

# CLIMATE CHANGE IS ECO-SLAVERY: A CLIMATE FUTURE OF AUSTRALIAN PROPERTY LAW

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## I INTRODUCTION

On the evening of 31 July 1761, L'Utile, a three-masted transport schooner owned by the French East India Company and bound for Mauritius from Madagascar, ran aground on Île des Sables, a small, uninhabited and inhospitable dot of sand and volcanic rock in the western Indian Ocean.<sup>1</sup> On board were 140 French crew and, nailed into the hold, 160 slaves.<sup>2</sup> The slaves on board were an open secret; while France had banned slave-trading in its Indian Ocean territories, the captain of L'Utile, and many others like him, picked up slaves as a side business tolerated by the Company. By sunrise, L'Utile was lost; 123 of the crew and 88 of the slaves (now unshackled) survived and scrambled ashore.

At first, the social order that had existed at sea held on land. With the captain speechless and unable to function, the First Officer, Berthelemy Castellan du Vernet, took charge. Only minimal rations recovered from the ship remained, and no fresh water. Three days of chipping through volcanic rock, however, revealed a brackish, milky liquid. This slaking came too late; 28 castaways had already died of thirst. Both erstwhile enslavers and enslaved had no way off the island. Everyone was now a slave to the island.

Castellan du Vernet, however, set to work designing and directing the construction of a life raft. Two months after the wreck, 123 castaways, all French, and around 100 of whom had played no part in its construction, boarded the Providence, a 33-foot-long life raft made of timber salvaged from the L'Utile. The original slaves were left behind with three months' provisions, a letter recognising their good conduct, and a promise that someone would return to rescue them. Enslaved yet again, they waited 15 years. The Dauphine, captained by Jacques-Marie Lanuguy de Tromelin, arrived on November 1776, fulfilling the promise made by Castellan du Vernet. Only seven women and an eight-month-old baby boy remained on Île Tromelin, as Île des Sables was renamed in honour of the captain who rescued those last survivors.

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1 The story of Île des Sables presented here is adapted from 'L'Èse Humanité', *The Economist* (online), 16 December 2015 <<http://www.economist.com/news/christmas-specials/21683979-what-happened-when-slaves-and-free-men-were-shipwrecked-together-lu00e8se>>.

2 Samir S Patel, 'Castaways: Illegally Enslaved and Then Marooned on Remote Tromelin Island for Fifteen Years, with Only Archaeology to Tell Their Story', *Archaeology* (online), 15 September 2014 <<http://www.archaeology.org/issues/145-1409/features/2361-tromelin-island-castaways>>.

Île des Sables eliminated the division that had characterised those on board: the instant the L'Utile hit the coral reef surrounding Île des Sables, two classes of person, enslaver and enslaved, were transformed into one: enslaved. From that moment, those who had enslaved others were themselves enslaved on that island, along with those whom they had previously enslaved. Those who had removed the liberty of others through an exercise of their own freedom were, through those very actions, themselves robbed of their freedom and liberty.

The story of the L'Utile provides a sobering metaphor for us who face the consequences of climate change. Just as the crew and slaves of the L'Utile were enslaved on Île des Sables by the consequences of the shipwreck, we, too, today, are enslaved by the consequences of anthropogenic climate change on our own, somewhat larger, but equally inescapable Île des Sables: Earth. Every person on the planet today is both enslaver and enslaved.

In earlier work, I have suggested that each and every person on the planet is an eco-colonialist;<sup>3</sup> in this article, I suggest that if we are eco-colonialists, we are also all 'eco-slaves', held captive on Earth by a slavery imposed of our own making, of others and of ourselves, by virtue of being an eco-colonialist. And none of us has even as remote a chance of escape as those unwilling inhabitants of Île des Sables did in 1761. None of us, that is, unless we can build our own metaphorical equivalent of the Providence. But unlike the Providence, if even one of us is left behind — if even some of us continue to suffer the consequences of anthropogenic climate change — we are all are left behind. In other words, the consequences of climate change cannot be left behind as easily — if one can say it was easy — as were the confines of Île des Sables in September 1761, or even as easily as could those last eight survivors who were finally rescued in 1776. No, our Providence, if it can be built, and if it can take anyone, will need to take everyone; for to leave one person behind will mean that we have failed, that we have left everyone behind.

Who might build this 'climate Providence'? The meetings of COP 21 Paris in late 2015 produced another political agreement which might, even if implemented, still fail to mitigate the effects of anthropogenic climate change.<sup>4</sup> While 175 nations signed the *Paris Agreement* in April 2016, signing on to a temperature

3 See generally Paul Babie, 'Choices that Matter: Three Propositions on the Individual, Private Property, and Anthropogenic Climate Change' (2011) 22 *Colorado Journal of International Environmental Law and Policy* 323; Paul Babie, 'Idea, Sovereignty, Eco-Colonialism, and the Future: Four Reflections on Private Property and Climate Change' (2010) 19 *Griffith Law Review* 527.

4 Indeed, the recent United Nations Climate Change Talks held in Paris between 30 November and 11 December 2015 adopted the *Paris Agreement* under the *United Nations Framework Convention on Climate Change*: see *Paris Agreement*, opened for signature 22 April 2016, [2016] ATS 24 (entered into force 4 November 2016); Conference of the Parties, United Nations Framework Convention on Climate Change, *Adoption of the Paris Agreement*, 21<sup>st</sup> sess, Agenda Item 4(b), UN Doc FCCC/CP/2015/L.9/Rev.1 (12 December 2015). See also Centre for Climate and Energy Solutions, *Outcomes of the UN Climate Change Conference in Paris* (December 2015) <<http://www.c2es.org/international/negotiations/cop21-paris/summary>>; Climate Reality Project, *What You Need to Know about the Paris Agreement* <[https://www.climateRealityProject.org/sites/climateRealityProject.org/files/Paris\\_Agreement\\_Toolkit-Edit.pdf?utm\\_source=email-Paris-Fact-Sheet&utm\\_medium=email&utm\\_campaign=RFP](https://www.climateRealityProject.org/sites/climateRealityProject.org/files/Paris_Agreement_Toolkit-Edit.pdf?utm_source=email-Paris-Fact-Sheet&utm_medium=email&utm_campaign=RFP)>.

rise of 2°C above pre-industrial temperatures in order to avoid the most serious consequences of climate change, the measures proposed by those signatories as part of the Paris deal will at best limit warming to a 3°C rise by 2100. Much more needs to be done to prevent the far greater impacts of warming represented by that 1°C difference.<sup>5</sup> But it is questionable whether that can happen;<sup>6</sup> indeed, the most recent trends suggest that it is very unlikely.<sup>7</sup> Given the consequences,<sup>8</sup> that ought to cause real alarm.<sup>9</sup> The governments that have signed the *Paris Agreement* on our behalf seem incapable of building a climate Providence.

The challenge of climate change ought to change everything.<sup>10</sup> The stark reality is that we must ‘rethink and renegotiate our wider social and political goals’.<sup>11</sup> We have entered a ‘period of consequences’<sup>12</sup> requiring us ‘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’.<sup>13</sup> So what will we do to change the way we live, to use climate change as a call to action both to adapt to a new world, and to prevent

- 5 Michael Le Page and Catherine Brahic, ‘Will Paris Deal Save Our Future?’, *New Scientist*, 19–26 December 2015, 8–9; Catherine Brahic, ‘Pragmatic but 25 Years Late’, *New Scientist*, 2 January 2016, 29; ‘Hopelessness and Determination’, *The Economist* (online), 19 December 2015 <<http://www.economist.com/news/leaders/21684153-paris-agreement-will-not-stabilise-climate-efforts-it-makes-possible-could-still>>; ‘Green Light’, *The Economist* (online), 19 December 2015 <<http://www.economist.com/news/international/21684144-what-expect-after-deal-exceeded-expectations-green-light>>.
- 6 Michael Le Page, ‘Signed, Sealed ... Undeliverable?’, *New Scientist*, 23 April 2016, 18–19.
- 7 ‘In the Red’, *The Economist* (online), 28 May 2016 <<http://www.economist.com/news/science-and-technology/21699434-end-cl-ni-o-secs-temperatures-soar-across-world-red>>; ‘Heat Respite in Sight’, *New Scientist*, 21 May 2016, 6.
- 8 Bjørn Lomborg, ‘Introduction’ in Bjørn Lomborg (ed), *Smart Solutions to Climate Change: Comparing Costs and Benefits* (Cambridge University Press, 2010) 1, 1.
- 9 As an overview for the alarm we ought to feel, see the data presented in the various polls at Gallup, *Climate Change* <[http://www.gallup.com/topic/category\\_climate\\_change.aspx](http://www.gallup.com/topic/category_climate_change.aspx)>.
- 10 To borrow from Naomi Klein, *This Changes Everything: Capitalism vs the Climate* (Simon & Schuster, 2014); *This Changes Everything* (Directed by Avi Lewis, Klein Lewis Productions and Louverture Films, 2015). See also Mike Hulme, *Why We Disagree about Climate Change: Understanding Controversy, Inaction and Opportunity* (Cambridge University Press, 2009); Mike Hulme, *Can Science Fix Climate Change? A Case Against Climate Engineering* (Polity Press, 2014); Mike Hulme, ‘The True Meaning of Climate Change’, *New Scientist*, 5 September 2009. Hulme notes ‘[r]ather than placing ourselves in a “fight” against climate change, we should use it to renegotiate how we live’: at 28; Babie, ‘Choices that Matter’, above n 3; Babie, ‘Idea, Sovereignty, Eco-Colonialism, and the Future’, above n 3.
- 11 Hulme, ‘The True Meaning of Climate Change’, above n 10, 28. See also Hulme, *Why We Disagree*, above n 10, 362.
- 12 Al Gore, *An Inconvenient Truth: The Planetary Emergency of Global Warming and What We Can Do about It* (Bloomsbury, 2006) 100–1, quoting Winston Churchill, ‘The Locust Years’ (Speech delivered at the House of Commons, 12 November 1936).
- 13 Hulme, *Why We Disagree*, above n 10, 362. See also Gore, *An Inconvenient Truth*, above n 12; Al Gore, *Earth in the Balance: Forging a New Common Purpose* (Earthscan, 2007); Al Gore, *Our Choice: A Plan to Solve the Climate Crisis* (Rodale, 2009); James Hansen, *Storms of My Grandchildren: The Truth about the Coming Climate Catastrophe and Our Last Chance to Save Humanity* (Bloomsbury, 2009); Michael S Northcott, *A Moral Climate: The Ethics of Global Warming* (Orbis Books, 2007).

further negative effects?<sup>14</sup> How can we change the way we live, to change the source of the difficulties rather than attempt to continue to live the way that got us into this mess? Large-scale, international governmental agreement and change, as we have seen, is difficult.

There are, however, changes to the way we understand law, and to the law itself, that may form part of the changes necessary. This article suggests one such change, not entirely unique or novel in the history of law itself: property law could adopt a social-obligation norm and corollary doctrine of abuse of right, drawn from French civilian law. While a social-obligation norm and abuse of right doctrine would be no small change to Australian property law, the potential benefits would be enormous. And this, I suggest, is the climate future of property law. It might seem a novel, unique and difficult change to achieve only because we are so imbued with liberalism and neoliberalism — the foundation of the way we see the political, social and legal world around us — and the changes the combination of those two theories have wrought to Anglo-Australian property law over the course of the last 200 years. In those 200 years the last vestiges of feudalism established a network of symbiotic relationships creating both rights and obligations between lord and tenant. But liberalism and neoliberalism changed all that, sharing as they do a very long lineage, dating back in the case of England and English law to the Glorious Revolution of 1688,<sup>15</sup> and the triumph of liberalism over republicanism,<sup>16</sup> the failure of the European revolutions of 1848<sup>17</sup> and the Paris Commune of 1871,<sup>18</sup> and, finally, the triumph of neoliberalism over all else.<sup>19</sup>

Today, the liberal concept of private property is the tool with which we act on the environment and others, the world over. With property, we destroy not only the planet, but also humanity; not only others, but also ourselves. And the truth is that a social-obligation norm and an abuse of right doctrine is something that ought to form a part of every property law system. Why? Because we need structures of

14 See generally Ulrich Beck, *The Metamorphosis of the World* (Polity Press, 2016); Simon Nicholson and Sikina Jinnah (eds), *New Earth Politics: Essays from the Anthropocene* (MIT Press, 2016); George Monbiot, *How Did We Get into this Mess? Politics, Equality, Nature* (Verso, 2016); Sarah Pratt, ‘Swim or Sink’ [2016] (Spring) *New Trail* 16; United Nations Environment Programme, ‘Current Climate Information Insufficient, Say World’s Financial Institutions’ (12 January 2011) <<http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=655&ArticleID=6884&I=en>>; Paschen von Flotow et al, *Advancing Adaptation through Climate Information Services: Results of a Global Survey on the Information Requirements of the Financial Sector* (Sustainable Business Institute and United Nations Environment Programme Finance Initiative, January 2011) <[http://www.unepfi.org/fileadmin/documents/advancing\\_adaptation.pdf](http://www.unepfi.org/fileadmin/documents/advancing_adaptation.pdf)>. See especially ‘Foreword by the UNEP Finance Initiative Climate Change Working Group (CCWG)’: at 3–4.

15 See generally Steve Pincus, *1688: The First Modern Revolution* (Yale University Press, 2009).

16 See generally Andreas Kalyvas and Ira Katznelson, *Liberal Beginnings: Making a Republic for the Moderns* (Cambridge University Press, 2008).

