PRIVATE PROPERTY IN POST-SECULAR LAW: AN INTRODUCTORY FORAY

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I INTRODUCTION

In 2008, the global community witnessed a financial crisis paralleled only by the Stock Market Crash of 1929 and the Great Depression which followed. This took place against the backdrop of frenetic domestic and international political debate about the sources of and solutions for the global climate crisis, which culminated in the Copenhagen Climate Conference in 2009. Explicitly and implicitly, both events raised questions about and produced many critiques of capitalism and markets, naming these twin-pillars of the modern global economy as the culprits underlying the political and legal order which permits market transactions and private and public use of resources that cause climate change and caused the Global Financial Crisis (GFC). From this momentary introspectiveness emerged a rich and varied analysis of the nature and role of capitalism and markets and the ways in which we might reassess those institutions in the light of the GFC.[1] In a few instances, some have suggested the potential for religion to play a transformative role in that reassessment.

A religious response to these global problems, and their possible origins in capitalism and markets, might begin with Reinhard Marx's *Das Kapital*. Reinhard Marx is the former Roman Catholic Bishop of Trier, the 1818 birthplace of Karl Marx, who wrote the 19th century *Das Kapital* on political economy.[2] Now Archbishop of Munich and Friesing, R Marx borrows the title of the much more famous book and writes in the form of a letter to Karl rejecting Marxist solutions to the current state of the global economy.

Juxtaposed against Karl Marx, whose views on religion are summarised in one pithy statement: 'religion…is the opium of the people[]',[3] R Marx's conclusion is that today's troubled economy needs to reconnect with fundamental Christian values if it is to be restored to health.[4] Reinhard Marx surveys the global financial system and the growing insecurity of ordinary people, and wonders: 'Was Marx's critique of capitalism wrong after all? 'It lasted longer than you expected back in the 19th century,' [R Marx] writes hypothetically to K Marx, 'but could it be that capitalism is just an episode of history that will end at some point because the system will collapse as a result of its internal contradictions?'[5] Karl Marx predicted that.

Assessing Karl's claim that capitalism will collapse as a result of internal contradictions, though, is clearly beyond the scope of this article—there are scholars

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1 See, for instance, a recent analysis of what the GFC might mean for the future of bankers, in Anat Admati and Martin Hellwig, *The Bankers' New Clothes: What's Wrong with Banking and What to Do about It* (Princeton University Press, 2013).

2 Karl Marx, *Das Kapital* (Penguin, 1976, 1978, 1981 (1867, 1885 and 1894)) 3 vols.

3 Karl Marx, *A Contribution to the Critique of Hegel's Philosophy of Right* (Intl Pub, 1973 (1843-1844)), Introduction, cf 195:18.

4 Reinhard Marx, *Das Kapital: Ein Plädoyer für den Menschen* (Pattloch, 2008).

5 Marx, above n 3, 'Introduction', 11-32, as cited by Peter Gumbel, 'Rethinking Marx. As we work out how to save capitalism, it's worth studying the system's greatest critic' (2 February 2009) *Time*, 39.

far more accomplished in assessing whether, when, and how that might happen.[6] But what seems absent from the dialogue, whatever shape it is currently taking, is a similar analysis of the nature and role of private property—a foundational component of capitalism and markets—either from a secular or non-secular perspective. The focus of this article, then is that aspect of Reinhard's thesis that argues for the usefulness of religious values as the key to correcting global dilemmas such as finance and climate change. And it does so through a consideration of private property, a part of the supporting structure of capitalism that allows it to operate, but which is far less understood, and very infrequently mentioned, in discussions about its future.

While much could be said about private property, this article offers a religious perspective that follows from R Marx's assessment, which may be of some assistance as we re-think the nature of capitalism in the face of global challenges like finance and climate change. Specifically, do religious values contain any lessons for the operation of private property, as a concept, that may allow it more appropriately to take account not merely of the desires and preferences of those who hold it, but of the needs and concerns of those who do not? In doing so, the article briefly touches on a larger issue—how the world's religious traditions might work together, rather than divide, on the future of private property and capitalism.

There are at least two reasons for offering such an assessment of the place and role of religion in law and legal development. First, the GFC itself, and its ongoing aftershocks, culminating most recently with the Greek and Italian Euro crises,[7] is one product of global legal pluralism. International economics and finance depend upon a complex global interplay of diverse, overlapping, legal systems and structures. William Twining, in exploring what a legal map confined to national legal systems leaves out, nearly summarises the contemporary global legal landscape:

> (i) [it]...leaves out other levels of supranational, sub-national and trans-national levels of legal relations: public international law, European Commmunity (sic) law, Islamic law, Maori law, and *lex mercatoria* for example. (ii) It leaves out some of the major legal traditions in which law is not conceptually or politically tied to the idea of the state. For example, it leaves out Islamic law or confines it to countries in which Islamic law is formally recognized as a source of municipal law. But it is obvious that this distorts the extent, scope, and nature of *shari'a.* (iii) However, if we decide to include major religious and customary normative orderings, and perhaps other examples of non-state law, we run into major conceptual problems. First, we have to adopt a conception of law that includes at least some examples of "non-state law". That re-opens the Pandora's box of the problem of the definition of law and all its attendant controversies. Second, there is the problem of individuating legal orders. What counts as one legal order or system or unit for the purposes of mapping? How does one deal with vaguely constituted agglomerations of norms, which may be more like waves or clouds than billiard balls? (iv) If one decouples the notion of law and state, one is confronted with another set of problems. If one moves away from the idea of one kind of institution having a legitimate claim to monopoly of authority and force, one has to accept the idea of legal and normative pluralism – i.e. the co-existence of more than one legal order in the same time-space context – and all the difficulties that entails.[8]

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6 See Terry Eagleton, *Why Marx Was Right* (Yale University Press, 2011); David Harvey, *A Companion to Marx's Capital* (Verso, 2010); David Harvey, *Limits to Capital* (Verso, 2006).

