

**PROPERTY  
BEYOND  
GROWTH**

TOWARD A POLITICS OF VOLUNTARY SIMPLICITY

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## ABSTRACT

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This jurisprudential thesis argues that when an economy has grown so large that it has reached or exceeded the threshold point beyond which any further growth is ‘uneconomic’ (i.e. socially or ecologically counter-productive), property relations as expressed in law should no longer be defined and defended in order to grow the economy. Instead, property relations should be reconstructed in order to achieve more specific welfare-enhancing objectives – such as eliminating poverty, lessening inequalities, and protecting the environment – and the efficient growth of GDP *or lack thereof* should be treated as a by-product of secondary importance. For these reasons reference will be made to a ‘post-growth’ property system, a system whose coherency, viability, and desirability will be evaluated and ultimately defended as the central project of this thesis.

After outlining the central thesis, the introduction looks more closely at the notion of economic growth (as measured by increases in GDP) and considers how its rise to dominance as the pre-eminent policy objective of governments has given modern property law a ‘pro-growth’ structure (focusing on the U.S. jurisdiction). Chapter One presents a multi-dimensional critique of growth – social, ecological, and economic – and concludes by proposing a new macro-economic framework ‘beyond growth.’ Chapter Two examines whether the macro-economic framework proposed could be advanced legally by reconfiguring property relations in advanced capitalist societies. Responding to the objection that such institutional restructuring would illegitimately interfere with established property rights, it is argued: (1) that due to the indeterminacy of property, contract, and market concepts, significant reform of a private property / market system is not a conceptual impossibility; (2) that the state is always and necessarily involved in defining property entitlements and market structures, a point that fundamentally blurs the private / public distinction which is often used to insulate the economy from state intervention; and (3) that defining those property entitlements and market structures is a normative, value-laden undertaking and therefore cannot be done in such a way that is neutral between conceptions of the good life.

Having established that property law, in particular, and the legal framework of the economy, in general, are malleable creatures of legal convention, the argument of the thesis becomes explicitly engaged with questions of normativity and value. Chapter Three draws on the life and ideas of Henry Thoreau to express an anti-consumerist ethics of consumption. It is argued that Thoreau’s ethics of consumption provide a coherent and attractive normative foundation for a post-growth jurisprudence of property. Chapter Four focuses attention on theories of law reform arising out of the growing literature on law and social movements. After explaining how cultural values and practices shape law, this chapter examines the Voluntary Simplicity Movement, an emerging social movement which represents the most coherent manifestation (in contemporary Western culture, at least) of the Thoreauvian ideals of sufficiency and simplicity. It is argued that this social movement will almost certainly need to expand, organize, and politicize, if anything resembling a post-growth property system is to be realized in law. The final chapter goes beyond foundational theory and critique and sketches an outline of what a post-growth property system might actually look like as a legal reality.



## DECLARATION

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*This is to certify that:*

- i. the thesis comprises only my original work towards the PhD;*
- ii. due acknowledgement has been made in the text to all other material used;*
- iii. the thesis is less than 108,000 words in length as approved by the RHD Committee.*

**SIGNED:**

.....  
**Samuel Alexander**

.....  
**Date**



## ACKNOWLEDGEMENTS

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## PUBLICATIONS

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In revised forms, all the chapters of this thesis, including the introduction, have been either published or accepted for publication in academic journals, conference proceedings, books, etc., over the course of my candidature. The details of publication are as follows:

- Parts of the Introduction are included in Samuel Alexander, 'Imagining a Post-Growth Jurisprudence of Property,' which will be published in the Proceedings of the Second International Conference on Economic Degrowth for Ecological Sustainability and Social Equity (2011, forthcoming).
- Parts of Chapter One are included in Samuel Alexander, 'Earth Jurisprudence and the Ecological Case for Degrowth' (2010) 6 *J. Juris.* 131. An abridged version of this paper will be published in Peter Burdon (ed), *An Invitation to Wild Law* (2011, forthcoming).
- Parts of Chapter Two will be included in Samuel Alexander, 'Property beyond Growth: Toward a Politics of Voluntary Simplicity,' in David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (2011, forthcoming).
- An extended and revised version of Chapter Three will be published as Samuel Alexander, *Just Enough is Plenty: Thoreau's Alternative Economics* (2011, forthcoming). A much shorter section of Chapter Three also appeared in Samuel Alexander, 'Thoreau' (2010) 18(3) *Adbusters: Journal of the Mental Environment*, Pt IV.
- Parts of Chapter Four are included in the 'Introduction' to Samuel Alexander (ed), *Voluntary Simplicity: The Poetic Alternative to Consumer Culture* (2009). Other parts of Chapter Four are included in Samuel Alexander, 'Deconstructing the Shed: Where I Live and What I Live For' *Concord Saunterer* (2011, forthcoming). A shorter section of Chapter Four also appeared in Samuel Alexander, 'Pare Down Your Life to Make it Happier' (2009) 28 *Green* 12 [the publication of the Australian Green Party].
- An extended and revised version of Chapter Five will be included in Samuel Alexander, 'Looking Backward from the Year 2099: Ecozoic Reflections on the Future,' in Center for Earth Jurisprudence (ed), *Continuing the Great Work: A Tribute to Thomas Berry's Contribution to Earth Jurisprudence* (2011, forthcoming).



# PROPERTY BEYOND GROWTH

TOWARD A POLITICS OF VOLUNTARY SIMPLICITY



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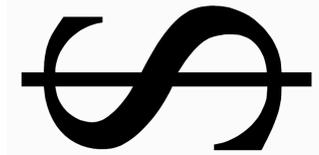
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### **'DEFACE THE CURRENCY'**

*This is the command given to Diogenes of Sinope by the Oracle, a command which can be interpreted to mean 'change the value of money,' that is, expose the errors of conventional economic valuation and seek true wealth in a simpler, less materialistic way of life. Michel Foucault, in his excursion into Greek philosophy, highlighted the similarity between the Greek words for money (nomisma) and law (nomos), and suggested: "Change the value of money" [means] "take a certain attitude with regard to what is convention, what is rule, what is law."\** Diogenes' mission was thus to change customs, habits, and laws, but to succeed he first needed to look inward and change himself.

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\* Michael Foucault, 'Le Gouvernement de soi et des autres: le courage de la vérité' (1984) 62 (unpublished lecture), as quoted in Joseph Tanke, 'The Care of Self and Environmental Politics: Towards a Foucaultian Account of Dietary Practice' (2007) 12(1) *Ethics & the Environment* 79, 91.



Lately in the wreck of a Californian ship, one of the passengers fastened a belt about him with 200 pounds of gold in it with which he was found afterwards at the bottom. Now, as he was sinking, had he the gold? Or had the gold him? – **John Ruskin**

## INTRODUCTION

### 1. FRAMING THE THESIS

In 2001 a legal economist named Paul Mahoney published a study on how economic growth, measured by increases in Gross Domestic Product (GDP), differed between common law and civil law jurisdictions during the final four decades of the twentieth century.<sup>1</sup> The study shows that common law countries generally experienced faster economic growth than civil law countries. In the tradition of Friedrich von Hayek, Mahoney argues that this finding is due to the ability of common law systems to ensure greater security of property and contract rights, and better constrain government interference in the economy, than civil law systems.<sup>2</sup> What is most interesting about Mahoney's argument is not so much his stated thesis but rather the unstated assumption upon which his thesis is based, namely, that economic growth is unquestionably a good thing – and the more of it, the better. Mahoney is hardly alone in making this assumption, of course. The desirability of economic growth is arguably one of the deepest and most widely held assumptions of our age, providing a common background to modern political ideologies, whether on the Left or the Right.<sup>3</sup>

It is the assumption that economic growth is always a good thing which this thesis will bring into question in the context of the jurisprudence of property.<sup>4</sup> This legal context provides a particularly appropriate space within which to deconstruct the notion of economic growth because the system of government which has proven to

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<sup>1</sup> Paul Mahoney, 'The Common Law and Economic Growth: Hayek Might Be Right' (2001) 30 *J. Legal Stud.* 503.

<sup>2</sup> Friedrich von Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (1973).

<sup>3</sup> As historian John McNeill writes, 'The overarching priority of economic growth was easily the most important idea of the twentieth century.' John McNeill, *Something New Under the Sun: An Environmental History of the Twentieth-Century World* (2000) 336. See also, Clive Hamilton, *Growth Fetish* (2003) 1 (arguing that across the political spectrum, '[n]othing more preoccupies the modern political process than economic growth').

<sup>4</sup> A property system is preliminarily defined as a system of enforceable rules governing access to and control of scarce and desired things (whether tangible or intangible). On that basis, 'property' refers not to a thing, as such, but to the nature and degree of power that is recognized in law as permissibly exercised over a thing. See generally, Margaret Davies, *Property: Meanings, Histories, Theories* (2007).

be most conducive to economic growth – capitalism – is founded upon the legal recognition of property rights and their market exchange.<sup>5</sup> One of the many functions of a property system is to provide a basis of expectation regarding the use and control of particular resources,<sup>6</sup> and for hundreds of years jurists have highlighted how such a basis of expectation promotes economic activity. Canonical figures such as Thomas Hobbes, William Blackstone, Adam Smith, and Jeremy Bentham, all argued in various ways that property rights provide an incentive to engage in economic activity by ensuring that one will reap where one has sown (i.e. by internalizing the benefits of productive labour).<sup>7</sup> In the modern era, legal economists have developed this line of thinking, arguing that well-defined and secure property rights give traders and creditors confidence that their interests are known and enforceable, which in turn serves to promote efficient or ‘wealth maximizing’ market exchanges.<sup>8</sup> More recently still, Hernando de Soto has argued that establishing a system of property rights is a prerequisite to releasing the economic potential of ‘dead capital’ which he claims is wasted in the absence of any formalized property system.<sup>9</sup> Within this long, formidable, and extremely influential tradition, property rights are variously defined and defended on the basis that they promote productive activity and function as an engine for growth.<sup>10</sup>

This thesis does not seek to reject the notion of property rights or oppose outright the idea market exchange. It does, however, seek to reconsider the assumption that growing the economy should always be an underlying aim when structuring or

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<sup>5</sup> See generally, John Locke, *Two Treatises of Government* (New ed, 1993 [1690]); Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1976 [1776]).

<sup>6</sup> See Armen Alchian and William Allen, *Exchange and Production: Theory in Use* (1969) 158 (defining property solely in terms of expectation).

<sup>7</sup> Thomas Hobbes, *Leviathan* (1991 [1651]) 88-9 (discussing how in a ‘state of nature’ the insecurity of possessions means that ‘there is no place for Industry; because the fruit thereof is uncertain’); William Blackstone, *Commentaries on the Laws of England* (1982 [1765-69]) 2 (asking ‘who would be at the pains of tilling, if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labour?’); Adam Smith, *Lectures on Jurisprudence* (1978 [1763]) 83 (arguing that the law protects property as an ‘encouragement to labour’); Jeremy Bentham, *Principles of the Civil Code*, in Jeremy Bentham, *The Works of Jeremy Bentham* (1843) 310 (arguing that one of the principal evils associated with attacks on property is the ‘Destruction of Industry’).

<sup>8</sup> See Ronald Coase, ‘The Problem of Social Cost’ (1960) 3 *J. L. & Econ.* 1; Harold Demsetz, ‘Toward a Theory of Property Rights’ (1967) 57(2) *Am. Econ. Rev.* 347; Richard Posner, ‘Wealth Maximization Revisited’ (1985) 2 *Notre Dame J. L. Ethics & Pub. Policy* 85.

<sup>9</sup> Hernando de Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2000). De Soto even compares the ability of property rights to release the economic potential of otherwise ‘dead capital’ with the release of energy in an atomic explosion, at 37. See also, Douglass North, *Structure and Change in Economic History* (1st ed, 1981) (anticipating de Soto’s argument that the creation of enforceable property rights is one of the most important institutional prerequisites for economic growth).

<sup>10</sup> As Morton Horwitz notes in his seminal study of the development of American law, ‘property rights came to be justified by their efficacy in promoting economic growth.’ Morton Horwitz, *The Transformation of American Law, 1780-1860* (1977) 34. See also, Wayne McIntosh and Laura Hatcher (eds), *Property Rights and Neoliberalism: Cultural Demands and Legal Actions* (2010).

restructuring a property system. The chief problem with treating property law solely or primarily as an economic tool is that doing so neglects the fact that a property system does much more than provide a legal structure to the economy. Property law does not just create legal relations between people and things, as commonsense may suggest; nor does it simply create legal relations between people with respect to things, as the legal realists argued.<sup>11</sup> More significantly, recent scholarship reveals how property law also shapes the contours of social relations and implies a particular vision of the 'proper' social world.<sup>12</sup> By shaping property law into a tool that maximizes economic growth, therefore, lawmakers should recognize that, in ways that are not always obvious, they are also shaping the social order and the human experience of it.<sup>13</sup> Of equal importance, property law also defines the relationship between human beings and the natural world, implying a vision of the 'proper' way to relate to that greater context in which we live, on which we rely, and of which we are a part.<sup>14</sup> Since what is 'proper' is always contestable, however, so are the nature and meaning – even the legitimacy – of existing property rights as expressed in law.

### 1.1. *Property beyond Growth*

In advanced capitalist societies today, and increasingly throughout the world, public policy seems to be founded upon a vision of the social world in which sustained economic growth will eventually lead to a life of material abundance for all.<sup>15</sup> Attractive on the surface, perhaps, this vision of abundance treats nature as a limitless resource to be exploited for human gratification and it promotes a possessive, materialistic attitude to life by equating happiness and well-being with

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<sup>11</sup> See Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays* (1923).

<sup>12</sup> Joseph Singer, *Entitlement: The Paradoxes of Property* (2000) 142. See also, Joseph Singer and Jack Beermann, 'The Social Origins of Property' (1993) 6 *Can. J. L. & Juris.* 217; Gregory Alexander, 'Property as Propriety' (1998) 77 *Nebraska L. R.* 667; Lee Godden, 'Grounding Law as Cultural Memory: A Proper Account of Property and Native Title in Australian Law and Land' (2003) 19 *Austl. Feminist L. J.* 61.

<sup>13</sup> As Margaret Davies writes: 'Property-thought or thought of the proper regulates not only the distribution of resources in society, it regulates our conceptions of self, knowledge, group identity, sexual identity, law and language.' Margaret Davies, 'The Proper: Discourses on Purity' (1998) 9(2) *Law and Critique* 147.

<sup>14</sup> See generally, David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (2011, forthcoming).

<sup>15</sup> It should be noted that socialist countries seem to be animated by the same vision. As Michel Foucault once pointed out, 'the universalization of the bourgeois model has been the utopia which has animated the constitution of Soviet society.' See Michel Foucault and Noam Chomsky, 'Human Nature: Justice versus Power,' in Arnold Davidson (ed), *Foucault and his Interlocutors* (1997) 132.

increased opportunities to accumulate and consume.<sup>16</sup> Whatever utility it may have had in the past, today there are compelling grounds for contesting this vision of abundance as well as the pro-growth conception of property (discussed below) that it both shapes and is shaped by. Not only are the materialistic values underlying this vision proving to have a caustic effect on personal and social well-being,<sup>17</sup> but the process of globalizing Western-style consumption habits is degrading the health and integrity of Earth's ecosystems and diminishing their capacity to support life in the future.<sup>18</sup> A new vision is urgently needed, and with it a new conception of property.

