

6-2-2011

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Recommended Citation

Paul Babie, *Choices That Matter: Three Propositions On The Individual, Private Property, And Anthropogenic Climate Change*, 22 COLO. ENV'T L. J. (2011).

Available at: <https://scholar.law.colorado.edu/celj/vol22/iss3/2>

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Articles

Choices That Matter: Three Propositions on the Individual, Private Property, and Anthropogenic Climate Change

Paul Babie*

ABSTRACT

This essay argues that the interaction of the concept of private property with anthropogenic climate change offers an opportunity for individuals to re-think the way they relate to the world in which they live. To do so, it offers three “propositions” concerning private property and its role in human caused climate change. The first proposition suggests that climate change reveals private property as two relationships: “social-legal” and “physical-spatial-temporal.” The consequences and outcomes of choices permitted by the social-legal relationship that constitutes private property affect other people, producing a connection between those who make the choices about goods and resources and those others who suffer the consequences. This essay calls this resulting physical-spatial-temporal relationship the “climate change relationship.” The second proposition posits that the real enemy in the climate change relationship is not so much the concept of private property but its “idea.” The regulation typically associated with

* Adelaide Law School, The University of Adelaide, Australia. Thanks to Cecilia Marcela Bailliet, Jeffrey Berryman, Mark Brindal, Hans Chr Bugge, Peter Burdon, Erling Eide, Bruce Elman, Ingunn Ikdahl, Kieran Mundy, Joseph William Singer, Anneke Smit, Endre Stavang, Geir Stenseth, Marcia Valiente, and Chris Waters for reading or discussing earlier versions of this project and for providing valuable comments. Any errors which remain are entirely my own.

private property can have little effect so long as people continue to have the choice conferred by private property, which is predicated upon an “idea” of property which gives little regard to the consequences of one’s actions for others. The idea therefore differs from the theory of property, which matters because private property is in fact the state’s conferral of “sovereignty” on the individual. Given the global reach of the consequences that flow from human caused climate change, this in turn means that private property allows individuals to be eco-colonialists, both spatially and temporally. The final proposition is offered in the form of a question: Assuming the existence of a moral imperative to act in the absence of governmental action to address anthropogenic climate change, could the idea of private property change, and, if it did, what might it look like? In response, the essay argues that it is possible for climate change to act as the catalyst for such a change in the idea of private property and offers some thoughts on what a changed idea might look like.

I. INTRODUCTION

While the commodification of carbon seemed *de rigueur* as recently as a year ago, the failure of United Nations (“UN”) talks in Copenhagen in late 2009 to produce a successor agreement to the Kyoto Protocol¹—opting instead for a weak political agreement²—threw into disarray those

1. Kyoto Protocol to the United Nations Framework Convention on Climate Change, Dec. 10, 1997, 37 I.L.M. 32.

2. U.N. Climate Change Conference, Dec. 7-19, 2009, U.N. Doc. FCCC/CP/2009/11/Add.1 (Mar. 30, 2010), *available at* <http://unfccc.int/resource/docs/2009/cop15/eng/11a01.pdf#page=4>; *see also* Fred Pearce, *Is It Time to Say Goodbye Cool World?*, NEWSCIENTIST, June 19, 2010, at 8, *available at* <http://www.newscientist.com/article/mg20627650.401-is-it-time-to-say-goodbye-cool-world.html>; David King, *No Cause for Climate Despair*, NEWSCIENTIST, June 15, 2010, at 3, *available at* <http://www.newscientist.com/article/mg20627652.900-david-king-no-cause-for-climate-despair.html>. While COP 15 received global attention as an historic opportunity to produce an internationally legally binding successor to the Kyoto Protocol for the mitigation of anthropogenic climate change, COP16, held November 29–December 10, 2010 in Cancún, Mexico, received understated coverage and sought modest outcomes, limited largely to incremental developments concerning multilateral processes for achieving industrialized country emissions targets and actions to reduce emissions, an agreement to prevent a gap between the Kyoto Protocol and its successor, clean development mechanisms to encourage investment in infrastructure aimed at reducing emissions, initiatives to protect the vulnerable from climate change, and various strategies aimed at adaptation to climate change: *See* U.N. Climate Change Conference, Nov. 29–Dec. 10, 2010, *The Cancun Agreements*, U.N. Doc. FCCC/CP/2010/7/Add.1, *available at* <http://unfccc.int/resource/docs/2010/cop16/eng/07a01.pdf#page=2> [hereinafter *Cancún Agreements*].

political and legal efforts to mitigate global anthropogenic (human-induced) climate change. Even governments such as those in the United States³ and Australia,⁴ which had been working toward “cap-and-trade” legislation aimed at permitting the purchase and sale of rights to emit the “Kyoto six”⁵ greenhouse gases (“GHGs”) let those initiatives lapse.⁶ In

3. See, e.g., American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009), *available at* <http://www.govtrack.us/congress/billtext.xpd?bill=h111-2454>; American Clean Energy Leadership Act, S. 1462, 111th Cong. (2009), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s111-1462>; Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s111-1733>; Clean Energy Partnerships Act, S. 2729, 111th Cong. (2009), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s111-2729>; Clean Energy Act, S. 2776, 111th Cong. (2009), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s111-2776>; Carbon Limits and Energy for America's Renewal (CLEAR) Act, S. 2877, 111th Cong. (2009), *available at* <http://www.govtrack.us/congress/bill.xpd?bill=s111-2877>; American Power Act, S. ____, 111th Cong. (2010) (introduced by Senators Kerry (D-Massachusetts) and Lieberman (I-Connecticut)) *available at* <http://www.law.columbia.edu/centers/climatechange/resources/legislation/senate>. See also NICOLA DURRANT, *LEGAL RESPONSES TO CLIMATE CHANGE* (2010); *Let's Agree to Agree: Barack Obama and Others Admit That Copenhagen Will At Most Produce Only an Outline Climate Agreement. But That Would Be a Lot Better Than Nothing*, *ECONOMIST*, Nov. 21, 2009, *available at* http://www.economist.com/displayStory.cfm?story_id=14915108.

4. Other jurisdictions, such as Australia, are currently embroiled in their own attempts to enact climate change legislation. See, e.g., CARBON POLLUTION REDUCTION SCHEME BILL, 2009, NO. 2 (AUSTL.) *available at* www.aph.gov.au/library/pubs/bd/2009-10/10bd059.pdf. A suite of complementary legislative enactments were also defeated in the Australian Senate on Dec. 2, 2009.

5. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *FOURTH ASSESSMENT REPORT [IPCC, AR4], CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS* (S. Solomon et. al. eds., 2007), *available at* http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg1_report_the_physical_science_basis.htm; IPCC, AR4, *CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY* (M.L. Parry et. al. eds., 2007), *available at* http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg2_report_impacts_adaptation_and_vulnerability.htm; IPCC, AR4, *CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE: CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE* (B. Metz et. al. eds., 2007), *available at* http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_wg3_report_mitigation_of_climate_change.htm; IPCC, AR4, *CLIMATE CHANGE 2007: SYNTHESIS REPORT* (R.K. Pachauri et. al. eds., 2007), *available at* http://www.ipcc.ch/publications_and_data/publications_ipcc_fourth_assessment_report_synthesis_report.htm. The IPCC is currently working on the FIFTH ASSESSMENT REPORT (“AR5”), which will follow the same structure as AR4 and is due to be completed between 2013 and 2014. See *Activities*, IPCC, <http://www.ipcc.ch/activities/activities.htm#1> (last visited Aug. 18, 2011).

6. See Stefan Theil, *A Green Retreat: Why the Environment Is No Longer a Surefire Political Winner*, *NEWSWEEK*, July 12, 2010, *available at* <http://www.newsweek.com/2010/07/12/a-green-retreat.html>; *Let It Be: The Democrats Abandon Their Efforts to*

many cases, the pre- and post-Copenhagen debate over legislative action strained credulity. In Australia, for instance, while much of the world, including China⁷ and India,⁸ had by that time stopped questioning the science of climate change and turned attention, even if only half-heartedly, to solutions, some in the Australian Senate questioned the science of anthropogenic climate change presented by the UN Intergovernmental Panel on Climate Change⁹ and the Australian Garnaut Climate Change Review.¹⁰ In the end, the Australian legislation failed, which in itself mattered little when, in early 2010, the Prime Minister announced that climate change would not be a priority of the Australian government until at least 2013.¹¹

As a result of these failures, as of January 1, 2013, the day Kyoto expires, the world will have no binding limits on GHGs.¹² For the majority of people in developed nations who continue to see climate change as a serious threat¹³—a threat requiring action, be it governmental

Limit Emissions Through Legislation, ECONOMIST, July 29, 2010, available at <http://www.economist.com/node/16693691>; see also *Capped: The Senate's Retreat from Cap and Trade Might, One Day, Lead to a Carbon Tax. For Now It Leaves a Dreadful Mess*, ECONOMIST, July 29, 2010, available at <http://www.economist.com/node/16693293>.

7. See *Fine words: But No Specifics*, ECONOMIST, Sept. 24, 2009, available at http://www.economist.com/node/14505451?story_id=14505451.

8. See Jeremy Kahn, *India Cleans Up Its Act*, NEWSWEEK, Nov. 6, 2009, available at <http://www.newsweek.com/2009/11/05/india-cleans-up-its-act.html>.

9. IPCC, AR4, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, *supra* note 5; IPCC, AR4, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, *supra* note 5; IPCC, AR4, CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE: CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 5; IPCC, AR4, CLIMATE CHANGE 2007: SYNTHESIS REPORT, *supra* note 5.