17 See generally Mike Rapport, *1848: Year of Revolution* (Basic Books, 2008).

18 See generally John Merriman, *Massacre: The Life and Death of the Paris Commune* (Basic Books, 2014).

19 See generally David Harvey, *A Brief History of Neoliberalism* (Oxford University Press, 2005); Pierre Dardot and Christian Laval, *The New Way of the World: On Neoliberal Society* (Gregory Elliott trans, Verso, 2013) [trans of: *La nouvelle raison du monde: Essai sur la société néolibérale* (first published 2009)].

limitation; without them, we run the risk of succumbing to the horrors of runaway climate change and global warming.<sup>20</sup> The social-obligation norm and the abuse of right doctrine, then, rather than being the entirety of our climate Providence, comprise its trim tab (that small part of a ship's rudder that can in fact move the entire ship).<sup>21</sup>

While I do not attempt to demonstrate precisely how the social-obligation norm would be integrated into the existing property law of Australia — that would be an enormous task involving a detailed assessment of the entirety of property law — I suggest why the law ought to be moving in that direction, and suggest that a social-obligation norm is the logical extension of that direction. It is, in short, part of the opportunity presented by climate change to begin to rethink the way we live, socially, economically, and politically. The integration itself is the work of that climate future.

The article is divided into two main parts. Part II begins with a simple question: why should the law of property change in the face of climate change? This question receives an equally simple answer: climate change is not only metaphorically slavery, it *is* slavery. We are not only changing the climate; rather, we are using the environment and the climate to enslave people, including ourselves. I argue that when we view climate change through the lens of private property, we will see that it is eco-colonialism and eco-slavery. A failure to adapt the law of property leaves us stranded on a climate 'Île des Sables'.

Part III is more speculative and normative, seeking not to present positive law, but an outline of the climate future of property, one which prioritises obligation over self-interest. I argue that a theory of property ought to begin with obligation as a means of defining what we mean by the rights which form property. And that focus carries implications for property law, namely, the adoption of a social-obligation norm and its corollary, the doctrine of abuse of right. I examine the French approach to obligation in property law simply to outline the broad contours of a working social-obligation norm and the doctrine of abuse of right. This is not intended as prescriptive, nor is it exhaustive, and it is certainly not meant to provide a roadmap for implementation; indeed, even in those nations where a social-obligation norm forms part of the positive law of property, it is difficult to articulate its precise shape and scope.<sup>22</sup> An attempt to do so in relation to a jurisdiction without a recognised social-obligation norm is a difficult task,<sup>23</sup> one beyond the scope of this article. Rather, what I present here serves as a

20 Timothy Snyder, *Black Earth: The Holocaust as History and Warning* (Tim Duggan Books, 2015) 326.

21 See Bergen Vermette, 'Call Me Trim-Tab (Thanks Bucky Fuller)' on *Beams and Struts* <<http://www.beamsandstruts.com/bits-a-pieces/item/456-call-me-trim-tab>>.

22 See, eg, Daniel Bonilla, 'Liberalism and Property in Colombia: Property as a Right and Property as a Social Function' (2011) 80 *Fordham Law Review* 1135; Alexandre dos Santos Cunha, 'The Social Function of Property in Brazilian Law' (2011) 80 *Fordham Law Review* 1171; M C Mirow, 'Origins of the Social Function of Property in Chile' (2011) 80 *Fordham Law Review* 1183.

23 For another demonstration of the difficulty of defining a social-obligation norm for a jurisdiction where one does not yet exist, see Gregory S Alexander, 'The Social-Obligation Norm in American Property Law' (2009) 94 *Cornell Law Review* 745.

speculative/normative suggestion of what a social-obligation norm might look like, as a response to the challenge of climate change.

Part IV concludes. The eco-slavery of climate change drives a ‘making new of the old’, or, put another way, a ‘back to the future’ moment for property law. In short, this is an article about a new way of life, one that places obligation towards the other over the self-interest of the individual. This article suggests why we should do that, and offers a proposal as to what it might look like.

## **II THE CLIMATE CHANGE RELATIONSHIP: ECO-COLONIALIST AND ECO-SLAVE**

Private property makes possible the choice (in other words, the freedom to choose how to use goods and resources)<sup>24</sup> that allows humans to act in the ways that produce greenhouse gas (‘GHG’) emissions and so enhance the natural greenhouse effect — anthropogenic climate change. Private property is, in other words, liberal choice, and that permits individuals to affect the environment, in turn changing the global climate. Individuals therefore contribute, collectively, through their choices, to the operation of ‘eco-colonialism’.<sup>25</sup> 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. I call this the ‘climate change relationship’, of which there are two sides; the first characterised by eco-colonialism, the other represented by those who are colonised under this process, the ‘eco-colonised’ or what I call here ‘eco-slaves’. The paradox of the climate change relationship is simply this: that each of us is both colonialist and colonised, or, eco-slave. This Part explains how.

### **A Eco-Colonialism<sup>26</sup>**

This much we know: while the science of anthropogenic climate change is complex, it is clear enough that humans, through their choices, produce the GHG emissions that enhance the natural greenhouse effect, in turn heating the Earth’s

24 Choice as the core of private property has been firmly established by the Nobel Prize winning work of Oliver Hart and Bengt Holmstrom. See generally Oliver Hart, *Firms, Contracts, and Financial Structure* (Oxford University Press, 1995); Bengt Holmstrom and Paul Milgrom, ‘The Firm as an Incentive System’ (1994) 84 *American Economic Review* 972.

25 My argument concerning the role of the concept of private property in making possible the human behaviour responsible for climate change is complex — rather than recount it here in detail, see Babie, ‘Choices that Matter’, above n 3; Babie, ‘Idea, Sovereignty, Eco-Colonialism, and the Future’, above n 3.

26 I have developed my own theory of eco-colonialism in earlier work: Babie, ‘Choices that Matter’, above n 3; Babie, ‘Idea, Sovereignty, Eco-Colonialism, and the Future’, above n 3.

surface and warming its oceans.<sup>27</sup> And every human, through the choices about goods and resources secured by the liberal concept of private property, controls the environment, and so controls the lives of others, thus ‘colonising’ them. The liberal individual, in other words, has the power to control the lives of many others, indeed, entire states. This power to eco-colonise is practised largely by individuals of the developed world against those of the developing. Before looking more closely at this, we must first examine how it is that private property makes this possible.

## 1 The Concept of Private Property

According to the standard liberal concept, private property is a bundle of Hohfeldian-Honorian use rights<sup>28</sup> ‘concern[ing] legal relations among people regarding [the] control and disposition of valued resources.’<sup>29</sup> This ‘bundle of legal relations’ confers on individuals (human and corporate) the ability to choose about the distribution, control and use of goods and resources. This begins with William Blackstone’s view of property:

There is nothing which so generally strikes the imagination, and engages the affections of mankind, as the right of property; or 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.<sup>30</sup>

- 27 These consequences are well-documented by the Intergovernmental Panel on Climate Change (‘IPCC’): see generally IPCC, *Fifth Assessment Report (AR5)* <<https://www.ipcc.ch/report/ar5/>>. The report contains: Thomas F Stocker et al (eds), *Climate Change 2013: The Physical Science Basis — Working Group I Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2013); Christopher B Field et al (eds), *Climate Change 2014: Impacts, Adaptation and Vulnerability: Part A: Global and Sectoral Aspects: Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014); Vincente R Barros et al (eds), *Climate Change 2014: Impacts, Adaptation and Vulnerability: Part B: Regional Aspects: Working Group II Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014); Ottmar Edenhofer et al (eds), *Climate Change 2014: Mitigation of Climate Change: Working Group III Contribution to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change* (Cambridge University Press, 2014); Core Writing Team, Rajendra K Pachauri and Leo Meyer (eds), ‘Climate Change 2014: Synthesis Report — Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change’ (Synthesis Report, IPCC, 2015). See also Gore, *An Inconvenient Truth*, above n 12; Nicholas Stern, *The Economics of Climate Change: The Stern Review* (Cambridge University Press, 2007); Ross Garnaut, *The Garnaut Review 2011: Australia in the Global Response to Climate Change* (Cambridge University Press, 2011); Andrew J Weaver, ‘The Science of Climate Change’ in Harold Coward and Andrew J Weaver (eds), *Hard Choices: Climate Change in Canada* (Wilfrid Laurier University Press, 2004) 13, 25; Lomborg, above n 8.
- 28 Stephen R Munzer, *A Theory of Property* (Cambridge University Press, 1990) 22–31.
- 29 Joseph William Singer, *Property* (Wolters Kluwer Law & Business, 5<sup>th</sup> ed, 2017) 2. See also Stephen R Munzer, ‘Property as Social Relations’ in Stephen R Munzer (ed), *New Essays in the Legal and Political Theory of Property* (Cambridge University Press, 2001) 36, 36–7.
- 30 William Blackstone, *Commentaries on the Laws of England: A Facsimile of the First Edition of 1765–1769* (University of Chicago Press, first published 1765, 1979 ed) vol 2, 2.



It may even be that more than despotic dominion, the control that Blackstone captures here is a form of theft, if not murder.<sup>31</sup> The point is that private property confers ‘decisionmaking authority’<sup>32</sup> on its holder to ‘do anything they like with what they own: use it, use it up, neglect it, destroy it, give it away entirely or for a time, lend it, sell or lease it, pledge it, leave it by will, and so on.’<sup>33</sup> Private property is, simply, the power of *choice* about the use of goods and resources.

The choice that is private property may appear to be unfettered and absolute. It is not. Rather, it is limited; unfettered choice is not possible: while private property ‘initially appears to abhor obligation ... on reflection we can see that it requires it. Indeed, it is the tension between [unfettered private property rights] and obligation that is the *essence* of [private] property.’<sup>34</sup>

And however one describes the choice which private property is, law plays an integral role in securing it to the individual. There can be no property without law, as Jeremy Bentham pithily wrote: ‘Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases.’<sup>35</sup>

## 2 *The Idea of Private Property*

The deployment of the concept of property as a legal institution in every nation of the world, in one form or another, must contend with the layperson’s understanding of what that theory means. And that, in fact, does not necessarily coincide with what theorists think. This section draws a distinction between private property according to property theorists, which I call the concept, and that which the layperson understands private property to mean, which I refer to as the idea.

For theorists, private property is seen, to a greater or lesser degree, as a relationship between those who control a good or resource, and those who do not, mediated

31 Pierre-Joseph Proudhon, *What Is Property?* (Donald R Kelley and Bonnie G Smith trans, Cambridge University Press, 1994) 13–14, 16, 136 [trans of: *Qu’est-ce que la propriété?* (first published 1840)].

32 C Edwin Baker, ‘Property and Its Relation to Constitutionally Protected Liberty’ (1986) 134 *University of Pennsylvania Law Review* 741, 742–3.

33 F H Lawson and Bernard Rudden, *The Law of Property* (Clarendon Press, 3<sup>rd</sup> ed, 2002) 90.

34 Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000) 204 (emphasis added). Clearly there are differences between legal jurisdictions in the way in which limitation and obligation is imposed through state action. That need not concern us here, though, as this article deals with the *theory* of property, rather than its specific invocation in a given legal system in the *law* of that state’s property. Theory, of course, attempts to transcend jurisdictional differences in its normative formulations of the concept of property.

35 Jeremy Bentham, *The Theory of Legislation* (Richard Hildreth trans, Routledge and Kegan Paul, 1931) 113 [trans of: *Traité de législation civile et pénale* (first published 1802)].



and regulated by law.<sup>36</sup> For the layperson, the *idea* of private property represents absolute freedom in respect of the self-interested and preference-satisfying choices that might be made regarding a good or resource.<sup>37</sup> In other words, the *concept* of private property is the province of theorists, with relationship and regulation being central to their work. As elaborated by theorists, however, 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.

What, then, does the layperson think of when they think of private property? I have argued elsewhere that for the layperson, the *idea* of private property upon which one operates consists of images, stories, and legends about what private property means.<sup>38</sup> 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 idealised 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’.<sup>39</sup>

The layperson understands private property as an individual and absolute entitlement (the bundle of Hohfeldian use rights, or decision-making authority,

36 The social relations view of private property can be traced to Wesley Newcomb Hohfeld, ‘Some Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1913) 23 *Yale Law Journal* 16; Wesley Newcomb Hohfeld, ‘Fundamental Legal Conceptions as Applied in Judicial Reasoning’ (1917) 26 *Yale Law Journal* 710; Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Yale University Press, 1919); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning and Other Legal Essays* (Walter Wheeler Cook (ed), Yale University Press, 1923).

The American legal realists subsequently developed Hohfeld’s thinking: see generally Robert L Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’ (1923) 38 *Political Science Quarterly* 470; Morris R Cohen, ‘Property and Sovereignty’ (1927) 13 *Cornell Law Quarterly* 8; Robert L Hale, ‘Bargaining, Duress, and Economic Liberty’ (1943) 43 *Columbia Law Review* 603; Felix S Cohen, ‘Dialogue on Private Property’ (1954) 9 *Rutgers Law Review* 357.

Contemporary scholars extensively developed and expanded the early realist work: see especially Jennifer Nedelsky, ‘Reconceiving Rights as Relationship’ (1993) 1 *Review of Constitutional Studies* 1; Duncan Kennedy, ‘The Stakes of Law, or Hale and Foucault!’ (1991) 15 *Legal Studies Forum* 327; Joseph William Singer, *The Edges of the Field: Lessons on the Obligations of Ownership* (Beacon Press, 2000); Singer, *Entitlement*, above n 34; Singer, *Property*, above n 29; Joseph William Singer, ‘The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld’ [1982] *Wisconsin Law Review* 975; Joseph William Singer, ‘The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations’ (2006) 30 *Harvard Environmental Law Review* 309; Joseph William Singer, ‘The Reliance Interest in Property’ (1988) 40 *Stanford Law Review* 611; Joseph William Singer, ‘Re-Reading Property’ (1992) 26 *New England Law Review* 711; Joseph William Singer and Jack M Beermann, ‘The Social Origins of Property’ (1993) 6 *Canadian Journal of Law and Jurisprudence* 217; Carol M Rose, *Property and Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press, 1994); Baker, above n 32; Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford University Press, 2003); Laura S Underkuffler, ‘On Property: An Essay’ (1990) 100 *Yale Law Journal* 127.

37 See my work on the idea of private property: Babie, ‘Idea, Sovereignty, Eco-Colonialism, and the Future’, above n 3, which draws upon the work of Charles Taylor, *A Secular Age* (Belknap Press, 2007).