This thesis explores one such vision – the vision of a property system beyond growth. Even to consider looking 'beyond growth' would seem rather premature, of course, if the analysis were to be directed toward the poorest nations on the planet, where the need for further economic development, of some form, is immediate and obvious.<sup>19</sup> But when the analysis is focused, as it will be presently, on the richest nations – nations which over the course of the twentieth century evolved from scarcity economies to surplus economies<sup>20</sup> and which now seem to be characterised by over-consumption rather than under-consumption<sup>21</sup> – it is much less clear why economic growth should remain a central policy objective of governments. Indeed, there are four main arguments, to be unpacked throughout this thesis, for why the richest nations should give up the pursuit of economic growth and try to manage without growth:<sup>22</sup> (1) Continued economic growth worldwide is no longer a sustainable option due to environmental and resource constraints, so the richest nations should leave room for growth in the poorest nations where the benefits of growth are evident;<sup>23</sup> (2) in the richest nations growth has become 'uneconomic,' in

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<sup>16</sup> See Thomas Berry, *Evening Thoughts: Reflecting on Earth as Sacred Community* (1st ed, 2006) (arguing that Earth should not be conceived of as a 'resource' to be consumed, but as something 'sacred'). See also, C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (1962) (outlining the 'possessive assumptions' built into liberal capitalism).

<sup>17</sup> See Tim Kasser, *The High Price of Materialism* (2002).

<sup>18</sup> See generally, Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being: Synthesis* (2005).

<sup>19</sup> See United Nations Development Program, *Human Development Report 2010: The Real Wealth of Nations* (2010) (assessing the progress and failings of human development since the 1970s). See also, Majid Rahnema and Victoria Bawtree (eds), *The Post-Development Reader* (1997) (warning against the imposition of Western-style development upon the Third World).

<sup>20</sup> See Richard Easterlin, *Growth Triumphant: The Twenty-First Century in Historical Perspective* (1996).

<sup>21</sup> Arrow Kenneth et al, 'Are We Consuming Too Much?' (2004) 18(3) *J. of Econ. Perspectives* 147, 168 (concluding that 'the need for vigorous public policies to support more efficient consumption and investment choices is unambiguous').

<sup>22</sup> See generally, Peter Victor and Gideon Rosenbluth, 'Managing without Growth' (2007) 61(2-3) *Ecological Economics* 492. The details and most of the supporting literature for these arguments are provided in Chapter One.

<sup>23</sup> See Donella Meadows, Jorgen Randers and Dennis Meadows, *Limits to Growth: The 30-year Update* (2004).

the sense that it detracts from well-being more than it contributes;<sup>24</sup> (3) growth in the richest nations is neither necessary nor sufficient for meeting policy objectives such as full employment, elimination of poverty, and protection of the environment;<sup>25</sup> and (4) growth in the richest nations is an ineffective and unsustainable means of reducing global poverty.<sup>26</sup> Building upon these arguments, this thesis will explore how property relations within rich capitalist nations might evolve, how our thinking about those relations might evolve, and with what consequences, if economic growth were to lose its privileged position as the touchstone of policy and institutional success.<sup>27</sup>

The argument of this thesis begins by drawing on social and ecological research and economic theory in an attempt to establish the veracity of what Manfred Max-Neef has called the ‘threshold hypothesis.’<sup>28</sup> This hypothesis holds that ‘for every society there seems to be a period in which economic growth (as conventionally measured) brings about an improvement in the quality of life, but only to a point – the threshold point – beyond which, if there is more economic growth, quality of life may begin to deteriorate.’<sup>29</sup> The basic idea is that when macro-economic systems expand beyond a certain size, the additional social and ecological costs of growth begin to outweigh the benefits, making any further growth uneconomic.<sup>30</sup> To establish this premise, this thesis will utilize the conceptual framework employed by many ecological economists, who have developed a number of indexes to measure and compare the benefits and costs of economic growth (e.g. the Index of Sustainable

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<sup>24</sup> See Herman Daly, ‘Uneconomic Growth: In Theory, in Fact, in History, and in Relation to Globalization’ in Herman Daly, *Ecological Economics and the Ecology of Economics: Essays in Criticism* (1999) 8-24.

<sup>25</sup> See Peter Victor, *Managing without Growth: Slower by Design, not Disaster* (2008).

<sup>26</sup> See David Woodward and Andrew Simms, ‘Growth Isn’t Working: The Unbalanced Distribution of Benefits and Costs from Economic Growth’ (2006) <<http://www.neweconomics.org/>> at 15 October 2010. Despite being focused primarily on the richest nations, this thesis recognizes the global nature of economic activity today (as evidenced especially by points 1 and 4 above). Although touched on in places in the thesis, however, the broader issues concerning globalization ‘beyond growth’ must be the focus of another study. But see, Debal Deb, *Beyond Developmentality: Constructing Inclusive Freedom and Sustainability* (2009).

<sup>27</sup> In this thesis the phrase ‘property relations’ will sometimes be preferred over ‘property rights’ for two reasons. First, to emphasize that property law creates asymmetrical relationships of power between members of society and not simply legal relationships between people and things, a point which is also meant to highlight the fact that property entails both rights and obligations. See, e.g., Singer, *Entitlement*, above n 12. Second, the phrase ‘property relations’ is meant to indicate that the ‘laws of property’ will be defined broadly in this thesis, encompassing not just conventional property law, but also the cluster of other legal rules which also help to shape the meaning of property in law, such as the liability doctrines of nuisance and negligence, environmental and planning statutes, aspects of labour law, tax law, etc., as well as the contractual rules governing the transfer of property. For the purposes of this thesis, then, these bodies of law together constitute a ‘property system.’

<sup>28</sup> Manfred Max-Neef, ‘Economic Growth and Quality of Life: A Threshold Hypothesis’ (1995) 15(2) *Ecological Economics* 115.

<sup>29</sup> *Ibid* 117.

<sup>30</sup> See Douglas Kysar, ‘Sustainability, Distribution, and the Macroeconomic Analysis of Law’ (2001) 43 *B.C. L. Rev.* 1.

Economic Welfare and the Genuine Progress Indicator, discussed below).<sup>31</sup> To anticipate the central finding here, in virtually every instance of where an index of this type has been calculated, the movement of the index appears to reinforce the threshold hypothesis.<sup>32</sup> Put more directly, there is an emerging body of evidence which indicates that many of the most developed regions of the world – including North America, Western Europe, Japan, and parts of Australasia – have entered or are entering a phase of uneconomic growth.<sup>33</sup>

Focusing on those highly developed regions, the central argument of this thesis is that when an economy has grown so large that it has reached or exceeded the threshold point beyond which any further growth is ‘uneconomic’ (i.e. socially or ecologically counter-productive), property relations as expressed in law should no longer be defined and defended in order to grow the economy. Instead, property relations should be constructed or reconstructed in order to achieve more specific welfare-enhancing objectives – such as eliminating poverty, lessening inequalities, and protecting the environment – and the efficient growth of GDP *or lack thereof* should be treated as a by-product of secondary importance. For these reasons reference will be made to a ‘post-growth’ property system, a system whose coherency, viability, and desirability will be evaluated and ultimately defended as the central project of this thesis.<sup>34</sup>

## 1.2. *Voluntary Simplicity as the Central Normative Idea*

‘A person who is going to make a fruitful inquiry into the question of the best political arrangement,’ Aristotle once wrote, ‘must first set out clearly what the most choiceworthy life is. For if that is unclear, the best political arrangement must also be unclear.’<sup>35</sup> In this passage Aristotle defends a conception of politics that has recently

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<sup>31</sup> See Philip Lawn, ‘A Theoretical Foundation to Support the Index of Sustainable Economic Welfare (ISEW), Genuine Progress Indicator (GPI), and Other Related Indexes’ (2003) 44(1) *Ecological Economics* 105.

<sup>32</sup> See Philip Lawn, ‘An Assessment of the Valuation Methods Used to Calculate the Index of Sustainable Economic Welfare (ISEW), Genuine Progress Indicator (GPI), and Sustainable Net Benefit Index (SNBI)’ (2005) 2 *Environment, Development, and Sustainability* 185.

<sup>33</sup> The evidence is reviewed in Chapter One.

<sup>34</sup> Although this thesis is always framed in a jurisprudential context, it draws heavily on economics, and the theoretical nature of the analysis means that other disciplines are engaged throughout the thesis too. In particular, the ‘critical’ approach to property law which will be taken up in this thesis (detailed and reviewed in Chapter Two, especially) necessitates an interdisciplinary engagement with normative ethics as well as political and social theory. See generally, Costas Douzinas and Adam Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (2005). See also, Davies, *Property*, above n 4, 9 (arguing that ‘property cannot be understood merely as a legal concept’).

<sup>35</sup> Aristotle, *The Politics* (Rev. ed, 1981) 1323a 14-17.

enjoyed a revival in political debate.<sup>36</sup> His basic claim, as Martha Nussbaum interprets it, is that ‘political arrangement cannot proceed intelligently unless it uses an account of human flourishing to guide it.’<sup>37</sup> In an age in which law is widely recognized as being inherently political,<sup>38</sup> Aristotle’s claim is also receiving renewed attention among legal scholars.<sup>39</sup> One function of a legal system – of a property system, in particular – is to distribute money, entitlements, and power; but in order for lawmakers to distribute these goods appropriately, that is, in a way that is ‘proper,’ they have to be guided by some conception of what those goods are good *for*, how people should act in relation to them, and how much of them people might need in order to flourish.<sup>40</sup> In determining these issues, politics and law are required to take a stand on what constitutes the good life, to some extent at least.

The standard liberal objection to infusing politics and law with a conception of the good life is that doing so might involve telling citizens in an unacceptable way how they should live and what they should value in life.<sup>41</sup> Although a legitimate anxiety, the Aristotelian or neo-Aristotelian response is that liberals who raise this objection are mistaken if they think that refraining from evaluating people’s value-judgements or ‘preferences’ is somehow neutral or apolitical.<sup>42</sup> The legal structure of a society inevitably privileges some values over others, and so lawmakers are inescapably situated in a normative universe and confronted by normative questions.<sup>43</sup> The liberal attempt to avoid value-judgments, therefore, is effectively opting for the values and norms of the status quo rather than favouring change, which is a choice that is neither neutral nor apolitical.<sup>44</sup> In short, law is not only a political institution (or set of institutions); law is also inherently normative and value-laden, a point this thesis

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<sup>36</sup> See generally, Lenn Goodman and Robert Talisse (eds), *Aristotle’s Politics Today* (2007).

<sup>37</sup> Martha Nussbaum, ‘The Good as Discipline, the Good as Freedom,’ in David Crocker and Toby Linden (eds), *Ethics of Consumption: The Good Life, Justice, and Global Stewardship* (1998) 312.

<sup>38</sup> See generally, David Kairys, *The Politics of Law: A Progressive Critique* (Revised ed, 1990).

<sup>39</sup> See, e.g., Francis Mootz, ‘A Future Foretold: Neo-Aristotelian Praise of Postmodern Legal Theory’ (2003) 68(3) *Brooklyn L. R.* 683; John Lunstroth, ‘Linking Virtue and Justice: Aristotle on the Melian Dialogue’ (2006) 12 *International Legal Theory* 99; Colin Farrelly and Lawrence Solum (eds), *Virtue Jurisprudence* (2008).

<sup>40</sup> For some recent discussions of property law with Aristotelian themes, see Eric Claeys, ‘Virtue and Rights in American Property Law’ (2009) 94(4) *Cornell L. R.* 889; Eduardo Penalver, ‘Land Virtues’ (2009) *Cornell L. R.*

<sup>41</sup> The representative strategy of John Rawls is to distinguish sharply between ‘the right’ and ‘the good’ and then argue that politics should be structured to protect the right, leaving people free to pursue their own conceptions of the good. That said, even Rawls accepts that political theory cannot wholly go without at least a ‘thin’ theory of the good. See John Rawls, *A Theory of Justice* (1971), esp. Ch. 7.

<sup>42</sup> See Nussbaum, above n 37, 316.

<sup>43</sup> See Robert Cover, ‘Nomos and Narrative: The Supreme Court 1982 Term’ (1983) 97 *Harv. L. R.* 4; Maksymilian Del Mar and Zenon Bankowski (eds), *Law as Institutional Normative Order* (2009).

<sup>44</sup> See Stanley Fish, *The Trouble with Principle* (1999).

openly acknowledges.<sup>45</sup> Accordingly, the central normative idea of this thesis will now be described and its relation to the thesis explained.

The post-growth jurisprudence of property being advanced in this thesis is normatively based upon an ethics of consumption known variously as 'voluntary simplicity' (the preferred term), 'downshifting,' 'anti-consumerism,' 'post-materialism,' or just 'simple living.'<sup>46</sup> Considered in depth later in the thesis, voluntary simplicity designates a philosophy of living that resists high-consumption, materialistic lifestyles in favour of 'a simpler life' of reduced consumption. As a practical matter this living strategy characteristically involves providing for material needs as simply and directly as possible, minimizing expenditure on consumer goods and services, and generally seeking non-materialistic sources of satisfaction and meaning. Put otherwise, it is an attempt to avoid superfluous income and consumption, in exchange for more time and freedom to pursue other life goals (whatever those goals may be). Various defended by its advocates on personal, social, humanitarian, and ecological grounds, voluntary simplicity is predicated on the assumption that human beings can live meaningful, free, happy, and infinitely diverse lives, while consuming no more than a sustainable and equitable share of nature. That, at least, is the challenging ideal which seems to motivate and guide many of its advocates and practitioners.<sup>47</sup>

The particular conception of voluntary simplicity to be advanced in this thesis arises out of the 'alternative economics' developed by the great simpler liver and pioneering environmentalist, Henry David Thoreau (1817-1862).<sup>48</sup> Thoreau's economics are 'alternative' in the sense that they lie outside the macro-economic growth paradigm which dominates thinking about economic growth today. According to growth economics, discussed in more detail below, the overriding objective of governments is to grow the economy. Implicit to this growth paradigm is a conception of the 'legal subject' or the 'human being' more generally as a consumer who needs and desires ever-increasing consumption of goods and services to increase well-being.<sup>49</sup> It is clear that from within the paradigm of growth economics a post-growth property system would be unattractive, because such a system would not be

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<sup>45</sup> The normativity of property law is explored in detail in Chapter Two.

<sup>46</sup> See generally, Samuel Alexander (ed), *Voluntary Simplicity: The Poetic Alternative to Consumer Culture* (2009).

<sup>47</sup> *Ibid.*

<sup>48</sup> See especially, Henry David Thoreau, 'Walden' in Carl Bode (ed), *The Portable Thoreau* (1982).

<sup>49</sup> See Joel Magnuson, *Mindful Economics: How the U.S. Economy Works, Why it Matters, and How it Could be Different* (2008) 237 (arguing that the growth imperative of capitalism depends upon 'consumerism,' defined as 'a cultural norm that equates personal well-being with purchasing more and better material possessions').

designed to maximize exactly that which consumers value as the most direct means to well-being, namely, increased consumption of goods and services made possible by growth in per capita income. But it is precisely the assumption that increased income/consumption always leads to increased well-being which Thoreau's alternative economics brings radically into question. In doing so, growth economics is brought radically into question, opening up normative space for an alternative economic perspective, and ultimately an alternative legal perspective, *beyond growth*.<sup>50</sup>

Put simply, Thoreau's economic analysis focuses attention on the question of how much money and material possessions are needed to live well. Rephrased for the purposes of this thesis, it could be said that Thoreau's focus is on how much property is 'proper.' A ruthless critic of what today would be called 'consumerism,'<sup>51</sup> Thoreau advocated a life of material simplicity, and he showed by example that surprisingly little is actually needed to live well, if only life is approached with the right attitude. 'Superfluous wealth can buy superfluities only,' he asserted.<sup>52</sup> 'Money is not required to buy one necessary of the soul.'<sup>53</sup> Though in need of refining and updating for today's world, Thoreau's penetrating critique of materialistic ideals and practices not only casts doubt on the idea that increased consumption is always the best path to increased well-being; it also goes significantly further, suggesting that in high-consumption societies like those in the developed world today, *reducing* consumption in many cases could actually *increase* well-being.<sup>54</sup>

Thoreau was also deeply troubled by the 'economic' conception of nature and particularly sensitive to its limitations: 'If a man walks in the woods for love of them half of each day, he is in danger of being regarded as a loafer. But if he spends his days as a speculator, shearing off those woods and making the earth bald before her time, he is deemed an industrious and enterprising citizen.'<sup>55</sup> Treating nature as a resource to be exploited for human gratification is one way to look at the world.<sup>56</sup> But Thoreau, and the Earth jurisprudence movement he has in part inspired, conceive of nature very differently, as a having an intrinsic value that is not wholly reducible to

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<sup>50</sup> See Samuel Alexander, 'Property beyond Growth: Toward a Politics of Voluntary Simplicity' in David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (2011, forthcoming).