10. ROSS GARNAUT, THE GARNAUT CLIMATE CHANGE REVIEW (2008).

11. AUSTL. DEP'T OF CLIMATE CHANGE & ENERGY EFFICIENCY, CARBON POLLUTION REDUCTION SCHEME, May 5, 2010, available at <http://www.climatechange.gov.au/media/whats-new/cprs-delayed.aspx>; AAP, Reuters, *Rudd Delays Carbon Scheme Until 2012*, SYDNEY MORNING HERALD, Apr. 27, 2010, available at <http://www.smh.com.au/business/rudd-delays-carbon-scheme-until-2012-20100427-tp29.html?comments=41>.

12. Indeed, the recently concluded UN Climate Change Talks held in Cancún, Mexico accept the inevitability of international and domestic failure to mitigate anthropogenic climate change by adopting a number of mechanisms aimed at adaptation to the effects of such climate change. See Press Release, United Nations, UN Climate Change Conference in Cancún Delivers Balanced Package of Decisions, Restores Faith in Multilateral Process (Dec. 11, 2010), available at http://unfccc.int/files/press/news_room/press_releases_and_advisories/application/pdf/pr_20101211_cop16_closing.pdf; see also *Cancún Agreements*, *supra* note 2.

13. See the various polls at GALLUP, CLIMATE CHANGE (2010), available at <http://www.gallup.com/tag/Climate%2bChange.aspx>. These polls demonstrate that while a

or individual—this ought to cause real alarm. This essay, however, takes a different tack in response to this alarm: even if a successor to Kyoto is found, and even if domestic legislation implements cap-and-trade, a carbon tax, or some other means of alleviating GHG emissions, those solutions represent only part—perhaps not the most significant part—of a long-term response to anthropogenic climate change. For a start, cap-and-trade may simply legislate for the trading of pollution, thus placing undue faith in private property, the concept largely responsible, as this essay argues, for the problem in the first place.

And more importantly, such legislation may simply entrench the popular belief that only governments can act to prevent and alleviate the causes of climate change, thus avoiding individual responsibility for those causes and eliding the real opportunity offered by climate change—collectively “to rethink and renegotiate our wider social and political goals.”¹⁴ Perhaps the real lesson of Copenhagen may be that we have relied for too long on politicians and their failed attempts to respond to climate change. Individuals have abdicated not only political but moral responsibility for this challenge to politicians and governmental institutions, which have, in turn, failed. True, climate change clearly requires political and legislative action. Change on the political front should not be ignored. Yet, climate change also forces us to re-think the way we as individuals relate to the environment and to others—in short, it ought to encourage us to re-conceive the world in which we live and our relationship to it. Indeed, as Al Gore has said, we have entered a “period of consequences”¹⁵ placing upon us, as individuals, a moral imperative to act in the absence of international and domestic responses. Mike Hulme summarizes it this way:

[W]e need to see how we can use the idea of climate change—the matrix of ecological functions, power relationships, cultural discourses and material flows that climate change reveals—to rethink how we take forward our political, social, economic and personal projects over the decades to come. We should use climate change both as a magnifying glass and as a mirror.

majority of people in the United States and Australia continue to see climate change as a serious threat, a larger minority in the former see its seriousness as exaggerated and in the former fewer consider human activities to be responsible for it.

14. Mike Hulme, *The True Meaning of Climate Change*, NEWSIDENTIST, Sept. 5, 2009, at 28–29, available at <http://www.350resources.org.uk/2009/09/05/the-true-meaning-of-climate-change-by-mike-hulme/>; see also MIKE HULME, WHY WE DISAGREE ABOUT CLIMATE CHANGE: UNDERSTANDING CONTROVERSY, INACTION AND OPPORTUNITY 362 (2009) [hereinafter HULME, WHY WE DISAGREE].

15. AL GORE, AN INCONVENIENT TRUTH: THE PLANETARY EMERGENCY OF GLOBAL WARMING AND WHAT WE CAN DO ABOUT IT 100–01 (2006) [hereinafter GORE, AN INCONVENIENT TRUTH] (citing Winston Churchill, 1936).

As a magnifier, climate change allows us to conduct examinations—both more forensic and more honest than we have been used to—of each of our human projects: whether they be projects of personal well-being, self-determination, liberated or localised trade, poverty reduction, community-building, demographic management, or social and psychological health. Climate change demands that we focus on long-term implications of short-term choices, that we recognise the global reach of our actions, and that we are alert both to material realities and to cultural values. And as mirror, climate change teaches us to attend more closely to what we really want to achieve for ourselves and for humanity.¹⁶

It might, therefore, be much more worthwhile for individuals to look for ways to reclaim some of the responsibility for acting on climate change typically relinquished to and expected of governments.

This essay argues that the concept of private property offers an opportunity for individuals to re-think the way they relate to the world in which they live. To do so, it offers three “propositions”¹⁷ concerning private property and its role in human caused climate change. The first, in Section II, suggests that climate change reveals private property as two relationships. Contemporary property theory characterizes property as a “social-legal relationship”—social relationships, mediated by law, amongst people embodying liberal choice in relation to the use and control of goods and resources. This is the first, constitutive, relationship of private property. Yet, related to this is a second relationship, a product of the first, which this essay calls “physical-spatial-temporal.” The consequences and outcomes of choices permitted by the social-legal relationship that constitutes private property affect other people, producing a connection between those who make the choices about goods and resources and those others who suffer the consequences. This essay calls this physical-spatial-temporal relationship the “climate change relationship,” and it is necessary, along with the first relationship, to understand both the role of private property in climate change and its

16. HULME, WHY WE DISAGREE, *supra* note 14, at 362–63; *see also* GORE, AN INCONVENIENT TRUTH, *supra* note 15; AL GORE, EARTH IN THE BALANCE: ECOLOGY AND THE HUMAN SPIRIT (1993) [hereinafter GORE, EARTH IN THE BALANCE]; AL GORE, OUR CHOICE: A PLAN TO SOLVE THE CLIMATE CRISIS (2009) [hereinafter GORE, OUR CHOICE]; JAMES HANSEN, STORMS OF MY GRANDCHILDREN: THE TRUTH ABOUT THE COMING CLIMATE CATASTROPHE AND OUR LAST CHANCE TO SAVE HUMANITY (2009); MICHAEL S. NORTHCOTT, A MORAL CLIMATE: THE ETHICS OF GLOBAL WARMING (2007).

17. I borrow this use of “proposition” from ALFRED F. YOUNG, LIBERTY TREE: ORDINARY PEOPLE AND THE AMERICAN REVOLUTION 300 (2006) to capture the formative and tentative nature of the arguments made in this essay, open to debate and further refinement through dialogue.

potential for allowing people to take personal, individual action in response.

Section III outlines the second proposition: the real enemy behind anthropogenic climate change is not so much the concept of private property but its “idea.” Any successor agreement to Kyoto and consequent domestic legislative initiatives represent attempts to use law to control and regulate the choice conferred by private property—the choice conferred by private property and its regulation constitute the “legal” in the social-legal relationship that constitutes private property. Yet regulation can have little effect so long as people continue to have choice predicated upon an “idea” of property giving little regard to the consequences of one’s actions for others. While most theorists use “idea” synonymously with “concept,” this essay defines it in the deeper, intuitive, psychological sense of what property means to those who hold it. In short, I define the idea of property according to its lay understanding, as distinguished from the legal-philosophical understanding¹⁸—the classic Blackstonian “sole and despotic dominion.”¹⁹

It matters that the “idea” of private property differs from the “concept” of property for two reasons. First, drawing upon the seminal work of Morris Cohen,²⁰ it matters because private property, a seemingly private law creation, is in fact the state’s conferral of “sovereignty” on the individual. And in the context of the climate change relationship, that sovereignty takes on new meaning with far-reaching, global consequences. The consequences or “externalities” of climate change produced by private property give individuals both a spatial reach—global, as opposed to national or legal jurisdictional—as well as a temporal one—affecting future generations as well as our own. Thus, private property allows individuals to be eco-colonialists, both spatially and temporally.

Section IV presents the final proposition in the form of a question. Assuming the existence of a moral imperative to act in the absence of

18. See STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 15–36 (1990); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 3–61 (1988).

19. Private property is “...that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.” WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND, THE RIGHTS OF THINGS VOLUME II* (Univ. of Chicago Press, 1979) (1766); see also David Schorr, *How Blackstone Became a Blackstonian*, 10 *THEORETICAL INQUIRIES* L. 103, 103–04 (2009); Robert P. Burns, *Blackstone’s Theory of the “Absolute” Rights of Property*, 54 *U. CIN. L. REV.* 67, 76 (1985); Carol M. Rose, *Canons of Property Talk, or, Blackstone’s Anxiety*, 108 *YALE L.J.* 601, 603 (1998).

20. Felix S. Cohen, *Dialogue on Private Property*, 9 *RUT. L. REV.* 357–72 (1954).

governmental action to address anthropogenic climate change, could the idea of private property change, and if it did, what might it look like? While Section IV does not offer a comprehensive answer, it argues that such a change is essential, for if the idea does not change, then there is no possibility for climate change to have a transformative effect upon the way we live our lives, the way we relate to the environment and to others, and on our broader social and political goals. Tentatively, then, this final Section argues that it is possible for climate change to act as the catalyst for such a change in the idea of private property and offers some thoughts on what a changed idea might look like.

Section V concludes along the following lines. Some argue that it matters little what we do to or for the earth, because whatever will happen over the long-term will happen anyway, whatever we do.²¹ That may be true. But when individuals use the earth as a tool for the exercise of the power, control, and choice conferred by private property in respect of others in the short-term, then what we do to or for the earth *does* matter. Viewed through the lens of climate change, control over the lives of others is precisely what private property allows.