38 See generally Babie, ‘Idea, Sovereignty, Eco-Colonialism and the Future’, above n 3.

39 Underkuffler, *The Idea of Property*, above n 36, 1 (citations omitted).

or, as I have defined the bundle here, simply 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, the state protects that claim when it is challenged. This idea remains deeply embedded in the human psyche,<sup>40</sup> associated with words like ‘mine’, ‘yours’, ‘castle’,<sup>41</sup> and ‘labour’/‘desert’.<sup>42</sup>

As I have noted, many theorists begin with Blackstone’s famous ‘sole and despotic dominion’ when they discuss the concept of property.<sup>43</sup> But they usually go no further. And that is a problem, for what Blackstone really demonstrated is not the totality of the concept of the theorists — which clearly recognises limitations as not only inherent to the concept itself, but also imposed by the state to limit the power of choice in private property — but the reality of the layperson’s idea, that which individuals like you and me act when we exercise the choice thereby conferred.<sup>44</sup> Roberto Unger characterised the idea this way:

The right [choice] is a loaded gun that the rightholder [the 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 ...<sup>45</sup>

Notwithstanding anything that 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’.<sup>46</sup> The individual holds an idea of private property quite at odds, then, with the concept held by contemporary property theorists, one that, for the holder of choice, provides and secures ‘a zone of unchecked discretionary action that others, whether private citizens or governmental officials, may not invade’.<sup>47</sup>

40 Joan Williams, ‘The Rhetoric of Property’ (1998) 83 *Iowa Law Review* 277, 280–2; Bethany R Berger, ‘What Owners Want and Governments Do: Evidence from the Oregon Experiment’ (2009) 78 *Fordham Law Review* 1281; Jonathan Remy Nash and Stephanie M Stern, ‘Property Frames’ (2010) 87 *Washington University Law Review* 449; Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 123.

41 Singer, ‘The Ownership Society’, above n 36, 317.

42 Ibid 322.

43 Blackstone, above n 30, 2.

44 See Felix S Cohen, above n 36, 374, 378–9.

45 Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press, 1983) 36. This analysis draws upon the concepts of governmentality and bio-politics first enunciated by Michel Foucault: Paul Rabinow and James D Faubion (eds), *Power: Essential Works of Foucault 1954–1984* (New Press, 2000) vol 3; Michel Foucault, *The Birth of Biopolitics: Lectures at the Collège de France, 1978–79* (Graham Burchell trans, Palgrave Macmillan, 2008) [trans of: *Naissance de la Biopolitique: Cours au Collège de France, 1978–1979* (first published 2004)]. See also Kennedy, ‘The Stakes of Law’, above n 36.

46 Unger, above n 45, 37–8.

47 Ibid 38.

So long as choice conferred by private property 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 thinks first of themselves, free to choose to suit themselves, to act as the unchecked ‘gunman’, without any regard for others, then consequences inevitably follow. And so long as that is the case, the *idea* held by the layperson and not the concept enshrined in theory is the real culprit behind the role played by private property in allowing the activities that produce anthropogenic climate change. The state might control, and even prevent, *some* choices, but it cannot prevent all of them (unless, of course, private property, or liberalism itself, is removed entirely).<sup>48</sup> As long as the core of absolute and unchecked discretion in the choices taken remains, the individual will see it as such and act accordingly.

### 3 The Concept and the Idea

The combination of four developments since the 18<sup>th</sup> century has proven disastrous for the planet and its inhabitants: first, the emergence and development of the concept of liberal private property (decision-making authority, or choice), second, the layperson’s idea of private property (absolute discretion in the exercise of choice), third, the extraction and wide availability of fossil fuels as a source of energy, and, fourth, the market economy.<sup>49</sup> The ‘extractivism’ of the fossil fuel industry,<sup>50</sup> then, converged with the market economy and private property which upholds it, generating a destructive force that implicates all, and making it possible for the individual to take control of the range of human activity in a way never before possible: to choose what to wear, where to live, what to do, how to travel, and so forth. Together, these developments permitted and continue to permit people to make choices about a lifestyle which, through the complexities of climate change, lie at the source of the GHG emissions which today threaten our very existence.<sup>51</sup>

In addition to this convergence, a new structure, created by law, also emerged in the 18<sup>th</sup> century, alongside extractivism, the market economy, and private property: the corporation, imbued with the same freedom and choice as the natural person, making it another liberal individual.<sup>52</sup> And the choices made by the corporation are of equal interest, for they structure the range of choice available to individuals. Corporations, through the choices made in relation to the use of goods and resources, enjoy a power to broaden or to restrict the meaning

48 Even the most radical proposals for reform call for allowing liberalism to achieve its full potential rather than its replacement: see, eg, Unger, above n 45.

49 Herman E Daly and Joshua Farley, *Ecological Economics: Principles and Applications* (Island Press, 2<sup>nd</sup> ed, 2011) 10–11.

50 See Klein, *This Changes Everything*, above n 10, 161–87. Klein’s outstanding account of climate change provides a full and careful summary of the historical forces behind these four developments.

51 *Ibid* 174–6.

52 See generally Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2004).

of private property in the hands of individuals. Corporate choices about what to produce determine what we can choose to wear, where we can live, what we can do, how we can travel, the forms of energy we can use, and so forth.<sup>53</sup> But it is a symbiotic relationship:

Whenever we travel by air, visit the supermarket, or consume fossil fuels, we are exporting our costs to others, and to future generations. A free economy is driven by individual demand. And in a free economy individuals, just as much as big businesses, strive to pass on their costs to others, while keeping the benefits.<sup>54</sup>

The GHG emissions made possible by the choice which the institution of private property confers upon individuals and corporations allow some people to visit adverse consequences on others.<sup>55</sup> I call this the ‘climate change relationship’.

The vernacular of property and economic theory innocuously refers to the consequences which we might visit upon others through our choices as ‘externalities’.<sup>56</sup> In the case of the climate change relationship, however, there is nothing innocuous about them. What are they and who do they affect? To answer that, we need to divide those externalities into two categories: spatial and temporal.

## 4 *Eco-Colonising*

### (a) *Spatially*

Our use of fossil fuels, quite unlike what we might have thought 100 years ago, is not without consequences. Quite the contrary: ‘the cumulative effect of those centuries of burned carbon is in the process of unleashing the most ferocious natural tempers of all’.<sup>57</sup> Nature gets its own back on humanity. Anthropogenic climate change increases global temperatures and so causes drought and desertification, the melting of polar sea ice (especially in the north), and rising sea

53 On this, see Murray Bookchin, *Toward an Ecological Society* (Black Rose Books, 1980) 39–40.

54 Roger Scruton, *Green Philosophy: How to Think Seriously about the Planet* (Atlantic Books, 2012) 17.

55 See John Houghton, *Global Warming: The Complete Briefing* (Cambridge University Press, 3<sup>rd</sup> ed, 2004) 201–5; Shahid Naeem, ‘The Life of the Party’ in Gavin Schmidt and Joshua Wolfe (eds), *Climate Change: Picturing the Science* (WW Norton, 2009) 113; Peter Burdon, ‘What is Good Land Use? From Rights to Relationship’ (2010) 34 *Melbourne University Law Review* 708; Peter Burdon, ‘Wild Law: The Philosophy of Earth Jurisprudence’ (2010) 35 *Alternative Law Journal* 62; Donald K Swearer (ed), *Ecology and the Environment: Perspectives from the Humanities* (Harvard University Press, 2009).

56 In relation to the concept of externalities in property theory, see Joseph William Singer, ‘How Property Norms Construct the Externalities of Ownership’ in Gregory S Alexander and Eduardo M Peñalver (eds), *Property and Community* (Oxford University Press, 2010) 57; Jedediah Purdy, *A Tolerable Anarchy: Rebels, Reactionaries, and the Making of American Freedom* (Alfred A Knopf, 2009) 187.

57 Klein, *This Changes Everything*, above n 10, 175.

levels, in turn increasing the intensity of extreme weather events.<sup>58</sup> For humans, us, this means a decrease in global security, and increases in health problems, food shortages and stress on available water supplies.<sup>59</sup> And just as nature has no regard for how we might want it to act, neither do these externalities pay any attention to borders, physical or legal, of a good or resource. Rather, everyone is affected, the world over.

Those with the greatest concentration of private property (the power to choose how to distribute and use the goods and resources that produce the GHG emissions that drive anthropogenic climate change) are disproportionately concentrated in the developed world,<sup>60</sup> while the disadvantaged who bear the brunt of the externalities of climate change are disproportionately found in the developing world.<sup>61</sup> This does not mean, however, that everyone is not contributing to the externality of climate change; it merely means that those of the developed world are disproportionately suffering the consequences. But all people contribute; 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.<sup>62</sup>

Those who live in regions barely above sea level, as is the case for most Pacific Island nations, offer a stark example, among the many the world over that could be used to make the same point, of the asymmetrical impact of these consequences. It is now well-known that all nations will suffer the consequences of climate

58 See IPCC, *AR5*, above n 27; Adam Sobel, 'Going to Extremes' in Gavin Schmidt and Joshua Wolfe (eds), *Climate Change: Picturing the Science* (WW Norton, 2009) 95. For a succinct and compelling summary of the science and the role of liberalism, see Purdy, *A Tolerable Anarchy*, above n 56, 187, 215–22, 225–8; Jedediah Purdy, 'Climate Change and the Limits of the Possible' (2008) 18 *Duke Environmental Law & Policy Forum* 289.

59 As noted above, these consequences are well-documented: see IPCC, *AR5*, above n 27; Gore, *An Inconvenient Truth*, above n 12; Stern, above n 27; Garnaut, *The Garnaut Review 2011*, above n 27; Weaver, above n 27.

60 See the analysis of global inequality in the distribution of wealth in 'More Millionaires than Australians', *The Economist* (online), 22 January 2011 <<http://www.economist.com/node/17929057>>, which presents statistics showing that some 41% of those who have net assets of more than \$1 000 000 live in the United States, with 10% in Japan and only 3% in China. Moreover, '[t]he global wealth pyramid has a very wide base and a sharp point. The richest 1% of adults control 43% of the world's assets; the wealthiest 10% have 83%. The bottom 50% have only 2%'. See also Keating et al, 'Global Wealth Report' (Report, Credit Suisse, October 2010) <<https://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=88DC32A4-83E8-EB92-9D57B0F66437AC99>> 4–5; Anthony Shorrocks, James B Davies and Rodrigo Lluberas, 'Global Wealth Databook' (Databook, Credit Suisse, October 2010) <<https://publications.credit-suisse.com/tasks/render/file/index.cfm?fileid=88DC07AD-83E8-EB92-9D5C3EAA87A97A77>> 78–94, 111–123; 'The Beautiful and the Damned', *The Economist* (online), 20 January 2011 <<http://www.economist.com/node/17957107>>; 'The Rich and the Rest', *The Economist* (online), 20 January 2011 <<http://www.economist.com/node/17959590>>.

61 See generally Field et al (eds), above n 27; Barros et al (eds), above n 27. See also Scruton, above n 54, 17; Singer, 'How Property Norms Construct the Externalities of Ownership', above n 56, 57; Purdy, *A Tolerable Anarchy*, above n 56, 187.

62 Purdy, *A Tolerable Anarchy*, above n 56, 187.

change externalities. The inhabitants of these small island states,<sup>63</sup> especially of the South Pacific,<sup>64</sup> already provide a mirror, reflecting what all states are soon to face; as it is often colloquially put, these small island states are a ‘canary in the mine’ for the rest of us. ‘[T]he most dire and immediate’ of these externalities<sup>65</sup> affect the natural environment, humans, and the economy of that region.<sup>66</sup>

In some cases, the effects of climate change for those living in the South Pacific island states occur rapidly and leave an immediately apparent consequence: the increasing intensity of extreme weather events, such as typhoons and cyclones.<sup>67</sup> This will cause movements of people in the immediate short-term. In the longer term, however, sea level rise poses the most serious yet slow and imperceptible threat.<sup>68</sup> Sixty per cent of the human population lives within 100 kilometres of the ocean, with the majority in small- and medium-sized settlements on land no more than 5 metres above sea level.<sup>69</sup> Low-lying atoll nations in the South Pacific — Marshall Island, Tuvalu, Nauru, Kiribati and Tokelau, all between five and ten metres above sea level — therefore face serious risk of losing land due to any rise in sea levels.<sup>70</sup> The evidence, then, is sobering;<sup>71</sup> William C G Burns finds:

In the South Pacific, recent research indicates that sea levels have been increasing by as much as 25 millimetres per year, more than ten times the global trend this century ... lead[ing] to the inference that sea levels may increase substantially over the next century in the Pacific. ... A one-meter rise could result in the loss of

63 The United Nations defines small island states as states that have an area of less than 10 000 square kilometres and a population of fewer than 500 000 inhabitants: France Bequette, ‘Small Islands: Dreams and Realities’, *UNESCO Courier*, March 1994, 23.

64 The South Pacific comprises 22 island states, of which four have a land area of less than 100 square kilometres, and 11 have land area between 100 and 1000 square kilometres: Paul F Holthus, ‘Coastal and Marine Environments of Pacific Islands: Ecosystem Classification, Ecological Assessment, and Traditional Knowledge for Coastal Management’ in George A Maul (ed), *Small Islands: Marine Science and Sustainable Development* (American Geophysical Union, 1996) 341, 342. Of the 22 island states that comprise the South Pacific, 14 are politically independent: J R Campbell, ‘Contextualizing the Effects of Climate Change in Pacific Island Countries’ in Thomas W Giambelluca and Ann Henderson-Sellers (eds), *Climate Change: Developing Southern Hemisphere Perspectives* (John Wiley & Sons, 1996) 349, 354.

65 William C G Burns, ‘The Impact of Climate Change on Pacific Island Developing Countries in the 21<sup>st</sup> Century’ in Alexander Gillespie and William C G Burns (eds), *Climate Change in the South Pacific: Impacts and Responses in Australia, New Zealand, and Small Island States* (Kluwer Academic, 2000) 233, 233.

66 *Ibid* 233–50. See also United Nations Office for the Coordination of Humanitarian Affairs, *El Niño in the Pacific* <<http://www.unocha.org/el-nino-pacific>>.