<sup>51</sup> See definition above n 49.

<sup>52</sup> Thoreau, *Walden*, above n 48, 568.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid* 258-334. See also, Tim Jackson, 'Live Better by Consuming Less? Is There a Double Dividend in Sustainable Consumption?' (2005) 9(1-2) *Journal of Industrial Ecology* 19.

<sup>55</sup> Henry David Thoreau, 'Life without Principle,' in Bode (ed.), *The Portable Thoreau*, above n 48, 633.

<sup>56</sup> See, e.g., Richard Posner, *Economic Analysis of Law* (3rd ed, 1986) 10.

dollars and cents.<sup>57</sup> The fact that nature's value defies precise analytical expression or economic valuation does not mean that it is of no value, of course. On the contrary, it may just mean that nature is ultimately *priceless* and thus deserving of our utmost care and respect.<sup>58</sup> In an age such as our own where human beings are inflicting ever-greater violence upon nature in the pursuit of economic growth, it will be argued that there are many reasons for returning to – or rather, advancing toward – a Thoreauvian sensibility of nature. As a species, we will be less likely to destroy that which we love and revere.

Thoreau's ideas and perspectives directly contradict the first premise of growth economics according to which more market consumption is always better. If a society is 'over-consuming,' in the sense that reducing overall consumption could actually increase overall well-being, it is not at all clear why growth in per capita income should be an aim of individuals or governments. Indeed, it will be argued that the more a society is characterized by over-consumption, the less important growth in per capita income should be as a policy objective. More precisely, this thesis proposes that property relations in over-consuming societies should not be structured with the goal of growing the economy; instead, more specific welfare-enhancing objectives should be prioritized, even if doing so functions to inhibit growth.

Such an argument will be challenged, of course, by all those who seek increased consumption of goods and services through growth in per capita income. What this means, in terms of this thesis, is that some form of 'voluntary simplicity' will almost certainly need to be embraced at the socio-cultural level, to some significant extent, at least, if there is to be any hope of reconstructing property law beyond growth economics.<sup>59</sup> For a post-growth jurisprudence of property to be attractive, then – or even given a fair hearing – it is absolutely critical that a sound case be made for why increased consumption is no longer a trustworthy path to well-being in affluent societies, all things considered. More relevant today than ever before,<sup>60</sup> Thoreau's alternative economics present a powerful justification for embracing 'a simpler life' of reduced consumption – a life of voluntary simplicity – and the post-growth jurisprudence of property being advanced in this thesis can be understood, ultimately,

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<sup>57</sup> See generally, Peter Burdon (ed), *An Invitation to Wild Law* (2011, forthcoming). Although I am extremely sympathetic to the deep environmentalist sensibility permeating the Earth jurisprudence movement, it will be seen that the argument of this thesis is more 'positivist' than many of the arguments in Earth jurisprudence, which draw heavily on 'natural law' traditions and perspectives. This points to a difference in legal theory, however, and does not imply any greater or lesser respect for nature.

<sup>58</sup> Berry, *Evening Thoughts*, above n 16.

<sup>59</sup> This argument is made in Chapter Four in the context of law and social movement literature.

<sup>60</sup> See Sandra Harbert Petruionis and Laura Dassow Walls (eds), *More Day to Dawn: Thoreau's Walden for the Twenty-First Century* (2007).

as an attempt to defend and politicize this vision of the good life, by infusing it into the legal framework of a private property / market system.<sup>61</sup>

The remainder of this introduction is divided into three sections (all of which remain introductory but the analysis begins to get more substantive and detailed). The first section looks more closely at the notion of economic growth and considers how its rise to dominance as the pre-eminent policy objective of governments has shaped and still shapes property law. The second section, laying the foundations of this thesis, presents an extensive literature review of ‘growth scepticism’ and indicates how this thesis in the jurisprudence of property contributes to and develops that literature in an original way. The final section outlines the structure of this thesis by providing an overview of the arguments in each of the forthcoming chapters.

## 2. THE GROWTH MODEL OF PROGRESS

Economic growth was defined earlier, according to convention, as a rise in Gross Domestic Product (GDP), and that is how the term will be used throughout this thesis, unless stated otherwise. The result of elaborate national accounting systems, GDP can be broadly understood as ‘the market value of all final goods and services [i.e. commodities] produced within a country during a given period of time’<sup>62</sup> It can be calculated in three different, but formally equivalent ways, as economist Tim Jackson explains:

[GDP] may be seen, first, as the total of all *incomes* (wages and profits) earned from the production of domestically owned goods and services. Next, it may be regarded as the total of all *expenditures* made in consuming the finished goods and services. Finally, it can be viewed as the sum of the *value added* by all the activities which produce economic goods and services.<sup>63</sup>

Since these different methods of calculating GDP are formally equivalent – that is, since they should add up to the same total (but for accounting errors) – it does not

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<sup>61</sup> Politicizing voluntary simplicity might strike some as paradoxical, in the sense that anything mandated by law does not sound very ‘voluntary.’ But this thesis will not argue that simplicity of living should be *imposed* on people, but that simplicity, rather than consumerism, should be systematically privileged, supported, and encouraged when making decisions about how to structure a society (especially over-consuming societies).

<sup>62</sup> N. Gregory Mankiw, *Principles of Economics* (5th ed, 2008) 510. A commodity is considered ‘final’ when it is consumed rather than used in the production of another commodity.

<sup>63</sup> Tim Jackson, ‘Quality of Life, Sustainability, and Economic Growth’ in Tony Fitzpatrick and Michael Cahill (eds), *Environment and Welfare: Towards a Green Social Policy* (2002) 99.

matter which one is used. In this thesis, however, the first two methods will be referred to more than the third, for the following reasons. The first method, based on total incomes, is useful simply due to its clarity, in that growth is perhaps most easily grasped when understood as a rise in per capita income. The second method, based on total consumption expenditure, is useful because it provides the strongest foundation for interpreting GDP as a proxy for social well-being, an interpretation which will be heavily qualified and often contested throughout this thesis. This welfare-based interpretation, we will see, holds that consumption expenditure in the market is an expression of the value consumers place on the goods and services they consume. An increase in income, therefore, should mean that consumers get more of what they value most, since more consumer ‘preferences’ can be satisfied through market transactions.<sup>64</sup> According to this view, there is a direct and positive correlation between consumption expenditure and well-being.<sup>65</sup>

By conflating economic welfare and social well-being, growth in GDP per capita becomes a measure not just of economic success but of a nation’s social progress more generally, a view which will be referred to in this thesis as the ‘growth model of progress.’<sup>66</sup> The dominance of this model today is clearly evidenced by the fact that growing the economy is the central objective of governments around the world and the primary measure of policy and institutional success.<sup>67</sup> Since this thesis is challenging the growth model – in particular, how that model shapes the legal

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<sup>64</sup> See Paul Samuelson, ‘A Note on the Pure Theory of Consumer’s Behaviour’ (1938) 5 *Economica* 61 (sketching the foundations of ‘consumer choice theory,’ which holds that consumers purchase that combination of goods and services that will maximize their utility given the income available).

<sup>65</sup> Since Arthur Pigou, at least, economists have generally distinguished between ‘social well-being’ or ‘social welfare,’ at large, and the narrower concept of ‘economic welfare.’ Arthur Pigou, *The Economics of Welfare* (2002 [1920]). However, after making that distinction, economists have normally disregarded or downplayed possible divergences between the two welfare concepts and operated on Pigou’s dictum that there is a clear presumption that changes in economic welfare (i.e. income / consumption) indicate changes in social welfare in the same direction, if not to the same degree. See Pigou, at 20. A leading textbook on growth economics typifies this conflation of concepts, stating that ‘In this book, we will often use the phrase “per capita income” as a generic welfare measure.’ Charles Jones, *Introduction to Economic Growth* (2nd ed, 2002) 7.

<sup>66</sup> GDP has been recently described as ‘the best-recognized measure of economic performance, often used as a generic indicator of progress.’ See European Commission, ‘Beyond GDP – International Conference Overview’ < <http://www.beyond-gdp.eu/overview.html> > 15 October 2010.

<sup>67</sup> In early 2010, then Prime Minister of Britain, Gordon Brown, arguably spoke for most nations when he stated: ‘Going for growth is the number one priority.’ See *Herald Scotland*, 8 January 2010 < <http://www.heraldscotland.com/news/politics/leadership-move-a-storm-in-a-teacup-claims-prime-minister-1.996934?localLinksEnabled=false> > at 10 June 2010. See also, Stephen Purdey, *Economic Growth, the Environment and International Relations: The Growth Paradigm* (2010) 25 (arguing that ‘Contemporary international relations, though complex and diverse, are unified by a common commitment to economic growth as a policy priority’); Michel Beaud, *A History of Capitalism, 1500-2000* (2001) 8 (arguing that ‘Growth has in fact become the supreme goal of... contemporary societies’).

structure of property relations in affluent societies – it is important to outline the theoretical foundations of that model.

### 2.1. *The Theoretical Foundations of the Growth Model*

The first estimates of national accounts in the Western world were provided in 1665 by an Englishman called Thomas Petty, who was trying to ascertain the taxable capacity of the nation.<sup>68</sup> A short time later, the Physiocrats in France began measuring national wealth in terms of agricultural product.<sup>69</sup> In the eighteenth century, as Britain became increasingly industrialized, Adam Smith argued for a broader evaluation of national wealth which included not just agricultural product but also manufacturing product.<sup>70</sup> Despite significant differences between these classical methods of national accounting, their common feature is that they sought to measure only *tangible* products of the economy, excluding what we would call ‘service economies,’ including government services.<sup>71</sup>

By the end of the nineteenth century, however, Alfred Marshall had articulated what is today called neoclassical economics,<sup>72</sup> and this had significant implications for how national wealth came to be calculated and conceptualized. Marshall argued that utility, rather than tangibility, was the true standard of production and wealth, by which he meant that the economic significance of a thing lay not in its nature or in how much labour went into its creation, but simply in its market price.<sup>73</sup> This is an inclusive and homogenizing theory, one which values all market activity according to the lowest common denominator of market price.<sup>74</sup> From this perspective, intangible ‘services,’ such as legal representation or accounting, are treated no differently from tangible ‘goods,’ such as sacks of potatoes or truckloads of iron.<sup>75</sup> All that matters is that a commodity is subject to exchange in the market, and since each market transaction is assumed to increase the wealth of both seller and buyer – otherwise

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<sup>68</sup> See E. Ray Canterbury, *The Making of Economics: The Foundation* (3rd ed, 2003) 72.

<sup>69</sup> *Ibid* 72-3.

<sup>70</sup> Smith, *The Wealth of Nations*, above n 5.

<sup>71</sup> For an more detailed history of national accounting, see Clifford Cobb, Ted Halstead and Jonathan Rowe, ‘If the Economy is Up, Why is America Down?’ (1995) October *The Atlantic Monthly* 1.

<sup>72</sup> Alfred Marshall, *Principles of Economics* (1890).

<sup>73</sup> *Ibid*.

<sup>74</sup> As Mankiw puts it, ‘Because market prices measure the amount people are willing to pay for different goods, they reflect the value of those goods.’ See Mankiw, *Principles of Economics*, above n 62, 510.

<sup>75</sup> See Cobb et al, above n 71.

why would the parties transact? – neoclassical economists argue that ‘free markets’ are in everyone’s interests and that market activity should be maximized.<sup>76</sup>

Neoclassicism accepts that there is an ‘optimal scale’ at the *microeconomic* level – which is to say, it accepts there will eventually come a point where growth in an individual firm’s production will cost more than it is worth (and therefore be judged ‘uneconomic’ growth).<sup>77</sup> However, there is no place in neoclassicism for an ‘optimal scale’ at the *macroeconomic* level, no ‘optimal scale’ of the economy as a whole.<sup>78</sup> This is because technological and allocative efficiency improvements are thought to allow for an infinitely expanding economy, despite the fact that the raw materials needed for production are scarce / finite.<sup>79</sup> Technological efficiency, it is assumed, will continually allow human beings to consume a finite set of resources more efficiently or, better yet, to consume a set of resources hitherto inaccessible.<sup>80</sup> Alternatively, human ingenuity in conjunction with pricing mechanisms will lead to scarce resources being substituted for less scarce resources when the benefits of doing so outweigh the costs.<sup>81</sup> Allocative efficiency, it is assumed, will ensure that market mechanisms continually move resources into the hands of those who will ‘exploit’ them best.<sup>82</sup> Upon these assumptions, neoclassical economics purports to show that an economy as a whole can and should continue growing indefinitely.<sup>83</sup>

When Marshall was writing in the 1890s, and for several decades afterward, there was no comprehensive set of national accounts which could provide governments with detailed information on the extent or nature of market activity. This began to change in the early 1930s with the onset of the Great Depression, which highlighted the need for more detailed economic data. Responding to this deficiency, the United States’ Department of Commerce commissioned Simon Kuznet (who

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<sup>76</sup> See Milton Friedman, *Capitalism and Freedom* (1962).

<sup>77</sup> See, e.g., N. Gregory Mankiw, *Principles of Micro-Economics* (5th ed, 2008) 323 (where optimality is discussed in twenty-four places).

<sup>78</sup> See, e.g., N. Gregory Mankiw, *Principles of Macro-Economics* (5th ed, 2008) (where optimality is discussed only twice, both in relation to micro-economic circumstances).

<sup>79</sup> For a discussion, see the debate between Herman Daly and Mark Sagoff in Crocker and Linden (eds), *Ethics of Consumption*, above n 37, 19-68.

<sup>80</sup> See Thomas Lee, ‘Advanced Fossil Fuel Systems and Beyond’ in Jesse Ausubel and Hedy Sladovich (eds), *Technology and Environment* (1989) 116. (‘The more advanced the technology, the more reserves become known and recoverable.’)

<sup>81</sup> See Robert Solow, ‘An Almost Practical Step toward Sustainability’ (1993) 19 *Resources Policy* 162, 164 (stating, ‘I shall assume that it is always possible to substitute greater inputs of labor, reproducible capital, [e.g. technology], and renewable resources for smaller direct inputs of the fixed resources’). See also, Wilfred Beckerman, *A Poverty of Reason: Sustainable Development and Economic Growth* (2002) 13.

<sup>82</sup> See, e.g., Posner, above n 56.

<sup>83</sup> As Purdey puts it, ‘Now floating free from material constraint, neoclassical theory did not place a numerical upper limit on national economic growth.... [GDP], in fact, is unique among economic variables in its capacity to grow forever.’ See Purdey, above n 67, 75.

would later receive the Nobel Prize in Economics) to develop a set of national accounts. These were the prototype for what later became the GDP accounts. GDP accounting developed significantly during World War II to assist with planning, but it was really in the post-war era that GDP came to prominence, not just in the United States but increasingly around the world.<sup>84</sup> Almost immediately international comparisons of GDP per capita were made as a way of assessing the relative 'progress' of nations.<sup>85</sup> At the national level, growth in GDP quickly became the overriding policy objective of governments around the world, and to this day growth holds its place as the touchstone of political success.<sup>86</sup> The defining assumption of our age, in other words, is that a bigger economy is simply better.

