

## PRIVATE PROPERTY: THE SOLUTION OR THE SOURCE OF THE PROBLEM?

Paul Babe<sup>\*</sup>

### Introduction

Climate change is a private property problem. Some may react strongly to such a bold claim—after all, private property, we are told, is a solution to the crisis, as the current fascination with the ‘commodification’<sup>1</sup> and ‘proptertisation’<sup>2</sup> of carbon through ‘cap-and-trade’ schemes suggests.<sup>3</sup> In this article, however, I will explain why this saviour may in fact be the source of the problem and why we need to take individual, personal action rather than waiting for government to act for us.

### I. What Private Property Is

I begin with an explanation of liberal theory, from which the dominant contemporary concept of private property emerges. Liberalism concerns itself with the establishment and maintenance of a political and legal order which, among other things, secures individual freedom in choosing a ‘life project’ – the values and ends of a preferred way of life.<sup>4</sup> In order for life to have meaning, some control over the use of goods and resources is necessary; private property is liberalism’s means of ensuring that individuals enjoy choice over goods and resources so as to allow them to fulfil their life project.<sup>5</sup>

The liberal conception of private property is, then, in simple terms, a ‘bundle’ of legal relations (or rights) created, conferred and enforced by the state

---

<sup>\*</sup> *University of Adelaide Law School, Australia. Thanks to Joseph William Singer and Peter Burdon for reading and providing invaluable comments on earlier versions of this project. Any remaining errors are, of course, entirely my own responsibility.*

<sup>1</sup> See Margaret Jane Radin, *Contested Commodities: The Trouble with Trade in Sex, Children, Body Parts and Other Things*, Cambridge, Massachusetts: Harvard University Press 1996.

<sup>2</sup> See Kevin Gray, ‘Property in Thin Air’, *Cambridge Law Journal* (50) 1991: p. 252.

<sup>3</sup> The popular press and media are filled with analysis of such schemes. For a recent example see ‘Lexington: A Refreshing Dose of Honesty’, *The Economist* (21 November 2009) ([http://www.economist.com/world/united-states/displaystory.cfm?story\\_id=15453166](http://www.economist.com/world/united-states/displaystory.cfm?story_id=15453166) (accessed on 8 February 2010)).

<sup>4</sup> See Michael J. Sandel, ‘Introduction’ in Michael J. Sandel (ed.), *Liberalism and its Critics*, New York: New York University Press 1984, p. 1; J.W. Harris, *Legal Philosophies*, Oxford: Oxford University Press 2<sup>nd</sup> ed. 2004, pp. 277-300.

<sup>5</sup> See Jeremy Waldron, *The Right to Private Property*, Oxford: Oxford University Press 1988; Stephen R. Munzer, *A Theory of Property*, Cambridge: Cambridge University Press 1990; Margaret Jane Radin, *Reinterpreting Property*, Chicago: University of Chicago Press 1993; Joseph William Singer, *Introduction to Property*, New York: Aspen Publishers 2<sup>nd</sup> ed. 2005, p. 2.

(law), between people in relation to the control of goods and resources.<sup>6</sup> At a minimum, these rights typically include use, exclusivity, and disposition. For example, one can use one's car (or generally any other tangible or intangible good, resource, or item of social wealth), to the exclusion of all others, and may dispose of it. The holder may exercise these rights in any way they see fit, to suit personal preferences and desires. Or, to use the language of liberal theory, rights are the shorthand way of saying that individuals enjoy choice about the control and use of goods and resources in accordance with, and to give meaning to, a chosen life project.

Notice, however, that in my definition such rights exist only as a product of relationship between individuals. This is significant, for it focuses our attention on the fact that where there is a right (choice) to do something, there is a corresponding duty (a lack of choice) to refrain from interfering with the interest protected by the right.<sup>7</sup> Rights would clearly be meaningless if this were not so. As concerns a particular good or resource, then, the liberal individual holds choice while all others (the community, society) are burdened with a lack of it. C Edwin Baker summarised the idea of rights and relationship this way:

... [private] property [i]s a claim that other people ought to accede to the will of the owner, which can be a person, a group, or some other entity. A specific property right amounts to the *decisionmaking authority* of the holder of that right.<sup>8</sup>

Private property, then, is not merely about the control and use of goods and resources, but also, significantly, about controlling the lives of others.<sup>9</sup> Using evocative and graphic language, Roberto Mangabera Unger puts it this way:

[t]he 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

---

<sup>6</sup> See Singer 2005, *ibid* note 5, p. 2.