67 Burns, above n 65, 244–6.

68 Andy Coghlan, ‘Rising Seas Expected to Sink Islands Near US Capital in 50 Years’, *New Scientist* (online), 15 December 2015 <<https://www.newscientist.com/article/mg22830523-900-rising-seas-expected-to-sink-islands-near-us-capital-in-50-years/>>.

69 Peter M Vitousek et al, ‘Human Domination of Earth’s Ecosystems’ (1997) 277 *Science* 494, 495; Moritz Bollmann et al, ‘World Ocean Review: Living with the Oceans’ (Report, Maribus, 2010) 68 <[http://worldoceanreview.com/wp-content/downloads/worl/WOR1\\_english.pdf](http://worldoceanreview.com/wp-content/downloads/worl/WOR1_english.pdf)>

70 Burns, above n 65, 235

71 See also Robert J Nicholls and Richard S J Tol, ‘Impacts and Responses to Sea-Level Rise: A Global Analysis of the SRES Scenarios over the Twenty-First Century’ (2006) 364 *Philosophical Transactions of the Royal Society A* 1073; Gordon McGranahan, Deborah Balk and Bridget Anderson, ‘The Rising Tide: Assessing the Risks of Climate Change and Human Settlements in Low Elevation Coastal Zones’ (2007) 19 *Environment and Urbanization* 17.



80 per cent of the Majuro atoll in the Marshall Islands, home to half of the nation's population, and 12.5 per cent of the land mass of Kiribati.<sup>72</sup>

Such rises pose a serious threat to '[m]ost [Pacific island states] ... characterized by high population density, especially in coastal regions, and [where] populations could double in the next 25 years.'<sup>73</sup> Even the modest sea level rises predicted for the Pacific island states, therefore, will result in a massive displacement of 'climate' or 'environmental refugees'.<sup>74</sup> Indeed, this is already occurring. In 2008, the Kiribati government approached the governments of New Zealand and Australia with a request to accept its population as permanent refugees and Tuvalu made a similar approach to Australia requesting a small portion of land to which the nation could be moved and re-established.<sup>75</sup> Between 1947 and 2014, five islands of the Solomon Islands sank below sea level.<sup>76</sup> And the developed world is not immune: the first American climate refugees have already been forced from south-eastern Louisiana,<sup>77</sup> and more could soon follow from Chesapeake Bay<sup>78</sup> and low-lying parts of Florida.<sup>79</sup>

### (b) Temporally

The South Pacific island states also demonstrate that the impacts of climate change are not only felt by the present generation in ways unconstrained by the legal or physical borders of states, but also by those of future generations. In other words, the consequences of climate change are uncontainable in time,<sup>80</sup> producing a temporal externality.<sup>81</sup> Mike Hulme summarises it this way: 'put

72 Burns, above n 65, 235 (citations omitted).

73 Ibid 236 (citations omitted).

74 Steve Lonergan, 'The Human Challenges of Climate Change' in Harold Coward and Andrew J Weaver (eds), *Hard Choices: Climate Change in Canada* (Wilfrid Laurier University Press, 2004) 45, 51–3; Ross Garnaut, *The Garnaut Climate Change Review: Final Report* (Cambridge University Press, 2008), 149–50.

75 Scott Leckie, 'Climate-Related Disasters and Displacement: Homes for Homes, Lands for Lands' (Paper presented at the Expert-Group Meeting on Population Dynamics and Climate Change, London, 24–25 June 2009) 7 <<http://www.pacificdisaster.net/pdnadmin/data/documents/5542.html>>.

76 'Rising Seas Sink 5 Islands', *New Scientist*, 14 May 2016, 6; Simon Albert et al, 'Interactions between Sea-Level Rise and Wave Exposure on Reef Island Dynamics in the Solomon Islands' *Environmental Research Letters* 2–4 <<http://iopscience.iop.org/article/10.1088/1748-9326/11/5/054011/pdf>>.

77 Coral Davenport and Campbell Robertson, 'Resettling the First American "Climate Refugees"', *The New York Times* (online), 3 May 2016 <<http://www.nytimes.com/2016/05/03/us/resettling-the-first-american-climate-refugees.html>>.

78 Andy Coghlan, 'Climate Change to Hit in Washington's Backyard', *New Scientist*, 19–26 December 2015, 9.

79 John Schwartz, 'NASA is Facing a Climate Change Countdown', *The New York Times* (online), 4 April 2016 <<https://www.nytimes.com/2016/04/05/science/nasa-is-facing-a-climate-change-countdown.html>>.

80 Houghton, above n 55, 200–1; Chris Park, *A Dictionary of Environment and Conservation* (Oxford University Press, 2008) 232–3; Stephen Gardiner, 'A Perfect Moral Storm: Climate Change, Intergenerational Ethics, and the Problem of Corruption' in Steve Vanderheiden (ed), *Political Theory and Global Climate Change* (MIT Press, 2008) 25; Hulme, *Why We Disagree*, above n 10, 132–8; Hansen, above n 13, 237–77; Northcott, above n 13, 145–8.

81 Gardiner, above n 80, 31. For a full account of the temporality of the choices predicated upon private property, see Babie, 'Choices that Matter', above n 3; Babie, 'Idea, Sovereignty, Eco-Colonialism, and the Future', above n 3.



... crudely, how much do we care about our own welfare (read, “consumption”) rather than the welfare of others (read, “foregone consumption”)?”<sup>82</sup> Either way, a choice is being taken about how to use goods and resources, and those choices bear consequences for others both today and in the future.<sup>83</sup> And those of future generations have much to lose from the failure to constrain present choice. 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.<sup>84</sup>

James Hansen paints a graphic picture of what the world may look like for future generations, and which, as we have seen, is already occurring for the inhabitants of the South Pacific islands. It is a world to which our choices, predicated on private property, are today contributing. It 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<sup>85</sup> (even a projected sea level rise of only 18–20 feet will mean that ‘[t]he maps of the world will have to be redrawn’).<sup>86</sup> 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),<sup>87</sup> affecting ‘populations that are one or two orders of magnitude greater than the number of people displaced by Hurricane Katrina’ in 2005.<sup>88</sup> For people living in affected areas in the future

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.<sup>89</sup>

Hansen concludes that ‘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.’<sup>90</sup> The power and choice that we have over goods and resources bring those who exercise such power and make those choices into a relationship that spans both the physical and

82 Hulme, *Why We Disagree*, above n 10, 133.

83 Ibid 135; Hansen, above n 13, 237–77.

84 Gardiner, above n 80, 32–5; See generally Gavin Schmidt, ‘The Prognosis for the Climate’ in Gavin Schmidt and Joshua Wolfe (eds), *Climate Change: Picturing the Science* (WW Norton, 2009) 195; Charles Officer and Jake Page, *When the Planet Rages: Natural Disasters, Global Warming, and the Future of the Earth* (Oxford University Press, revised ed, 2009); Stephan Faris, *Forecast: The Consequences of Climate Change, from the Amazon to the Arctic* (Scribe, 2009).

85 Hansen, above n 13, 250.

86 Gore, *An Inconvenient Truth*, above n 12, 196–7 (citations omitted). See also the images of Florida, San Francisco, the Netherlands, Beijing, Shanghai, Calcutta, Bangladesh and New York: at 198–209.

87 See generally Cleo Paskal, *Global Warring: How Environmental, Economic, and Political Crises Will Redraw the World Map* (Palgrave Macmillan, 2010); Gwynne Dyer, *Climate Wars: The Fight for Survival as the World Overheats* (Scribe, revised ed, 2010).

88 Hansen, above n 13, 257.

89 Ibid 259.

90 Ibid 269.

spatial and the temporal. And the law is beginning to recognise the temporality of the climate change relationship.<sup>91</sup>

The climate change relationship, then, is an interdependency of human and environment, within which the choices made today carry the potential to affect not only one's neighbour across the street, but also across the globe, and not only for current generations, but also future ones. It is another way of saying that we, individuals (natural and corporate), are engaged in massive 'eco-colonialism'.

The way in which I use the term 'eco-colonialism', here and in earlier work, begins with its historic meaning. Historically, through colonialism, international law permitted the exploitation or subjugation of a people, the 'peripheral society' or colony, by a larger or wealthier power, the 'metropole', thus creating a set of unequal relationships between the two.<sup>92</sup> In acquiring territory as a colony, states relied upon colonialism in order to gain supreme, absolute, and unlimited power over a people and thus change the social, political and economic structures within the colony.<sup>93</sup> Jürgen Osterhammel summarises 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.<sup>94</sup>

I argue elsewhere that adopting and adapting this historical meaning of colonialism, and in conjunction with the choice conferred by the concept of private property, we can redefine as 'eco-colonialism' the myriad choices made by individuals and corporations about goods and resources and the consequences of those choices for others such as those living in the South Pacific island states. Some scholars 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.'<sup>95</sup> I reject that approach as too

91 See, eg, *Juliana v United States of America* 217 F Supp 3d 1224 (D Or, 2016), which was decided on 8 April 2016. Magistrate Judge Coffin ordered that a negligence claim for harm to future generations caused by activities which produce emissions responsible for climate change could proceed to trial. The decision was affirmed on 10 November 2016.

92 Jürgen Osterhammel, *Colonialism: A Theoretical Overview* (Shelley L Frisch trans, Markus Wiener, 1997) 16–17 [trans of: *Kolonialismus* (first published 1995)].

93 Margaret Kohn, *Colonialism* (10 April 2012) Stanford Encyclopedia of Philosophy <<http://plato.stanford.edu/entries/colonialism/>>. See also *ibid*.

94 Osterhammel, above n 92, 16–17.

95 Michael Edwards, 'Parochialism and Empowerment: Responding to Ecocolonialism and Globalisation in the Southwest Pacific' in Alexander Gillespie and William C G Burns (eds), *Climate Change in the South Pacific: Impacts and Responses in Australia, New Zealand, and Small Island States* (Kluwer Academic, 2000) 251, 258 n 19. Similar modifications have been made to 'imperialism', which has been adapted to 'eco-imperialism', or 'ecological imperialism'. On imperialism, see Osterhammel, above n 92, 21–2. On eco-imperialism, see generally Paul Driessen, *Eco-Imperialism: Green Power Black Death* (Academic Foundation, 2005). On ecological imperialism, see generally Alfred W Crosby, *Ecological Imperialism: The Biological Expansion of Europe, 900–1900* (Cambridge University Press, 2<sup>nd</sup> ed, 2004).

narrow, adopting a position that corresponds more fully to the historic meaning of ‘colonialism’, while adapting it in two important respects.

First, because the climate change relationship comprises a spatial dimension, by ‘eco-colonialism’ I mean the way in which individuals in one nation, through the power conferred 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 the private property choices made by individuals and corporations.

Are all individuals who hold private property eco-colonialists in the way defined here? Yes. Even having accounted for the inherent state regulation of private property, the choice it confers instantiates the climate change relationship between the holders of choice and others — not only those living beyond the legal jurisdictional and territorial boundaries of one state, but also those of future generations. And we have seen that those externalities fall disproportionately (asymmetrically) on the poor and disadvantaged of the developing world and of future generations. Individuals in the developed world (a new metropole), through the agency made possible by private property, affect the environment through climate change and thereby subjugate and exploit the citizens of developing nations, both now and in the future (a new peripheral society, or eco-colony).

Just as nations once colonised peoples, usually through the direct use of military might, individuals now eco- and intergenerationally-colonise others indirectly through the control and use of goods and resources made possible by private property. And this occurs within the legal, jurisdictional boundaries of those who hold the private property making possible that control and use. And this, just as nations did in the past, allows individuals today, through the use of the choice conferred by private property, to create an unequal relationship between the developing and the developed world, altering the social, political and economic structures of the developing world, both today and in the future. This is eco-colonialism.

At various times in human history, slavery sometimes went hand in hand with colonialism. Is it possible that a form of ‘eco-slavery’ is also occurring alongside the eco-colonialism of climate change? Is it possible that we are doing the same to others today? I turn to that question in the next section.

## B Eco-Slavery

Andrew J Hoffman was among the first<sup>96</sup> to suggest a connection between climate change and slavery.<sup>97</sup> Slavery was once a primary source of global energy and wealth and, Hoffman argues, those who fought against it challenged the very way of life in colonial societies. To abolish it, those who supported it claimed, would lead to economic collapse.<sup>98</sup> The same economic arguments are made today: ‘Just as few people saw a moral problem with slavery in the 18<sup>th</sup> century, few people in the 21<sup>st</sup> century see a moral problem with the burning of fossil fuels.’<sup>99</sup> And equating the two is used as a way of shocking or jolting us into action.

Hoffman’s and others’ argument runs this way: because there exists substantial scientific consensus about anthropogenic climate change, there is little social consensus and, for that reason, we require a jolt, something to jar us out of our current ways, the rut that sees us continue to produce the GHG emissions that drive the enhanced greenhouse effect. We need to change our behaviour, we know that, but we continue to delay. Comparing our failure to act with the failure to abolish slavery may provide the needed jolt.<sup>100</sup> There is no question that something shocking, such as equating climate change and slavery, might provide that shock. But quite apart from whether equating climate change and slavery will provide a jolt to action, I argue here that climate change *is* slavery.

It may seem hyperbole to equate climate change directly with the abhorrent and historically laden concept of slavery, especially in light of the very real slavery that continues to afflict our world. A recent report estimates that 45.8 million people live in slavery in 167 countries.<sup>101</sup> Nearly 60 per cent live in India, China, Pakistan, Bangladesh, and Uzbekistan,<sup>102</sup> engaged in ‘human trafficking, forced labor, sexual exploitation, and other forms of illegal enslavement’.<sup>103</sup> But does the choice which the *concept* of private property confers and the absolutist *idea* of private property held by the layperson and upon which people operate in

96 See W J Nuttall, ‘Slaves to Oil: Exploring Parallels between the Abolition of Slavery and the Challenge of Climate Change Mitigation’ (Working Paper No 0921, University of Cambridge Electricity Policy Research Group, 12 August 2009) 9–10 <<http://www.eprg.group.cam.ac.uk/wp-content/uploads/2014/01/binder113.pdf>>.