Reduced to its essential characteristics, this growth model of progress holds that the overall well-being of a society is approximately proportional to the size of its economy, in terms of GDP per capita, since more money means that more individual and social 'preferences' can be satisfied via market transactions. From this perspective, the answer to almost all social, political, economic, and even ecological problems is *more economic growth*. In other words, the model suggests that more growth, and only more growth, can eliminate poverty, reduce inequality, lower unemployment, and properly fund schools, hospitals, the arts, scientific research, environmental protection programs, etc.<sup>87</sup> The great social problem according to this popular narrative is that even the richest nations do not have enough money to live well. And thus economic growth is heralded across the political spectrum as the goal towards which all nations should direct their collective energy. It should come as no surprise, therefore, that this deeply entrenched economic model has shaped the legal structure of economies around the world, the laws of property in particular.

## 2.2. *The Pro-Growth Structure of Modern Property Law*

This section outlines with a broad brush how the growth model of progress has shaped and continues to shape the structure of modern property law. For jurisdictional coherency (and to keep the scope of this thesis within manageable bounds), this section limits its examination to the historical evolution of property law

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<sup>84</sup> See H. W. Arndt, *The Rise and Fall of Economic Growth* (1978) (tracing the rise of the GDP as a policy objective and rather prematurely anticipating its fall). See also, Robert Collins, *More: The Politics of Economic Growth in Post-war America* (2000).

<sup>85</sup> Colin Clark, *The Conditions of Economic Progress* (3rd ed, 1957).

<sup>86</sup> See Purdey, above n 67.

<sup>87</sup> See also, Benjamin Friedman, *The Moral Consequences of Economic Growth* (2005) (arguing that growth is necessary for the development of national and moral character).

in the United States.<sup>88</sup> While the development of law in any particular jurisdiction is always context-dependent and therefore unique to its own circumstances, the powerful economic forces flowing from industrialization which we will see shaped property law in the United States were present – to a greater or lesser degree and at around the same time – in other advancing capitalist societies.<sup>89</sup> This certainly does not mean that what is true about the development of property law in the United States is necessarily true of other developed nations. It is suggested, however, that examining the development of property law in the United States may well provide some insight into how the social desire for economic growth shaped the property systems of advanced capitalism more broadly, despite jurisdictional and contextual differences.<sup>90</sup>

The examination begins by considering the nature of property law in the early eighteenth century, prior to industrialization. This was an era when the United States' economy was comprised predominantly of small, independent farmers, and property law at this time generally functioned to protect and promote this agrarian vision.<sup>91</sup> In a seemingly boundless new continent, colonials were granted or claimed land (legitimately or not) and the law generally protected them in the 'quiet enjoyment' thereof.<sup>92</sup> At the same time, property law also permitted the public to use privately owned lands for subsistence (hunting, fishing, foraging, etc.) if the lands were unenclosed or uncultivated and provided the owner's actual use was not interfered with.<sup>93</sup> The legislature had the power to regulate private land uses in the public interest, and did so frequently,<sup>94</sup> but the most important institution for shaping property rights and resolving property conflicts at this time was the common law. The basic structure of ownership was defined by the frequently invoked common law

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<sup>88</sup> The United States was selected primarily because it is the nation which has been most successful (if that is still the right word) in growing its economy – arguably making it a 'mentor' economy, in that respect. Another reason for the selection was because there are several excellent studies on the evolution of property law in the United States, of which this section is essentially a synthesis and summary. Particular debts are owed to the following texts: Joseph Guth, 'Law for the Ecological Age' (2008) 9 *Vt. J. of Environ. L.* 431; Eric Freyfogle, *The Land we Share: Private Property and the Common Good* (2003); Gregory Alexander, *Commodity & Propriety: Competing Visions of Property in American Legal Thought, 1776-1970* (1997); Morton Horwitz, *The Transformation of American Law, 1780-1860* (1977).

<sup>89</sup> See generally, Peter Stearns, *The Industrial Revolution in World History* (3rd ed, 2007).

<sup>90</sup> In this thesis the term 'advanced capitalism' will be used, according to convention, to refer to the private property / market systems of the developed world (i.e. North America, Western Europe, Australia, New Zealand, etc.).

<sup>91</sup> Horwitz, above n 88, 32.

<sup>92</sup> Guth, 'Law for an Ecological Age,' above n 88, 446-9.

<sup>93</sup> Freyfogle, *The Land We Share*, above n 88, 22-4, 255-6.

<sup>94</sup> Guth, 'Law for an Ecological Age,' above n 88, 447 (noting that 'scholars have extensively documented what often seems to us today to be a surprising amount of early American land use and economic regulation').

principle, ‘*sic utere tuo ut alienum non laedas*’ (i.e. ‘use your own so as not to injure another’).<sup>95</sup> This principle essentially imposed strict liability on landowners for harm caused to others, irrespective of the social or economic utility of the interfering activity and regardless of whether the actor was at fault. The reasoning beneath this principle reflected the dictum of the celebrated English jurist, William Blackstone, who asserted that a neighbour was expected not to interfere with another’s quiet enjoyment of his or her land because ‘it is incumbent on [a neighbouring owner] to find some other place to do that act, where it will be less offensive.’<sup>96</sup>

In the agrarian economy of this era, where farm land was cheap and available and where land-use conflicts were quite rare, the strict liability ‘no harm’ principle functioned sufficiently well as a structuring principle of property law. But as land-uses intensified over time, it became apparent that the principle was beginning to limit economic development and expansion, since one landowner’s ‘quiet enjoyment’ could effectively curtail a neighbour’s right to use their own land as productively as possible.<sup>97</sup> Something had to give. The forces of industrialization strengthened over the eighteenth and nineteenth centuries and this brought with it the idea that public welfare would best be promoted by encouraging industrial development. The result was a profound restructuring of property law. Old legal notions of ‘no harm’ came to be replaced by cost / benefit economic analysis, such that law came to consider harm justified if the activity in question was likely to provide a net gain to society.<sup>98</sup> This clash of old and new legal perspectives famously came to the fore in the 1805 case of *Palmer v Mulligan*.<sup>99</sup>

The material facts of the case are quite straightforward. Palmer purchased some land alongside the Hudson River, erected a sawmill, and constructed a dam. Some years later a competitor constructed a similar mill and dam upstream, altering the river’s flow and otherwise interfering with the operation of Palmer’s mill. Palmer sued, and he may have done so confidently given the strict liability of prevailing property law. Indeed, two of the justices adjudicating the case concluded that the defendant ‘clearly’<sup>100</sup> had no right to obstruct Palmer as he was doing. The three-judge majority, however, concluded otherwise. Justice Livingston for the majority acknowledged the

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<sup>95</sup> Horwitz, above n 88, 32.

<sup>96</sup> William Blackstone, *Commentaries on the Laws of England* (1982) Bk. III, 217-18.

<sup>97</sup> Freyfogle, *The Land We Share*, above n 88, 68. See also Horwitz, above n 88, 32 (referring to the principle as ‘antidevelopmental’).

<sup>98</sup> Horwitz, above n 88, 33. (‘Claims founded on natural use began to recede into a dim preindustrial past and the newer ‘balancing’ test of efficiency came into sharper focus.’)

<sup>99</sup> *Palmer v Mulligan* 3 Cai. R. 307 (NY Sup., 1805).

<sup>100</sup> *Ibid* 320.

wisdom of the ‘familiar maxim’<sup>101</sup> of *sic utere tuo* which would indeed have protected Palmer against the defendant’s harmful actions. But Livingston also recognized the public benefit which ‘always attends rivalry and competition,’<sup>102</sup> and protecting Palmer would probably have eliminated the defendant’s mill. Arguing that the public had an economic interest in all landowners being able to use their land productively, Livingston articulated a new standard for liability, ruling that the ‘no harm’ principle should be limited to such cases where ‘a manifest and serious damage’<sup>103</sup> results.

This case marks a turning point in the development of American property law. According to Morton Horwitz, it introduced ‘the entirely novel view that an explicit consideration of the relative efficiencies of conflicting property uses should be the paramount test of what constitutes legally justified injury.’<sup>104</sup> Although it would take many decades before judges would widely apply and develop the core reasoning of *Palmer*,<sup>105</sup> the case represents ‘the beginning of the gradual acceptance of the idea that the ownership of property implies above all the right to develop that property for business purposes.’<sup>106</sup> By the time the Civil War was over, many judges would accept the idea that industrial activity generally produced a net social benefit, despite the damage it may cause, and that society would be better off if everyone tolerated this damage rather than remain mutually undisturbed in the quiet enjoyment of their land.<sup>107</sup> As one judge put it in the 1873 case of *Losee v. Buchanan*:

The general rules that I may have the exclusive and undisturbed use and possession of my real estate, and that I must so use my real estate as not to injure my neighbor, are much modified by the exigencies of the social state. We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization. [The damaged neighbor] receives his compensation... by the general good, in which he shares, and the right which he has to place the same things upon his lands.<sup>108</sup>

By the end of the nineteenth century the common law had almost completely abandoned the old principle of strict liability with respect to land use, as one Mrs. Sanderson discovered in 1886.<sup>109</sup> She had purchased land near Meadow Brook in

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<sup>101</sup> Ibid 313-4.

<sup>102</sup> Ibid 314.

<sup>103</sup> Ibid.

<sup>104</sup> Horwitz, above n 88, 38.

<sup>105</sup> Ibid 63-108.

<sup>106</sup> Ibid 37.

<sup>107</sup> Guth, ‘Law for an Ecological Age,’ above n 88, 452.

<sup>108</sup> *Losee v Buchanan* 51 N.Y. 476, 484 (NY, 1873).

<sup>109</sup> *Pennsylvania Coal Co. v Sanderson* 113 Pa. 126 (1886).

Scranton, Pennsylvania, and as a court later explained: ‘the existence of the stream, the purity of its water, and its utility for domestic and other purposes... was a leading inducement to the purchase.’<sup>110</sup> Around the time of purchase, however, a 1600-acre mining company began operating upstream. Within a few years the stream had been contaminated by the mining operations, meaning that Mrs. Sanderson could no longer supply herself with fresh water, fish, and ice, as she had been doing. She sued the mining company, but lost.

The court denied Sanderson damages because it feared that if all landowners similarly injured by the mining industry could recover damages the industry would not survive, which the court suggested would be to the detriment of the public good. The policy being promoted here was that ‘[t]o encourage the development of the great natural resources of a country trifling inconveniences to particular persons must sometimes give way to the necessities of a great community.’<sup>111</sup> On that basis, the court ruled that ‘the rightful use of one’s own land may cause damage to another without any legal wrong,’<sup>112</sup> a ruling which clearly exemplifies the shift that had occurred away from an agrarian property system toward a system designed to facilitate industrial development. As Eric Freyfogle puts it, ‘[p]roperty law was no longer about the right to remain undisturbed in one’s lawful use; it was now chiefly about the right to use land for maximum gain.’<sup>113</sup>

The case of *Lenk v. Spezia* provides another example, this time in the twentieth century, of how the common law of property had become slanted in favour of industry and economic growth.<sup>114</sup> Factually unique but ultimately typical of modern property law disputes in common law,<sup>115</sup> this case involved a beekeeper, Lenk, and a tomato farmer, Spezia. Lenk wanted to continue using his land to harvest honey, as he had been doing for thirty-eight years. Spezia was an industrial farmer who had started using pesticides to protect his tomatoes from insects. A conflict arose because Spezia’s land use clashed with Lenk’s land use, insofar as Spezia’s use of pesticides was killing Lenk’s bees. Clearly the old ‘no harm’ principle would have held Spezia liable for the damage his industrial practices inflicted upon Lenk and his more agrarian practices. But times had well and truly changed, and no minor beekeeper was going to interfere with the productive potential of an industrial farmer. All that Spezia had to show was that he was not ‘negligent’ in his use of pesticides, which he

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<sup>110</sup> Ibid 143.

<sup>111</sup> Ibid 149.

<sup>112</sup> Ibid 457.

<sup>113</sup> Freyfogle, *The Land We Share*, above n 88, 73.

<sup>114</sup> *Lenk v Spezia* 95 Cal. App. 2d 296 (CA, 1949).

<sup>115</sup> See Eric Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (2007) ix.

was able to do since he had followed standard industry practices. Accordingly, Lenk lost. By this stage property law was demonstrably founded upon the vision that economic growth promoted the common good and that harm caused by industry was permitted in law unless a plaintiff could show that it was 'unreasonable' in view of the social desire for economic growth.

And so it was that notions of strict liability were incrementally exorcised from structure of property law in the United States and replaced with fault-based notions of 'negligence.' Put simply, an act is negligent when it creates an 'unreasonable' risk of harm, and 'unreasonable' is typically defined not in ethical or moral terms, but explicitly as a cost-benefit principle.<sup>116</sup> The doctrine of nuisance, which is notably the common law's primary vehicle for addressing environmental issues,<sup>117</sup> is now defined by cost-benefit tests also; that is, an act is only a nuisance 'if the gravity of the harm outweighs the utility of the actor's conduct.'<sup>118</sup> In a recent paper Joseph Guth incisively examines some of these issues in more detail.<sup>119</sup> With respect to the laws of negligence and nuisance, Guth shows that current legal rules concerning (1) who bears the burden of proof; (2) the facts that the party bearing the burden of proof must establish; and (3) the certainty with which those facts must be established; are designed to structure the common law for the purpose of promoting economic growth and insulating economic actors from liability. He writes:

The modern doctrines of negligence and nuisance are effective as rules of law because they do much more than simply state a policy preference for industrial growth that courts must then somehow accommodate. They specify rules of decision that tell courts how to resolve specific disputes that come before them. The preference for economic growth over other interests is automatically implemented every time these rules are applied because that preference is embedded within their structure. Courts need not explicitly reaffirm the policy goal in their decisions or even take note of it; the goal is furthered simply by application of the law's decision-making rules.<sup>120</sup>

Furthermore, and significantly, Guth explains how legislation in the United States (his focus is environmental legislation) mirrors the pro-growth structure of modern

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<sup>116</sup> See Restatement (Second) of Torts (1965) 291 (stating that 'the act is negligent if the risk is of such a magnitude as to outweigh what the law regards as the utility of the act').

<sup>117</sup> See generally, David Wilgus, 'The Nature of Nuisance: Judicial Environmental Ethics and Landowner Stewardship in the Age of Ecology' (2001) 33 *McGeorge L. R.* 99.

<sup>118</sup> See Restatement (Second) of Torts, above n 116, 826a.

<sup>119</sup> Guth, 'Law for an Ecological Age,' above n 88.

<sup>120</sup> *Ibid* 457.

common law. During the twentieth century – from the 1970s mainly – the federal and state governments were forced to confront some of the more pressing environmental problems which the common law had been unable to resolve.<sup>121</sup> What is striking about these environmental statutes, Guth points out, is the degree to which they reflect the same balance of interests which defines the common law. Most of this legislation ‘harbors the same core presumption that economic activity provides a net social benefit, places the same burdens on efforts to control that activity, and is incapable of restraining the economy’s cumulative ecological damage to a sustainable scale.’<sup>122</sup> It is true that in recent years some (slightly) more progressive legislative steps have been taken to promote environmental issues uncompromised by economic interests.<sup>123</sup> But this creates the further problem of creating a divide between the social interests being promoted by environmental legislation, on the one hand, and the common law, on the other, a divide which Guth argues is ‘socially corrosive.’<sup>124</sup>

This divide sets up property owners to view environmental laws not as a legitimate democratic expression of the proper structure of property rights in our current circumstances, but as invasions of their rights, as efforts by government to take their property and give it to the public. It exposes environmental laws to the charge of being an imposition of a repressive and authoritarian government. It allows conflicts over property rights to be characterized as the heroic struggle of private individuals for freedom from government.<sup>125</sup>

This is problematic for many reasons, but primarily because it gives rise to the presumption that governments must compensate property owners whenever environmental legislation diminishes the economic value of their property.<sup>126</sup> That presumption structurally opposes such legislation and entrenches the status quo by threatening environmentally progressive governments with prohibitively large compensation costs. Consequently, Guth concludes, both legislation and common law must be transformed if the United States’ economy is to be directed down a new, ecologically sustainable path.