II. PROPOSITION ONE: THE INTERACTION BETWEEN PRIVATE PROPERTY AND CLIMATE CHANGE INVOLVES TWO RELATIONSHIPS

Little doubt exists today that private property, as a concept, involves relationships. Joseph William Singer puts it this way: “[p]roperty concerns legal relations among people regarding control and disposition of valued resources.”²² And to emphasize the point, Singer adds, “[n]ote well: Property concerns relations *among people*, not relations between people and things.”²³ This essay refers to the relational understanding of private property as “social-legal,” capturing a conclusion about property involving the accumulation of research stretching back to the American legal realist movement, through Critical Legal Studies and culminating in the modern “property as social relations” approach or view.²⁴ This

21. See George F. Will, *The Earth Doesn't Care About What Is Done To or For It*, NEWSWEEK, Sept. 12, 2010, at 19, available at <http://www.newsweek.com/2010/09/12/george-will-earth-doesn-t-care-what-is-done-to-it.html>.

22. JOSEPH WILLIAM SINGER, PROPERTY 3 (Aspen Publishers 3d ed. 2010) (1954) [hereinafter SINGER, PROPERTY].

23. *Id.* (emphasis in original).

24. See STEPHEN R. MUNZER, *Property as Social Relations*, in NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY 36–37 (2000).

The social relations approach or view can be traced to Wesley Newcomb Hohfeld,

“social-legal” conclusion is central to understanding the human role in climate change. Yet, as significant as that relationship is, human-caused climate change that is predicated upon private property reveals a second, equally important relationship, which this essay refers to as “physical-spatial-temporal.” The former is constitutive of private property, the latter is a product of it, and both are necessary to an understanding of why private property is both part of the problem and the source of a solution to anthropogenic climate change.

one of the fathers of legal realism and the father of the bundle metaphor. See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions I*]; Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917) [hereinafter Hohfeld, *Some Fundamental Legal Conceptions II*]; WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (Walter Wheeler Cook ed., Yale Univ. Press 1919) [hereinafter HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS I*]; WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING II* (Walter Wheeler Cook ed., Yale Univ. Press 1923) [hereinafter HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS II*].

The American legal realists subsequently developed Hohfeld’s thinking. See Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POLITICAL SCIENCE QUARTERLY 470 (1923); Morris R. Cohen, *Property and Sovereignty*, XIII CORNELL L.Q. 8 (1927); Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Felix S. Cohen, *supra* note 20.

Contemporary scholars extensively developed and expanded the early realist work. See Jennifer Nedelsky, *Reconceiving Rights as Relationship*, 1 REV. CONST. STUD./REVUE D’ÉTUDES CONSTITUTIONNELLES 1 (1993); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991); JOSEPH WILLIAM SINGER, *THE EDGES OF THE FIELD: LESSONS ON THE OBLIGATIONS OF OWNERSHIP* (2000); JOSEPH WILLIAM SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* (2000) [hereinafter SINGER, *ENTITLEMENT*]; SINGER, *PROPERTY*, *supra* note 22; Joseph William Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975 (1982) [hereinafter Singer, *The Legal Rights Debate*]; Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309 (2006) [hereinafter Singer, *Ownership Society*]; Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988); Joseph William Singer, *Re-Reading Property*, 26 NEW ENG. L. REV. 711 (1992); Joseph William Singer & Jack M. Beermann, *The Social Origins of Property*, 6 CAN. J. L. & JURISPRUDENCE 217 (1993); CAROL M. ROSE, *PROPERTY & PERSUASION: ESSAYS ON THE HISTORY, THEORY, AND RHETORIC OF OWNERSHIP* (1994); C. Edwin Baker, *Property and its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986); LAURA S. UNDERKUFFLER, *THE IDEA OF PROPERTY: ITS MEANING AND POWER* (2003) [hereinafter UNDERKUFFLER, *THE IDEA OF PROPERTY*]; Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990).

*A. Constitutive of: Social-Legal (Private property)*²⁵

Classical liberalism and its notion of individual freedom and rights permeate the core of the relationship constitutive of the modern conception of private property found in all modern legal systems.²⁶ And behind that stands the liberal moral order dominating political life the world over since Locke and Grotius: one begins with an atomistic individual who is given rights structured to serve the needs of ordinary life—a “life project” (the values and ends of a preferred way of life)²⁷ by a political society which emerges to protect the individual’s rights.²⁸ The liberal concept of private property mirrors this classical liberal contractarian moral order. Thus, to give a life project meaning, liberalism posits that some power, control, or choice over the use and control of goods and resources is necessary. Private property, through a “bundle” of legal relations (rights), created, conferred, and enforced by the state,²⁹ achieves that objective.³⁰

At a minimum, the bundle conferred typically includes the “liberal triad”: use, exclusivity, and disposition.³¹ One may use one’s car (or, with few exceptions, any other tangible or intangible good, resource, or item of social wealth), for example, to the exclusion of all others, including destruction of the item (this is private management—or the rights of use and exclusivity), and may dispose of it through market or other transactions. And all of this may be done in any way the holder sees fit to suit personal preferences and desires.³² We could also put this

25. On social-legal relationships, see WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* ch. 15, 1–7 (2009), available at www.cambridge.org/twining.

26. See MUNZER, *supra* note 18, at 15–36; WALDRON, *supra* note 18, at 3–61.

27. See Michael J. Sandel, *Introduction*, in *LIBERALISM AND ITS CRITICS* 1 (Michael J. Sandel ed., 1984); J.W. HARRIS, *LEGAL PHILOSOPHIES* 277–300 (Oxford Univ. Press 2d ed. 2004) (1980); Jeremy Waldron, *Liberalism*, in *THE SHORTER ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY* 570–76 (Edward Craig ed., Rutledge 2d ed. 2005) (1998).

28. This is a highly condensed summary of CHARLES TAYLOR, *A SECULAR AGE* 159–71 (2007).

29. For various accounts of the liberal conception of private property, see WALDRON, *supra* note 18; MUNZER, *supra* note 18. See generally MARGARET JANE RADIN, *REINTERPRETING PROPERTY* (1993); SINGER, *PROPERTY*, *supra* note 22, at 3–20.

30. This was first suggested in G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* (T.M. Knox trans., Clarendon Press 1952) (1820).

31. RADIN, *supra* note 29, at 121–23. On the issue of essential rights, see generally Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 734–35 (1998); Lior Strahilevitz, *Information Asymmetries and the Right to Exclude* 104 MICH. L. REV. 1835 (2006).

32. See generally JOHN STUART MILL, *ON LIBERTY* (Gertrude Himmelfarb ed., Penguin Books 1974) (1859) (on Mill’s “self-regarding act”); see Joseph William Singer,

in the language of liberal theory—rights are a shorthand way of saying that individuals enjoy choice—the ability to set agendas³³—about the control and use of goods and resources in accordance with and to give meaning to a chosen life project.

To this simplified liberal account must be added the social, relational, dimension: as Singer pointed out, choice (or power and control) only exists as a product of relationship between individuals in respect of things. Wesley Newcomb Hohfeld summarized this truth in “jural opposites”—a right (choice) to do something carries with it a corresponding duty (a lack of choice) to refrain from interfering with the interest protected by the right.³⁴ The liberal individual holds choice, the ability to set an agenda about a good or resource, then, while all others (the community, society) are burdened with a lack of choice as concerns that good or resource:

[Private] property [i]s a claim that other people ought to accede to the will of the owner, which can be a person, a group, or some other entity. A specific property right amounts to the *decisionmaking authority* of the holder of that right.³⁵

Rights would clearly be meaningless if this were not the case. In this web of “asymmetrical”³⁶ legal relationships, constitutive of the rights that comprise it, we find the liberal concept of private property.

Seen in this way, as a social-legal relationship, private property is not only the power to control and use goods and resources, but also, and more significantly, to control, to make choices, to set agendas, and to make decisions about the rights of others. Identifying the importance of relationship reveals the reality that private property and non-property rights overlap; choices made by those with the private property rights

How Property Norms Construct the Externalities of Ownership, in GREGORY S. ALEXANDER ET AL., *PROPERTY AND COMMUNITY* 66-70 (2010) (outlining how property norms assist in determining the difference between a truly self-regarding act and one that is not) [hereinafter Singer, *Property Norms*]; MUNZER, *supra* note 18, at 3–9; SINGER, *ENTITLEMENT*, *supra* note 24, at 30. The seminal modern work on self-regarding acts is Singer, *The Legal Rights Debate*, *supra* note 24. But see Gregory S. Alexander, *Property as Propriety*, 77 NEB. L. REV. 667, 699 (1998); J.W. HARRIS, *PROPERTY AND JUSTICE* 29, 31, 105 (1996).

33. This is an adaptation of a phrase coined by Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L.J. 275, 275 (2008).

34. Hohfeld, *Some Fundamental Legal Conceptions I*, *supra* note 24, at 30; Hohfeld, *Some Fundamental Legal Conceptions II*, *supra* note 24; HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS I*, *supra* note 24; HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS II*, *supra* note 24.

35. Baker, *supra* note 24, at 742–43 (emphasis added).

36. This phrase was coined by David Lametti, *The Concept of Property: Relations Through Objects of Social Wealth*, 53 U. TORONTO L.J. 325, 345 (2003).

have the potential to create negative outcomes—consequences, or “externalities”—for those with the non-property rights.³⁷ Every legal system acknowledges the problem of externalities, “tak[ing] for granted that owners have *obligations* as well as rights and that one purpose of property law is to regulate property use so as to protect the security of neighboring owners and society as a whole.”³⁸ The state, then, both exerts power to create, confer, and protect the decisionmaking authority of private property vested in the individual and, more importantly, through regulation, mediates the socially contingent, relational boundary between the private property of holders and the non-property rights of others. Thus, the tension between unfettered private property rights and obligations is the *essence* of private property.³⁹

This brings us back to the liberal theory with which we began. Private property as a social-legal relationship reveals an important, yet paradoxical, dimension of the choice so central to liberalism. An individual’s freedom to choose a life project also means—in the province of politics and adjudication (through electing representatives, who enact laws and appoint judges who interpret those laws according to ideological agendas)⁴⁰—the freedom to choose the context within which that life project is lived. In other words, the individual exercises the freedom to choose the laws, relationships, and communities that constitute the political and legal order. This in turn defines the scope of one’s rights—choice, agenda-setting, decisionmaking authority—and the institutions that confer, protect, and enforce it. Individuals, therefore, as much choose the regulation of property (through political and judicial processes) as they do the control and use of the goods and resources subject to it.⁴¹

37. See Singer, *Property Norms*, *supra* note 32, at 59.

38. *Id.* at 60 (emphasis in original).

