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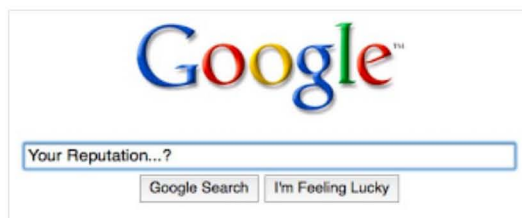
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Friday, 20 December 2013

There's no property in reputation



In a Sydney Morning Herald piece yesterday, the new Freedom Commissioner [Tim Wilson](#) [claimed](#) that reputation was 'essentially a property right'.

With the greatest respect, this is not correct as a matter of law.

Property

Property is considered by the law to be a relationship between a person and a thing. (See eg the decision in [Yanner v Eaton](#).) This is not much help however as to the content of the rights contained in what we regard as property.

In this respect, there are considered to be only two essential characteristics of property. First, that it is an enforceable right, and secondly, that it relates to a thing outside of ourselves.

A property right is enforceable against the whole world. It does not depend on your having a relationship with a particular person. For example, the right to sue someone for breach of contract is not a property right because it is limited to enforcement against only that one person. However a 'right' held in common with everyone, such as a 'right' to clean air, is not a property right. There is no way to enforce this as a question of property, although rights may exist under the law of nuisance or pollution laws.

The foundation of this idea of enforceability is that if we have property in a thing, we can exclude others from it.

Some may suggest that to be property a thing must have value. However this is not the case. I can have property in a disposable pen that has no ink, even though it may have no value at all. Likewise, some may suggest that it to be property means that a thing can be alienated ie sold, or given away. However this is not an essential element of property. An easement (right of way) is property, but it cannot be sold or given away without also selling the entire block of land with it. Leases, which are property, can stipulate that they are not to be transferred. So this is often a right associated with property, but it is not essential.

About Me



Kate Galloway

I lecture in land law at James Cook University and I write and think about the nature of property and its representations in the law; about issues affecting women; about justice generally; and about legal education.

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Do we have property in our person?

Similarly rights that we hold over our person, such as our bodily integrity, our reputation, our identity and our privacy, are not considered property rights. They are instead, personal rights.

While it has often been said, notably by John Locke, that we have property in our own body, in legal terms this is not the case. Locke proposed the 'labour theory of property'. He justified private property by saying that a person owns their own body and when they mix their labour with the land, for example, this justifies their private taking of what was once a public resource. This property is so fundamental to personhood that Locke theorised this as the justification for government itself: as a solution to the protection of private property.

Without challenging Locke's theory of government, the problem with the idea of property in one's own body is that if a body is capable of being property, others too may own it. Perhaps the essential idea that Locke proposed is really more that a person has full control over their own labour. Implicit in this idea is that people have bodily autonomy: the right to be free from interference, to exclude others from their body. By extension, this would refer to other aspects of one's own self, including reputation.

There are private law rights that do protect our person—notably tort law through the torts of battery and trespass on the person, or the law of defamation in respect of one's reputation. The majority of rights in our own person and personality exist though within the realm of public law.

It is under the criminal law, for example, that redress exists for assault, sexual offences and deprivation of liberty. Human rights law prohibits torture and arbitrary imprisonment by the state. Human rights law also protects other aspects of our self. A right to family life and to have children are seen as human rights that give expression to our self but cannot be considered in terms of property. Indeed procreative rights (such as they exist in Australia) are expressly protected from categorisation as a market transaction or as a property right. Legislative regulation is an expression of a public law approach to protection of the rights of the child and the parents—and their personhood—in these arrangements.

Reputation

In *Victoria Park Racing & Recreation Grounds v Taylor*, the High Court considered whether there was property in a spectacle. In this case, the neighbour of a race track had built a tower overlooking the racetrack and was broadcasting the races. The race track sued (unsuccessfully) to protect what they claimed was their property in the event and to recover the profits made by the neighbour. Dixon J pointed out that:

...courts of equity have not in British jurisdictions thrown the protection of an injunction around all the intangible elements of value, that is, value in exchange, which may flow from the exercise by an individual of his powers or resources whether in the organization of a business or undertaking or the use of ingenuity, knowledge, skill or labour. This is sufficiently evidenced by the history of the

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law of copyright and by the fact that the exclusive right to invention, trademarks, designs, trade name and reputation are dealt with in English law as special heads of protected interests and not under a wide generalization.

This provides an analogy for personal reputation - or as Tim Wilson expressed it, 'earned' reputation. If through our endeavours we develop a reputation that puts us in good standing in the community and may even be of monetary (exchange) value in terms of job prospects, or friendships or business opportunities, this reputation is not property. It may be protected by law, but it is not property.

Whether this is a human right is probably doubtful, but it should be noted that if it is, it is not a human right associated with property.

Posted by Kate Galloway at 08:37

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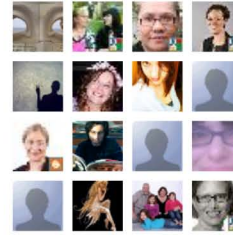
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