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<sup>121</sup> Robert Percival, *Environmental Regulation: Law, Science, and Policy* (5th ed, 2006) (discussing the rise of the modern environmental movement and related federal regulation).

<sup>122</sup> Guth, ‘Law for an Ecological Age,’ above n 88, 435. See also, Joseph Guth, ‘Cumulative Impacts: Death-Knell for Cost-Benefit Analysis in Environmental Decisions’ (2008) 11 *Barry L. R.* 23.

<sup>123</sup> See Guth, ‘Law for an Ecological Age,’ above n 88, 474-480.

<sup>124</sup> *Ibid* 435.

<sup>125</sup> *Ibid* 475.

<sup>126</sup> See Freyfogle, ‘When We Should Pay’ in *On Private Property*, above n 115, 105-130.

This excursion into legal history was intended to outline in broad terms how an underlying social desire for economic growth shaped and still shapes property law in the United States.<sup>127</sup> By extension it could be argued that the desire for economic growth shaped and still shapes the property systems of advanced capitalism more broadly, albeit in jurisdictionally and contextually specific ways.<sup>128</sup> We have seen that in the early eighteenth-century, prior to industrialization, property law in the United States was structured by the ‘no harm’ principle of strict liability. This seemed to suit the agrarian society of those times. But as the Industrial Revolution took hold in the social imagination strict liability came to be seen as an impediment to growth, since it stopped owners using their property as productively as possible. Driven (consciously or unconsciously) by the assumption that economic growth generally promoted the common good, judges incrementally relegated strict liability to the pre-industrial past and in its place property law was given a new, pro-growth structure based on cost / benefit economic analysis. The upshot was that causing harm through productive activity came to be justified in law if the activity in question was likely to provide a net economic gain to society. The underlying philosophy here is that the overall social benefits of economic growth will outweigh the costs, from which it follows that a property system should be designed, both by the judiciary and the legislature, to facilitate the maximization of economic growth. This is a manifestation of the growth model of progress in property law.

Exposing the relationship between economic growth and property law is important for it suggests that if attitudes toward growth change in the future, property law may be transformed once more. That indeed is the possibility being explored in this thesis, which implies challenging the growth model of progress that currently underpins property law. Accordingly, the next section steps back from legal theory to consider the foundations of growth scepticism, for it is out of this tradition that the arguments of this thesis emerge.

### 3. A LITERATURE REVIEW OF GROWTH SCEPTICISM

The sceptical attitude towards growth being advocated in this thesis has its roots at least as far back as John Stuart Mill’s *Principles of Political Economy*, first published

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<sup>127</sup> For the details, see above n 88.

<sup>128</sup> See, e.g., Gerry Rubin and David Sugarman (eds), *Law, Economy, and Society, 1750-1914: Essays in the History of English Law* (1984); See also, Austin Sarat, Bryant Garth and Robert Kagan (eds), *Looking Back at Law's Century* (2002) 13 (discussing how, during the 20<sup>th</sup> century, ‘law tended to construct and legitimate markets, spurring aggregate economic growth’ in capitalist economies).

in 1848.<sup>129</sup> In this otherwise famous text there is a short and neglected chapter, entitled 'Of the Stationary State,' where the author asked: 'Towards what ultimate point is society tending by its industrial progress?'<sup>130</sup> Unremarkable on the surface, perhaps, this question subtly challenges the growth model of progress in three important ways. First, because it acknowledges, implicitly, that industrial progress (or what we might call economic growth) is of only instrumental value and not of any intrinsic value; second, because it raises the possibility that there might come a time when further economic growth no longer advances any worthwhile purposes; and, third, and perhaps most importantly, because it prompts us to consider not only how much economic growth is *enough*, but also what we want growth *for*.

Mill proposed that if there came a time when economic growth stopped contributing to well-being (or began undermining those things upon which well-being depends) the most suitable economic system would be what he called 'the stationary state.'<sup>131</sup> By this he meant a society with a stable population and zero growth in physical capital stock, but with continued improvements in technology and in what he called the 'Art of Living.' Mill argued that technology in a stationary state would serve not to increase material wealth, but to abridge labour. As for the 'Art of Living,' Mill was of the view that cultural, moral, and social progress would be much more likely 'when minds ceased to be engrossed by the art of getting on.'<sup>132</sup> Despite its attractiveness as a vision of a future society, Mill's conception of a stationary state proved to be too far ahead of its time and was ignored by his contemporaries. For generations to come the growth scepticism it entailed lay dormant and forgotten.

It was not until the 1950s and '60s that growth scepticism reemerged. More than a century of sustained economic growth had occurred since Mill first published 'Of the Stationary State,' and by this stage ordinary Westerners were wealthier than Mill may have ever dared to think was possible.<sup>133</sup> Books were being published with titles such as *The Affluent Society*<sup>134</sup> and *The Challenge of Abundance*,<sup>135</sup> suggesting that a stationary state with sufficient material resources for all was not the utopian pipedream it may once have seemed to be. Western economies had indeed grown

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<sup>129</sup> John Stuart Mill, *Principles of Political Economy: With Some of their Applications to Social Philosophy* (2004 [1848]).

<sup>130</sup> *Ibid* 188.

<sup>131</sup> *Ibid* Bk. IV, Chap. VI.

<sup>132</sup> *Ibid* 191. He later adds, at 191: 'It is scarcely necessary to remark that a stationary condition of capital and population implies no stationary state of human improvement.'

<sup>133</sup> As has been recently noted, 'Economic growth over the past 300 years has delivered gains in people's standard of living at a rate that once would have been unimaginable.' See Robert Frank, Ben Bernanke and Nick Olekalns, *Principles of Macro-Economics* (2nd ed, 2007) 348.

<sup>134</sup> John Galbraith, *The Affluent Society* (1958).

<sup>135</sup> Robert Theobald, *The Challenge of Abundance* (1st ed, 1961).

significantly, providing the vast majority of citizens with unprecedented material comforts,<sup>136</sup> but not everyone took this as an unmitigated social advancement and some were beginning to doubt both the desirability and the feasibility of continued growth. Kenneth Boulding was one of the first to argue at any length that economic growth, being dependent on natural resources, could not continue infinitely on a finite planet.<sup>137</sup> He famously quipped that anyone who thought it could ‘was either a madman or an economist.’<sup>138</sup> In the cultural domain, Herbert Marcuse presented a scathing indictment of how Western nations fixated on growth and consumption were creating ‘one-dimensional’ societies.<sup>139</sup> He argued that the emergence of consumer culture was homogenizing human experience and providing people with little more than a ‘comfortable unfreedom.’<sup>140</sup>

Growth scepticism received its first comprehensive statement, however, in 1967, with the publication of Ezra Mishan’s *The Costs of Economic Growth*.<sup>141</sup> In this path-breaking text, directed at affluent Western nations, Mishan expressed deep reservations about whether limitless economic expansion – a policy which he called ‘growthmania’ – was in the interests of human welfare.<sup>142</sup> After acknowledging that growth had historically brought significant benefits to the West, Mishan set about highlighting the unpleasant costs of economic growth which he felt were too often overlooked when governments shaped their pro-growth policies. Casting doubt on the dominant economic paradigm, he provocatively suggested that perhaps the costs of growth – which he argued included psychological ill-health, long working hours, loss of community, ugly cityscapes, traffic congestion, pollution, environmental degradation, etc. – were beginning to outweigh the benefits. Just for a moment, he proposed, we should put our minds to the question of whether it is all really worth it, whether there might not be a better path to follow. In the context of this thesis, what is particularly significant about Mishan’s argument is the fact that it exposed how the single-minded pursuit of growth placed severe limits on government action, presumptively excluding any policy or institutional reform that would retard growth in any way. Mishan recognized that if growth were ever to lose its privileged position as

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<sup>136</sup> See Easterlin, *Growth Triumphant*, above n 20.

<sup>137</sup> Kenneth Boulding, ‘The Economics of the Coming Spaceship Earth’ in Henry Jarrett (ed), *Environmental Quality in a Growing Economy* (1997) 3. This ‘limits to growth’ argument is touched on again below and considered in more detail in Chapter One.

<sup>138</sup> As quoted in Robert Collins, *More: The Politics of Economic Growth in Post-war America* (2000) 141.

<sup>139</sup> Herbert Marcuse, *One-Dimensional Man: Studies in the Ideology of Advanced Industrial Society* (2nd ed, 2002 [1964]).

<sup>140</sup> *Ibid* 3.

<sup>141</sup> Ezra Mishan, *The Costs of Economic Growth* (1967).

<sup>142</sup> *Ibid* 3.

the touchstone of policy and institutional success, new avenues would open up for progressive political and legal reform. In the following decades, however, the desire for growth not only persisted but intensified and the politics of growth became more deeply entrenched.<sup>143</sup>

A few years after the publication of Mishan's manifesto, several other texts emerged which made significant contributions to the tradition of growth scepticism. In 1972 a group of systems analysts, known as the Club of Rome, caused much controversy with their publication, *Limits to Growth*.<sup>144</sup> In this text the authors explored, with the help of computer modelling techniques, the potential consequences of exponential growth in human population and resource consumption in a world of finite resources. Their alarming but arguably commonsensical diagnosis was that if growth trends in world population, industrialization, and resource depletion were to continue or accelerate, the planet would eventually come up against 'limits to growth,' with potentially catastrophic consequences. Widely but erroneously dismissed at the time for ignoring pricing mechanisms and denying adaptation, the last few decades of environmental research (reviewed in Chapter One) have provided further scientific support for the view that the never-ending pursuit of growth is incompatible with biophysical reality.<sup>145</sup>

In 1973 a supporting analysis was offered by the Buddhist economist, Ernst Schumacher, in his thoughtful text, *Small is Beautiful: A Study of Economics as if People Mattered*.<sup>146</sup> Schumacher faulted conventional economic theory for failing to address the issue of macro-economic 'scale,' that is, for never asking the question of how much growth is 'enough' and instead just assuming that a bigger economy is always better. Challenging the orthodox view that economic policy should always seek to maximize opportunities for consumption through continuous growth, Schumacher quietly proposed that the aim, both of individuals and societies, should be to obtain the maximum amount of well-being with the minimum amount of consumption. Sensible though this proposal may sound, the world was not ready for it, and Wilfred Beckerman, representing economic orthodoxy, eventually responded to Schumacher's arguments asserting that 'small is stupid.'<sup>147</sup>

Over the next few years there were several developments of sociological significance which provided further support for growth scepticism. Theorists such as

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<sup>143</sup> Robert Collins, *More: The Politics of Economic Growth in Post-war America* (2000).

<sup>144</sup> Donella Meadows, Jorgen Randers and Dennis Meadows, *The Limits to Growth* (1972).

<sup>145</sup> Meadows et al, *Limits to Growth: The 30-year Update*, above n 23.

<sup>146</sup> Ezra Schumacher, *Small is Beautiful: A Study of Economics as if People Mattered* (1973).

<sup>147</sup> Wilfred Beckerman, *Small is Stupid: Blowing the Whistle on the Greens* (1995).

Richard Easterlin,<sup>148</sup> Fred Hirsch,<sup>149</sup> and Tibor Scitovsky,<sup>150</sup> variously provided arguments and evidence to the effect that once the basic material needs of a society are met, further growth in per capita income contributes little or nothing to overall well-being.<sup>151</sup> Scitovsky explained this finding on the ground that, beyond basic material needs, human beings simply do not find the consumption and accumulation of material things all that fulfilling, contrary to the promises of advertisements.<sup>152</sup> The not inconsistent explanation offered by Easterlin and Hirsch was essentially that once basic material needs are met, people tend to become more concerned about relative wealth than absolute wealth and, consequently, start engaging in wasteful status competition which is necessarily a zero-sum game.<sup>153</sup> It is a zero-sum game because if one person's status is increased, someone else's status must have relatively decreased, typically leaving overall satisfaction unchanged. As Hirsch argued, this indicates that there are 'social limits' to growth.<sup>154</sup> These sociological insights, among others which will be examined, challenge the assumption that more consumption is always better, raising further doubts, at least in relation to affluent societies, about the validity of the growth model of progress and the pro-growth conception of property it has engendered.

From the 1970s onward, ecological economist, Herman Daly, built upon and developed this diverse tradition in important ways, paying close attention to the emerging environmental predicament and its impact on questions of macro-economic scale.<sup>155</sup> Two aspects of Daly's work are of particular significance to this thesis. The first is his notion of a 'steady-state' economy.<sup>156</sup> Daly criticizes neoclassical economics for treating the natural environment as a subset of a boundless, price-dependent economy, proposing instead that the economy ought to be considered a subset of the finite environment, the biophysical limits of which an economy cannot

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<sup>148</sup> Richard Easterlin, 'Does Economic Growth Improve the Human Lot? Some Empirical Evidence' in Paul David and Melvin Reder (eds), *Nations and Households in Economic Growth: Essays in Honor of Moses Abramovitz* (1974).

<sup>149</sup> Fred Hirsch, *Social Limits to Growth* (1976).

<sup>150</sup> Tibor Scitovsky, *The Joyless Economy: The Psychology of Human Satisfaction and Consumer Dissatisfaction* (1976).

<sup>151</sup> The evidential basis for such a claim is reviewed in Chapter One.

<sup>152</sup> See also, Abraham Maslow, 'A Theory of Human Motivation' (1943) 50 *Psychological Review* 370.

<sup>153</sup> For an early expression of a similar thesis, see Thorstein Veblen, *The Theory of the Leisure class* (1965 [1899]).

<sup>154</sup> Hirsch, above n 149. See also, Robert Frank, 'Positional Externalities Cause Large and Preventable Welfare Losses' (2005) 95(2) *Am. Econ. Rev.* 137.

<sup>155</sup> On ecological economics, see Herman Daly and Joshua Farley, *Ecological Economics: Principles and Applications* (2004).

<sup>156</sup> See Herman Daly, *Toward a Steady-State Economy* (1973); Herman Daly, *Steady-State Economics* (2nd ed, 1991).

justifiably exceed.<sup>157</sup> Merging environmentalist and economic perspectives, Daly argues that sustainable development in the developed world necessarily entails a radical shift away from 'growth economies' toward what he calls a 'steady-state' economy.<sup>158</sup> By this he means an economy that continues to develop in response to new technologies and changing market and cultural forces, but without growing beyond the sustainable biophysical limits of the planet.<sup>159</sup>

The second aspect of Daly's scholarship which this thesis draws upon is the work he pioneered with John Cobb developing 'alternative indicators' to GDP.<sup>160</sup> Daly and Cobb were early critics of GDP and painstakingly exposed its many defects as a proxy for social well-being. GDP, they argued, is merely a measure of total economic activity which makes no distinction between activity that contributes to well-being and activity that does not. For example, GDP treats market expenditure on guns, antidepressants, and cleaning up oil spills, no differently from expenditure on education, solar panels, and bicycles. They also pointed out that GDP says nothing at all about the level or nature of *non-market* activity in a society, such as community engagement or the functioning of ecosystems; nor does GDP say anything about the distribution of wealth in a society.<sup>161</sup> Wanting to provide a much more nuanced assessment of overall progress and well-being, Daly and Cobb developed the Index of Sustainable Economic Welfare (ISEW).<sup>162</sup> This index and others like it, such as the Genuine Progress Indicator (GPI),<sup>163</sup> take into consideration important social and ecological factors that GDP simply does not reflect. For example, the ISEW and GPI begin with total private consumption expenditure and then make deductions for such things as resource depletion, pollution, income inequalities, loss of leisure, 'defensive expenditures' etc., and make additions for such things as public infrastructure, volunteering, and domestic work. The aim is to measure, as accurately as possible, the overall wellbeing of a nation, including its sustainability, not just its total market activity.<sup>164</sup> The results from such indexes, we will see, tend to show that despite steady growth in GDP over recent decades, the genuine progress of many developed

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<sup>157</sup> Herman Daly, *Ecological Economics and the Ecology of Economics: Essays in Criticism* (1999).