7 See 'Special Report: Europe and its Currency: Staring into the abyss' (12 November 2011) *The Economist*.

8 William Twining, 'Law, Justice and Rights: Some Implications of a Global Perspective' (2007) <http://www.ucl.ac.uk/laws/academics/profiles/twining/Law_Justice%20_Rights.pdf>, 5

Thus, because religion is one part of this plural legal environment, we ought to understand its role in relation to capitalism and markets if for no other reason than for the sake of completeness in understanding the legal complexity that produces the current context.

Second, it is very likely the case that within the pluralistic legal environment outlined by Twining, what legal liberals have told us for so long—that religion simply has no place in 'secular' law—was likely never really true. Law, in other words, has probably never been secular. Rather, as Winnifred Sullivan, Robert A Yelle and Mateo Taussig-Rubbo argue, the postmodern, and post-secular, legal order may be recognising that secular law and theology/religion are intimately bound together, deeply intertwined, historically and ethnographically; '[l]aw is thus increasingly being recognized as varied, plural, and overlapping, dependent on religious anthropologies and cosmologies, as well as sharing symbols, ideas, and institutions with religion.'[9] It is important, then, that

> We ... continue to ask: What is law? How does it work? Can it do what we expect of it? What is religion? Is it an inevitable part of human life or is it something disposable, something we might evolve out of? Has the separation between law and religion ever occurred, and does it even make sense, in either logical or normative terms?[10]

It may be, having explored such questions, that there is a '...possibility that, "after separation" neither law nor religion will have the same power or presence—and that other ways of living will emerge. That possibility, too, beckons.'[11] Thus, it is becoming increasingly apparent that it is this nexus, between theology and secular law, that is relevant to the world in which we live and the relationships that sustain us as nations and societies.

This article therefore begins—it does not finish—the work to which Fallers Sullivan, Yelle and Taussig-Rubbo allude: to explore the lessons which emerge from three religious traditions—Judaism, Christianity and Islam—for the standard liberal account of property. It does not purport fully to explore or draw conclusions on the role that religion may play in restructuring liberalism or property and the role of state regulation. Rather, the article introduces the potential for religion to play a role in those choices left to the individual once liberalism and law have structured whatever property will be for a given society. And this demonstrates, in part, that engaging the two disciplines, law and theology, can bear fruit for a full understanding of society, exploring the possible interconnectedness of theology and liberal secular law.

The article contains three parts. Part II briefly examines the standard liberal, secular, conception of private property. Part III outlines what the monotheistic traditions of Judaism, Christianity and Islam say about private property, focussing on the nature of the human person, the community, and obligation. This allows a comparison of the approach taken to private property in liberal secular theory to that found in a number of religious perspectives found in South East Asia. Part IV offers some concluding reflections on how lessons drawn from these three traditions concerning community, relationship and obligation might actually provide both a

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(footnotes omitted). See also William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009).

9 Winnifred Fallers Sullivan, Robert A Yelle, and Mateo Taussig-Rubbo, 'Introduction' in Winnifred Fallers Sullivan, Robert A Yelle, and Mateo Taussig-Rubbo (eds), *After Secular Law* (Stanford Law Books, 2011) 7.

10 Ibid 16.

11 Ibid.

glimpse of global legal pluralism and the way in which selected religious components of that context may work together to provide lessons about re-conceiving and re-deploying a post-secular private property to meet global challenges such as international financial crises or global climate change. Because property, as a matter of political theory, lies at the heart of the state, it can form one of the ways in which the state-theology/religion relationship can be fostered through a post-secular law.

II SECULAR LAW: THE STANDARD LIBERAL ACCOUNT OF PRIVATE PROPERTY

What is private property? That question elicits as many answers as there are respondents. Typically, when asked such a question, some respond that it is things—cars, houses, money, clothes, ideas, university degrees, natural resources, and so forth. Others say it is rights to control those things. Still others say it is both. The 'things' view is very old, while the 'rights' view traces its origins to the eighteenth century work of Sir William Blackstone.[12]

Combined with modern scholarship, the rights view of private property finds expression in what is known as the standard liberal account or conception. This account is characterised by the 'bundle of rights metaphor', which holds that private property is really a bundle of rights, or at least three principle rights: use, exclusivity, and alienability.[13] Yet the bundle is merely one way of summarising the liberal conception; in the last two hundred years there have been hundreds of other such attempts.[14] Still, this summary serves the purpose of making clear that the standard liberal account is concerned primarily with the creation and conferral of rights that make possible the allocation, control and use of goods and resources.

But the liberal conception could also be explained another way: as choice, as relationship, and as community. While drawing upon the dominant liberal conception of rights over things, this view reveals some very important aspects of the operation of private property in the real world. The next three sections consider each of those alternative descriptions of the liberal account.

A *Choice*

If we think more deeply about liberalism as political theory, we see that it is concerned, above all, with promoting and protecting freedom of choice for the individual.[15] And throughout its history, liberalism has gone about establishing rights

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[12] Private property is '…that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.': William Blackstone, *Commentaries on the Laws of England: Volume II* (University of Chicago Press, 1979 (1766)) 2.

[13] See Laura S Underkuffler, *The Idea of Property: Its Meaning and Power* (2003) 13.

[14] See Richard Pipes, *Property & Freedom* (The Harvill Press, 1999) and JW Harris, *Property and Justice* (Oxford University Press, 1996).