97 Andrew J Hoffman, ‘Climate Change as a Cultural and Behavioural Issue: Addressing Barriers and Implementing Solutions’ (2010) 39 *Organizational Dynamics* 295, 296; Andrew J Hoffman, *How Culture Shapes the Climate Change Debate* (Stanford University Press, 2015) 74–9. See also Mat McDermott, *Climate Change, Like Slavery, Needs a True Cultural Shift to Stop It* (29 October 2010) Treehugger <<http://www.treehugger.com/corporate-responsibility/climate-change-like-slavery-needs-a-true-cultural-shift-to-stop-it.html>>.

98 Hoffman, ‘Climate Change’, above n 97, 296. See also McDermott, above n 97.

99 Hoffman, ‘Climate Change’, above n 97, 296.

100 Hoffman, *How Culture Shapes the Climate Change Debate*, above n 97, 7–13.

101 Walk Free Foundation, ‘Global Slavery Index 2016’ (Report, 2016) 4 <<http://downloads.globalslaveryindex.org/GSI-2016-Full-Report-1499478866.pdf>>.

102 Ibid. See also John W Loftus, ‘The Slave is the Owner’s Property: Christianity and the Savagery of Slavery’ in John W Loftus (ed), *Christianity is Not Great: How Faith Fails* (Prometheus Books, 2<sup>nd</sup> ed, 2014) 158.

103 Marina Koren, ‘Where the World’s Slaves Live’, *The Atlantic* (online), 31 May 2016 <<http://www.theatlantic.com/news/archive/2016/05/where-the-worlds-slaves-live/484994/>>.

exercising that choice combine to render anthropogenic climate change a form of ‘eco-slavery’? Can we add the whole of the world’s population to the number of slaves, and climate change as the medium by which the whole of the world’s population are the enslavers? Others have made similar claims, not merely about a set of choices and their consequences, such as the use of fossil fuels and the production of GHG, but about the whole of liberalism/neoliberalism itself.<sup>104</sup> But in some ways, this has been to use ‘slavery’ in a metaphorical sense, as the absence or restriction of freedom that may come about through the existence of this or that political ideology.<sup>105</sup> My claim here is not metaphorical — it is factual. If that is my claim, I must first define what I mean by slavery.

## 1 What is Slavery?

Slavery is the ownership of one person by another. There is no ambiguity about it: the ownership of one by another was and is the dominant characteristic feature of slavery, and it is this which makes the practice so abhorrent.<sup>106</sup> Historically, two legal systems developed a body of slave law that coalesced around the fundamental characteristic of the ownership of one person by another: Roman and American. The Roman law of slavery represents the earliest extant body of law detailing the treatment of individuals as the property or things of another.<sup>107</sup> In the Americas, and particularly in the United States during the 17<sup>th</sup> – 19<sup>th</sup> centuries, a slave law developed the consequences of which the United States continues to live with today.<sup>108</sup>

Roman law perhaps captured best this fundamental characteristic of slavery: ‘an institution of the *ius gentium* [law of nations], whereby someone is against nature made subject to the ownership of another.’<sup>109</sup> The law of nations may have meant that this applied to citizens and foreigners alike, or it may have meant that it was part of the general common law of Rome, as opposed to special laws in particular states. Either way, though, the important point involves the fact that it is against nature: ‘if freedom is natural, slavery must be unnatural’.<sup>110</sup> A slave in Roman

104 Howard Zinn, *A People’s History of the United States* (Harper & Row 1980) 205.

105 See, eg, Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969) 131–41.

106 Karl Marx, ‘Wage Labour and Capital’ in Robert C Tucker (ed), *The Marx-Engels Reader* (WW Norton, 2<sup>nd</sup> ed, 1978) 203, 205. More recent, and seminal, scholarship traces the transformation of the concept of slave to the legal construct of ‘personhood’: see generally Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates about Property and Personality* (Ashgate Publishing, 2001); Ngaire Naffine, *Law’s Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* (Hart Publishing, 2009).

107 See Barry Nicholas, *An Introduction to Roman Law* (Clarendon Press, 1962) 60–76; Alan Watson, *Roman Slave Law* (Johns Hopkins University Press, 1987); Paul du Plessis, *Borkowski’s Textbook on Roman Law* (Oxford University Press, 4<sup>th</sup> ed, 2010) 87–8; Andrew Lewis, ‘Slavery, Family, and Status’ in David Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press, 2015) 151, 151–65.

108 See generally Alan Watson, *Slave Law in the Americas* (University of Georgia Press, 1989); Mark V Tushnet, *Slave Law in the American South: State v Mann in History and Literature* (University Press of Kansas, 2003); Zinn, above n 104, ch 9.

109 Alan Watson (ed), *The Digest of Justinian* (University of Pennsylvania Press, revised ed, 1998) vol 1, 15

110 Du Plessis, above n 107, 88.

law was thus the object of ownership of another, which carried with it the notion that as a ‘thing’ a slave is without rights.<sup>111</sup> And while it is often said that a slave was ‘rightless’, this was not always the case: ‘there were circumstances in which slaves had certain privileges or the power to alter legal relationships, eg a slave could make contracts on behalf of his master in some circumstances, and public slaves could marry and make wills.’<sup>112</sup> And it was not as if the humanity of the slave, and so its importance in Roman society, could simply be swept away by the fact of slavery.<sup>113</sup> Moreover, the possibility of freedom, through the process of manumission in Roman law,<sup>114</sup> meant that the humanity of the slave remained even while treated as a thing subject to property.<sup>115</sup>

Yet a careful reading of the Roman law reveals that while ownership remains the fundamental criterion of determining when slavery exists, in that relationship of ownership of one by another, something more was happening: the slave lost liberty and freedom while subject to the owner-slave relationship. Roman law drew a ‘great divide’ in relation to the law of persons: all people are either free or slaves.<sup>116</sup> The Romans defined freedom as ‘one’s natural power of doing what one pleases, save insofar as it is ruled out either by coercion or by law’.<sup>117</sup> The Romans began with a presumption that all men were free — it is a ‘natural’ condition. It hardly need be said that freedom is notoriously difficult to define,<sup>118</sup> and, reassuring as this definition of freedom might be, it does little to assist with precision, especially in light of the ‘great importance of slavery as a social, economic, and legal institution’.<sup>119</sup>

The main difference between the Roman and American systems of slave law further illustrates this point: ‘the central criterion for determining whether a person would be a slave in America was skin color, while in Rome enslavement was not based upon race or background, but was a “misfortune that could happen to anyone.”’<sup>120</sup> The racist foundation of American slave law carried with it one important implication for the divergence of the American and Roman law. In the former, freedom was never possible, even if released from slavery, whereas in the latter, once freed, or manumitted, a slave could become a citizen. In America, true freedom, in the form of citizenship, was never possible because racism continued to hold the freed slave in its grip, while in Rome ‘in the late Republic and in the early Empire there were tens of thousands of ex-slaves mingling with the freeborn

111 Nicholas, above n 107, 69–71; Lewis, above n 107, 152–3.

112 Du Plessis, above n 107, 88.

113 Ibid 88–9.

114 Nicholas, above n 107, 72–6; Lewis, above n 107, 154–5.

115 See Watson, *Roman Slave Law*, above n 107, 23–34, 46–66.

116 Watson, *The Digest of Justinian*, above n 109. See also Du Plessis, above n 107, 87–8; Nicholas, above n 107, 60–1.

117 Watson, *The Digest of Justinian*, above n 109.

118 Du Plessis, above n 107, 88; Watson, *Roman Slave Law*, above n 107, 7.

119 Du Plessis, above n 107, 88. See also Watson, *Roman Slave Law*, above n 107, 7.

120 A Leon Higginbotham, Jr, ‘Foreword’ in Alan Watson, *Roman Slave Law* (Johns Hopkins University Press, 1987) ix, x.

inside the city of Rome itself.<sup>121</sup> Thus, in short, in the Roman system, the loss of freedom could be and was called slavery; and a Roman slave could aspire to being freed and thus to becoming a citizen, to regaining liberty and freedom.<sup>122</sup>

While certainly not denying that it is simply the ownership of one person by another, I use slavery in the Roman sense, as a loss of liberty and freedom, to describe the consequences of climate change as eco-slavery. For present purposes, then, slavery means the exercise of the freedom of choice by one person or a collective of persons, made possible by private property so as to remove, or which has the effect of removing, the liberty and freedom of another person or collective of persons. It is, in short, ‘the most extreme form imaginable of exploitation of one human being by another’.<sup>123</sup> And this is true of anthropogenic climate change; that is what I mean by eco-slavery.

And how is this exploitation and the removal of liberty and freedom accomplished? Certainly it is not a direct exertion of power, as in the more recognisable form of slavery found in Rome or the Americas. Rather, the choice exercised by people through private property which produces the GHGs which drive anthropogenic climate change, acts upon the environment itself. And it is through this complex relationship, which I have called the climate change relationship, that all people act upon others and themselves. I am not the first to identify the slavery that results through our acting upon the environment. While it might be tempting to think that humanity controls nature to the betterment of everyone, in fact, as C S Lewis wrote, powerfully, ‘what we call Man’s power over Nature turns out to be a power exercised by some men over other men with Nature as its instrument’,<sup>124</sup> to the detriment of many. Murray Bookchin provides the background to this point, noting the parallels between how historically we have made people into slaves and how we have done the same to the environment. It is not a great leap from that to Lewis’s claim that we use one slave, the environment, to enslave another, people. And Bookchin is clear that when we enslave others this way, we also enslave ourselves.<sup>125</sup> Nature, then, is that upon which we act, private property is the tool which we use so as to act, and others are those who we enslave in so acting.

121 Watson, *Roman Slave Law*, above n 107, 23 (citations omitted).

122 Ibid.

123 Ibid 1.

124 C S Lewis, *The Abolition of Man: or Reflections on Education with Special Reference to the Teaching of English in the Upper Forms of Schools* (Geoffrey Bles, 1967) 40.

125 Bookchin, *Toward an Ecological Society*, above n 53, 40–1; Murray Bookchin, *The Ecology of Freedom: The Emergence and Dissolution of Hierarchy* (Cheshire Books, 1982) 1–13. And if there was ever any doubt that we act to enslave ourselves as much as others, a simple review of the evidence dispels that misconception. Consider the simple example of climate-related extreme weather events. A list of the increasing number and severity of those events in Australia over time can be found in Will Steffen and David Alexander, ‘Super-Charged Storms in Australia: The Influence of Climate Change’ (Report, Climate Council, 2016) 6–16.



## 2 Eco-Enslaver

Who is the eco-enslaver? In a seminal article written almost 100 years ago, Morris Cohen, writing about capitalism and the right to exclude in respect of labour relations, appropriated a public law concept, sovereignty, to argue that the conferral of power engendered in private property is, in fact, nothing less than a state grant of sovereignty to the individual said to hold property.<sup>126</sup> By drawing upon this traditionally public law concept to describe property, Cohen at once makes clear what property is, whilst simultaneously blurring the traditional boundary drawn between the public and the private law. Cohen argues that the public–private divide was, at the time he wrote — and it continues to remain so today — ‘one of the fixed divisions of the jural field’, dating as far back as the Roman division ‘between dominium, the rule over things by the individual, and imperium, the rule over all individuals by the prince’.<sup>127</sup> Still, Cohen continues, while John Austin cast serious doubt on the classical distinction between public and private law,<sup>128</sup> some legal traditions extant at, or emerging very nearly after, the time of the Roman law, such as ‘early Teutonic law, the law of the Anglo-Saxons, Franks, Visigoths, Lombards and other tribes’, and even feudal tenurial law, made no such distinction.<sup>129</sup> The blurring of this divide, then, as far as property is concerned, has been with us for quite some time.

Yet, what Cohen wanted to show was that as a tool for use in the analysis of property, the Roman distinction between dominium and imperium, between the private and the public, retains its usefulness, notwithstanding the conceptual ‘blurring’ in the case of property. While both comprise a form of sovereignty, the real distinction lies in who holds the power encapsulated by each form. In the case of property, dominium is the grant of power in the form of rights conferred by the state upon the individual, of which there are three main types: those which protect economic productivity, those which protect privacy, and those protecting social utility. In each case, the benefit of the right inures to the individual.<sup>130</sup> Cohen concludes that:

the law of property helps me directly only to exclude others from using the things which it assigns to me. If then somebody else wants to use the food, the house, the land, or the plow which the law calls mine, he has to get my consent. To the extent that these things are necessary to the life of my neighbor, the law thus confers on me a power, limited but real, to make him do what I want.<sup>131</sup>

Cohen found, writing in 1927, that there were a number of areas where the state was expanding this power, this sovereignty, this dominium conferred upon individuals; the power of the owner over labour being the most significant. And in the course of the state expanding that power, Cohen argued, one must not

126 See generally Morris R Cohen, above n 36.

127 Ibid 8–9.

128 Ibid 8, citing John Austin, *Lectures on Jurisprudence* (John Murray, 5<sup>th</sup> revised ed by Robert Campbell, 1885) vol 2, 744.

129 Morris R Cohen, above n 36, 9.

130 Ibid 11–12.

131 Ibid 12.

lose sight of the fact that dominium over things also constitutes imperium over people;<sup>132</sup> the greater the protection accorded the individual, the greater the possibility that choices exercised pursuant to that power will have consequences, both positive and negative, for others.<sup>133</sup>

Focusing on labour law, Cohen found that the ownership of machinery also determined future distribution of goods among people.<sup>134</sup> Today we can see more of what Cohen found, but in different aspects of modern life. And that is where Cohen's work, seminal in 1927, and just as relevant today, assists us in looking at the role of private property within the climate change relationship. Every choice we make also affects the course of the lives of others. Using what I own, for instance, can and does have environmental consequences for people all over the earth. Cohen also recognised something that is significant still today:

those who have the power to standardize and advertise certain products do determine what we may buy and use. We cannot well wear clothes except within lines decreed by their manufacturers, and our food is becoming more and more restricted to the kinds that are branded and standardized.<sup>135</sup>

Think about this in our contemporary world: I may choose green power, but if no corporation produces it, to say I have that choice is hollow. In short, concludes Cohen, in property 'we have the essence of what historically has constituted political sovereignty'.<sup>136</sup>

What we can take away from Cohen is simply this: a public law concept — sovereignty — captures what private property means; it is power, conferred by the state and enjoyed by individuals so as to protect themselves through controlling both things and others. Private property, then, is the state's conferral of 'sovereignty' upon the individual. Cohen's use of the concept of sovereignty allows us to draw two conclusions about how private property is the tool which we use to enslave others through the medium of the environment.