<sup>158</sup> Herman Daly, *Beyond Growth: The Economics of Sustainable Development* (1996).

<sup>159</sup> In framing his 'steady state' analysis in biophysical terms rather than in terms of GDP, Daly acknowledges his intellectual debts to Nicholas Georgescu-Roegen. See Nicholas Georgescu-Roegen, *The Entropy Law and the Economic Process* (1971).

<sup>160</sup> Herman Daly and John Cobb Jr., *For the Common Good: Redirecting the Economy toward Community, the Environment, and a Sustainable Future* (1989).

<sup>161</sup> See also, Cobb et al, above n 71. On the social costs of inequality, see Kate Pickett and Richard Wilkinson, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (2009).

<sup>162</sup> Daly and Cobb, above n 160.

<sup>163</sup> See generally, Philip Lawn, *Sustainable Development Indicators in Ecological Economics* (2006).

<sup>164</sup> See also, Joseph Stiglitz, Amartya Sen and Jean-Paul Fitoussi, *Mis-Measuring Our Lives: Why GDP Doesn't Add Up* (2010).

nations has been stagnant or even in minor decline. Put otherwise, the results indicate that growth has stopped contributing to well-being in the developed world and now may even be causing the very problems that growth is supposed to be solving. Redistribution of wealth and the protection of natural ecosystems are two areas, among others that will be explored, where these results could have potentially significant legal implications, on the laws of property, in particular.<sup>165</sup>

In recent years Clive Hamilton has made a valuable contribution to the critique of growth with his impassioned text, *Growth Fetish*.<sup>166</sup> Hamilton is most original when he is exposing how the Left-liberal politics of the so-called 'Third Way' has apologetically subscribed to the central presuppositions of the neoliberalism of the 'First Way.'<sup>167</sup> Political parties today may differ on social policy, he argues, but there is a seemingly unchallengeable consensus that the primary aim of governments should be growth of the economy and that markets must prevail. With evidence mounting that growth in the developed world is no longer contributing to social well-being and, indeed, that growth is destabilizing Earth's life-support systems, Hamilton may well be justified in labelling the current political consensus on growth 'fetishistic.' During the writing of this thesis, new and outstanding contributions to growth scepticism have also been made by Peter Victor and Tim Jackson, who extend the critique in ways which will be considered in more detail later in the thesis. Victor excavates the foundations of a macro-economic approach beyond growth, providing a strong case for the socio-economic feasibility of 'managing without growth' in developed nations.<sup>168</sup> In a similar vein, Jackson calls for a 'macro-economics of sustainability' and insightfully develops the notion of 'prosperity without growth.'<sup>169</sup>

This literature review will now culminate by turning to the rigorous and provocative expressions of growth scepticism which have emerged over the last decade out of the 'degrowth' movement in Europe. In broad terms, degrowth can be defined as 'an equitable down-scaling of production and consumption that increases human well-being and enhances ecological conditions.'<sup>170</sup> Regrettably, the rich literature surrounding this idea has barely made an appearance in Anglo-Saxon

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<sup>165</sup> To clarify, redistribution of wealth is necessary in any 'post-growth' or 'steady-state' framework in order to eliminate poverty, since growth would no longer be considered a legitimate or effective means to that end (within affluent societies, at least). Redistribution is also deemed desirable due to the social corrosiveness of excessive inequality. See Pickett and Wilkinson, *The Spirit Level*, above n 161.

<sup>166</sup> Clive Hamilton, *Growth Fetish* (2003).

<sup>167</sup> *Ibid*, ix-21, 122-146.

<sup>168</sup> See Victor, *Managing without Growth*, above n 25.

<sup>169</sup> Tim Jackson, *Prosperity without Growth: Economics for a Finite Planet* (2009).

<sup>170</sup> Francois Schneider, Giorgos Kallis and Joan Martinez-Alier, 'Crisis or Opportunity? Economic Degrowth for Social Equity and Ecological Sustainability' (2010) 18(6) *J. Clean. Prod.* 511, 512.

academic or public debates,<sup>171</sup> although perhaps the tide may eventually turn as a result of the first two International Conferences on Degrowth, held in Paris in 2008 and Barcelona in 2010.<sup>172</sup>

Although it is not a unified doctrine by any means, an emerging consensus within the Degrowth Movement has resulted in the 'Paris Declaration'.<sup>173</sup> This document (to paraphrase) calls for a paradigm shift from the general and unlimited pursuit of economic growth to a concept of 'right-sizing' both global and national economies. At the global level, right-sizing means reducing the global ecological footprint (including carbon footprint) to a sustainable level. In countries where per capita footprint is greater than the sustainable global level, this right-sizing implies a reduction to this level through the process of voluntary economic contraction (i.e. degrowth). In countries where severe poverty still remains, right-sizing implies increasing consumption to a level adequate for a decent life. This will need to involve increasing economic activity in some cases, but the Declaration holds that redistribution of income and wealth both within and between countries is a more essential part of the process. Once right-sizing has been achieved, the Declaration concludes, the aim should be to maintain a 'steady-state' economy with a relatively stable level of consumption.

In response to 'free-market environmentalists'<sup>174</sup> or 'technological optimists',<sup>175</sup> who claim that there is no conflict between growth and sustainability, and who claim that something called 'development' is the way forward, degrowth scholars point out that although techno-efficiency solutions have been widely applied, flows of material and energy are still increasing.<sup>176</sup> This increase in material and energy use despite efficiency and technology improvements is largely due to 'rebound effects,' as Francis Schneider explains by way of examples: 'a car that consumes less gasoline per km leads to financial savings that may be spent on longer car distances... A so-called secondary rebound exists when a house is better insulated and that reduced

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<sup>171</sup> As late as 2008 Valerie Fournier noted that there were only three English-language articles on degrowth, beside a few articles by Serge Latouche published in the English version of *Le Monde Diplomatique*. See Valerie Fournier, 'Escaping the Economy: The Politics of Degrowth' (2008) 28(11/12) *International Journal of Sociology and Social Policy* 528. See, e.g., Baris Baykan, 'From Limits to Growth to Degrowth within French Green Politics' (2007) 16(3) *Environmental Politics* 513. See also, Samuel Alexander, 'Earth Jurisprudence and the Ecological Case for Degrowth' (2010) 6 *J. Juris.* 131.

<sup>172</sup> See <[www.degrowth.net](http://www.degrowth.net)> at 15 November 2010 (Paris Conference) and <<http://www.degrowth.eu/v1/>> at 15 November 2010 (Barcelona Conference).

<sup>173</sup> The Paris Declaration is included as Appendix III, in Samuel Alexander (ed), *Voluntary Simplicity: The Poetic Alternative to Consumer Culture* (2009) 423-7.

<sup>174</sup> See generally, Terry Anderson and Donald Leal, *Free Market Environmentalism* (Rev. ed, 2000).

<sup>175</sup> See above n 79-81.

<sup>176</sup> See, e.g., John Polimeni et al, *The Jevons Paradox and the Myth of Resource Efficiency Improvements* (2008).

expenditure on heating is reinvested in buying a second car or travelling by plane.<sup>177</sup> Though not widely appreciated, ‘rebound effects’ are highly significant, for they mean that techno-efficiency improvements, rather than reducing material and energy use, merely function to create revenue which is then spent on more of the same commodity (a primary rebound) or other commodities (a secondary rebound).<sup>178</sup> If this is so, as the weight of evidence suggests it is,<sup>179</sup> technology and efficiency are fatally flawed solutions to the ecological problems of growth and over-consumption. It will be argued that lawmakers ought to bear this mind when constructing and defining legal systems – property systems, in particular – since techno-efficiency improvements will not allow for growth without limits, as the growth model assumes is possible. Evidently, there are social and ecological limits to growth, and this thesis will argue that the laws of property, particularly in advanced capitalist societies, should be restructured to reflect this reality.

### 3.1. *A Post-Growth Jurisprudence of Property as Original Contribution*

There have been and are other growth sceptics, arising out of various disciplines and addressing a wide range of issues.<sup>180</sup> One subject that growth sceptics have not explored in any depth, however, is property relations in law, and this thesis seeks to advance the literature by taking up this challenge.<sup>181</sup>

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<sup>177</sup> Francis Schneider, ‘Macroscopic Rebound Effects as Argument for Economic Degrowth,’ in *Proceedings of the First International Degrowth Conference* (2008) 29 available at <<http://www.degrowth.net/>> at 15 October 2010.

<sup>178</sup> *Ibid.*

<sup>179</sup> See, e.g., Stig-Olof Holm and Göran Englund, ‘Increased Ecoefficiency and Gross Rebound Effect: Evidence from USA and Six European countries 1960-2002’ (2009) 68(3) *Ecological Economics* 879.

<sup>180</sup> See, e.g., Thomas Malthus, *An Essay on the Principle of Population* (1803); Paul Wachtel, *The Poverty of Affluence: A Psychological Portrait of the American Way of Life* (1983); Richard Douthwaite, *The Growth Illusion: How Economic Growth has Enriched the Few, Impoverished the Many, and Endangered the Planet* (1992); Kenneth Arrow et al, ‘Economic Growth, Carrying Capacity, and the Environment’ (1995) 15(2) *Ecological Economics* 91; Ted Trainer, ‘Recognizing the Limits: A Challenge to Political Economy’ (2002) 50(2) *J. of Austl. Pol. Econ.* 163; Charles Siegel, *The End of Economic Growth* (2006); Serge Latouche, *Farewell to Growth* (2009).

<sup>181</sup> On 4 July 2007 I gave a talk at Melbourne Law School, entitled ‘Voluntary Simplicity: Toward a Post-Growth Theory of Property,’ in which I first presented an overview of this thesis. For a list of my publications on this subject, see the Publications section of this thesis. The only other sustained discussion of property from within the degrowth movement is, Pascal van Griethuysen, ‘Why are we Growth-Addicted? The Hard Way towards Degrowth in the Involutionary Western Development Path’ (2009) *J. Clean. Prod.* 1 (arguing in the context of political and economic theory that current property institutions in advanced capitalist societies function to systematically ‘lock-in’ growth economics). In legal scholarship, the most explicit growth sceptic is Joseph Guth. See especially, Guth, ‘Law for an Ecological Age,’ above n 88; Guth, ‘Cumulative Impacts,’ above n 122. While Guth and I both argue that law needs to deliberately limit the macro-economic scale of highly developed economies, by focusing solely on ecological issues, Guth does not address the equally important (and interrelated) social and distributive implications which growth scepticism has on property law. This thesis seeks to enrich the notion of ‘property beyond growth’ by adding those important aspects to the jurisprudential

Private property is one of the central institutions of capitalism. Among other things, it generally provides a legally enforceable guarantee for credit, and credit functions to facilitate economic growth.<sup>182</sup> Since property and credit in a market economy are commonly measured and valued in monetary terms, perhaps it is to be expected that GDP is given such weight as a measure of policy and institutional success. As Francois Schneider et al note, 'GDP may not measure social welfare, but it measures well what matters for the market economy: profits, wages, and land rents.'<sup>183</sup> But if growth scepticism were ever to take hold in advanced capitalist societies, what would become of the institution of property? Is private property compatible with a degrowth society? How might property relations need to evolve (both personally and legally) to facilitate the transition to a degrowth society?

Those are some of the central questions to be explored throughout this thesis. They are important questions, it is suggested, because even if degrowth (or something like it) one day gained acceptance in the cultural mainstream of advanced capitalist societies, it might still be objected that the legal, political, and economic reforms needed to facilitate degrowth (whatever they may be) would illegitimately interfere with established property rights and therefore be unjustifiable. After all, one of the most entrenched beliefs in liberal and neoliberal political thought today is that state institutions should protect existing property rights and enforce contracts, but otherwise presumptively stay out of the 'free market' economy.<sup>184</sup> According to this influential view, private property facilitates the maximization of economic growth and protects individuals from state power, and for either or both of those reasons it is widely believed that property rights should not be interfered with or regulated significantly by the state. This 'property rights' objection to progressive reform has the potential to block any movement toward a degrowth society; indeed, it may be one significant reason why the degrowth movement, or growth scepticism more generally, has had little impact to date on legal, political, and economic policies and institutions. It is surprising, therefore, that so little has been written on the subject of property jurisprudence from within the degrowth tradition. In examining at length the foundations of what I am calling a post-growth property system, this thesis seeks to

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analysis, as well as developing the ecological implications of growth scepticism. Furthermore, it will be argued that Guth does not go far enough in his critique, in that he does not specifically address the need for degrowth, despite his acknowledgment that developed economies have exceeded their ecologically sustainable limits. See Guth, above n 88.

<sup>182</sup> See De Soto, above n 9.

<sup>183</sup> Schneider et al, above n 170, 115.

<sup>184</sup> See generally, McIntosh and Hatcher (eds), *Property Rights and Neoliberalism*, above n 10. This position, which, in various ways, owes much to John Locke and Adam Smith, will be detailed and critiqued in Chapter Two. See generally, Locke, above n 5; Smith, above n 5.

make an original contribution to legal scholarship by introducing degrowth scholarship into the field of property jurisprudence. This contribution also seeks to raise interest in how growth scepticism and voluntary simplicity might impact, not only on property law, but on legal issues more broadly, for it is my contention that legal scholars will find in these traditions the seeds of much fruitful and important research.

#### 4. CHAPTER OVERVIEWS

Beyond this introduction the thesis consists of five substantial chapters and a conclusion. The following chapter overviews sketch an outline of the central arguments.

##### 4.1. *Planned Economic Contraction: The Emerging Case for Degrowth*

Since growth scepticism remains a marginalized intellectual position, especially in the legal academy, Chapter One must provide more details on its scientific and theoretical foundations. The chapter begins by presenting a multi-dimensional critique of growth – social, ecological, and economic – and concludes by proposing an alternative macro-economic model based on the scholarship surrounding degrowth and ecological economics. It will be argued that when an economy has grown so large that it exceeds the social and ecological threshold point beyond which further growth is uneconomic, lawmakers should initiate a degrowth process of planned economic contraction. The primary aim of this degrowth process would be to move toward and ultimately arrive at an ecologically sustainable and socially desirable ‘steady-state’ economy. That, in essence, is the basic macro-economic framework within which this thesis is situated. The most significant feature of this framework is that it does not accept that growth should be a dominant policy objective of developed nations – a feature which this thesis will argue has significant implications for how property systems should be legally constructed or reconstructed. The maintenance and protection of ecological integrity, on the one hand, and redistribution of wealth to eliminate poverty and lessen inequalities, on the other, are the main policy objectives which this chapter will argue are implied by the idea of a degrowth transition toward a steady-state economy.