[15] See Andreas Kalyvas and Ira Katznelson, *Liberal Beginnings: Making a Republic for the Moderns* (Cambridge University Press, 2008) generally; Paul W Kahn, *Putting Liberalism in its Place* (Princeton University Press, 2005) 30; Stephen L Carter, 'Liberal Hegemony and Religious Resistance: An Essay on Legal Theory' in Michael W McConnell, Robert F Cochran, Jr, and Angela C Carmella (eds), *Christian Perspectives on Legal Thought* (Yale University Press, 2001) 47-9; Charles Taylor, *A Secular Age* (Harvard University Press, 2007) generally; Richard H Thaler and Cass R Sunstein, *Nudge: Improving Decisions About Health, Wealth, and Happiness* (Yale University Press, 2008) 4-14. On the complexity of the relationship between private property and freedom see Jedediah Purdy, 'A Freedom-

to protect that freedom in a number of ways. Private property is simply one of those ways—it achieves the objective of securing freedom of choice to the individual in relation to the allocation, control and use of goods and resources among individuals.[16] That bundle metaphor captures this well.

Consider the three principle rights within the bundle: use, exclusivity and alienability. The right to use secures choice about any use or non-use; the right to exclusivity the ability to choose who to exclude and who not to exclude; and, the right to alienability, the choice about any alienation or non-alienation. Those choices are created, conferred and protected by legal systems that adopt the concept of private property as an organising principle.

In addition to this, liberalism sees the rights conferred by private property as securing choice exercisable *in any way the holder sees fit*. This is usually described as 'preference-satisfaction', 'self-interest', 'self-seekingness', or a 'self-regarding act'.[17] The ability to exercise rights in such a self-regarding way means that the '…the rules of [a] property institution are premised on the assumption that, *prima facie*, [a] person is entirely free to do what he will with his own, whether by way of use, abuse, or transfer.'[18] Moreover, '…[h]e may also, within the terms of the relevant property institution, defend any use or exercise of power by pointing out that, as owner, he was at liberty to suit himself.'[19]

B *Relationship*

The difficulty with the liberal conception, though, is that some choices, clearly, are not merely self-regarding. In other words, when a choice is truly self-regarding, it affects only the person who made it; when it is not, it affects others, or, as it is sometimes put, it creates 'externalities'.[20] This asks the question whether the choices conferred by rights are absolute and unfettered. The question masks a commonly held view—that private property is absolute.[21] For those who hold this view, private property confers unfettered and therefore absolute choice in relation to the use of goods and resources.[22] In other words, every choice is treated as self-regarding. Yet, upon any deeper reflection, it can be seen that this is a fiction.

Promoting Approach to Private Property: A Renewed Tradition for New Debates' (2005) 72 *University of Chicago Law Review* 1237.

16 Jeremy Waldron, *The Right to Private Property* (Oxford University Press, 1988) 31-40.

17 Which has its origins in John Stuart Mill's 'self-regarding act': John Stuart Mill, *On Liberty* (Gertrude Himmelfarb ed, Penguin, 1974 (1859)). See especially 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, 61-9 (who outlines how property norms assist in determining the difference between a truly self-regarding act and when not); Stephen R Munzer, *A Theory of Property* (Cambridge University Press, 1990) 3-9; Gregory S Alexander, 'Property as Propriety' (1998) 77 *Nebraska Law Review* 667, 699; Harris, above n 14, 29, 31, 105; Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale University Press, 2000) 30.

18 Harris, above n 14, 29.

19 Ibid, 31.

20 Singer, 'How Property Norms Construct the Externalities of Ownership', above n 17; David Lametti, 'The Concept of Property: Relations Through Objects of Social Wealth' (2003) 53 *University of Toronto Law Journal* 325, 342-7; David Lametti, 'Property and (Perhaps) Justice. A Review Article of James W. Harris, Property and Justice, and James E. Penner, The Idea of Property in Law' (1998) 43 *McGill Law Journal* 663, 670-2.

21 Margaret Jane Radin, *Reinterpreting Property* (University of Chicago Press, 1993) 123. See also Singer, 'How Property Norms Construct the Externalities of Ownership', above n 17.

22 This is based on Radin, above n 21, 121-3, and her analysis of Richard Epstein, *Takings, Private Property and the Power of Eminent Domain* (1985) 22-9, 58-73, 112-21, 195-215,

Every decision predicated upon private property occurs within a broader framework or network of relationships between people. While private property is choice, choice alone is merely '…a simple and *non-social*…' beginning to a full understanding of that concept.[23] Every private property right held by an individual or corporation—fees simple, easements, mortgages, intellectual property, and so forth—has a counterpart, an individual or a corporation, who either has a different type of private property or who does not have private property at all. In other words, the private property right is a relationship between persons in respect of the allocation, control and use of goods and resources.[24]

Yet, there are other relationships, too, those that go beyond the existence of private property. For every choice made by someone who has private property bears the potential not only to affect those in a private property relationship—lease,

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230-1, 252-3, 304, and 324-9. See also Richard Epstein, 'Why Restrain Alienation?' (1985) 85 *Columbia Law Review* 970. For a vigorous critique, see Thomas C Grey, 'The Malthusian Constitution' (1986) 41 *University of Miami Law Review* 21.

[23] Gregory S Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (University of Chicago Press, 1997) 321 (emphasis added).