<sup>7</sup> Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal* (23) 1913: p. 16; Wesley Newcomb Hohfeld, 'Some Fundamental Legal Conceptions as Applied in Judicial Reasoning', *Yale Law Journal* (26) 1917: p. 710; Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, New Haven: Yale University Press 1919; Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, II*, New Haven: Yale University Press (Walter Wheeler Cook (ed.)) 1923.

<sup>8</sup> C. Edwin Baker, 'Property and its Relation to Constitutionally Protected Liberty', *University of Pennsylvania Law Review* (134) 1986: 741, pp. 742-743 (emphasis added).

<sup>9</sup> Morris R. Cohen, 'Property and Sovereignty', *Cornell Law Quarterly* (XIII) 1927: 8, p. 13.

the actual effect of any decision upon the other person are incompatible with this view of right....<sup>10</sup>

Identifying the importance of relationship reveals the fact that private property and non-property rights overlap; choices made by those with the former have the potential to create negative outcomes—consequences, or what economists call ‘externalities’ – for those with the latter. At the highest level of generality, Unger’s ‘gunman’ is vested with 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>11</sup> The individual revels in ‘...a zone of unchecked discretionary action that others, whether private citizens or governmental officials, may not invade.’<sup>12</sup>

Every legal system acknowledges this problem and, in doing so, seems to accept that with rights come obligations towards others.<sup>13</sup> The state, through law, creates private property just as through that same law (what is more commonly known as regulation), it is said to mediate the socially contingent boundary between private property and non-property holders. This is the essence of private property – state conferral of self-serving rights that come with obligations towards others.<sup>14</sup>

Yet there is something much more disturbing lurking just below the surface of what appears to be state control aimed at preventing harmful outcomes like those of climate change. What is really being conferred by private property is what Duncan Kennedy calls “the legal ground rules giving permissions to injure others, to cause legalised injury.”<sup>15</sup> This is insidious, for ‘...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>16</sup> And those ground rules are invisible, in the sense ‘...that 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 law is responsible for the

---

<sup>10</sup> Roberto Mangabera Unger, *The Critical Legal Studies Movement*, Cambridge, Massachusetts: Harvard University Press 1983, p. 36.

<sup>11</sup> Idem, pp. 37-38.

<sup>12</sup> Idem, p. 38.

<sup>13</sup> Joseph William Singer, ‘How Property Norms Construct the Externalities of Ownership’, *Harvard Law School Public Law Research Papers*, (No. 08-06) 2008, p. 3 (emphasis in the original)

(<http://ssrn.com/abstract=1093341> (accessed on 14 January 2009)).

<sup>14</sup> Joseph William Singer, *Entitlement: The Paradoxes of Property*, New Haven: Yale University Press 2000, p. 204 (emphasis added).

<sup>15</sup> Duncan Kennedy, *Sexy Dressing Etc.*, Cambridge, Massachusetts: Harvard University Press 1993, pp. 90-91 (emphasis in the original).

<sup>16</sup> Idem, p. 91.

outcome, at least in the abstract sense that the law “could have made it otherwise.”<sup>17</sup> Indeed, “[i]t is clear that lawmakers *could* require almost anything. When they require nothing, it looks as though the law is uninvolved in the situation, though the legal decision not to impose a duty is in another sense the cause of the outcome when one person is allowed to ignore another’s plight.”<sup>18</sup>

This brings us full circle to the broader liberal theory with which we began, for the importance of relationship in understanding private property reveals an important, yet paradoxical, dimension of choice. It is simply this: the freedom that liberalism secures to the individual to choose a life project means that in the course of doing so, the individual also chooses the laws, relationships, communities, and so forth that constitute the political and legal order. In other words, in the province of politics people choose their contexts (through electing representatives, who enact laws and appoint judges who interpret those laws), which in turn defines the scope of one’s rights (choice or decisionmaking authority) and the institutions that confer, protect and enforce it (bearing in mind the ground rules of permission as well as the ground rules of prohibition). Individuals choose the regulation of property as much as they do the control and use of goods and resources.<sup>19</sup>

## II. How Private Property Facilitates the Externalities of Climate Change

When we focus on relationship as being central to private property and the political-regulatory contexts we choose, we begin to see something that was always there, yet hidden from our view. The externalities of private property create many other types of relationship in which the lives of many are controlled by the choices of a few. Anthropogenic climate change is a stark example.