##### 4.2. *Critical Property Theory: Politicizing the Economy*

Chapter Two examines whether the macro-economic agenda of degrowth could be advanced legally and politically by reconfiguring property relations in advanced

capitalist societies or whether doing so would illegitimately interfere with established property rights. It is important to emphasize that the post-growth jurisprudence of property being proposed in this thesis will not seek to discard the central organizing institutions of 'private property' and 'the market.' Rather, it will examine the possibility of giving them a radically new content. This inquiry is central to this thesis, as noted above, because within the dominant neoliberal paradigm it is widely assumed that state institutions should protect existing property rights and enforce contracts, but otherwise presumptively stay out of the 'free market' economy. So far as that neoliberal position is accepted, significant restructuring of the property system will be deemed an illegitimate legal and political agenda.

This chapter, however, will not explore in any detail what concrete property reforms may be needed to initiate the transition to a degrowth society, since that issue will be taken up in the final chapter once the groundwork is complete. Instead, this chapter will examine the preliminary issue of whether significant property reform is even a democratically available option, or whether, on the contrary, reform is *prima facie* objectionable on the grounds that it would involve illegitimate interference with established property rights. In other words, the primary concern of this chapter is not so much whether degrowth reform, in particular, is justifiable, but whether significant reform of the property system, in general, is even possible. That said, the discussion of property reform in general is still framed by the environmental and redistributive motivations of the degrowth movement in particular.

In examining these issues the chapter will seek to establish the following three points: (1) that due to the indeterminacy of property, contract, and market concepts, significant reform of a private property / market system is not a conceptual impossibility; (2) that the state is always and necessarily involved in defining market structures and property entitlements, a point that fundamentally blurs the private / public distinction which neoliberal politics rely on to insulate the economy from state intervention; and (3) that defining those market structures and property entitlements is a normative, value-laden undertaking and therefore cannot be done in such a way that is neutral between conceptions of the good life. These three points, it will be argued, open up the theoretical space needed for the fundamental reformation of private property / market systems, since together they suggest that if the value-orientation of lawmakers (or their constituencies) change, so will the manner in which those lawmakers create, define and interpret the malleable legal rules which govern

the economy. In this way, the legal structure of private property / market systems can evolve legitimately and in potentially radical ways, given the political will.<sup>185</sup>

#### 4.3. *How much Property is 'Proper'? Thoreau's Alternative Economics*

One of the central themes in the previous chapter was that property law, in particular, and the legal framework of the economy, in general, are inescapably normative constructions. What this means, essentially, is that when lawmakers are defining the property, contract, and market rules which structure and govern the economy, they cannot avoid making a vast multiplicity of value-laden decisions of policy. One way to attempt to bring about legal change, therefore, is to challenge the normative foundations upon which existing legal relations are based and to provide improved foundations. By logic of argument, that is the course taken up in Chapter Three. The growth model of progress is normatively based upon the idea that human beings are essentially consumers whose well-being depends on ever-increasing levels of income and consumption (made possible by growth in GDP). This chapter challenges that normative basis by turning to the alternative economics of Henry David Thoreau. A post-growth property system is defended in this thesis partly on the grounds that it would enhance human well-being, *despite it implying a phase of planned macro-economic contraction*, and this argument calls for an explanation of the perhaps counter-intuitive premise that well-being could be increased while consumption is reduced. It is through a close analysis of Thoreau's theory and practise of voluntary simplicity that such an explanation is offered. Thoreau's critical approach to consumption directly undermines the normative foundations of the growth model of progress and, by extension, I will argue, the pro-growth conception of property which that model has shaped. In doing so, this chapter opens up the normative space needed to develop a conception of property *beyond growth*. Rejecting the consumerist ethos that 'more is always better,' Thoreau's central normative insight is

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<sup>185</sup> Although some readers may perceive a Marxian sub-text in parts of this thesis – especially those parts of Chapter Two which engage sympathetically with critical legal studies scholarship – Marx's influential ideas on property will not be explicitly addressed in any sustained way in the following pages. The justification for this is that, by exploring the possibility of giving private property a radically new content, as apposed to calling for its abolition, this thesis is ultimately situated outside the communist tradition. Another significant point of differentiation is that Marx's conception of a communist utopia was predicated on 'material superabundance,' whereas the post-growth property system being advanced in this thesis is predicated on the social and ecological desirability of 'material simplicity.' On Marx's view of the communist utopia, see Patrick Coby, 'The Utopian Vison of Karl Marx' (1986) *Winter Modern Age* 22. The rich Hegelian tradition of property theory also falls outside the scope of this thesis – again, not because it lacks relevance, but simply because in the space available the core arguments of this thesis require that attention be dedicated elsewhere. See Georg Hegel, *Philosophy of Right* (1952 [1821]).

that ‘just enough is plenty.’ And that simple insight, it will be argued – which has both distributive and ecological implications – provides the most secure normative foundation upon which to construct a post-growth jurisprudence of property (and a degrowth society more generally).

#### 4.4. *The Social Construction of Law: The Promise of the Voluntary Simplicity Movement*

It is not enough, however, simply to propose a new normative foundation for a property system and hope for the best; which is to say, capitalism as we know it certainly will not lie down like a lamb at the mere pronouncement of Thoreauvian ideals. Some explanation must also be offered as to how those ideals of simplicity and sufficiency could become infused into law, and that process of legal transformation is the issue which will be explored in Chapter Four. In particular, this chapter will focus on theories of law reform arising out of the growing literature on law and social movements.<sup>186</sup> Drawing on that literature and developing it in the context of this thesis, the foundational argument of this chapter is that law can be understood, to a large extent, as an expression of cultural values, such that *cultural evolution tends to induce legal evolution*.<sup>187</sup> In more theoretical terms, the argument is that if legal concepts (including property) are social constructs, then social movements can be understood as a cultural mechanism through which legal concepts are socially constructed and reconstructed. Upon that foundation, the chapter will proceed to define and discuss the Voluntary Simplicity Movement,<sup>188</sup> a quietly emerging social movement which represents the most coherent manifestation (in contemporary Western culture, at least) of the Thoreauvian ideals of sufficiency and simplicity. It will be argued that this social movement or something like it will almost certainly need to expand, organize, and politicize, if anything resembling a post-growth property system is to emerge through democratic processes in advanced capitalist societies. The basic reasoning here is that the legal structure of a property system will not reflect an ethics of simplicity and sufficiency until such an ethics is embraced at the socio-cultural level.

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<sup>186</sup> See generally, Michael McCann (ed), *Law and Social Movements* (2006).

<sup>187</sup> As one European politician put it in relation to the politics of environmentalism: ‘Political parties are just a reflection of society.... Politics will only behave in a more environmental fashion the moment the average citizen will do so, and not in the reverse order.’ See Marius De Geus, *The End of Over-Consumption: Towards a Lifestyle of Moderation and Self-Restraint* (2003) 25 (quoting Dick Tommel).

<sup>188</sup> See generally, Mary Grigsby, *Buying Time and Getting By: The Voluntary Simplicity Movement* (2004).

#### 4.5. *Political Downshifting on the Path to Entropia*

The final chapter goes beyond foundational theory and critique and sketches an outline of what a post-growth property system might actually look like as a concrete legal reality. The goal is to explore practical ways that property relations could evolve in advanced capitalist societies to achieve policy objectives more specific than economic growth, objectives such as ecological sustainability, material sufficiency for all, distributive justice, leisure expansion, the flourishing of culture and community, and the advancement of democracy. Although the legal reforms proposed in this chapter may well slow an economy's growth – even to the point of degrowth – and thereby not maximize a nation's GDP per capita, the underlying thesis being advanced is that the reforms would at the same time: (1) increase human well-being; (2) promote social justice; and (3) enhance the health and integrity of the planet's ecosystems. This is the potential 'triple dividend' which it will be argued makes a post-growth property system such an alluring and promising prospect.





If we do not change direction, we are likely to end up where we are going – **Chinese Proverb**

## Chapter One

# PLANNED ECONOMIC CONTRACTION: THE EMERGING CASE FOR DEGROWTH

## 1. INTRODUCTION

From the dawn of civilization to the early modern period of European history – roughly, from 8000 B.C. to 1500 A.D. – the average world per capita GDP is estimated by a Berkeley economist to have been approximately US\$115 (in constant 1990 US\$).<sup>1</sup> This figure is a measure of per capita economic output in pre-industrialized agricultural societies and it represents a bare subsistence economy of negligible growth. From 1500 to 1750, world GDP grew by a modest 0.4% annually, with total wealth created in this 250-year period being \$21 trillion. Due to industrialization and the large-scale use of fossil fuels, the period from 1750 to 1950 generated a considerable increase in world GDP, with \$139 trillion being created during the period 1900 to 1950 alone. From 1950 to 2000, however, the increase in world GDP was simply astonishing, marking a growth explosion the kind of which humankind had never experienced before.<sup>2</sup> As another economist notes, ‘Total wealth created in this 50-year period was \$847 trillion, more than three times that created in the preceding 10,000 years.’<sup>3</sup> These figures are a stark reminder of the power of exponential growth.

If world GDP increases throughout the 21<sup>st</sup> century at a rate comparable with the last few decades, human beings will produce between 8 and 26 times more wealth (in terms of GDP) than has been created in the entire human history to date.<sup>4</sup> Though that may sound attractive on the surface, this thesis arises out of a deep scepticism as to whether it is a future which humankind should be seeking to achieve. In the poorest societies of the world, of course, where the basic material needs of most

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<sup>1</sup> J. Bradford Delong, ‘World GDP, One Million B.C. – Present’ (1998) <[http://www.j-bradford-delong.net/TCEH/1998\\_Draft/World\\_GDP/Estimating\\_World\\_GDP.html](http://www.j-bradford-delong.net/TCEH/1998_Draft/World_GDP/Estimating_World_GDP.html)> at 15 March 2010. See also, Angus Maddison, *The World Economy: Historical Statistics* (2006).

<sup>2</sup> Ibid.

<sup>3</sup> Geoffrey Glasby, ‘Beyond Growth: The Environment Key to Survival in the 21st Century’ (2008) 16 *Pacific Ecologist* 15, 17.

<sup>4</sup> Ibid.

inhabitants are not adequately or securely met,<sup>5</sup> increasing national productivity is justifiably of overwhelming importance and concern. In such conditions, an increase in GDP per capita – provided it is broadly distributed – will tend to have a direct and positive impact on human well-being, for the reason that extra resources are of the highest value when they lift people out of sheer biophysical destitution.<sup>6</sup> In conditions of moderate or comfortable affluence, however, which are the socio-economic circumstances this thesis is focusing on, it is not obvious why societies should continue to dedicate so much energy and attention to maximizing growth. More specifically, it is not obvious why the laws of property in such socio-economic circumstances should be structured for that purpose. The diminishing importance of growth relative to other goals is especially apparent in light of the mounting evidence, to be reviewed in this chapter, which indicates that current growth trends and consumption practices in the developed regions of the world are not just ecologically unsustainable but also increasingly counter-productive in terms of social well-being.<sup>7</sup>

In the interests of clarity it may be helpful to spend a moment further unpacking the premise of this foundational chapter. In the developed regions of the world today, such as North America, Western Europe, Japan, Australia, New Zealand, etc., decades of unprecedented economic growth have all but solved the economic problem of how to secure the necessities of life and, indeed, have resulted in most people living lives of relative luxury and comfort.<sup>8</sup> Though a small residue of poverty remains in these regions,<sup>9</sup> on the whole ordinary people are fabulously wealthy when considered in the context of all known history or when compared to the 2.5 billion human beings who live on \$1 or \$2 dollars per day.<sup>10</sup> The average, full-time Australian income, for example, is over AU\$67,000 per annum,<sup>11</sup> and there are

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<sup>5</sup> See generally, World Bank, ‘World Development Indicators: Poverty Data,’ (2008) 11 <<http://siteresources.worldbank.org/DATASTATISTICS/Resources/WDI08supplement1216.pdf>> at 5 September 2010.

<sup>6</sup> See Ronald Inglehart, *Modernization and Postmodernization: Cultural, Economic, and Political Change in 43 Societies* (1997) 64 (providing evidence that ‘The transition from a society of scarcity to a society of security brings a dramatic increase in subjective well-being’). The social research into the correlation between income and well-being will be explored in some detail below.

<sup>7</sup> See generally, Tim Jackson, *Prosperity without Growth: Economics for a Finite Planet* (2009).

<sup>8</sup> See Avner Offer, *The Challenge of Affluence: Self-Control and Well-Being in the United States and Britain since 1950* (2006); Richard Easterlin, *Growth Triumphant: The Twenty-First Century in Historical Perspective* (1996).

<sup>9</sup> Acknowledging that figures differ from country to country, economist Clive Hamilton estimates that the residue of poverty in the developed world is approximately 5-15 percent. Clive Hamilton, *Growth Fetish* (2003) 145.

<sup>10</sup> See World Bank, ‘World Development Indicators: Poverty Data,’ (2008) 11, above n 5.

<sup>11</sup> As reported by the Australian Bureau of Statistics in February 2010. See <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/6302.0>> at 10 August 2010).

fourteen nations richer still (with many more of comparable wealth).<sup>12</sup> Notwithstanding the global economic downturn, it would seem that the developed world is now characterized by affluence, not deprivation.

Why is it, then, that even in the most affluent societies, economic growth is still the dominant goal of governments and the primary measure of policy and institutional success?<sup>13</sup> One might have expected that the exponential rise in material standards of living would have led to what economist John Hicks called ‘the diminishing marginal significance of economics,’<sup>14</sup> by which he meant a decreasing concern with economic activity the richer in material terms a society becomes. ‘As wealth increases,’ he wrote, ‘wealth itself becomes (or should become) less important.’<sup>15</sup> In other words, Hicks’ hypothesis was that once the material resources needed for subsistence were secured, human beings would not be so strictly bound by the dictates of economic rationality and thus be free to dedicate more of their energy and attention to things other than wealth creation. But far from observing a decrease in economic activity in affluent societies, or a movement away from materialistic concerns, we see quite the opposite. Economic valuation continues to infiltrate and commodify our lives,<sup>16</sup> and the insatiable desire for more economic growth continues to structure the collective imagination.<sup>17</sup> It is as if Margaret Thatcher were right when she declared, ‘There is no alternative.’<sup>18</sup>

Contesting Thatcher’s dictum, this chapter presents an evidential case for the radical alternative of degrowth – or rather, the matrix of degrowth alternatives.<sup>19</sup> This sceptical approach to growth was preliminarily defined in the introduction as ‘an equitable down-scaling of production and consumption that increases human well-being and enhances ecological conditions.’<sup>20</sup> Focusing on the developed regions of the world, the substantive argument of this chapter begins by presenting a multi-dimensional critique of growth – social, ecological, and economic – and concludes by proposing a new macro-economic approach based on the emerging scholarship

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<sup>12</sup> See International Monetary Fund, ‘World Economic Outlook Database,’ (2009) <<http://www.imf.org/external/pubs/ft/weo/2009/01/weodata/index.aspx>> at 10 August 2010).

<sup>13</sup> See Stephen Purdey, *Economic Growth, the Environment and International Relations: The Growth Paradigm* (2010).

<sup>14</sup> John Hicks, *Essays in World Economics* (1959) xiii.

<sup>15</sup> *Ibid.*

<sup>16</sup> As Margaret Davies notes, ‘capitalism tends to promote the commodity form: when something can be made an object, it will be.’ Margaret Davies, *Property: Meanings, Histories, Theories* (2007) 20. For a classic account of the commoditization of Western societies, see Karl Polanyi, *The Great Transformation* (1957). See also, Margaret Radin, *Contested Commodities* (1996).

<sup>17</sup> See Hamilton, above n 9.

<sup>18</sup> Quoted in David Harvey, *A Brief History of Neoliberalism* (2005) 40.