[24] This view can be traced to Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1913) 23 *Yale Law Journal* 16; (1917) 26 *Yale Law Journal* 710. These ideas, reproduced in Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press, 1919) and Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, II* (Walter Wheeler Cook ed, Yale University Press, 1923)—were subsequently taken up by the early American legal realists—Morris R Cohen, 'Property and Sovereignty' (1927) 13 *Cornell Law Quarterly* 8; Felix S Cohen, 'Dialogue on Private Property' (1954) 9 *Rutgers Law Review* 357; Robert L Hale, 'Bargaining, Duress, and Economic Liberty' (1943) 43 *Columbia Law Review* 603; Robert L Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Quarterly* 470—and, more recently, extensively developed and expanded, especially by those of the critical legal studies movement: see CB Macpherson, 'Liberal-Democracy and Property' in CB Macpherson (ed), *Property: Mainstream and Critical Positions* (University of Toronto Press, 1978) 199; CB Macpherson, 'The Meaning of Property' in Macpherson, ibid 1; CB Macpherson, 'Capitalism and the Changing Concept of Property' in Eugene Kamenka & RS Neal (eds), *Feudalism, Capitalism and Beyond* (Edward Arnold, 1975) 104; Jennifer Nedelsky, 'Law, Boundaries, and the Bounded Self' (1990) 30 *Representations* 162; Jennifer Nedelsky, 'Reconceiving Autonomy: Sources, Thoughts and Possibilities' (1989) 1 *Yale Journal of Law and Feminism* 7; Jennifer Nedelsky, 'Reconceiving Rights as Relationship' (1993) 16 *Review of Constitutional Studies/Revue d'études constitutionelles* 1; Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15 *Legal Studies Forum* 327; Singer, 'How Property Norms Construct the Externalities of Ownership', above n 17; Singer, *Entitlement,* above n 17; Joseph William Singer, *Property Law: Rules, Policies, and Practices* (Aspen, 3rd ed, 2010); Joseph William Singer, 'The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld' (1982) *Wisconsin Law Review* 975; 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 & Jack M Beerman, 'The Social Origins of Property' (1993) 6 *Canadian Journal of Law & Jurisprudence* 217; Joseph William Singer, 'Sovereignty and Property' (1991) 86 *Northwestern University Law Review* 1; Carol M Rose, *Property & Persuasion: Essays on the History, Theory, and Rhetoric of Ownership* (Westview Press, 1994); C Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty' (1986) 134 *University of Pennsylvania Law Review* 741; 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.

This view is not, of course, without its critics: 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) 36-75.

easement, mortgage, or whatever—but also those who are not part of that relationship. The notion of externalities seeks to reveal this truth. The process of identifying the choices that humans make and linking those to specific human externalities reveals an overarching relationship made possible by private property. Writing in general terms, Joseph William Singer says that:

> property owners and the public are linked to each other through individual actions [choices] and laws affecting the use of property (which can…be both beneficial and detrimental). From this perspective, we could conceive of property as a type of ecosystem, with every private action and legislative mandate potentially affecting the interests of other organisms.[25]

Thus, private property as choice and private property as relationship are not two conflicting or mutually exclusive models of private property, but rather, two components of the totality of what private property is. Private property rights—choice—exist and operate within a social context—relationship.[26] Relationship means that private property rights overlap with the rights, property or otherwise, of others.

C *Community*

That brings us to 'community', by which is meant here the totality of the relationships found in a society, both instantiated by private property between individuals and others and those that are non-property relationships.[27] It is, in other words, the totality of all social relationships, of which private property is merely a sub-set. The claim made here is that through the operation of private property, a community in which both the individual is free to flourish and in which the collective is not subjected to negative social outcomes, can either be fostered or destroyed. How does private property do this? Consider three steps.

First, if we fail to account for the relational dimension of private property we fall into a dangerous conclusion, one inherent to the liberal conception, namely, that '[r]ights define boundaries others cannot cross and [that] it is those boundaries, enforced by the law, that ensure individual freedom and autonomy.'[28] Yet, in response, we might argue that not individualism but '…*interdependence* is the foundational characteristic of free individuals[]';[29] that people best function within a web of social relationships that allow their own abilities to flourish.[30] The 'human interactions to be governed [by law should not be] seen primarily in terms of the clashing of rights and interests, but in terms of the way patterns of relationship can develop and sustain both an enriching collective life and the scope for genuine individual autonomy.'[31] This is an entirely '…different concept of individual well-being and autonomy: one that recognizes the individual's need for freedom as well as the need for the development and expression of that freedom in the context of

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25 Joseph William Singer, 'The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations' (2006) 30 *Harvard Environmental Law Review* 309, 334, n 82. See also Craig Anthony Arnold, 'The Reconstitution of Property: Property as a Web of Interests' (2002) 26 *Harvard Environmental Law Review* 281.

26 Singer, 'How Property Norms Construct the Externalities of Ownership', above n 17.

27 See Amnon Lehavi, 'How Property Can Create, Maintain, or Destroy Community' (2009) 10(1) *Theoretical Inquiries in Law* 8 http://www.bepress.com/til/.

28 Nedelsky, 'Reconceiving Rights as Relationship', above n 24, 7-8.

29 Singer, *Entitlement*, above n 17, 131.

30 Ibid.

31 Ibid, citing Nedelsky, 'Reconceiving Rights as Relationship', above n 24, 8.

relatedness to others.'[32]

Second, the resulting network requires a means of preventing harm to the have-nots in this web of relationships. And it is law, crucial to the very existence of private property itself, which provides this palliative in the form of regulation, a use of the police power, to safeguard the collective against the excesses of the individual. Regulation mediates the relationships established by private property; to prevent the tyranny of the individual over the collective, the underlying social functions and relationships of private property *require* monitoring and regulation of choice by corresponding moral imperatives, duties and obligations.[33] The overlap between rights in a context of relationship '…takes for granted that owners have *obligations* as well as rights and that one purpose of property law is to regulate property use so as to protect the security of neighbouring owners and society as a whole.'[34]

And third, admitting that regulation is an inherent component of private property that seeks to balance the interests of the individual against those of the community,[35] and that it ought to do so in order to promote the social good,[36] is not the product of some outdated socialism, as some would have us believe,[37] but the full consequence of recognising that private property is relational.[38] Every system of private property is inherently limited by moral imperatives, duties and obligations, imposed and enforced by law, so as to allow the holder of private property to choose not only personal preferences but also so as to prevent outcomes inimical to the legitimate interests of others.[39] Thus, while '[private property]…initially appears to abhor obligation, …on reflection we can see that it requires it. Indeed, it is the tension between [unfettered choice] and obligation that is the *essence* of [private] property.'[40] While we might argue about what the obligations are, we cannot seriously question that they exist.

