air’, above n 62 at 270. Note also Gray’s insistence that the test of physical excludability be applied with care, because it only applies to the property in its existing form. ‘Ultimately’, he suggests, ‘most resources can be physically insulated from access by strangers – if only through vast expenditures of money or imagination’: K. Gray, ‘Property in Thin Air’, above n 62 at 272.

80 ‘The plaintiff who neglects to utilise relevant legal protection has failed, so to speak, to raise around the disputed resource the legal fences which were plainly available to him. He has failed to stake out his claim; he has failed in effect to propertise the resource’, K. Gray, ‘Property in Thin Air’, above n 62 at 274.
81 See J.W. Harris, *Property and Justice*, above n 63 at 23–41 for how trespassory rules form part of the minimal structure of a property institution.

82 See the fuller discussion of contractual protection as a form of legal excludability, intellectual property protection and the implications for fiduciary law in K. Gray, ‘Property in Thin Air’, above n 62 at 274–280.

83 Ibid, at 281.

84 K. Gray, ‘Equitable Property’, above n 16.

85 Ibid, at 170.


89 Ibid, at 10.

90 Ibid.


92 Ibid.

93 J.W. Harris, *Property and Justice*, above n 63 at 155.


98 Ibid, at 169.

99 J.W. Harris, *Property and Justice*, above n 63 at 151.


101 Ibid.


103 Ibid, at 205.


105 The phrase is Finnis’s, *Natural Law and Natural Rights*, above n 102 at 209.

106 The relationship between rights and duties is complex, and certainly an over-emphasis on duties would undermine certain fundamental human rights norms. However, it has often been argued that contemporay rights discourse has under-emphasised duties and over-emphasised rights as being individualistic, atomised claims of self-interest. The debates surrounding the Banjul Charter, with its extensive emphasis on duties which move far beyond duties correlative to rights, is instructive in this regard.

107 Consider, for example, Tesco Plc’s plans to invoke human rights arguments against the ECJ ruling that it could not sell ‘grey import’ Levi Strauss jeans (*Zino Davidoff SA v A & G Imports Ltd, Levi Strauss & Co v another v Tesco Stores Ltd and another; Levi Strauss & Co and another v Costco Wholesale UK Ltd* (Joined Cases C 414/99–C 416/99 [2002] CMLR 1)): Tesco’s plan was to invoke the right to freedom of expression, right of freedom to own and deal in property, and the right not to be discriminated against. For more see *Wall Street Journal*
In relation to inclusion as a necessary pre-condition of law (in particular of criminal law) see A. Duff, ‘Inclusion and Exclusion: Citizens, Subjects and Outlaws’ (1998) 51 Current Legal Problems 241–266. Duff argues that any ‘plausible interpretation’ of the concepts of law and legal obligation entail certain essential conditions, one of which is a certain notion of inclusion: ‘those bound by the law must be included within, as members of, a community whose law it is; and that notion of inclusion has normative substance’ (at 242).


Ibid, at 10.

Ibid, at 11.

Ibid, at 18.

Ibid, at 11. The three companies are Thames Water, Suez and Vivendi. While 85 per cent of the world’s population is not supplied by these providers, their operations are significant and part of a rapidly consolidating, and contested, paradigm for water services delivery.


T. Johnson, ‘Water War’, above n 118.


Ibid, at 15.


See above, Chapter 7 at 152.


130 Case No. 06/13865 Mazibuko and Others v The City of Johannesburg and Others.


132 Mazibuko at para 2.

133 Para. 4.

134 Para. 9.

135 Para. 11.

136 Paras. 157–158.

137 Paras. 159–160.

138 ‘Dignity’, although a central value in human rights discourse, is, to say the least, multivalent: see C. McCrudden, ‘Human Dignity’, University of Oxford Faculty of Law Legal Studies Research Paper Series: Working Paper No. 10/2006. McCrudden argues that the use of the notion of dignity is widespread in legal discourse, whether instantiated in international or constitutional documents, judicial decision-making in the human rights context, or in transnational judicial conversation. Nevertheless, ‘[t]here is little common understanding of what dignity requires across jurisdictions. The meaning of dignity is therefore highly context specific, varying significantly from jurisdiction to jurisdiction and (often) over time within particular jurisdictions …. Dignity often provides a convenient cover for the adoption of interpretations of human rights guarantees that appear to be intentionally, not just coincidentally, highly contingent on local circumstances’ (at 21).

139 See, for example, the arguments offered by E. Grant, ‘Dignity and Equality’ (2007) 7 Human Rights Law Review 299–329.

140 See paras 168–181.

141 Para 79.


143 Ibid, at 8.

144 Ibid, at 8–9.


147 Ibid, at 10.

148 Ibid, at 11.

149 For example, this is the argument presented by K. Bakker, ‘The “Commons” Versus “Commodity”’, above n 94.


152 This does not preclude the fact that vulnerability needs to be theorised in a way that reflects species-specific nuances and forms of differentiation important to the design of legal regimes of protection and facilitation.

Chapter 9

1 Some of the issues related to this scepticism and a set of concomitant dangers to human rights are explored in C. Geczy, Can Human Rights Survive (Cambridge: Cambridge University Press, 2006).
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