39. SINGER, ENTITLEMENT, *supra* note 24, at 204.

40. See generally DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION {FIN DE SIÈCLE} (1997) [hereinafter DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION]; ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1983); Kerry Rittich, *Who's Afraid of the Critique of Adjudication?: Tracing the Discourse of Law in Development*, 22 CARDOZO L. REV. 929 (2001).

41. I am most grateful to Joseph William Singer for bringing this crucial point to my attention. See also Stephen Gardiner, *A Perfect Moral Storm: Climate Change, Intergenerational Ethics, and the Problem of Corruption*, in POLITICAL THEORY AND GLOBAL CLIMATE CHANGE 32 (Steve Vanderheiden ed., 2008).

B. Produced by: Physical-Spatial-Temporal (Climate change)

While the exploration of social-legal relationships dominates contemporary theoretical debate about property,⁴² the externalities of such relationships bear the potential to produce many other types of relationships, not legal-social, but physical-spatial.⁴³ As we have seen, this is particularly so with the externalities associated with private property, and Joseph William Singer provides an apt summary of such relationships:

[private] property owners and the public are linked to each other through individual actions [choices] and laws affecting the use of [private] property (which can . . . be both beneficial and detrimental). From this perspective, we could conceive of [private] property as a type of ecosystem, with every private action and legislative mandate potentially affecting the interests of other organisms.⁴⁴

Yet, in addition to the physical-spatial, anthropogenic climate change reveals, and is a stark example of, another dimension—the temporal.⁴⁵ These externalities will be felt not only by those of us who are here now, but also by our descendants of future generations. This section outlines in turn the physical-spatial and the temporal dimensions that together comprise the physical-spatial-temporal “climate change relationship” produced by private property.

1. Physical-Spatial

While the science of anthropogenic climate change is complex, it is clear that humans, through our choices, produce the GHGs that enhance the natural greenhouse effect, which heats the Earth’s surface and warms its oceans. Private property facilitates the activities of individuals, both human and corporate. Humans and corporations create agendas that dictate the use of goods and resources that emit GHGs. Agendas run the

42. See TWINING, *supra* note 25, at ch. 15, 1–7; WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY (2000); William Twining, *Law, Justice and Rights: Some Implications of a Global Perspective* 4 (Jan. 2007) (unpublished draft), available at http://www.ucl.ac.uk/laws/academics/profiles/twining/Law_Justice%20_Rights.pdf [hereinafter Twining, *Law, Justice and Rights*].

43. On the physical-spatial relationship, see TWINING, *supra* note 25, at ch. 15, 1–7.

44. Singer, *Ownership Society*, *supra* note 24, at 334 n.82.

45. On the importance of the temporal dimension from the perspective of socio-legal theory, see EDWARD W. SOJA, POSTMODERN GEOGRAPHIES: THE REASSERTION OF SPACE IN CRITICAL SOCIAL THEORY 122–24 (1989).

gamut of our chosen life projects: what we wear, where we live, what we do there, how we travel from place to place and so forth. Corporate choices are equally important, for they structure the range of choice available to individuals in setting their own agendas, thus conferring on corporations the power to broaden or restrict the meaning of private property in the hands of individuals. Green energy (solar or wind power), for instance, remains unavailable to the individual consumer if no corporate energy provider is willing to produce it.

Among other effects, through human interconnectedness with the non-human environment,⁴⁶ the enhancement of the natural greenhouse effect produces two principal sorts of externalities. First, adverse outcomes, not only for others—in the form of drought and desertification and the melting of polar sea ice (especially in the north) and rising sea levels, in turn increasing the intensity of extreme weather events⁴⁷—but also for the larger world of all living things—such as loss of species and their habitat with corresponding biodiversity loss.⁴⁸ Second, and following from the first, those externalities do not end at the borders, physical or legal, of a good or resource; choices are not made in a vacuum, but take place within a web of physical and spatial relationships. Everyone is affected, with the poor and disadvantaged of the developing world disproportionately bearing the brunt of the human consequences of climate change⁴⁹ in the form of decreasing security, health problems, food shortages, and increased stress on available water

46. See JOHN HOUGHTON, *GLOBAL WARMING: THE COMPLETE BRIEFING* 201–05 (Cambridge Univ. Press 3rd ed. 2004) (1994); Shahid Naeem, *The Life of the Party*, in *CLIMATE CHANGE: PICTURING THE SCIENCE* 113 (Gavin Schmidt and Joshua Wolfe eds., 2009); Peter D. Burdon, *Wild Law: The Philosophy of Earth Jurisprudence*, 35 *ALTERNATIVE L.J.* 14 (2010); *ECOLOGY AND THE ENVIRONMENT: PERSPECTIVES FROM THE HUMANITIES* (Donald K. Swearer et al. eds., 2009) [hereinafter *ECOLOGY AND THE ENVIRONMENT*].

47. See IPCC, AR4, *CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS*, *supra* note 5; IPCC, AR4, *CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY*, *supra* note 5; IPCC, AR4, *CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE: CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE*, *supra* note 5; IPCC, AR4, *CLIMATE CHANGE 2007: SYNTHESIS REPORT*, *supra* note 5; Adam Sobel, *Going to Extremes*, in *CLIMATE CHANGE: PICTURING THE SCIENCE*, *supra* note 46, at 95.

48. See HOUGHTON, *supra* note 46, at 127–31; HANSEN, *supra* note 16, at 237–77; Naeem, *supra* note 46, at 118–31; Burdon, *supra* note 46.

49. IPCC, AR4, *CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY*, *supra* note 5. For a succinct and compelling summary of the science and the role of liberalism, see JEDEDIAH PURDY, *A TOLERABLE ANARCHY: REBELS, REACTIONARIES, AND THE MAKING OF AMERICAN FREEDOM* 187, 215–22, 225–28 (2009) [hereinafter *PURDY, A TOLERABLE ANARCHY*]; Jedediah Purdy, *Climate Change and the Limits of the Possible*, 18 *DUKE ENVTL. L. & POL'Y F.* 289 (2008).

supplies.⁵⁰ Indeed, Purdy writes that:

[c]limate change threatens to become, fairly literally, the externality that ate the world. The last two hundred years of economic growth have been not just a preference-satisfaction machine but an externality machine, churning out greenhouse gases that cost polluters nothing and disperse through the atmosphere to affect the whole globe.⁵¹

Consider human security, predicted to decrease both within countries affected directly by climate change, and in those indirectly affected through the movement of large numbers of people displaced by the direct effects of climate change in their own countries.⁵² In the case of rising sea levels, for instance, sixty percent of the human population lives within 100 kilometers of the ocean, with the majority in small- and medium-sized settlements on land no more than five meters above sea level.⁵³ Even the modest sea level rises predicted for these places will result in a massive displacement of “climate” or “environmental refugees.”⁵⁴

2. Temporal

Not only are the consequences or externalities of anthropogenic climate change unconstrained by the legal or physical borders of states, they are uncontainable in time.⁵⁵ In other words, climate change

50. These consequences are well-documented. See IPCC, AR4, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, *supra* note 5; IPCC, AR4, CLIMATE CHANGE 2007: IMPACTS, ADAPTATION AND VULNERABILITY, *supra* note 5; IPCC, AR4, CLIMATE CHANGE 2007: MITIGATION OF CLIMATE CHANGE, *supra* note 5; IPCC, AR4, CLIMATE CHANGE 2007: SYNTHESIS REPORT, *supra* note 5; GORE, AN INCONVENIENT TRUTH, *supra* note 15; NICHOLAS STERN, STERN REVIEW: THE ECONOMICS OF CLIMATE CHANGE (2006), available at http://www.hm-treasury.gov.uk/stern_review_report.htm; GARNAUT, *supra* note 10; Andrew J. Weaver, *The Science of Climate Change*, in *HARD CHOICES: CLIMATE CHANGE IN CANADA* 13, 25 (Harold Coward et al. eds., 2004) (Fig. 2.8. Schematic Diagram of Observed Variations, (a) Temperature Indicators).

51. PURDY, A TOLERABLE ANARCHY, *supra* note 49, at 187.

52. See GWYNNE DYER, CLIMATE WARS: THE FIGHT FOR SURVIVAL AS THE WORLD OVERHEATS 13–14 (2010).

53. Steve Lonergan, *The Human Challenges of Climate Change*, in *HARD CHOICES*, *supra* note 50, at 51–53; C. Small and R. J. Nicholls, *A Global Analysis of Human Settlement in Coastal Zones*, 19 J. COASTAL RESEARCH 584, 584–99 (2003).