Private property, then, through the way in which it mediates the choices made by individuals, can either foster or destroy community. It can destroy community when choice is given the upper hand over obligation. It can foster community where an appropriate balance between the choice of the individual and obligation to the social good is achieved through regulation. What might an appropriate balance look like? Of course, liberalism accepts that there are many options, and in making the classic liberal 'choice of a life project', one must decide which one or ones have value. Religion offers its own options, its own insights into how private property may foster community, demonstrating what an appropriate balance between individual and collective and appropriate obligation may look like. The remainder of this article considers those insights which might be taken from Judaism, Christianity and Islam.

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32 Underkuffler, 'On Property', above n 24, 129.

33 Lametti, 'The Concept of Property', above n 20, 346-8. See also Lametti, 'Property and (Perhaps) Justice', above n 20.

34 Singer, 'How Property Norms Construct the Externalities of Ownership', above n 17, 3 (emphasis in the original).

35 Singer, *Entitlement*, above n 17, 208; Lametti, 'Property and (Perhaps) Justice', above n 20, 164; Underkuffler, 'On Property', above n 24, 143-4.

36 See Macpherson, 'Capitalism and the Changing Concept of Property', above n 24, 121.

37 See, eg, Jon Meacham and Evan Thomas, 'We Are All Socialists Now' (16 February 2009) *Newsweek*, http://www.newsweek.com/id/183663.

38 Gregory S Alexander in Singer, *Entitlement*, above n 17, dust jacket.

39 Singer, *Entitlement*, above n 17, 204. And see AM Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford University Press, 1961) 107, especially regarding the duty to prevent harm and the liability to execution. Singer, *Entitlement*, above n 17, 78-9, makes this point in relation to the United States' system of private property, although it can easily be extended to the legal system of any capitalist market economy.

40 Singer, *Entitlement*, above n 17, 204 (emphasis added).

III RELIGION: PERSON, COMMUNITY, AND OBLIGATION

Religion offers existing models of community, developed over many years, containing examples of obligation, of ways in which individuals choose when given the rights conferred by private property. Legal theory and legal systems may turn to such models, among others, for guidance as to the shape of community, in which both the individual and the collective flourish. Joseph William Singer says:

> Given the ambiguities in the meaning of property, it is important to establish which values we will use to define the appropriate contours of legal rights. Those values determine the kinds of social relationships the law encourages and the kinds it precludes. Religion may provide insight. [While we can]…examine religious rhetoric…partly in hopes of eliciting some recognition or evoking some persuasion through these traditions…we can [also] learn from centuries of study and debate about the appropriate role of morality in the economic world. Major religions have grappled with the question of what obligations a good person has in the world of commerce, and have suggested ways to make an economic system compatible with the full range of our values. By looking at religious traditions, we may deepen our engagement with those values and find some inspiration on how to negotiate tensions we face between the pursuit of profit and the pursuit of humanity.[41]

This Part touches briefly upon the models presented by Judaism, Christianity, and Islam, each of which are much broader than Western law, 'as much concerned with *ethical standards* as well as with purely legal matters ... in short, [they are] both a system of morality and a system of law.'[42]

It is conceded at the outset that there is much more to each of the three monotheistic traditions generally, and in relation to possessions, or property, specifically, than is presented here. That need not overly concern us, for while there is a risk in such a methodological approach if one seeks a comprehensive account of the nature and role of property in each of the three traditions, such an account would be impossible in an introductory foray such as this. To do justice to the three would require much more breadth and depth of analysis of the diversity of approaches, both as between *and within* the three traditions. The purpose of this Part, and of this article, though, is rather more modest: to suggest the path that one might take in opening a dialogue with the non-secular about a re-assessment and re-conceptualisation of the secular, or what we have always thought the secular was, or is. Alain de Botton captures the approach this way:

> [it]…does not endeavour to do justice to particular religions; they have their own apologists. It tries, instead, to examine aspects of religious life which contain concepts that could fruitfully be applied to the problems of secular society. It attempts to burn off religions' more dogmatic aspects in order to distil a few aspects of them that could prove timely and consoling to sceptical contemporary minds facing the crises and griefs of finite existence on a troubled planet. It hopes to rescue some of what is beautiful, touching and wise from all that no longer seems true.[43]

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41 Joseph William Singer, *The Edges of the Field: Lessons of the Obligations of Ownership* (Beacon Press, 2000) 41-2.

42 Hunt Janin and ***André*** Kahlmeyer, *Islamic Law: The Sharia from Muhammad's Time to the Present* (McFarland & Co, 2007) 31.

43 Alain de Botton, *Religion for Atheists: A non-believer's guide to the uses of religion* (Hamish Hamilton, 2012) 19.

Using de Botton as a guide, then, this Part presents a selection of models drawn from the monotheistic traditions—and a rather arbitrary and eclectic one at that—which directs us towards the non-secular view of private property. What we do once we have taken that path remains to be seen. Whatever the shortcomings, all that is attempted here is charting the journey.