The first conclusion emerges from the orthodox understanding of the concept of sovereignty, according to which an independent state acquires jurisdiction over a territory, in turn gaining international independence with supreme, absolute, and uncontrollable power to govern and regulate its internal affairs without accountability.<sup>137</sup> Cohen's use represents a radical departure from this orthodox view; applying this to the private sphere captures the essence of the power, control and choice which private property confers on individuals. The state endorses,

132 Ibid 13.

133 We find this trend, expanding the scope of the individual's power into novel areas, continued by Charles A Reich, 'The New Property' (1964) 73 *Yale Law Journal* 733, which demonstrates that, far from receding, the power of the individual conferred by the state through property expands with every passing year.

134 Morris R Cohen, above n 36, 13.

135 Ibid 13–14.

136 Ibid 13.

137 Bryan A Garner (ed), *Black's Law Dictionary* (Thomson Reuters, 9<sup>th</sup> ed, 2009) 1524. See also Kent McNeil, *Common Law Aboriginal Title* (Oxford University Press, 1989) 108–33. Perhaps the fullest and best depiction of the means by which sovereignty could be acquired over territory is found in *Mabo v Queensland [No 2]* (1992) 175 CLR 1.

through private property, individual freedom of choice in relation to goods and resources. Felix Cohen used this to describe the relationship between state and individual:

that is property to which the following label can be attached:  
 To the world [including the state]:  
 Keep off X unless you have my permission, which I may grant or withhold.  
 Signed: Private citizen  
 Endorsed: The state<sup>138</sup>

In its essence, then, private property is *really* a state delegation of *power* permitting the individual to do as one pleases with a particular good or resource.

This delegation forms the core of what Duncan Kennedy calls legal ground rules that permit people to cause legalised injury to others.<sup>139</sup> And these ground rules 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.<sup>140</sup>

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 policy, and that the law is responsible for the outcome, at least in the abstract sense that the law 'could have made it otherwise.' ... It is clear that lawmakers *could* require almost anything. When they require [sic] 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.<sup>141</sup>

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.

And this leads to the second important conclusion that Cohen's use of sovereignty allows us to draw in relation to private property's role in the climate change relationship. If we accept that the state *could* act, through moral imperatives, duties and obligations, to prevent the harm of anthropogenic climate change which 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, as with all western jurisprudence, developed in a post-Westphalian world, one in which arbitrary national boundaries were treated as more important than the human-caused

138 Felix S Cohen, above n 36, 374.

139 Duncan Kennedy, *Sexy Dressing Etc: Essays on the Power and Politics of Cultural Identity* (Harvard University Press, 1993) 90–1.

140 Ibid 90–1 (emphasis in original) (citations omitted).

141 Ibid 91 (emphasis in original) (citations omitted).

phenomena that transcend those boundaries.<sup>142</sup> 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 national legal 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’;<sup>143</sup> 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 with only two kinds of law: the domestic municipal law of nation states and public international law ...<sup>144</sup>

The history of private property and theorising about it exhibits 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. The holders of private property are, then, when viewed through the climate change relationship, eco-enslavers.

### 3 *Eco-Enslaved*

Who is eco-enslaved? Historically, colonialism took place at the state level. The pernicious and morally abhorrent practice of slavery typically went hand-in-hand with colonialism, especially that form of colonialism practiced by all early modern empires. Colonialism was power and domination exerted over a territory and its people; slavery was the power exerted by individuals over individuals as an adjunct to colonialism.<sup>145</sup>

Morris Cohen’s use of ‘sovereignty’ focuses our attention on the truth that ‘we must not overlook the actual fact that dominion over things is also imperium over our fellow human beings.’<sup>146</sup> Decision-making authority, or choice, is exercisable not only in relation to the good or resource, but also in relation to others. And what is exercised has a very specific consequence: it limits, and removes freedom. Thus, the conferral of sovereignty in private property results in a state-created, state-delegated, and state-enforced asymmetry, for it is not one, or even a few, others who suffer the removal of their freedom; rather, the climate change

142 See generally Parag Khanna, *The Second World: Empires and Influence in the New Global Order* (Random House, 2008).

143 William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009) 10.

144 William Twining, ‘Law, Justice and Rights: Some Implications of a Global Perspective’ in Jonas Ebbesson and Phoebe Okowa (eds), *Environmental Law and Justice in Context* (Cambridge University Press, 2009) 76, 81.

145 On the close historical relationship between colonialism and slavery, see Osterhammel, above n 92, 31, 74, 77, 84.

146 Morris R Cohen, above n 36, 13.

relationship means that every decision so taken has the potential to remove the freedom of a great many others. In fact, every such decision removes the freedom of every other person on the planet, including, paradoxically, those who exercised the choice in the first place.

And what is more, the power to control and so affect the lives of many others is not limited to those within the jurisdiction which conferred the choice, nor is it limited to the current generation. It is ‘supreme’ in the fullest sense of that word,<sup>147</sup> for what is conferred by one state on one individual has the potential to allow for untold consequences — the removal of freedom — for others who reside outside of the legal jurisdictional boundaries of the state that conferred that choice for both present *and future* generations. The state that confers this power in fact has no authority to do so, for, as we have seen, its consequences, its outcomes, its externalities, are visited disproportionately, *asymmetrically* upon those over whom that state has no jurisdiction whatsoever, both spatially and temporally.

More troubling still, this sovereignty cannot be limited by the very people whose freedom is affected — those who live beyond the legal jurisdictional and temporal borders of the state that delegated this power. Nor can it even be limited by those who might wish to do so; the very existence of private property means that when one acts on it, consequences are created. It is ‘hard-wired’ into the system.<sup>148</sup> Whereas the concept of private property developed when the consequences of one’s choices might be limited by private law actions — the torts of nuisance, trespass, and negligence, for example — brought by a neighbour across the street or living in the next village and typically, through the limitation of actions, in one’s own generation, the loss of freedom is suffered by those on the next continent and in times yet to come. This renders meaningless the countervailing democratic power that one might have to choose one’s own context through political and adjudicative processes. The citizens of Sudan, or Bangladesh, or Tuvalu, let alone those who are not yet here, whose problems are in part the consequence 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 that context for them. Anthropogenic climate change is a form of eco-colonising of other nations — imposing ‘a system of domination’ over them.<sup>149</sup>

And, just as colonialism itself brought with it slavery, so, too, does eco-colonialism bring with it eco-slavery. Hoffman placed three caveats on drawing an analogy between arguments against slavery and those against climate change:

147 See Larissa Katz, ‘Exclusion and Exclusivity in Property Law’ (2008) 58 *University of Toronto Law Journal* 275, 278.

148 See generally Frédéric Lordon, *Willing Slaves of Capital: Spinoza & Marx on Desire* (Verso, 2014) 1–48.

149 Osterhammel, above n 92, 4 (emphasis altered). Colonialism is to be distinguished from “[c]olonization” [which] designates a *process* of territorial acquisition, [and] “colony” a particular type of sociopolitical *organization*: at 4 (emphasis in original). Eco-colonialism, then, drawing on the meaning of colonialism, is a form of domination of others through anthropogenic climate change.

First, there can be no direct comparison between the injustice, torture, brutality, and murder of one race of human beings by another and the emission of greenhouse gases. Second, while slavery is repugnant and immoral, fossil fuels make our way of life possible. There can be no Emancipation Proclamation for fossil fuels, eliminating them with the stroke of a pen. Third, those who resist the science of climate change are not the “moral equivalent of slave-owners.” In fact, all of us rely on fossil fuels. Every time we turn on a light switch, we are using the energy of fossil fuels.<sup>150</sup>

Understanding the climate change relationship, however, allows us to see the analogy differently. The fact is that the choice conferred by private property allows us to engage in the same injustice and brutality in a repugnant and immoral way against others that slavery did. It is simply removed from our sight. Every time we turn on a light switch, among the many thousands of choices we make each day, we consume fossil fuels, drive anthropogenic climate change, and produce adverse impacts for others. As we have seen earlier, these consequences are, ultimately, abusing and killing others, both spatially and temporally. The only difference is that the results are removed from our sight; they happen somewhere else, and so they are easy to put out of mind. We are limiting, and removing, the liberty and freedom of others.

Yet there is an ultimate irony here. It is only an illusion that those who hold the power asymmetrically to limit the freedom of others, spatially and temporally, can continue to choose a context that suits their preferences and desires while harming those of others who cannot. It is an illusion because in choosing what might seem to suit one’s preferences, one is really choosing to limit one’s own freedom. That is the paradox of the climate change relationship. In the end, the choice inherent to private property is a tool for the enslavement of all. Private property permits us to choose to enslave others and — while it may be a contested notion — ourselves. Not only, then, is every person an eco-colonialist, using the environment as a place to ‘store’ the externalities of climate change, but every person is also an eco-enslaver, through the limitation and, ultimately, removal of freedom which eco-colonialism causes. In climate change, through the very choice we exercise we enslave not only others, but also ourselves.<sup>151</sup>

### III EMANCIPATION

#### **A *Obligation: A Climate Future for the Concept of Private Property***

The paradox of freedom promised by private property holds within itself the source of emancipation from the very slavery it permits. There is to be found one possible climate future of the *concept* of private property, and one such future

150 Hoffman, *How Culture Shapes the Climate Change Debate*, above n 97, 75.

151 Bookchin, *Toward an Ecological Society*, above n 53, 40–1; Bookchin, *The Ecology of Freedom*, above n 125, 1–13.

of the *law* of private property. This section deals with the former, while the remaining sections deal with the latter.

Eco-colonialism and eco-slavery depend upon a concept of private property that tends to disregard if not ignore the importance of obligation. Legal theory, beginning with Blackstone and running through to Morris Cohen, understands the role played by the state in limiting the power conferred in private property. The sovereignty conferred by the state upon the individual is not the end of the story of property, for if the individual has a form of sovereignty which mirrors political sovereignty, in the form of both dominium over things and imperium over people, it becomes necessary to consider the other side of the equation: what power has the state, with its own political sovereignty, to stop individuals exercising the sovereignty exercised upon them in ways that may harm the greater social good or the general welfare?<sup>152</sup> Cohen argues, in order to avoid chance and anarchy, that the state should do quite a lot: 'This profound human need of controlling and moderating our consumptive demands cannot be left to those whose dominant interest is to stimulate such demands',<sup>153</sup> for '[n]o community can view with indifference the exploitation of the needy by commercial greed'.<sup>154</sup> Cohen's focus was primarily on labour relations and the role played by corporations in stimulating demand for its products, which somewhat limits that analysis.<sup>155</sup> Yet, the essential core of Cohen's argument applies to not only to the corporation, but also to the individual. And property theory today continues this strand of thought concerning the importance of obligation as an inherent component of the concept of private property.<sup>156</sup>

The problem, though, is that existing theory, while recognising obligation, continues to begin its descriptive and normative assessment of property with rights. As Gregory Alexander notes, even in American theory and law, where obligation forms a large component of theorising about property, one finds a lack of explicitly established contours of that norm, let alone an explicit recognition.<sup>157</sup> This is nothing new: while at one time both Anglo-Australian and American law expended a good deal of effort in arguing for the explicit adoption of such

152 Morris R Cohen, above n 36, 11.

153 Ibid 30. This is a veiled critique of Adam Smith, *An Enquiry into the Nature and the Causes of the Wealth of Nations* (W Strahan and T Cadell, 1776) and his 'invisible' hand, although modern scholarship has shown that even Adam Smith himself did not think that his work would be read in isolation from his earlier *The Theory of Moral Sentiments* (A Millar, 2<sup>nd</sup> ed, 1761): See Nicholas Phillipson, *Adam Smith: An Enlightened Life* (Allen Lane, 2010) 2–3.

154 Morris R Cohen, above n 36, 23.

155 The limitations of Cohen's analysis to labour relations and corporations mean that it alone cannot support a social-obligation norm. Of course, the remainder of this article develops an argument for just such a norm.

156 Singer, *Entitlement*, above n 34, 18.

157 Alexander, above n 23, 746–52.



a norm, that concern has receded over time.<sup>158</sup> And so today, the modern liberal concept of private property begins with rights making it possible to become an eco-colonialist.

The precariousness of life inherent in the consequences of climate change limits, if not entirely removes, freedom which, as we have seen, is the hallmark of slavery. The very liberty which liberal private property confers through its focus on rights is the very thing which limits that freedom. I have identified this as the paradox of the climate change relationship: the liberal focus on rights not only confers and constrains freedom but it also portends a solution to this seemingly insoluble problem — and so a possible climate future for private property: obligation. The climate change relationship and its eco-colonialism and eco-slavery, demands that we shift our initial focus, from rights to obligation. Peter M Gerhart provides the first explicit attempt to do this, drawing upon other categories of private law, especially contract and tort.<sup>159</sup>

Gerhart considers the decision-making authority of an individual found in contract and tort, noting that the law sees choices made as giving rise to obligations rather than rights, at least at the analytical outset. In the case of negligence, for instance, one does not look at a putative tortfeasor and say that ‘X had the right to injure Y’, only asking later what obligations X might have had *not* to injure Y. Rather, we begin with X’s *obligation* not to injure Y and proceed to determine the scope of that obligation. Why should it be any different with any other area of private law, property included? It should not. Gerhart concludes: ‘Although what property owners owe each other and nonowners may be less expansive than in torts and contracts ... the responsibility of an individual for the well-being of others is nonetheless the key to understanding the scope of property rights.’<sup>160</sup> To outline that scope in the light of obligation as of paramount importance, Gerhart’s thesis proceeds from four propositions.