While the science is complex, it is clear enough that humans, through their choices, produce the gasses that enhance the natural greenhouse effect which heats the earth’s surface. Among other effects, anthropogenic climate change results in drought and desertification, increased extreme weather events, and the melting of polar ice (especially in the north) and so rising seas levels. We might call this the ‘climate change relationship.’ And private property facilitates choice (both human and corporate) about the use of goods and resources in such a way that emits greenhouse gasses.

---

<sup>17</sup> Idem, p. 91.

<sup>18</sup> Idem, p. 91 (emphasis in the original, footnotes removed).

<sup>19</sup> I am most grateful to Joseph William Singer for bringing this crucial point to my attention. And see also Gregory S. Alexander and Eduardo M. Peñalver (eds.), *Property and Community*, Oxford: Oxford University Press 2010, and the essays collected therein.

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

Externalities do not end at the borders, physical or legal, of a good or resource; choices occur within a web of relationships, not only legal and social, but also physical and spatial. Who is affected? Everyone, the world over, with the poor and disadvantaged of the developing world disproportionately bearing the brunt of the human consequences of climate change<sup>20</sup>—decreasing security, shortages of food, increased health problems, and greater stress on available water supplies. Indeed, as Jedediah Purdy argues,

[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>21</sup>

Consider human security. This will decrease both within countries affected directly by climate change, and in those indirectly affected through the movement of large numbers of people displaced by the direct effects of climate change in their own countries. In the case of rising sea levels, for instance, sixty percent of the human population lives within 100km of the ocean, with the majority in small- and medium-sized settlements on land no more than 5m above sea level. Even the modest sea level rises predicted for these places will result in a massive displacement of ‘climate’ or ‘environmental refugees’. And private property, through securing choice about the use of goods and resources to those in the developed world, makes all of this possible.

### **Conclusion: Is it the Solution?**

---

<sup>20</sup> United Nations Intergovernmental Panel on Climate Change, *Climate Change 2007 – Impacts, Adaptation and Vulnerability: Working Group II Contribution to the Fourth Assessment Report*, Cambridge: Cambridge University Press 2007, p. 7 (<http://www.ipcc.ch/ipccreports/ar4-wg2.htm> (accessed on 14 January 2010)).

<sup>21</sup> Jedediah Purdy, *A Tolerable Anarchy: Rebels, Reactionaries, and the Making of American Freedom*, New York: Alfred A. Knopf 2009, p. 187. See also Jedediah Purdy, ‘Climate Change and the Limits of the Possible’, *Duke Environmental Law & Policy Forum* (18) 2008: p. 289.

Private property and the commodification it depends upon seem to be in vogue at the moment as a solution to anthropogenic climate change. It is claimed, and we tend to believe, that creating a proprietary interest in carbon that can be bought and sold is the answer to the climate crisis. But is it really? We could just as easily say that the concept of private property is the primary culprit. Is it wise to entrust the solution to the concept that put us here? Or might it be more appropriate, as Mike Hulme suggests, 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>22</sup>

Before we pin our hopes on it as a cure-all, we might first ask whether the liberal concept of private property is ripe for just such a reappraisal. We can choose, but we must do so with our eyes open to the reality: that private property and the contexts in which we live are in fact *our* choice, not that of governments. We can no longer wait for government to act, with cap-and-trade schemes or any other form of regulation. At the very least it is not enough, and at worst, it will take too long. Now is the time to act, and only we can take that action. In exercising choice about our context and about goods and resources, we must take responsibility for ourselves, rather than waiting for our governments to act for us.<sup>23</sup>

---

- *The Amsterdam Law Forum is an open access initiative supported by the VU University Library* -

---

<sup>22</sup> Mike Hulme, *Why We Disagree About Climate Change: Understanding Controversy, Inaction and Opportunity*, Cambridge: Cambridge University Press 2009, p. 362.

<sup>23</sup> See James Hansen, *Storms of My Grandchildren: The Truth About the Coming Climate Catastrophe and Our Last Chance to Save Humanity*, New York: Bloomsbury 2009.