As such, rather than setting out the totality of the moral and ethical teachings of each of these three traditions, and rather than working chronologically, this part draws one aspect of obligation from each of the three: an alternative model of the person, found in Christianity, an alternative model of the community, from Islam, and alternative model of obligation, as seen in Judaism. This approach may make most sense in the current global, plural, post-secular legal environment in which we live. In other words, these religious 'legal systems' already operate, cutting across one another. To draw from them selectively in this Part is to draw them into no greater service than they are currently giving in the modern global legal context.

Each of the components explored in this Part represents an alternative to the standard liberal account of property and, when taken together, provide an alternative model of private property, one emphasising not only the individual, but also, and more importantly, the obligations borne by the individual within a global community. Rather than being a divisive approach, though, this alludes to the much deeper convergence among the three faiths in relation to possessions, or private property, demonstrating that the three say remarkably similar things about the nature and role of private property within the broader community.

A *Christianity: Person*

Liberal theory treats 'person' synonymously with 'individual';[44] so, too, does Western Christian theology.[45] Liberalism treats the individual, the empowered, atomistic, rights-bearing entity, as paramount to community. Although they may mutually complement one another, the individual remains separate from society; attempts to reconcile the two usually represent little more than re-conceptualizations of individual liberty as the flourishing of the individual within a network of social relationships. Yet one finds in Christianity, and especially the work of John Zizioulas,[46] a tool for a reconciliation of the individual and the community achieved, paradoxically, by *separating* the meaning of 'person' from that of 'individual'.[47]

Zizioulas' conclusion is that Christianity conceives of the person as possible only *within* and capable of ontological existence only *through* relationship.[48] This is not to deny the liberal project and its understanding of the person as an individuated entity, nor is it to say that persons are *only* relations with no substance.[49] Rather, this conclusion stresses the relational nature of the individuated entity. Indeed, it stresses that the individuated entity can only *be* a person as a consequence of relationship. The

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44 Edward Craig (ed), *The Shorter Routledge Encyclopedia of Philosophy* (Routledge, 2005) 'Personal Identity'; Douglas H Knight, 'Introduction' in Douglas H Knight (ed), *The Theology of John Zizioulas* (Ashgate, 2007) 1.

45 Christos Yannaras, *The Freedom of Morality* (SVS Press, 1984) 22-4.

46 John D Zizioulas, *Being as Communion: Studies in Personhood and the Church* (SVS Press, 1985) 27-65; John D Zizioulas, *Communion & Otherness: Further Studies in Personhood and the Church* (T&T Clark, 2006). See also Knight, above n 44, 3, who writes that Zizioulas' work 'represents one of the most rigorous expressions of the neglected themes of the Christian faith'.

47 Knight, above n 44, 1-14.

48 Yannaras, above n 45, 22; Knight, above n 44, 2.

49 Knight, above n 44, 4-5.

liberal *individual*, then, is concerned with oneself, while the *person* is relational, a member of community, and so, is concerned with others.[50]

Zizioulas' reading of Christian theology carries three anthropological implications for the human person.[51] First, the human person is otherness in communion and communion in otherness, emerging as an identity only through relationship—an 'I' that can exist only as long as it relates to a 'thou' which affirms both its existence and its otherness. Isolating 'I' from 'thou' results in the loss not only of otherness, but of being. The 'I' simply cannot 'be' without the other. This distinguishes a person from an individual. Second, personhood is freedom; because a person depends for existence on relationship—'one person is no person, [thus] freedom is not *from* the other but…*for* the other. Freedom thus becomes identical with *love*.'[52] A person can only love if we allow the other to be truly other, and yet remain in communion, in relationship with us. For Zizioulas, 'only a person is free in the true sense',[53] which means that '[i]f we love the other not only in spite of his or her being different from us but *because* he or she is different from us, or rather *other* than ourselves, we live in freedom as love and in love as freedom.'[54] Finally, personhood is creativity. Because freedom is not from but *for* someone or something other than ourselves, the person is ec-static, going outside and beyond the boundaries of 'self'; and rather than moving towards the unknown, this affirms the other. Although usually limited to the other that already exists, it may also extend to affirming the other that does not yet exist.[55] Kallistos Ware summarises God's ontological model for human existence this way:

> [p]ersonhood in turn implies *relationship*….it is no coincidence that the Greek word for person, *prosopon*, should have the literal meaning "face": each of us is authentically a person only in so far as he or she "faces" others and relates to them in love. Thus [a] key term...is *koinonia*, which in Greek signifies equally "communion" and "society".[56]

For Christianity, relationship constitutes the *sine qua non* of the person and of community.

This ontology of the person has implications for understanding the numerous admonitions found in the New Testament concerning private property. One of these, the parable of the rich fool found in Luke 12:16-21, is instructive:

> Then He spoke a parable to them, saying: "The ground of a certain rich man yielded plentifully. And he thought within himself, saying, 'What shall I do, since I have no room to store my crops?' So he said, 'I will do this: I will pull down my barns and build greater, and there I will store all my crops and my goods. 'And I will say to my soul, "Soul, you have many goods laid up for many years; take your ease; eat, drink, and be merry."' "But God said to him, 'Fool! This night your soul will be required of you; then whose will those things be which you have provided?' "So is he who lays up treasure for himself, and is not rich toward God."

New Testament scholars and theologians consistently make two points about this parable. First, that it places an emphasis on 'my', implicitly demonstrating the lack of

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50 Zizioulas, *Being as Communion*, above n 46, 27-65; Zizioulas, *Communion & Otherness*, above n 46. And see Yannaras, above n 45, 13-27.
51 Zizioulas, *Communion & Otherness*, above n 46, 9-11.
52 Ibid.
53 Ibid, 9.
54 Ibid, 11.
55 Ibid, 10.
56 Bishop Kallistos of Diokleia, 'Foreword' in Yannaras, above n 45, 9, 11.

concern for others. Second, that its final admonition to store up treasure toward God requires that one take account of others, the community, in making decisions about private property.