54. Lonergan, *supra* note 53, at 45–71, 51–53; GARNAUT, *supra* note 10, at 147–50.

55. CHRIS PARK, OXFORD DICTIONARY OF ENVIRONMENT AND CONSERVATION 232 (2009) (“intergenerational equity”); Stephen Gardiner, *A Perfect Moral Storm: Climate Change, Intergenerational Ethics, and the Problem of Corruption*, in *POLITICAL THEORY AND GLOBAL CLIMATE CHANGE*, *supra* note 41, at 30–35; HULME, WHY WE DISAGREE, *supra* note 14, at 132–38; HANSEN, *supra* note 16, at 237–77; NORTHCOTT, *supra* note 16,

demonstrates very clearly a temporal dimension to the choices predicated upon private property.⁵⁶ Demonstrating this involves a rather complex cost-benefit analysis of taking action to control emissions and so ameliorate climate change now as against taking those same actions at some future time.⁵⁷ Put simply, economic theory posits that, as a consequence of economic growth and cost discount rates based on interest rates, the cost of taking an action in the future is almost always less than the cost of taking the same action now. Such a calculus is typically based on a cost discount rate of five percent per annum; climate change, however, is a "severely lagged" and "substantially deferred" phenomenon⁵⁸ involving very long-term costs, which means that in only two decades the costs to future generations of harms from climate change are discounted to near zero.⁵⁹ According to "this logic, the benefits of economic activities which threaten harms to future generations beyond twenty years always outweigh the costs."⁶⁰ And it is this sort of logic that drives the governmental failure to take action, or even to take climate change seriously today, especially when such action requires decisions to reduce dependency on a fossil-fuel based economy:

If the costs of climate change cannot be clearly quantified, and therefore demonstrated to exceed the costs of adaptation, then no action that would harm the US economy should be taken to reduce fossil-fuel use. However, this approach neglects the gravity of the problems that future generations will face if climate change is not mitigated by action now.⁶¹

Some strongly criticize the use of economic analysis and mathematics to make what are essentially moral decisions about the scale of values in different societies. Yet, the fact is, whether one agrees or not, such analyses are relied upon and calculations are made, which militate against the steps that might be taken to mitigate climate change.⁶² Further,⁶³ the economic analyses and calculations used to avoid action today will be "iterated," meaning that "[e]ach new generation will face the same incentive structure as soon as it gains the power to decide

at 145-48.

56. Gardiner, *supra* note 55, at 31.

57. NORTHCOTT, *supra* note 16, at 146.

58. Gardiner, *supra* note 55, at 31.

59. NORTHCOTT, *supra* note 16, at 146; HULME, WHY WE DISAGREE, *supra* note 14, at 132-38.

60. NORTHCOTT, *supra* note 16, at 146.

61. *Id.*

62. *Id.* at 146-47, citing STERN, *supra* note 50, at 278-79.

63. *Id.*

whether to act or not.”⁶⁴ In short, this is a matter of intergenerational equity, which seeks “a fair distribution of the costs and benefits of a long-term environmental policy, when costs and benefits are borne by different generations.”⁶⁵ Mike Hulme summarizes it this way: “put . . . crudely, how much do we care about our own welfare (read, ‘consumption’) rather than the welfare of others (read, ‘foregone consumption’).”⁶⁶ Either way, a choice is being made about how to use goods and resources. And those choices bear consequences for others, and about their values and cultures, both today and in the future.⁶⁷

And future generations have much to lose from this present inaction based upon economics and mathematics. We have seen that the externalities of climate change for those here now, both human and non-human, are dire. For those of future generations, they are extreme and potentially catastrophic.⁶⁸ James Hansen paints a graphic picture of what the world may look like for future generations, a world to which our choices, predicated on private property, are today contributing. This is a world in which global warming reaches a magnitude that will lead eventually to an ice-free planet, with a sea level rise of almost 250 feet.⁶⁹ Even a projected sea level rise of only eighteen to twenty feet will mean that “[t]he maps of the world will need to be redrawn.”⁷⁰ This will, in turn, influence a complex process of ocean cooling at higher latitudes and warming at low latitudes, together causing increases in the strength of thunderstorms, tornadoes, and tropical storms such as hurricanes and typhoons. Ultimately, this could lead to global conflict (some argue it already has),⁷¹ affecting populations that are one or two orders of a magnitude greater than the number of people displaced by Hurricane Katrina in 2005.⁷² For people living in affected areas in the future:

64. Gardiner, *supra* note 55, at 33 (footnote omitted).

65. PARK, *supra* note 55.

66. HULME, WHY WE DISAGREE, *supra* note 14, at 133 (2009).

67. *Id.* at 135; HANSEN, *supra* note 16, at 237–77.

68. Gardiner, *supra* note 55, at 32–35; Gavin Schmidt, *The Prognosis for the Climate*, in CLIMATE CHANGE: PICTURING THE SCIENCE, *supra* note 46, at 195; CHARLES OFFICER & JAKE PAGE, WHEN THE PLANET RAGES: NATURAL DISASTERS, GLOBAL WARMING, AND THE FUTURE OF THE EARTH (rev’d ed., 2009); STEPHAN FARIS, FORECAST: THE CONSEQUENCES OF CLIMATE CHANGE, FROM THE AMAZON TO THE ARCTIC (2009).

69. HANSEN, *supra* note 16, at 250.

70. GORE, AN INCONVENIENT TRUTH, *supra* note 15, at 196–97 (citing Sir David King); *see also* the images of San Francisco, Florida, Netherlands, Beijing, Calcutta, Bangladesh, and New York, at 198–209.

71. CLEO PASKAL, GLOBAL WARRING: HOW ENVIRONMENTAL, ECONOMIC AND POLITICAL CRISES WILL REDRAW THE WORLD MAP (2010); DYER, *supra* note 52.

72. HANSEN, *supra* note 16, at 252–53, 257–59.

changes will be momentous. China, despite its growing economic power, will have great difficulties as hundreds of millions of Chinese are displaced by rising seas. With the submersion of Florida and coastal cities, the United States may be equally stressed. Other nations will face greater or lesser impacts. Given the global interdependencies, there may be a threat of collapse of economic and social systems.⁷³

Hansen concludes:

continued unfettered burning of all fossil fuels will cause the climate system to pass tipping points, such that we hand our children and grandchildren a dynamic situation that is out of their control.⁷⁴

The power, control, and choice over goods and resources conferred by private property brings those who exercise such power and make those choices into a relationship that spans both the physical-spatial and the temporal. This essay calls this the climate change relationship, which is intended to reflect the fact that choices made today have the potential to affect not only one's neighbor across the street, but also across the globe, and not only for the current generation, but also future ones.

III. PROPOSITION TWO: THE "IDEA" OF PRIVATE PROPERTY AND WHY IT MATTERS

A. The "Idea" of Private Property

The *concept* of private property, while it explains what private property is, and reveals the climate change relationship, is the province of theorists, an abstraction not readily apparent to the layperson.⁷⁵ As elaborated by theorists, the concept fails to account for how real-world, flesh-and-blood, socially-situated people actually *understand* what private property *means*. And if private property is self-seeking choice, then it matters what such people *think* that they have when faced with making a decision about where they live, how they get there, what they wear, and so forth. This essay refers to this belief, this understanding about what private property is and what it allows as its "idea." This forms the subject of the second proposition: the idea, and not the concept of theorists, represents the real villain behind the climate change

73. *Id.* at 259.

74. *Id.* at 269.

75. This draws upon the work of TAYLOR, *supra* note 28.

relationships.

The idea of private property consists of images, stories, and legends about what private property means. Who can forget, for example, “possession is nine-tenths of the law,” “finders, keepers—losers, weepers.” That is precisely the point—we *cannot* forget these idealized portrayals of private property, because

[f]rom the earliest moments of childhood, we feel the urge to assert ourselves through the language of possession against the real or imagined predations of others. ‘Property’ as an assertion of self and control of one’s environment provides human beings with a place of deep psychological refuge. With its concreteness and its unfailing assurances, property promises to protect us from change and from our fear that we will leave no evidence of our passage through this world.⁷⁶

All of this pushes us inexorably to one conclusion. The layperson understands private property as an individual and absolute entitlement (rights or choice) to a thing (car, house, factory, patent, etc.) which cannot be challenged by any other person, not even the state; indeed, to the contrary, if such a claim to entitlement is challenged, the state protects the individual. This idea remains deeply embedded in the human psyche,⁷⁷ associated with words like “mine,” “yours,” “castle,”⁷⁸ and “labour”/“desert.”⁷⁹ William Blackstone captured the idea of property quite well in his famous aphorism that property is “sole and despotic dominion,”⁸⁰ which we might summarize as Felix Cohen did:

[T]hat is property to which the following label can be attached:
To the world: Keep off X unless you have my permission,
which I may grant or withhold.
Signed: Private citizen
Endorsed: The state.⁸¹

Or, as Roberto Unger does:

[t]he right [choice] is a loaded gun that the rightholder [the

76. UNDERKUFFLER, *THE IDEA OF PROPERTY*, *supra* note 24, at 1 (footnotes omitted).

77. Joan Williams, *The Rhetoric of Property*, 83 IOWA L. REV. 277, 280–82 (1998); Bethany R. Berger, *What Owners Want and Governments Do: Evidence from the Oregon Experiment*, 78 FORDHAM L. REV. 1281, 1283, 1296 (2009); *see generally* Jonathan R. Nash & Stephanie M. Stern, *Property Frames*, 87 WASH. U. L. REV. 449; RADIN, *supra* note 29, at 123.

78. Singer, *The Ownership Society*, *supra* note 24, at 317.

79. *Id.* at 322.

80. BLACKSTONE, *supra* note 19, at 2.

81. Felix S. Cohen, *supra* note 20, at 374, 378–79.

holder of choice] may shoot at will in his corner of town. Outside that corner the other licensed gunmen may shoot him down. But the give-and-take of communal life and its characteristic concern for the actual effect of any decision upon the other person are incompatible with this view of right.⁸²

Notwithstanding anything that liberal property theorists might tell us, the person in the street who holds the choice conferred by the liberal concept of private property believes, understands, that they are a "gunman" in the sense that there exists a zone of essentially unfettered and absolute discretion to "an absolute claim to a divisible portion of social capital" and that "[i]n this zone the rightholder [can] avoid any tangle of claims to mutual responsibility."⁸³ The individual holds an idea of private property that is quite at odds with the liberal conception advanced by contemporary property theorists. For the individual, private property provides and secures "a zone of unchecked discretionary action that others, whether private citizens or governmental officials, may not invade."⁸⁴

So long as choice persists—and as long as liberalism underpins contemporary political, economic and social life, it will—then it matters *how* the *individual* understands what that choice *means*. So long as an individual, when faced directly with a clear and specific choice—car or not, green house or not, coal powered electricity or not—is free to think first of themselves without any regard for others, to act as the unchecked "gunman," then the externalities of anthropogenic climate change will inevitably follow. And so long as individuals can act accordingly, the *idea* of property, rather than the abstract concept, is the real culprit behind the role played by private property in anthropogenic climate change. Regulation might control, and even prevent, *some* choices, but it cannot prevent all of them, unless, of course, society entirely removes property, or liberalism itself, which is unlikely to happen anytime soon.⁸⁵ As long as law protects the core, the zone, of absolute and unchecked discretion in the choices taken, the individual will act accordingly.