First, ‘the essence of property ... [begins with] constrained decision making’, and this allows what a property right is to vary with the social context in which it arises and is exercised.<sup>161</sup> In other words, the right itself is defined through the lens of obligation, which requires constraint. Second, ‘at their core, property rights are socially recognized, and that ... recognition comes with implicit constraints on the owner’s decision-making authority’.<sup>162</sup> This adds the important dimension, noted in Part II, above, that the context within which a right may vary is socially

158 Michael Taggart, *Private Property and Abuse of Rights in Victorian England: The Story of Edward Pickles and the Bradford Water Supply* (Oxford University Press, 2002) ch 7. See also Rebecca Lubens, ‘The Social Obligation of Property Ownership: A Comparison of German and US Law’ (2007) 24 *Arizona Journal of International and Comparative Law* 389. Recently, though, one Australian commentator does stand alone as a prophet in this regard: see generally Murray Raff, *Private Property and Environmental Responsibility: A Comparative Study of German Real Property Law* (Kluwer Law International, 2003); Murray Raff, ‘Environmental Obligations and the Western Liberal Property Concept’ (1998) 22 *Melbourne University Law Review* 657.

159 Peter M Gerhart, *Property Law and Social Morality* (Cambridge University Press, 2014).

160 *Ibid* 6.

161 *Ibid* 14. Gerhart elaborates on this proposition: at ch 3.

162 *Ibid* 15.

dependent and contingent. The context is social, relational. Relationship matters as that allows one to understand who it is that may be harmed by any given decision, and so it allows one to determine the object of obligation. Rights ‘are validated by the community — giving rights their moral force — while social recognition provides an implicit constraint on the owner’s scope of decisions.’<sup>163</sup>

Third, ‘the law requires individuals who make decisions about resources to act as the ideal, other-regarding decision maker would act’.<sup>164</sup> This is a normative argument; people can justifiably ask why this should be so. Why allow the law to limit or impinge upon what the property holder can do with whatever is said to be ‘theirs’? This takes us back to the analogy with torts and contract. Few would countenance allowing the individual to decide the harm to others for which one might liable, or in relation to the keeping of promises. Why, then, would we allow a person to determine that for which they will be responsible towards others in respect of the use of goods and resources? We ought, in other words, to ‘understand social interests (the “public good”) to be defined independently of individual interests’;<sup>165</sup> as Gerhart further argues, then, the relationship of property holders and others requires that:

An owner has authority to make a wide variety of decisions about a resource, but only if her behaviour reflects decisions that take into account, in an appropriate way, the interest and well-being of individuals toward whom the owner has an obligation. Similarly, nonowners and other owners must behave ... as if they have made decisions that give due regard to the interests of others.<sup>166</sup>

Fourth, Gerhart argues that a cost-benefit analysis occurs whereby each decision-maker acts as would the ideal decision-maker in order to assign ‘the burdens and benefits of decisions about resource use’.<sup>167</sup> This allows a ‘property system [to achieve] an equilibrium that guarantees the equal freedom of each individual in the community given the existing distribution of resources’.<sup>168</sup>

How, though, to achieve a cost-benefit analysis that balances liberty with freedom? A principle of law is required to inject the priority of obligation in the definition of private property rights within the broader socio-community context. This is a matter of law, as opposed to theory. The first two of Gerhart’s propositions relate to property *theory*; they interrogate what it means to say that one has property, concluding that the right is defined by initial considerations of obligation towards others. The third and fourth propositions concern the implications for property *law* if we shift the focus from right to obligation in theory.

I argue that eco-colonialism and eco-slavery provide the inertia for making the sort of shift Gerhart supports in our modern liberal concept of private property from a focus on rights to a focus on obligation. That theoretical shift, however,

163 Ibid 15. Gerhart elaborates on this proposition: at ch 4.

164 Ibid 15. Gerhart elaborates on this proposition: at ch 5.

165 Ibid 15.

166 Ibid.

167 Ibid 16

168 Ibid 16. Gerhart elaborates on this proposition: at ch 6.

is meaningless unless accompanied by a shift in law, a shift achieving Gerhart's 'equilibrium ... guarantee[ing] the equal freedom of each individual in the community given the existing distribution of resources'.<sup>169</sup> Put another way, a norm, enshrined in law, is necessary in order to balance liberty/freedom with obligation. What could such a norm look like?

## **B Social-Obligation Norm: A Climate Future for the Law of Property**

The implementation of the concept of private property (a theory of property) in a society occurs through the operation of property law (part of the law of a state). A shift in emphasis from rights to obligation in the concept of private property therefore requires a corresponding shift in property law which goes beyond the existing limitations imposed upon the power of private property found in various pieces of common or legislative law. For Anglo-Australian law, historically dominated by a focus on rights (with, it must be said, some limitations found in judge-made law and legislation), this will require a reconsideration of the rejection of an abuse of right doctrine enunciated in *The Mayor, Aldermen and Burgesses of the Borough of Bradford v Pickles*.<sup>170</sup> It is odd that there is even one solitary case which makes possible a right to abuse the power that property confers on its holder; American law, while reaching the same conclusion, has never explicitly done so in one case.<sup>171</sup> Yet, its existence notwithstanding, *Bradford v Pickles* is hardly known today, such is the status that a right of abuse has assumed. While it forms part of the bedrock of Anglo-Australian property law, few question it because few even know of its existence, let alone its towering importance. But as with the whole of property, it is merely a part of the construction and deployment of the liberal concept of property, by a legal system. And that means it can be changed.

### **1 Bradford v Pickles**

*Bradford v Pickles* involved a dispute between Edward Pickles and the Corporation of Bradford. Pickles owned land adjoining a spring used by the Corporation. The spring, fed by water below Pickles' farm, was used to supply water to the town of Bradford. 'In the early 1890s, Edward Pickles announced a plan to drain the water in an attempt to mine for flagstone on his land. ... Bradford took the view that Pickles was acting maliciously',<sup>172</sup> attempting to force the Corporation to pay for the land or a right to the water. 'Pickles claimed the right to do whatever he pleased with the water under his land',<sup>173</sup> unless paid compensation by Bradford. Both sides refused to negotiate and, ultimately, the Corporation sought injunctive

169 Ibid 16.

170 [1895] AC 587 ('*Bradford v Pickles*').

171 Alexander, above n 23, 746–52.

172 Taggart, above n 158, 1.

173 Ibid.

relief against Pickles. The dispute reached the House of Lords, which decided that Pickles had the right to do as he pleased with his land and so the water.<sup>174</sup>

The common law, as we have seen in Part II.B.3, developed the torts of nuisance, trespass and negligence to deal with such problems;<sup>175</sup> the limitation of those torts, however, lies in the requirements that the person bringing an action for one of them must themselves be claiming an interference with their own property and so demonstrate some loss or damage to that property. In *Bradford v Pickles*, Bradford, however, while holding adjoining land, was simply claiming that Pickles' conduct was motivated by malice and that such rights could not be exercised maliciously so as to cause harm to another, whether that involved damage to property or not. The idea that malice might be prevented by the law of torts, however, 'never really flourished in English property law; penalising an owner's malicious motive being inimical to the common law approach of *laissez-faire*'.<sup>176</sup>

Thus, in *Bradford v Pickles*, while the House of Lords concluded that injunctive relief was available on the basis of the *Bradford Waterworks Act 1854*, the decision left untouched the common law. While Pickles might have been motivated by malice, the common law offered 'no authority to restrain a landowner from exercising his or her property rights in bad faith';<sup>177</sup> no exception to the notion that rights to underground water were absolute would be made for malice.<sup>178</sup> Michael Taggart writes that '[t]he judges ignored or dismissed earlier dicta supporting such a limitation in English, American, and Scottish cases, as well as in Roman law'.<sup>179</sup> The principle established by *Bradford v Pickles*, taken to have 'decisively shut the door on the possibility of having a malice exception in English property law',<sup>180</sup> can be succinctly stated as

establishing that it is not unlawful for a property owner to exercise his or her property rights maliciously and to the detriment of others or the public interest. This is accepted by many as a bedrock principle of the common law, and, like bedrock, is often invisible and taken for granted.<sup>181</sup>

The prohibition on a doctrine of malice in *Bradford v Pickles* is nothing less than a judicial codification of the modern liberal concept of private property as absolutist which, as we have seen, places great emphasis on the right rather than on obligation. And while the case might have been confined to water law, or even only to real property law, the case has nonetheless come to be 'taken as authority for the much wider proposition that abuse of rights is unknown to English law'.<sup>182</sup> It is, as I noted above, axiomatic and talismanic.

174 The summary of the case is drawn from Taggart, above n 158, 1.

175 Eva Steiner, *French Law: A Comparative Approach* (Oxford University Press, 2010) 390–1; Taggart, above n 158, ch 7.

176 Steiner, above n 175, 391.

177 Taggart, above n 158, 2.

178 Ibid 3.

179 Ibid. Taggart elaborates on the Court's rejection of the doctrine of abuse of right: at ch 6.

180 Ibid 3.

181 Ibid 1.

182 B W Napier, 'Abuse of Rights in British Law' in M Rotondi (ed), *L'Abus de Droit* (Padova, 1979) 267, 267–8 (citations omitted).

Yet many have called for a reconsideration of the principle enunciated in *Bradford v Pickles*: Lords Denning,<sup>183</sup> Reid,<sup>184</sup> and Professors Roscoe Pound,<sup>185</sup> A L Goodhart,<sup>186</sup> Glanville Williams,<sup>187</sup> Wolfgang Friedmann,<sup>188</sup> and C K Allen.<sup>189</sup> And, most recently, Taggart

observe[s] that the tide ... turned against laissez-faire ideology for much of the last century, leaving the *homo economus* (personified by Edward Pickles) high and dry. Successive waves of regulatory legislation have left little room for such behaviour. Is it time to heed these persistent calls for a reconsideration of the common law position?<sup>190</sup>

It is time to heed the call issued by so many over so long a time. The reason is simple: the role played by private property in the climate change relationship — eco-colonialism and eco-slavery — demand no less than putting an end to *Bradford v Pickles* and the absolutism of property rights. We have already considered why the concept of property can and must shift from a focus on right to obligation. We must now do the same with the law, and the law that requires shifting is *Bradford v Pickles*, away from the narrow focus of torts such as trespass and nuisance. In the final sections of this Part, I outline what a replacement principle could look like.

Before proceeding to that outline, I must stress, as I did in the Introduction, that this section is not intended to be a comprehensive account of how the social-obligation norm would be integrated into the existing property law of Australia. That would be an enormous task involving a detailed assessment of the entirety of property law; that is something beyond the scope of this article. Rather, this section is intended merely to identify that which would provide one of many possible legal vehicles, in any system of property law, to begin the process of emancipation from the eco-slavery of climate change. This section, as I noted in the Introduction, is intended to identify the opportunity presented by climate change, if we see it in terms of eco-colonialism and eco-slavery, to begin to rethink our legal structures, one part of which is the law of property. The integration of a vehicle such as the social-obligation norm, once identified, is work yet to come of that climate future of property law.

183 Sir Alfred Denning, *Freedom under the Law* (Stevens & Sons, 1949) 68–9.

184 Lord Reid, ‘The Law and the Reasonable Man’ (1970) 54 *Proceedings of the British Academy* 189, 198.

185 Roscoe Pound, *The Spirit of the Common Law* (Marshall Jones, 1921) 184–6, 197–8.

186 Arthur L Goodhart, *Essays in Jurisprudence and the Common Law* (Cambridge University Press, 1931) 36–7.

187 Glanville L Williams, ‘The Foundation of Tortious Liability’ (1939) 7 *Cambridge Law Journal* 111, 127–8.

188 W Friedmann, *Legal Theory* (Stevens & Sons, 4<sup>th</sup> ed, 1960) 507.

189 Carleton Kemp Allen, ‘Legal Morality and the *Ius Abutendi*’ (1924) 40 *Law Quarterly Review* 164, 165–6, 168–9.

190 Taggart, above n 158, 193 (citations omitted).

## 2 Parlez-Vous Français? *Léon Duguit and the Propriété Fonction Sociale*

In the sixth of a series of lectures given in 1920 in Buenos Aires, Léon Duguit, a French legal scholar at the University of Bordeaux, wrote that ‘property is not a right; it is a social function’,<sup>191</sup> thus coining the now axiomatic French phrase ‘*la propriété fonction sociale*’ or ‘the social function of property’.<sup>192</sup> M C Mirow summarises Duguit’s formulation of the social function this way: ‘capitalist property, and particularly real property, is increasingly less of a subjective individual right and more of a social function’<sup>193</sup> and ‘[p]roperty is no longer the subjective right of the owner; it is the social function of the possessor of wealth’.<sup>194</sup>

Duguit thus ‘coined two hyphenated words to describe the old notion of property or ownership and the new: right-property (*propriété-droit*) and function-property (*propriété-fonction*)’.<sup>195</sup> And these terms derived from Duguit’s conception of the state, whose goal was not to exercise imperium, but rather to fulfil a social function of collective service. And if that was the function of the state, Duguit argued, it was also the function of all lesser institutions established, constructed and created by the state, such as property and its legal obligations, which ‘should also fulfil this general social function’.<sup>196</sup>

This social-obligation norm of property<sup>197</sup> has since come to characterise the French understanding of the law of property, as well as that of many other civilian legal systems.<sup>198</sup> Today, quite apart from the *Code civil*,<sup>199</sup> the French

191 ‘Mais la propriété n’est pas un droit; elle est une fonction sociale’: Léon Duguit, *Les Transformations Générales du Droit Privé depuis le Code Napoléon* (Librairie Félix Alcan, 2<sup>nd</sup> ed, 1920) 21, quoted in M C Mirow, ‘The Social-Obligation Norm of Property: Duguit, Hayem, and Others’ (2010) 22 *Florida Journal of International Law* 191, 191.