Taken within the context of the broader importance of relationship and the community to the existence of the human person, such admonitions therefore tell us something about the choices that one makes about private property. Choice is still important in the Christian worldview, yet those choices harmful to the community are in fact detrimental to one's own personhood. Hence, from a Christian perspective, when making a choice about private property, one ought always to have in mind relationships with others, especially the poor and the oppressed. Christianity often refers to this concern for the other as the stewardship of goods and resources, and it is captured in the parable of the rich fool. And while stewardship may be a choice, to avoid or reject it not only harms the community, it harms oneself, and, in that sense, becomes obligatory if one is to be truly human.

B *Islam: Community*

The global financial crisis brought a great deal of attention to Islamic finance, which is frequently seen as involving specific financial instruments and the prohibition on interest, or *riba*. Islam starts where liberalism does in identifying property as a bundle of rights, or choice. But it quickly moves beyond that, recognising that rights and their choices are exercised against the backdrop of the Islamic understanding of unity and community. Thus, unlike liberalism's approach, for Islam, community is the dominant concern, with private property operating within, and perhaps subordinate to, that background. This section considers both the Islamic understanding of property and its emphasis on community.

1 *Bundle of Rights*

There is little in Islamic theology or jurisprudence that outlines the concept, as distinct from the law, of property (*mal*). We can say this much, however: God is seen to be absolute and eternal owner of all that is and has appointed humanity as a vice-regent, holding on trust (*amanah*) in order to deal with God's possessions.[57] Still, while there is little detailed analysis of the substance of the concept of property, in its operation, Islamic law conforms to the standard liberal account.[58] Indeed, in that regard, it takes a similar tack to that found in other religions: the dominant positive law of the state in relation to the concept of property is implicitly adopted for use within the religion.[59]

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[57] Jamila Hussain, *Islam: Its Law and Society* (Federation Press, 2nd ed, 2004) 169; H Patrick Glenn, *Legal Traditions of the World* (Oxford University Press, 3rd ed, 2007) 183.

[58] Hussain, above n 57, 169.

[59] See Peter W Salsich, Jr, 'Toward a Property Ethic of Stewardship: A Religious Perspective' in Charles Geisler and Gail Daneker (eds), *Property and Values: Alternatives to Public and Private Ownership* (Island Press, 2000) 21 and 36; Pipes, above n 14, 14-6; Jaroslav Pelikan, 'Stewardship of Money in the Early Church: A Close Reading of *Who Is the Rich Man that Shall Be Saved?* By Clement of Alexandria' in Anthony Scott (ed), *Good and Faithful Servant: Stewardship in the Orthodox Church* (SVS Press, 2003) 13; Margaret M Mitchell, 'Silver Chamber Pots and Other Goods Which Are Not Good: John Chrysostom's Discourse against Wealth and Possessions' in William Schweiker and Charles Mathewes (eds), *Having: Property and Possession in Religious and Social Life* (SVS Press, 2004) 88; Rachael Oliphant and Paul Babie, 'Can the Gospel of Luke Speak to a Contemporary Understanding of Private Property: The Parable of the Rich Man' (2006) 38 *Colloquium: The Australian and New Zealand Theological Review* 3.

2 *Unity and Community*

While the Islamic concept of private property may be under-analysed, the community in which it operates is not. For Islam, private property operates within the most primal statement of monotheism found in Islam—*la illaha illa'Llah*, there is no God but God—the divine describing its own reality, which is a basis for understanding *tawhid*, the unity and uniqueness of God. And this is the way in which *tawhid*, unity, is understood, it is first and foremost embedded in the being of God, and it is manifested in nature, human relationships, social organisations, worship and ritual and the material dimension of the religion. The human community replicates this *tawhid*, not in the sociological sense, but as a group of people, a tribe or nation, united not by blood ties, language, culture, food or customs, but by their relationship to God. The ultimate manifestation of such a community would be the whole of humankind living in accordance with God's will. And in concrete terms, this unity is manifested in the life of Muslims through ritual life—communal unity is the fullest implementation of Muslim prayer life: Friday prayers, Ramadan, and, above all, Hajj.[60] And, although historically it has proven difficult to maintain this unity, *tawhid* is closely related to the notion of community, of *umma*, in which '...ordinary Muslims can look to the wider Muslim community and feel that they belong to it even though it is divided into various competing factions....'[61]

Thus, the Islamic understanding of property, while consistent with the bundle of rights metaphor, devotes comparatively greater attention to the notion of obligation, the limits placed upon the rights and their exercise[62]—within a broader social context, than to the underlying substance of the rights of the holder of private property. That may be why it is so hard to find any comprehensive statement of the concept of private property, or property generally, having instead to build that up from the specific application of defined legal rules for the ordering of control and distribution of goods and resources. And the principles of *tawhid* and *umma* are given focussed and explicit efficacy through obligation which attaches to the rights allowing for the control and use of goods and resources. Indeed, in many books on Islamic law, chapters on charity precede those on the acquisition and disposal of property.[63] And from the general principle of obligation flows, specific forms of obligation in the nature of the exercise of property rights.

The significant point to take away from Islam is not the theological dimension, but the sociological: those to whom obligation is required or encouraged can be re-framed within the broader context of unity and community within which it occurs—the community of humanity as a whole. This is important for it means that while property contains a strong element of choice and freedom, it is also imbued with obligation, and not merely obligation towards those living in the same locality, town, village, city, as the holder of property, but to all humanity.

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60 Ron Greaves, *Aspects of Islam* (Dartman, Longman, Todd, 2005) 34-8.