B. Why Does the Idea Matter?

The idea of private property matters for two reasons, both of which can be encapsulated by concepts drawn from public and international law

82. UNGER, *supra* note 40, at 36.

83. *Id.* at 37–38.

84. *Id.* at 38.

85. Even the most radical proposals for reform call for allowing liberalism to achieve its full potential rather than its replacement. *See, e.g.*, UNGER, *supra* note 40.

and modified for use in the private law context: sovereignty and colonialism. The idea informs the exercise of the “sovereignty” of private property over goods, resources, and others, which, in turn, makes “eco-colonialists” of individuals.

1. “Sovereignty”

As a public law concept, sovereignty describes the consequences of an independent state’s acquisition of territorial jurisdiction: the international independence of the state with supreme, absolute, and uncontrollable power over the acquired territory and the regulation of its internal affairs without accountability⁸⁶ to the international community.⁸⁷ In a radical departure from this orthodox view, however, in 1927 Morris Cohen appropriated sovereignty from the public law realm for use in the private to capture the essence of the power, control, and choice which private property confers on individuals.⁸⁸ Using a public law concept sharpens and makes more forcefully Felix Cohen’s point that the state endorses, through private property, individual freedom of choice in relation to goods and resources.⁸⁹ In its essence, private property is *really* a state delegation of *power* permitting the individual to do as one pleases with a particular good or resource.

And this state delegation of power forms a core component of what Duncan Kennedy calls legal ground rules giving permissions to cause injury to others,⁹⁰ which are “invisible” because:

we don’t think of [them] as ground rules at all, by contrast with ground rules of prohibition. This is Wesley Hohfeld’s insight: the legal order permits as well as prohibits, in the simple-minded sense that it *could* prohibit, but judges and legislators reject demands from those injured that the injurers be restrained.⁹¹

Thus,

when lawmakers do nothing, they appear to have nothing to do with the outcome. But when one thinks that many other forms of injury are prohibited, it becomes clear that inaction is a

86. BLACK’S LAW DICTIONARY (9th ed. 2009) (“sovereignty”); *see also* KENT MCNEIL, COMMON LAW ABORIGINAL TITLE 108–33 (1989). Perhaps the fullest and best depiction of the means by which sovereignty could be acquired over territory is found in *Mabo v. Queensland II* (1992) 175 C.L.R. 1.

87. *See* MCNEIL, *supra* note 86; *Mabo v. Queensland II* (1992) 175 C.L.R. 1.

88. Morris R. Cohen, *supra* note 24.

89. Felix S. Cohen, *supra*, note 20.

90. DUNCAN KENNEDY, SEXY DRESSING ETC. 90 (1993).

91. *Id.* at 90–91 (footnotes omitted).

policy, and that law is responsible for the outcome, at least in the abstract sense that the law "could have made it otherwise."⁹²

Indeed,

[i]t is clear that lawmakers *could* require almost anything. When they require nothing, it looks as though the law is uninvolved in the situation, though the legal decision not to impose a duty is in another sense the cause of the outcome when one person is allowed to ignore another's plight.⁹³

While the state may act to prevent it, in every way that it does not so act, the state, through the sovereignty of private property delegated to one individual, confers the power to harm others, and to do it legally.

If we accept that the state *could* act, through moral imperatives, duties, and obligations imposed upon individuals to prevent the harm of anthropogenic climate change that it endorses through these grants of sovereignty, then all appears to be well. But appearances deceive. The problem is this: the liberal concept of private property we have seen, as with all western jurisprudence developed in a post-Westphalian world, is one in which arbitrary national boundaries were treated as more important than the human-caused phenomena that transcend those arbitrary lines on a map.⁹⁴ In fact, there was probably very little recognition that individuals could even produce trans-boundary consequences and, as such, so it was thought, the state could enforce both the holding of choice through private property and ensure the limitation of negative externalities because all of that would occur within territorial boundaries. William Twining explains that western legal concepts like private property developed in order to account for and explain "the municipal law of sovereign states, mainly those in advanced industrial societies."⁹⁵ Indeed,

most of the leading Western jurists of the twentieth century have focused very largely on municipal state law, have had strong conceptions of sovereignty, and have assumed that legal systems and societies can be treated as discrete, largely self-contained units. They have either articulated or assumed that jurisprudence and the discipline of law is or should be concerned only with two kinds of law: the domestic municipal

92. *Id.* at 91.

93. *Id.* (emphasis in original, footnotes omitted).

94. See PARAG KHANNA, *THE SECOND WORLD: HOW EMERGING POWERS ARE REDEFINING GLOBAL COMPETITION IN THE TWENTY-FIRST CENTURY* (2009).

95. Twining, *Law, Justice and Rights*, *supra* note 42, at 4.

law of nation states and of public international law. . . .⁹⁶

The history of private property theorizing reveals no break in this pattern. As we have seen, however, climate change unmasks the falsity of the belief that whatever the holders of private property may do to others, it is contained by national jurisdictional boundaries.

Morris Cohen's use of "sovereignty," then, focuses our attention on the core insight to be drawn from the first proposition of this essay, that "we must not overlook the actual fact that dominion over things is also *imperium* over our fellow human beings."⁹⁷ Power, control, and choice are exercisable not merely over the good or resource, but also over others. And this results in a state-created, state-delegated, and state-enforced asymmetry between choice and consequence, for it is not one, or even a few, others who can be legally harmed; rather, anthropogenic climate change reveals, and is but one example of the fact that every decision taken has the potential to affect a great number of other people.⁹⁸

And what is more, the power to control and so affect the lives of many others is not limited to those within the jurisdiction that conferred the choice, nor is it limited to the current generation. This power over others is "supreme"⁹⁹ in the fullest sense of the word, for what is conferred by one state on one individual has the potential to allow for untold consequences for present and future generations of people outside the jurisdictional boundaries of the state that conferred the power. The state that confers the power to harm in fact has no authority to do so, for its consequences, its outcomes, its externalities are visited upon people over whom that state has no jurisdiction whatsoever, either physically or temporally. As we have seen, the externalities of climate change bear disproportionately, *asymmetrically*, on those of the developing world, now and in the future.

More troubling still, this sovereignty granted by one state cannot be limited by the very people who are subject to it—those who live beyond the legal jurisdictional and temporal borders of the state that delegated it. The concept of private property developed at a time when it was thought that the consequences of one's choices might be limited by private law actions—the tort of nuisance, for example—brought by a neighbor across the street or living in the next village, and typically, through the limitation of actions, in one's own generation. Yet, as we have seen, the externalities of climate change are felt by those on the next continent and

96. *Id.* at 7–8.

97. *Id.* at 13.

98. See Lametti, *supra* note 36.

99. Katz, *supra* note 33.

in times yet to come, rendering the countervailing power that one might have to choose one's own context, through political and adjudicative processes, meaningless. The citizens of Sudan, Bangladesh, or Tuvalu, let alone those who are not yet here, whose problems are in part the consequences of anthropogenic climate change, are powerless to choose the political-legal context that affects them. Rather, those in developed nations who hold the sovereignty conferred by private property choose the context of those living in the developed world and those yet to come for them. While the environmental context (the spatial-physical-temporal relationship) is global, the political-legal (the legal-social relationship) is divided into discrete units that lack the power to alter another's grant of sovereignty. Those who hold that power can continue to choose a context that suits their preferences and desires, even though doing so may cause harm to others. Yet there is more.

2. "Eco-Colonialism"

To explain fully why the idea of private property matters, we must appropriate a second concept drawn from public international law closely associated with sovereignty: colonialism. Historically, colonialism referred to the exploitation or subjugation of a people in a "peripheral society" or colony by a larger or wealthier state, the "metropolis," thus creating a set of unequal relationships between the two.¹⁰⁰ In acquiring territory as a colony, states relied upon colonialism in order to gain supreme, absolute, and uncontrollable power over a people thus changing the social, political, and economic structures within the colony.¹⁰¹ Jürgen Osterhammel summarizes the historical meaning of colonialism as:

a relationship of domination between an indigenous (or forcibly imported) majority and a minority of foreign invaders. The fundamental decisions affecting the lives of the colonized people are made and implemented by the colonial rulers in pursuit of interests that are often defined in a distant metropolis. Rejecting cultural compromises with the colonized population, the colonizers are convinced of their own superiority and of their ordained mandate to rule.¹⁰²

Historically, one metropole subordinated several peripheries, forming a colonial empire. Most overseas empires of the early modern

100. JÜRGEN OSTERHAMMEL, COLONIALISM: A THEORETICAL OVERVIEW 16–18 (Shelley L. Frisch trans., 2d ed. 2005) (1995).

101. Margaret Kohn, *Colonialism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2006), available at <http://plato.stanford.edu/entries/colonialism/>; see also OSTERHAMMEL, *supra* note 100.

102. OSTERHAMMEL, *supra* note 100, at 16–17.

era were almost exclusively of this sort.¹⁰³ In the case of Britain and other empires of the nineteenth and twentieth centuries, the political and economic sphere of influence far exceeded their colonial core—"imperialism" describes these "transcolonial empires," which "presupposes the will and the ability of an imperial center to *define* as imperial its own national interests and enforce them worldwide in the anarchy of the international system."¹⁰⁴

In its historical sense, and in conjunction with sovereignty, a modified version of colonialism, which this essay calls "eco-colonialism," explains why the idea of private property matters to the climate change relationship. Before explaining how, though, it is necessary to define the adapted use of colonialism. Some scholars within the climate change discourse use "eco-colonialism" to refer to "the process by which industrialised nations manipulate concerns about the environment in order to maintain their political, economic and ideological hegemony."¹⁰⁵ This essay rejects this view as too narrow, instead taking a position that corresponds more fully to the historic meaning of "colonialism," albeit modified in two important respects.