192 See Léon Duguit, *Les Transformations Générales du Droit Privé depuis le Code Napoléon* (Librairie Félix Alcan, 2<sup>nd</sup> ed, 1920) 147–78. For an outline of the background to and content of Duguit’s Buenos Aires lectures, see Mirow, ‘The Social-Obligation Norm of Property’, above n 191; Sheila R Foster and Daniel Bonilla, ‘The Social Function of Property: A Comparative Law Perspective’ (2011) 80 *Fordham Law Review* 1003. See also Jean-Pascal Chazal, *La Propriété: Dogme ou Instrument Politique?: Ou Comment La Doctrine S’Interdit De Penser Le Reel* <<http://piketetty.pse.ens.fr/files/Chazal2014.pdf>>.

193 ‘[L]a propriété capitaliste, et particulièrement la propriété foncière, cesse de plus en plus d’être un droit subjectif de l’individu pour devenir une fonction sociale’: Léon Duguit, *Les Transformations Générales du Droit Privé depuis le Code Napoléon* (Librairie Félix Alcan, 2<sup>nd</sup> ed, 1920) iv, quoted in Mirow, ‘The Social-Obligation Norm of Property’, above n 191, 199.

194 ‘La propriété n’est plus le droit subjectif du propriétaire; elle est la fonction sociale du détenteur de la richesse’: Duguit, above n 191, 158, quoted in Mirow, ‘The Social-Obligation Norm of Property’, above n 191, 199.

195 Mirow, ‘The Social-Obligation Norm of Property’, above n 191, 199.

196 *Ibid* 200.

197 *Ibid*.

198 See generally Foster and Bonilla, above n 192.

199 *Code civil* [Civil Code] (France) books III–IV (‘*Code civil*’). See also Steiner, above n 163, 377–400; John Bell, Andrew Bell and Sophie Boyron, ‘Property Law’ in John Bell, Sophie Boyron and Simon Whittaker (eds), *Principles of French Law* (Oxford University Press, 2<sup>nd</sup> ed, 2008) 269.

judge-made law of property<sup>200</sup> contains a substantial set of restrictions, often of great complexity, prioritising the public good through obligations as against the individual's rights contained in property.<sup>201</sup>

The most imaginative of these restrictions is the doctrine of abuse of right,<sup>202</sup> traceable to Cicero's dictum '[s]ummum ius summa iniuria',<sup>203</sup> or the 'strict enforcement of a law or a right may sometimes lead to a great injustice'.<sup>204</sup> The legal application of this dictum emerged initially in Roman law and flowered throughout the civil law,<sup>205</sup> 'viewed by many as a manifestation of equity, softening the absolutism of ownership in the interests of justice'.<sup>206</sup>

Nineteenth century French jurists, culminating with Duguit's seminal work, developed Cicero's dictum through social doctrines which transformed and replaced the standard liberal concept of private property, which tends not to focus on obligation, with the view which prevails in French law today, stressing social considerations as a balance to the decision-making authority of private property.<sup>207</sup> Larombière says that a person exercising a property right must 'do so prudently, with ordinary precautions, without abusing it and without exceeding equitable (*justes*) limits'.<sup>208</sup> Eva Steiner summarises the framework and contours of the doctrine in French law this way:

no one, in the exercise of his property rights, should have as his sole purpose the intention of harming his neighbour. In other words, in certain circumstances, the use of one's property will become illegal when held as being prompted by a motive which is improper or malicious.<sup>209</sup>

And the doctrine has been applied extensively in French property law cases since the 19<sup>th</sup> century.<sup>210</sup>

The shift proposed here — from a focus on rights to a focus on obligation as the template through which the decision-making authority of property is shaped — leads inexorably to the rejection of *Bradford v Pickles* and the adoption of the doctrine of abuse of right. If the current legal deployment of the concept of

200 Not part of the codified law of property as found in the *Code civil* Books III–IV, '[t]he doctrine of "abuse of right" was developed in France by the judiciary in the late 19<sup>th</sup> century': Steiner, above n 175, 391.

201 Steiner, above n 175, 390.

202 See generally *ibid* 391–3; Taggart, above n 158, 145–66.

203 Cicero, *De Officiis* (Walter Miller trans, Harvard University Press, 1913) 34 [trans of: *De Officiis* (first published 44 BC)].

204 Steiner, above n 175, 390.

205 Taggart, above n 158, 3. See also Elspeth Reid, 'The Doctrine of Abuse of Rights: Perspective from a Mixed Jurisdiction' (2004) 8(3) *Electronic Journal of Comparative Law* <<http://www.ejcl.org/83/abs83-2.html>>.

206 Taggart, above n 158, 145, citing Benoit Jeanneau, 'The Reception of Equity in French Private and Public Law' (R A Newman and M Guillois trans) in Ralph A Newman (ed), *Equity in the World's Legal Systems: A Comparative Study* (Établissements Émile Bruylant, 1973) 223, 229.

207 Steiner, above n 175, 390.

208 Taggart, above n 158, 145, quoting M L Larombière, *Théorie & Pratique des Obligations* (A Durand, 1857) vol V, 692.

209 Steiner, above n 175, 390.

210 Taggart, above n 158, 145–9.



private property in Anglo-Australian law allows for eco-colonialism and eco-slavery; and if we are to shift, in the legal application of that concept, from a focus on rights to one on obligation, and an adoption of the social-obligation norm, and its corollary; then the abuse of right doctrine necessarily presents itself as the climate future of Anglo-Australian property law. This could be adopted either through the common law or through legislative means. While it may seem a major shift in the emphasis placed upon the individual by the concept of private property, it will, in the long run, be a small price to pay. But is its adoption as a matter of domestic law alone enough?

### C *Heart of the Empire*



**Figure 1**

*The Heart of the Empire (Niels Møller Lund)*<sup>211</sup>

The analysis of private property presented here shows that all inhabitants of the Earth are both eco-colonialist *and* eco-slave. The metaphor of Île des Sables ought to serve as a warning: those of us who may feel that our choices, our actions, affect no one, and certainly not ourselves, should think again. In the age of climate change, we are all colonialists and we are all slaves. And so the domestic law of nation-states is not change enough in response to this challenge. Why? Think of it this way.

<sup>211</sup> Reproduced by kind permission, Guildhall Art Gallery, City of London (licence granted 27 September 2016).

Neils Møller Lund's 1904 painting *The Heart of the Empire* (Figure 1) depicts a scene of early 20<sup>th</sup> century Imperial London, in which 'Bank Junction [is shown] as the monumental, thronging hub of nineteenth-century imperial might',<sup>212</sup> with the Houses of Parliament, the Imperial legislature, in the background, further up the Thames. Here, in the financial and political intersection of power we see, '[t]hen, as now ... a symbolic site of a Britain made great by its global reach'.<sup>213</sup> Today, nations and states continue to wield global power (although no longer colonising in quite the same way as they once did); yet, so, too, does the individual. Indeed, I have argued that it is this individual power, based upon the sovereignty of private property that is the more substantial, yet invisible, global power of our own time. While the 'symbolic heart of [the] empire' for 19<sup>th</sup> and 20<sup>th</sup> century England was the political power wielded by the state and the financial power wielded by banks as represented in Lund's painting, that 'symbolic heart' in the 21<sup>st</sup> century world is the neoliberal individual, exercising through private property a sovereignty having global reach, embodied by the climate change relationship, building an 'eco-colonial empire' that transcends national legal systems and their arbitrary physical and temporal boundaries.<sup>214</sup>

Seeing the heart of the empire this way gives added potency to Morris Cohen's sovereignty as a descriptor of private property (it was always there; climate change provides a glaring example). Private property is more than the dominium to affect the control and use of goods and resources within the jurisdiction which conferred the choice, and, what even Cohen failed to highlight, it is more than the imperium to control the lives of many others within that jurisdiction. In fact, it is 'supreme' in the fullest sense of that word,<sup>215</sup> for the choice conferred by one state on one individual has the potential to allow for untold consequences for others who reside outside of the legal jurisdictional boundaries of the state that conferred it. It is imperium, then, over all others inhabiting the planet. This is an example of Kennedy's invisible ground rule with a twist — while it bears all the marks of invisibility, the state which confers this power to harm in fact has no authority to do so, for its consequences, its outcomes, its externalities, are visited upon those over whom that state has no jurisdiction whatsoever.

The global complexity of human-caused climate change makes impossible the identification of specific individuals or even the singling out of individual nations,<sup>216</sup> thus rendering the international law prohibitions on transboundary pollution meaningless.<sup>217</sup> Those who suffer asymmetrically the consequences

212 Jane M Jacobs, *Edge of Empire: Postcolonialism and the City* (Routledge, 1996) 39.

213 Ibid 38.

214 On this, see David Kennedy, 'The Mystery of Global Governance' in Jeffrey L Dunoff and Joel P Trachtman (eds), *Ruling the World? Constitutionalism, International Law, and Global Governance* (Cambridge University Press, 2009) 37.

215 Katz, above n 147, 295.

216 Timothy W Luke, 'Climatologies as Social Critique: The Social Construction/Creation of Global Warming, Global Dimming, and Global Cooling' in Steve Vanderheiden (ed), *Political Theory and Global Climate Change* (MIT Press, 2008) 145, 147.

217 See, eg, *Report of the United Nations Conference on Environment and Development*, UN Doc A/CONF.151/26/Rev.1 (1993) annex 1; *Trail Smelter Case (United States of America v Canada) (Decision)* (1938) 3 RIAA 1911.

of the actions of those who hold the sovereignty conferred by private property cannot choose their own political-legal context; rather, a reified mass market of neoliberal individual consumers<sup>218</sup> in developed nations chooses it for them.

While national sovereignty ends at arbitrary jurisdictional and immutable temporal borders, 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.

**Figure 2**



The consequences of climate change transcend both national and temporal borders. We are the heart of the 21<sup>st</sup> century empire. Perhaps the new image of the heart of the empire can be captured in Figure 2. No longer can agglomerations of ‘the neoliberal individual’ constitute the heart of the empire in one physical, spatial, geographical place. Instead, we must realise that each of us forms the heart of the empire, wherever we are. We do so anonymously; no one individual can be singled out, nor can one even be found, for while our actions are individual,

218 Luke, above n 216, 147.

the consequences are caused collectively.<sup>219</sup> We have the power to do damage, wherever we are, to others, everywhere, now and in the future.

And all of this carries serious implications for the adoption of a social-obligation norm. Because private property, as law, operates only within the boundaries of a nation-state, so too, the social-obligation norm and the doctrine of abuse of right operate only within the domestic legal structure of any given state. As we know, the climate change relationship reveals this: the consequences of anthropogenic climate change are both spatially and temporally unbounded. No natural spatial or temporal boundaries limit the harm done. Indeed, the whole point of my using the highly evocative and hyperbolic terms eco-colonialism and eco-slavery is to emphasise this simple truth.

The truth of the climate change relationship means, simply, that a social-obligation norm cannot be limited to the domestic, national boundaries of the legal system of one, or even a few nation-states. Rather, it requires a law of property that assumes a trans-jurisdictional role, operating in relation to the consequences of property choice which go beyond national boundaries, and one which adapts a broader form of the social-obligation norm and the doctrine of abuse of right, controlling across national boundaries.

Such major structural changes to the law of property may not be something we can easily or readily envisage now; at the very least, it would require an entirely new understanding of what law is. But come such changes must, at some time, if we are to adopt a new way of life. Such are the demands placed upon us of living in the age of the Anthropocene. It is beyond the scope of this article to consider how that could happen, if it could happen. All that can be said here is that if private property is to be fully adapted to the challenge of climate change, it would have to happen.

Until we can imagine and implement a new way of understanding law, the domestic legal adoption of a social-obligation norm is an appropriate step. It cannot, alone, solve the problem. But it is start. And my argument here has been that it is one possible climate future of the Anglo-Australian law of property.

#### IV CONCLUSION: NEVER FORGET ÎLE DES SABLES

Just as did the unfortunate, enforced, slaves of Île des Sables, we must find our own climate Providence in order to escape from this island upon which we have enslaved ourselves: Earth. And we must emancipate everyone, not a select few. The social-obligation norm and the doctrine of abuse of rights is not the Providence. It is, instead, a trim tab, a small part of the rudder capable of

219 This paradoxical dimension of individual–collective action is captured by Gerald Raunig in his conception of the ‘dividuum’ and ‘dividuality’: Gerald Raunig, *Dividuum: Machinic Capitalism and Molecular Revolution* (Aileen Derieg trans, Semiotext(e), 2016) vol 1 [trans of: *Dividuum: Maschinischer Kapitalismus und Molekulare Revolution* (first published 2015)].

moving the entire ship.<sup>220</sup> It is vitally important to the climate future of the law of property, one without which property will continue to eco-enslave everyone, the world over, now and in the future.

I began with Timothy Snyder's confronting, indeed, deeply disturbing comparison of the global circumstances and consequences of climate change to the circumstances that made possible a Hitler and a Holocaust. But perhaps we need that deeply disturbing comparison, and the contention that we are enslaving not only others, but also, alarmingly, ourselves, in order to act. Snyder writes:

Understanding the Holocaust is our chance, perhaps our last one, to preserve humanity. That is not enough for its victims. No accumulation of good, no matter how vast, undoes an evil; no rescue of the future, no matter how successful, undoes a murder in the past. Perhaps it is true that to save one life is to save the world. But the converse is not true: saving the world does not restore a single lost life. ...

The evil that was done to the Jews — to each Jewish child, woman, and man — cannot be undone. Yet it can be recorded, and it can be understood. Indeed, it must be understood so that its like can be prevented in the future.

That must be enough for us and for those who, let us hope, shall follow.<sup>221</sup>

A robust concept of private property, one that encompasses both right and obligation, is necessary. And such a concept can also be implemented as the climate future of the law of private property, if we are willing to limit ourselves. Can we? For some, the social-obligation norm and the doctrine of abuse of rights may seem a small, almost insignificant step in the face of the threat facing us. For others, it might seem like a great intrusion on freedom and choice. It is in fact neither small nor great, for it would represent the recognition that we must limit ourselves if we are to save ourselves. Our climate Providence requires a trim tab for its rudder. It is possible — the structures exist to alter private property. The question is not 'can we take this step?' The question is 'will we?'

220 See Vermette, above n 21.

221 Snyder, above n 20, 342–3.