61 Ibid 95, and see 75-95.

62 Hussain, above n 57, 170.

63 See for instance Maulana Muhammad Ali, *The Religion of Islam: A Comprehensive Discussion of the Sources, Principles, and Practices of Islam* (Ahmadiyya Anjuman Isha'at Islam, 1990) Part III, chapters II and VII.

C *Judaism: Obligation*[64]

Property is granted enormous protection in the Jewish tradition: two of the Ten Commandments concern it, Jewish law devotes significant attention to the rights of owners, and a good portion of the Talmud deals with rules concerning ownership. Yet, what of the place of obligation within community? We have seen that both Christianity to some extent contains obligation within its scriptural canon, and that to a greater extent, Islam in both its sacred scripture and broader legal literature, exhibits a significant emphasis on obligation towards the other within community. Judaism, too, displays this emphasis and, as with Christianity and Islam, it is instructive in exploring the exercise of choice conferred by private property.

Much of the law relating to the marketplace stems from Leviticus 25:14: 'do not, any of you, oppress your brother or your sister.' This is captured by three admonitions found in the Tanakh, or the Hebrew Scriptures: *tzedakah*, gleanings, and jubilee. *Tzedekah* stems from the command to share property with those who have none—over and over again, people are commanded to look out for the widow, the orphan, the stranger and the poor. This obligation extends to everyone in the community, not as a matter of charity, but as a matter of justice. *Tzedakah* means righteousness or justice, and it means that the duty to provide support for those in need is just that, a duty, a matter of justice, and not one of choice. It is an obligation.[65]

Gleanings and Jubilee might be called specific dimensions of *tzedakah*. Throughout the Tanakh and the Talmud one finds agricultural practices that take up the obligation of justice to the poor and needy. Gleanings, such as leaving harvested sheaves in the field, or planting to the very edge of field and leaving that area unharvested, are aimed at providing for those in need.[66] Jubilee is the requirement to leave the land fallow at certain times—every seven years, which is called Sabbath—and then in the fiftieth year following seven Sabbath cycles of years. These cycles provide not only for the land itself, but also for those in need, for during the Sabbath years, what grows is owned by all, while during the Jubilee year there is a renouncing of debt and redistribution of land.[67]

This brief exploration of the understanding of the person in Christianity, the role of community in Islam, and the place of obligation to others, both human and non-human, in Judaism, demonstrate a convergence in relation to the way in which the choice conferred by private property ought to be exercised. Rather than the atomistic, self-regarding, individual of liberalism, these three traditions posit an alternative: relational, obligation-bearing person living within community. While founded in a belief in God, their sociological implications as an alternative model are equally clear, and ought not to be overlooked in efforts to re-conceive capitalism and markets.

IV A POST-SECULAR PRIVATE PROPERTY: CONCLUDING REFLECTIONS

In the global, plural, post-secular legal environment which characterises twenty-first century life, three reflections assist in considering the contribution of Judaism, Christianity and Islam to a re-conception and re-deployment of private property, as a concept, within the broader structures of capitalism and global markets. And it may be that such engagements and dialogue between secular law and theology/religion will

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64 This section draws on Singer, above n 41, 42-56. See also Meir Tamari, With All Your Possessions: Jewish Ethics and Economic Life (Jason Aronson Inc, 1998) 242-306.

65 Singer, above n 41, 46-8.

66 Ibid 49-50.

67 Ibid 50-1.

reveal that what was always viewed as 'secular' law is not really secular at all, and that what is emerging now is a truly post-secular law, one that is '...varied, plural, and overlapping, dependent on religious anthropologies and cosmologies, as well as sharing symbols, ideas, and institutions with religion.'[68] The three reflections offered here converge on one alternative model, among many, to the standard liberal account of private property, and this may sow the seeds of a post-secular model of private property.

First, each tradition offers remarkably similar teachings concerning the nature and role of private property. Each places great emphasis on personhood and community. Christianity suggests that the human person only exists within community and relationship with others. Judaism and Islam make very clear that ignoring the community diminishes the individual.

Second, each offers ways in which the individual or person ought to act toward the community when exercising the choice conferred by private property through rights to the allocation, control and use of goods and resources. Christianity provides admonitions of stewardship of goods and resources for the poor and the oppressed that allow the person to choose to prioritise and so foster community. Judaism, while recognising that choice exists, largely rejects it as an organising idea in private property, opting instead for mandatory obligations to share one's wealth with others, especially the poor and the oppressed. Islam provides for obligation which fosters a robust model of community.

Thus, as concerns private property, quite unlike the dominant secular liberal conception, Judaism, Christianity, and Islam diminish the importance of choice and prioritise relationship and community. That is the key difference, the central lesson offered to secular liberal law in its attempt to foster community through striking the appropriate balance between the individual and the community. Choice is important, but relationship and community are more so.

And this leads to a third reflection, one more broadly framed: the popular media and some quarters of academia continually tell us that religion *divides* and *promotes conflict*. That is certainly true historically. But, at least as concerns private property, religion contains within it the potential for cooperation, the possibility to unite, to foster rather than to destroy community. Each of Judaism, Christianity and Islam do this through teaching the importance of relationship and community, promoting those ideals through a concern for others rather than oneself.

An assessment of private property, then, reveals Reinhard Marx's thesis to be partly correct: the future of capitalism does require re-assessment, along with its underlying structural components, if it is to retain relevance to twenty-first century life. Yet, it is only partly correct, for it is not Christianity alone that can offer lessons and insight about the appropriate balance between community and individual but, rather, a *plurality* of religious traditions. And this recognises, and unpacks, the pluralistic post-secular legal world in which we live.

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[68] Sullivan, Yelle, and Taussig-Rubbo, above n 9, 7.