First, because the climate change relationship comprises a spatial-physical dimension, by "eco-colonialism" this essay means the way in which individuals in one nation, through the sovereignty conferred (without the authority to do so) by private property, exert supreme, absolute, and uncontrollable power over the citizens of other nations, creating a set of unequal, or asymmetrical, relationships that alter the social, political, and economic structures within those other nations. Second, we must not forget that the climate change relationship also comprises a temporal or intergenerational dimension. Thus, eco-colonialism involves the alteration of the social, political, and economic structures of other nations for *future generations*. This temporal dimension means that eco-colonialism includes "intergenerational-colonialism," which adds another layer to the asymmetrical impact of sovereignty.

103. *Id.* at 18.

104. *Id.* at 21 (emphasis in original).

105. Michael Edwards, *Parochialism and Empowerment: Responding to Ecocolonialism and Globalisation in the Southwest Pacific*, in CLIMATE CHANGE IN THE SOUTH PACIFIC: IMPACTS AND RESPONSES IN AUSTRALIA, NEW ZEALAND, AND SMALL ISLAND STATES 258 n.19 (Alexander Gillespie & William C. G. Burns eds., 2000). Similar modifications have been made to "imperialism," which has been adapted to "eco-imperialism," or "ecological imperialism." On imperialism, see OSTERHAMMEL, *supra* note 100, at 21–22. On eco-imperialism, see PAUL DRIESSEN, *ECO-IMPERIALISM: GREEN POWER, BLACK DEATH* (2003). On ecological imperialism, see ALFRED CROSBY, *ECOLOGICAL IMPERIALISM: THE BIOLOGICAL EXPANSION OF EUROPE, 900–1900* (2d ed. 2004).

The question, then, is this: are all individuals who hold private property eco-colonialists? In short, yes. Even having accounted for the inherent state regulation of private property, we have seen that sovereignty remains such as to instantiate the climate change relationship between the holders of power, control, and choice and others—not only those living beyond the legal jurisdictional and territorial boundaries of the state which conferred the sovereignty, but also those of future generations. We have seen that those externalities—decreased stability and security, increased health risks, food shortages, and water stress—fall disproportionately (asymmetrically) on the poor and disadvantaged of the developing world and of future generations. Individuals in the developed world (a new metropole) use private property as a tool to affect the environment through climate change, subjugate, and exploit the citizens of developing nations, both now and in the future (a new periphery, or eco-colony). Just as nations once colonized peoples, usually through the direct use of military might, individuals now eco- and intergenerationally-colonize others indirectly through the control and use of goods and resources within their borders. And just as nations did in the past, this allows individuals today, through the use of the sovereignty over goods and resources, to create an unequal relationship between the developing and the developed worlds and so alter the social, political, and economic structures of the developing world both today and, more alarmingly, in the future.

There is a disjuncture here between the sovereignty of eco-colonialism, which posits supreme, absolute, and uncontrollable power, both territorially and temporally, and that conferred by private property, which the concept of liberal theory portrays as neither supreme nor absolute due to inherent limitation and control through the state power which conferred and recognizes it. The inherent limitation of private property supposedly limits the externalities that may follow from its exercise; and those subject to its consequences may supposedly choose the context in which they live through the political process. But we have seen that this conceptual outline fails to correspond to the idea of private property. Most, if not all, individuals tend to see private property in absolutist and individualist terms—they see it, in other words, as supreme, absolute, and uncontrollable—allowing for any and all uses of a good or resource that might suit personal preferences and desires. Of course, it matters little if that is what a person thinks they can do with a resource so long as the state will prevent that use when the time comes. But that comfort evaporates in the global and intergenerational contexts. While national sovereignty ends at arbitrary jurisdictional and immutable temporal borders, we have seen that the sovereignty of private property does not. Just as the territorial sovereignty of a state is seen to be uncontrollable and unaccountable within its territory, in the case of

anthropogenic climate change, the sovereignty of private property is truly uncontrollable and unaccountable, for there is no spatial or temporal sovereignty capable of limiting its externalities. The consequences of climate change transcend both national and temporal borders.

The analysis of sovereignty and colonialism presented here means that we are all eco-colonialists. An apt way to think about this comes from Neils M. Lund's 1904 painting "The Heart of the Empire," which depicts a scene of early twentieth century Imperial London, in which "Bank Junction [is shown] as the monumental, thronging hub of nineteenth-century imperial might."¹⁰⁶ The intersection becomes, "[t]hen, as now . . . a symbolic site of a Britain made great by its global reach."¹⁰⁷ Today, nations and states continue to wield global power (although no longer colonizing in quite the same way as they once did); yet, so too does the individual. Indeed it is the individual's power, based upon the sovereignty of private property, that is the more substantial, yet invisible, global power of our own time. The symbolic heart of the empire for nineteenth and twentieth century England, as represented in Lund's painting, was the political power (wielded by the state) and the financial power (wielded by banks). In the twenty-first century it is the liberal individual, exercising through private property a sovereignty having global reach, represented by the climate change relationship, building an "eco-colonial empire" that transcends national legal systems and their arbitrary physical and temporal boundaries.¹⁰⁸

IV. PROPOSITION THREE: THE IDEA *COULD* CHANGE

Assuming that we bear a moral imperative to act in the absence of a governmental response to anthropogenic climate change, is it even possible for the idea of private property to change? If it cannot, we lose the possibility to transform the way we live and the way we relate to others and the world around us. Tentatively, though, this section argues that it could be possible for the idea to change and concludes with some thoughts as to what that altered idea might look like.

A. How?

If the idea of private property is deeply ingrained in the human

106. JANE M. JACOBS, *EDGE OF EMPIRE: POSTCOLONIALISM AND THE CITY* 39 (1996).

107. *Id.* at 38.

108. See David Kennedy, *The Mystery of Global Governance*, in *RULING THE WORLD? CONSTITUTIONALISM, INTERNATIONAL LAW, AND GLOBAL GOVERNANCE* 37 (Jeffrey L. Dunoff & Joel P. Trachtman eds., 2009).

psyche, then even talking of its change may seem idealistic and, frankly, entirely impossible. Can one even conceive of a change in an idea that places at its core the freedom of the individual, with absolute rights to act in their self-interest in order to suit individual preferences, producing externalities without regard for their impact on others? It may seem impossible, but perhaps not. The answer lies in our own liberal history.

In *A Secular Age*,¹⁰⁹ Charles Taylor outlines the "social imaginary,"¹¹⁰ which encompasses and comprises

the ways in which [people] imagine their social existence, how they fit together with others, how things go on between them and their fellows, the expectations which are normally met, and the deeper normative notions and images which underlie these expectations.¹¹¹

Taylor explicitly uses "imaginary" in contrast to "social theory" for the latter, as its very name suggests, focuses on theory or concepts, and not on the way that ordinary people "imagine" their social surroundings in images, stories, legends, etc.¹¹² Moreover, theory is the province of a small minority (perhaps elite), rather than large groups of people, perhaps the whole of society.

The social imaginary, as Taylor defines it, emerges over time from a broader "moral order," which, whatever it is for a given society, permeates one's social existence and comes to constitute the common understanding making possible all of the collective practices of a society.¹¹³ Through this process of infiltration and transformation,

what is originally an idealization [theory] grows into a complex imaginary through being taken up and associated with social practices, in part traditional ones, but often transformed by the contact. This is crucial to what [Taylor] call[s] . . . the extension of the understanding of moral order. It couldn't have become the dominant view in our culture without this penetration/transformation of our imaginary.¹¹⁴

And importantly, the social imaginary lags behind shifts in the moral order. As the latter changes, it becomes the dominant view in a given culture through penetration and transformation of the imaginary.

109. TAYLOR, *supra* note 28.

110. *Id.* at 171.

111. *Id.*

112. *Id.* at 171-72.

113. *Id.* at 171-76.

114. *Id.* at 175. This notion of idealization as starting with the theory of a small elite enjoys a long history in sociological thought. See CHARLES H. COOLEY, HUMAN NATURE AND THE SOCIAL ORDER 352-53 (1922).

This is particularly true of legal idealization or theory, which might “lead to change in mass consciousness [the social imaginary] . . . just maybe, in the very long run, through the complex processes by which elite ideas [idealizations/theories] interact with popular ideas in a mass culture.”¹¹⁵

Driven by idealizations, theories, or elite ideas, the moral order shifts first, followed by the imaginary, the popular idea.¹¹⁶ Taylor calls this the “long march,” which

is a process whereby new practices, or modifications of old ones, either developed through improvisation among certain groups and strata of the population . . . or else were launched by elites in such a way as to recruit a larger and larger base. . . . Or alternatively, a set of practices in the course of their slow development and ramification gradually changed their meaning for people, and hence helped to constitute a new social imaginary. . . . The result in all these cases was a profound transformation of the social imaginary in Western societies, and thus of the world in which we live.¹¹⁷

For Taylor, a “Grotian-Lockean” theory of moral order—which prioritizes the individual in terms of rights, provides both a political order to protect those rights and a society to secure them for the mutual benefit of all participants equally—first penetrated and transformed, and ultimately created our modern social imaginary. In other words, a theoretical idealization or elite idea of individualism transformed the modern social imaginary.¹¹⁸ This is important for our purposes because the social imaginary includes ideas about law, including those about the idea of private property as defined in Section IV of the essay. The question, then, is this: can a new moral order based upon the climate change relationship penetrate and transform the idea of private property in the same way that individualism transformed it in the past?

Again, Taylor offers guidance by identifying a few epochal moments in human history where such shifts have occurred—the most notable being “the great founding revolutions of our contemporary world, the American and the French.”¹¹⁹ In the former the transition was smooth and less catastrophic because the idealization of popular sovereignty was easy to connect with an existing practice of popular election. In the latter, however, the inability to translate the same idealization into a stable and agreed upon set of practices led to a great

115. DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION*, *supra* note 40, at 274.

116. TAYLOR, *supra* note 28, at 175.

117. *Id.* at 176.

118. *Id.* at 170–71.

119. *Id.* at 175.

conflict that lasted for over a century. Still, Taylor argues that:

in both these great events, there was some awareness of the historical primacy of theory, which is central to the modern idea of a "revolution", whereby we set out to remake our political life according to agreed principles. This "constructivism" has become a central feature of modern political culture.¹²⁰

And the lesson is that a shift in social imaginary occurs where:

people take up, improvise, or are inducted into new practices. These are made sense of by the new outlook, the one first articulated in [a] theory; this outlook is the context that gives sense to the practices. And hence the new understanding comes to be accessible to the participants in a way it wasn't before. It begins to define the contours of their world, and can eventually come to count as the taken-for-granted shape of things, too obvious to mention.¹²¹

Previous shifts of the moral order relied upon political and, in the case of both the American and the French revolutions, often violent, events. Altering the climate change relationship, however, may herald a non-violent and perhaps non-political "revolution;" itself the new moral order¹²² that moves us beyond not only the liberalism that dominated the last 400 years of human history, but also the concept and idea of private property. Almost forty years ago, Charles Reich wrote:

There is a revolution coming. It will not be like revolutions of the past. It will originate with the individual and with culture, and it will change the political structure only as its final act. It will not require violence to succeed, and it cannot be successfully resisted by violence. It is now spreading with amazing rapidity, and already our laws, institutions and social structure are changing in consequence. It promises a higher reason, a more human community, and a new and liberated individual. Its ultimate creation will be a new and enduring wholeness and beauty—a renewed relationship of man to

120. *Id.*

121. *Id.* at 175–76.

122. Hulme, *The True Meaning of Climate Change*, *supra* note 14; *see also* GORE, *EARTH IN THE BALANCE*, *supra* note 16; GORE, *AN INCONVENIENT TRUTH*, *supra* note 15; GORE, *OUR CHOICE*, *supra* note 16; NORTHCOTT, *supra* note 16; JAMES GUSTAVE SPETH, *THE BRIDGE AT THE EDGE OF THE WORLD: CAPITALISM, THE ENVIRONMENT, AND CROSSING FROM CRISIS TO SUSTAINABILITY* (2008); *ECOLOGY AND THE ENVIRONMENT*, *supra* note 46; FARIS, *supra* note 68.

himself, to other men, to society, to nature, and to the land.¹²³

Our own era may witness this peaceful revolution. Indeed, the failure of Copenhagen and of cap-and-trade schemes in various nations may themselves mark the coming of a new moral order, no matter how sluggish and painful that change may be. Far from being a threat, in climate change and the popular response to it,¹²⁴ we may find the source of this revolution, and in that, the shift in the social imaginary and the idea of private property. It turns out that this is not so outlandish after all. In those epochal moments in our own human history, events that no one foresaw, that allowed the theory of liberalism to become the social imaginary of contemporary society, one finds not doom but hope. Itself the source of the problem that brought us to this ecological tipping point, our own liberal history provides “[t]he greatest encouragement we have in starting that process . . . that it is more like than unlike other great changes we have managed, and that the same tradition of freedom that drove those changes has resources for this one.”¹²⁵

B. What Would It Look Like?

Assuming that such a change is possible, what would the new idea of private property look like? The answer is rather straightforward. Just as the modern idea of private property focuses on the rights and personal preference-satisfaction of the liberal concept, an idea of property more finely attuned to the climate change relationship would adopt the relational dimension of the liberal concept. In other words, a model for a renewed idea suited to the contemporary world already exists: the *concept* of private property itself, as outlined in Section IIA.¹²⁶

Some might see such a shift as a sacrifice of what we already have—liberty and unfettered choice hard-won over a long period of human history. Jedediah Purdy suggests, though, that such a view of liberalism treats freedom merely as self-indulgence, and paints a shallow picture, indeed, of our own human history.¹²⁷ Purdy argues that, in fact, the concept of freedom emerged over time (most notably in America) from attempts to imagine and create a society of equals making possible

123. CHARLES A. REICH, *THE GREENING OF AMERICA* 11 (1970).

124. See GALLUP, *supra* note 13.

125. PURDY, *A TOLERABLE ANARCHY*, *supra* note 49, at 228.

126. See Nash & Stern, *supra* note 77; Berger, *supra* note 77. In both sources, the authors argue that the concept of property has not penetrated the public or common consciousness.

127. PURDY, *A TOLERABLE ANARCHY*, *supra* note 49, at 221–22.

a request for sacrifice.¹²⁸ In other words, it is possible to see freedom differently, and climate change demands doing so. We must re-imagine the very nature of freedom as being susceptible to limitation by regulation aimed at enriching it by respecting the dignity and autonomy of others.¹²⁹ Such an idea of private property requires nothing less than “a complete acknowledgment and accounting of the effects of our actions [choices], and, in that respect, an economy that does not require its participants to look away from what they do.”¹³⁰

Three advantages might follow if the concept of private property were to penetrate the popular psyche and become an idea forming part of the social imaginary. First, because the concept more accurately reflects the legal reality of private property, as comprising a social-legal relationship, the popular idea would also seek to identify and respond to the relationships that are produced by the choice conferred by those rights, such as the climate change relationship. Second, regulation (or concern for others), currently something popularly thought to be external to private property and an imposition on the owner, would be seen as it is—internal to and part of the concept of property, the responsibility of both the state and the individual.

Above all, such a model for the idea of private property preserves intact the notion that choice lies at the heart of property. This model in no way rejects choice as being central to private property or the individual as being the primary actor in the social-legal relationship that instantiates it. On the contrary, it merely conceives choice and the individual differently—as socially- and community-situated rather than atomistic. This model gives full recognition to the simple truth that no choice is made in a vacuum. And while some property theorists already argue for just such a change, they do so at the level of concept and not idea.¹³¹ This essay argues that a deeper change is possible—one at the psychological level of the individual making the choice, whatever it is.

V. CONCLUSION: WHAT WE DO *MATTERS*

In a recent editorial, George F. Will,¹³² citing an essay written by

128. *Id.* at 222–24.

129. *Id.* at 224–25.

130. *Id.* at 227.

131. See, e.g., RADIN, *supra* note 29, at 120–45; William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991); Singer, *The Ownership Society*, *supra* note 24.

132. Will, *supra* note 21.

Robert B. Laughlin,¹³³ proclaims that the Earth does not care about what is done to or for it,¹³⁴ arguing that “[w]hat humans do to, and ostensibly for, the earth does not matter in the long run, and the long run is what matters to the earth. We must . . . think about the earth’s past in terms of geologic time.”¹³⁵ To put it simply, what is going to happen to the earth and its atmosphere will happen whether humans act or not. Moreover, in his essay, Laughlin writes, “[o]n the scales of time relevant to itself, the earth doesn’t care about any of these governments or their legislation.”¹³⁶ Will concludes: “[b]uy a hybrid, turn off your air conditioner, unplug your refrigerator, yank your phone charger from the wall socket—such actions will “leave the end result exactly the same.”¹³⁷ Will and Laughlin’s argument provides a useful counterpoint for two conclusions.

First, while it may be true that what we do to or for the earth will do little *for the earth*, the same is not true for how our actions will affect humans. The sovereignty conferred by private property, through the climate change relationship, allows us to use the earth as a tool for the asymmetrical exercise of power, control, and choice over every other person on the planet (including, paradoxically, ourselves). Private property, based upon an absolutist and individualist idea, allows individuals to use the earth and its natural greenhouse effect, to eco-colonize others, both now and in the future.

This is not a gloomy eco-anarchism or eco-authoritarianism,¹³⁸ but a recognition of the tough reality that many of our private law concepts were developed in the age of nation states, a time when private property, contract, etc., were seen as background concepts that mediated relationships between people within defined and discrete legal jurisdictional borders. But such concepts, and the ideas which underpin them, no longer work in the era of globalization. Private property is the paradigm example of this truth. More importantly, it forces us to face the tough reality that it *does* matter what we do to or for the earth; perhaps not for what it *will mean* for the earth, but for what it *means*, now and in the future, for others.

Second, Will and Laughlin are partly right about governments and their legislation, but, rather than the earth not caring about what is done from a legal perspective, the real insight here is this: we need not wait for governments to act. We have already seen that governments are

133. Robert B. Laughlin, *What the Earth Knows*, THE AMERICAN SCHOLAR, Summer 2010, available at <http://www.theamericanscholar.org/what-the-earth-knows/>.

134. Will, *supra* note 21 (citing Laughlin, *supra* note 133).

135. *Id.*

136. Laughlin, *supra* note 133.

137. Will, *supra* note 21 (citing Laughlin, *supra* note 133).

138. HULME, WHY WE DISAGREE, *supra* note 14, at 309.

expressing a reticence about taking the sort of action that might be necessary to respond to anthropogenic climate change. Individuals, however, can act now, without the need to wait for governments and legislation, be it cap-and-trade, carbon tax, or some other remedy. The hidden reality of the sovereignty conferred by private property is that it is just that—sovereignty. We can just as easily choose to exercise that power so as to produce the GHG emissions that drive the climate change relationship, or we can choose not to so act. We need not wait for governments to either allow us to do that or instruct us to do so. And in taking action, we will change the idea of private property and “see how we can use the idea of climate change—the matrix of ecological functions, power relationships, cultural discourses and material flows that climate change reveals—to rethink how we take forward our political, social, economic and personal projects over the decades to come.”¹³⁹ In short, we have the sovereignty to make those choices now, and we always have, in our idea of private property.

139. *Id.* at 362.