<sup>19</sup> Serge Latouche, ‘Degrowth’ (2010) 18 *J. Clean. Prod.* 519, 520.

<sup>20</sup> Francois Schneider, Giorgos Kallis and Joan Martinez-Alier, ‘Crisis or Opportunity? Economic Degrowth for Social Equity and Ecological Sustainability’ (2010) 18(6) *J. Clean. Prod.* 511, 512.

surrounding degrowth and ecological economics.<sup>21</sup> In this way the chapter outlines the scientific and theoretical foundations for a post-growth jurisprudence of property.

## 2. THE SOCIAL CRITIQUE OF GROWTH

The argument begins with a ‘social’ critique of growth. The following sections review the social research that has assessed the correlation between income (measured in terms of dollars) and human well-being (defined below). The purpose of this inquiry is to evaluate how far and in what circumstances growth in per capita income contributes to well-being in a society. The evidence will be used to determine whether, or to what extent, lawmakers in affluent societies should still be structuring property relations with the aim of growing the economy.<sup>22</sup>

### 2.1 *Measuring Human Well-Being*

For many decades now social scientists have been using surveys to assess empirically the well-being of human beings in different places, situations, and times.<sup>23</sup> A variety of terms has been used to denote overall well-being, including ‘happiness,’ ‘utility,’ ‘subjective well-being,’ ‘reported well-being,’ and ‘life satisfaction,’ and I will follow prominent researchers Bruno Frey and Alois Stutzer in using these terms interchangeably.<sup>24</sup> Although scientists have sought to measure human well-being using a number of different methods – for example, using physiological and neurobiological indicators, observing social behaviour, and non-verbal behaviour – Frey and Stutzer conclude: ‘Self-reported happiness has turned out to be the best indicator of happiness. Extensive research has shown that people are capable of

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<sup>21</sup> See generally, Serge Latouche, *Farewell to Growth* (2009); Herman Daly, *Ecological Economics and Sustainable Development: Selected Essays of Herman Daly* (2007).

<sup>22</sup> See Derek Bok, *The Politics of Happiness: What Government Can Learn From the New Research on Well-Being* (2010).

<sup>23</sup> See Ed Diener, ‘Subjective Well-Being: Three Decades of Progress’ (1999) 125(2) *Psychological Bulletin* 276. These surveys have been crafted in a variety of ways, asking such questions as, ‘Taken all together, how happy would you say you are: very happy, quite happy, not very happy, or not happy at all.’ Another prominent approach involves asking people to consider such statements as ‘The conditions of my life are excellent’ and then asking them to provide a response from 1-7 ranging from ‘strongly agree’ to ‘strongly disagree.’

<sup>24</sup> Bruno Frey and Alois Stutzer, *Happiness and Economics: How the Economy and Institutions Affect Human Well-Being* (2002) 25. See also, Ed Diener et al, *Well-Being for Public Policy* (2009) 8-20 (discussing the nuances in these terms).

consistently evaluating their own state of well-being.’<sup>25</sup> The following critique proceeds on that basis.<sup>26</sup>

Although surveys on subjective well-being cannot provide an exact accounting of a notion as complex as ‘human well-being,’ if their results are received critically and cautiously then they can still provide a good deal of insight into the state of human well-being and provide valuable information with which individual, social, and political (including legal) decisions can be made.<sup>27</sup> It would be quite unjustified to ignore the vast empirical research into the state of human well-being simply because the subject of well-being defies exact accounting. It would be especially unjustified given that in recent years a vast amount of research has been dedicated to this subject,<sup>28</sup> suggesting that these studies ought to be taken seriously, despite the fact that there is still ‘more work to be done.’<sup>29</sup>

## 2.2. *Income, Well-Being, and the Growth Model of Progress*

As outlined in the introduction, the growth model of progress assumes as a matter of course that an increase in GDP per capita will increase well-being. In other words, it takes for granted a direct and positive relationship between utility  $U$  and income  $Y$  of the form  $U = U(Y)$ , and this is thought to hold for all relationships between utility and income, be it across nations, between individuals within a nation, or over time.<sup>30</sup> The present inquiry, therefore, must consider what empirical evidence exists for this assumed correlation, in those three situations: across nations; between individuals within a nation; and over time.

Since these matters have been rehearsed well elsewhere,<sup>31</sup> the essential findings (and some of the on-going controversies) can be concisely stated, although a degree of detail is still required since this so-called ‘happiness research’ has received very little attention by legal scholars.<sup>32</sup> The potential legal implications of this research will

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<sup>25</sup> Ibid 26.

<sup>26</sup> For a convincing defence of this approach, see Ed Diener et al, *Well-Being for Public Policy* (2009).

<sup>27</sup> See Alan Kruger and David Schkade, ‘The Reliability of Subjective Well-Being Measures’ (2008) 92 *J. of Pub. Economics* 1833; Ed Diener et al, *Well-Being for Public Policy* (2009); Bok, *The Politics of Happiness*, above n 22.

<sup>28</sup> Kruger and Schkade note that between 2000-2006, 157 scholarly articles and numerous books have been published in the economics literature alone using data on life satisfaction or subjective well-being. See Kruger and Schkade, above n 27. See also, Diener, ‘Subjective Well-Being,’ above n 23 (reviewing over 300 studies on well-being).

<sup>29</sup> See Ed Diener and Robert Biswas-Diener, ‘Will Money Increase Subjective Well-being? A Literature Review and a Guide to Needed Research’ in Ed Diener (ed), *The Science of Well-Being* (2009) 119.

<sup>30</sup> Frey and Stutzer, above n 24, 90.

<sup>31</sup> See supporting footnotes below.

<sup>32</sup> But see, Eric Posner and Cass Sunstein (eds), *Law and Happiness* (2010). The idea that public policy should focus on promoting happiness, of course, dates back at least to the influential utilitarian

be briefly noted as the discussion proceeds, in anticipation of later chapters where those implications will be explored in more detail.

### 2.3. *The Correlation between Income and Well-Being across Nations*

There is now a substantial body of research which has assessed the correlation between income and well-being across nations.<sup>33</sup> If ever there were people who seriously subscribed to the romantic notion of poor nations being happier than rich nations, rigorous studies over recent decades have convincingly dispelled such a myth. On average, persons living in rich countries are demonstrably happier than those living in the poorest countries.<sup>34</sup> This unsurprising result, which seems to conform to the conventional economics of the growth model, has been established by Ed Diener and colleagues in an extensive study covering 55 nations.<sup>35</sup> Their study was based on data from the *World Values Survey*, which is one of the best sources for international comparisons of life satisfaction over such a large number of countries. Many other studies, comparing various sets of nations, have found the same positive association between per capita income and life satisfaction.<sup>36</sup>

When the results of these studies are illustrated graphically, however, with average per capita income in a nation (across the horizontal axis) and average life satisfaction (on the vertical axis), a curious relationship is observable.<sup>37</sup> While life satisfaction indeed rises with income up to a point, many researchers have observed a distinct *curvilinear* relationship between the two variables, suggesting that increases in income have a more or less direct and positive impact on life satisfaction at low levels of income, but beyond a surprisingly modest threshold point the

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economist and legal reformer, Jeremy Bentham. In recent decades, however, Benthamite utilitarianism has been widely abandoned in favour of the ‘preference orderings’ view of neoclassical economics. See Posner and Sunstein, above, at 2. Although using research on self-reported happiness to shape legal institutions is similar (though not identical) to the Benthamite position, I wish to make clear that this thesis is not arguing that property relations should be structured to ‘maximize’ self-reported happiness; rather, the argument, or part of the argument, is that lawmakers should give the research on self-reported happiness more attention when structuring property relations, for reasons to be explained.

<sup>33</sup> See generally, Ed Diener, Daniel Kahneman and John Helliwell (eds), *International Differences in Well-Being* (2010); Bruno Frey, *Happiness: A Revolution in Economics* (2008).

<sup>34</sup> See Angus Deaton, ‘Income, Health, and Well-Being Around the World: Evidence from the Gallup World Poll’ (2008) 22(2) *J. of Econ. Perspectives* 53.

<sup>35</sup> Ed Diener et al, ‘Factors Predicting the Subjective Well-Being of Nations’ in Ed Diener (ed), *Culture and Well-Being* (2009) 43.

<sup>36</sup> See, e.g., Saamah Abdallah, Sam Thompson and Nic Marks, ‘Estimating Worldwide Life Satisfaction’ (2008) 65(1) *Ecological Economics* 35; Carol Graham, ‘Insights on Development from the Economics of Happiness’ (2005) 11 *World Bank Research Observer* 1.

<sup>37</sup> See Ronald Inglehart and Has-Dieter Klingemann, ‘Genes, Culture, and Happiness,’ in Ed Diener and Eunkook Suh, *Culture and Subjective Well-Being* (2000) 165.

correlation between income and life satisfaction weakens significantly.<sup>38</sup> In one of the most comprehensive reviews of this body of literature, Frey and Stutzer suggest that 'there is no sizeable correlation between wealth and satisfaction with life above an average income level of US\$10,000.'<sup>39</sup> This is not to suggest, necessarily, that there is no correlation at all above that surprisingly low level, only that income above that level has a diminishing marginal utility.<sup>40</sup> That said, some have indeed argued that beyond a certain level the correlation is actually non-existent,<sup>41</sup> although this remains a matter of contention,<sup>42</sup> and is likely to remain contentious.<sup>43</sup>

*When comparing only the richest nations*, however – which are the focus of this thesis – the correlation between income and life satisfaction is evidently negligible. Clive Hamilton, for example, has studied data on the richest 17 nations, and he found that 'there is no relationship at all between higher incomes and higher reported appreciation of life.'<sup>44</sup> Similarly, Richard Layard, in his well researched text, *Happiness: Lessons from a New Science*, concludes: 'If we compare the Western industrial countries, the richer ones are no happier than the poorer ones.'<sup>45</sup> In a very recent study,<sup>46</sup> Layard and his colleagues provide further evidence for this position and rigorously respond to their critics.<sup>47</sup> This new study essentially corroborates Ronald Inglehart's thesis that 'although economic gains apparently make a major contribution to subjective well-being as one moves from societies at the subsistence

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<sup>38</sup> See Ronald Inglehart, *Culture Shift in Advanced Industrial Society* (1990). See also, Rafael Di Tella and Robert MaCulloch, 'Happiness Adaptation to Income Beyond "Basic Needs"' in Ed Diener, Daniel Kahneman and John Helliwell (eds), *International Differences in Well-Being* (2010) 217; Peggy Schyns, *Income and Life Satisfaction: A Cross-National and Longitudinal Study* (2003).

<sup>39</sup> Frey and Stutzer, above 24, 75. See also, Frey, above n 33, 42.

<sup>40</sup> Richard Layard, Guy Mayraz and Stephen Nickell, 'The Marginal Utility of Income' (2008) 92 *J. of Pub. Econ.* 1846; Ronald Inglehart, 'The Diminishing Utility of Economic Growth' (1996) 10(4) *Critical Review* 509.

<sup>41</sup> Richard Easterlin, 'Does Economic Growth Improve the Human Lot? Some Empirical Evidence' in Paul David and Melvin Reder (eds), *Nations and Households in Economic Growth: Essays in Honor of Moses Abramovitz* (1974); Richard Easterlin, 'Will Raising the Incomes of All Increase the Happiness of All?' (1995) 27(1) *Journal of Economic Behavior & Organization* 35; Richard Easterlin, 'Explaining Happiness' (2003) 100(19) *Proceedings of the National Academy of Sciences of the United States of America* 11176.

<sup>42</sup> See Betsey Stevenson and Justin Wolfers, 'Economic Growth and Subjective Well-Being: Reassessing the Easterlin Paradox' (2008) (Spring) *Brookings Papers on Economic Activity* 1; Deaton, above n 34. For a response, see Richard Easterlin and Laura Angelescu, 'Happiness and Growth the World Over: Time Series Evidence on the Happiness – Income Paradox' in Holge Hinte and Klaus Zimmermann (eds), *Happiness, Growth and the Life Cycle* (2010).

<sup>43</sup> See Ed Diener, Daniel Kahneman and John Helliwell (eds), *International Differences in Well-Being* (2010).

<sup>44</sup> Hamilton, above n 9, 26.

<sup>45</sup> Richard Layard, *Happiness: Lessons from a New Science* (2005).

<sup>46</sup> Layard et al, 'Does Relative Income Matter? Are the Critics Right?' in Ed Diener, Daniel Kahneman and John Helliwell (eds), *International Differences in Well-Being* (2010).

<sup>47</sup> For the most prominent critics, see Stevenson and Wolfers, above n 42. But see Bok, above n 22, 14 (noting that 'even experts who agree that economic growth brings happiness in prosperous countries often find that the rate of increase is very slight').

level to those with moderate levels of economic development, further economic growth seems to have little or no impact on subjective well-being.<sup>48</sup> To those people or governments who subscribe to the growth model of progress and who assume that GDP is a proxy for social progress, these research findings present a challenging anomaly. Indeed, it is suggested that they provide credible grounds for doubting whether growth in GDP should still be a dominant policy objective for rich nations, since it would seem getting richer is no longer contributing much, if anything, to well-being.<sup>49</sup>

When considering this body of social research one must, of course, allow for the possibility that any perceived correlation between income and happiness may be produced by factors other than income, as such. To some extent this will almost certainly be the case. Frey and Stutzer note, in particular, that ‘countries with higher per capita incomes tend to have more stable democracies than poor countries’<sup>50</sup> and so ‘it may well be that the seemingly observed positive association between income and happiness is in reality due to the more developed democratic conditions.’<sup>51</sup> Or perhaps the perceived association is actually due to more secure human rights or better average health. Controlling as far as possible for these and several other possibly misleading factors, Frey and Stutzer still hold that ‘there is substantial evidence that it is indeed income that produces subjective well-being, at least for countries below a certain threshold of wealth.’<sup>52</sup>

Once that threshold has been crossed, however – which we have seen the rich Western nations already seem to have crossed – evidence suggests that further growth in GDP has a fast diminishing marginal utility.<sup>53</sup> What this means is that beyond the threshold, the growth model of progress is a flawed analytical tool and an increasingly poor indicator of human well-being.<sup>54</sup> This is a cause for concern

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<sup>48</sup> Ronald Inglehart, 'The Diminishing Utility of Economic Growth' (1996) 10(4) *Critical Review* 509.

<sup>49</sup> One important explanation (among others to be considered below) for why growth is failing to contribute much to well-being in rich countries is because in recent decades, especially, the rewards of growth have gone mainly to the richest few percent of the population. For an incisive discussion of this issue, see Kate Pickett and Richard Wilkinson, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (2009) (presenting an impressive body of evidence showing the social benefits of a broad-based distribution of wealth). See also Robert Frank, *Falling Behind: How Rising Inequality Harms the Middle Class* (2007). These studies show that inequality in a society can be socially corrosive, in itself, a point which supports a more egalitarian distribution of wealth in societies where wealth is highly polarized. The issue of whether, or to what extent, the laws of property can be legitimately restructured to redistribute wealth will be explored in the next chapter.

<sup>50</sup> Frey and Stutzer, above n 24, 75.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Ibid* 75-6.

<sup>53</sup> Explanations for this finding (beyond the one considered above, n 49) will be reviewed in a later section.

<sup>54</sup> Ed Diener and Martin Seligman, 'Beyond Money: Toward an Economy of Well-Being' (2004) 5(1) *Psychological Science in the Public Interest* 1 (arguing that economic indicators are extremely

because law and policy makers in those rich nations who persist in using the growth model in their decision-making (consciously or unconsciously) will continue to endorse and seek growth, and structure institutions accordingly, even when growth has stopped contributing positively to human well-being, a point to which we will return.<sup>55</sup>

#### 2.4. *The Correlation between Income and Well-Being within a Nation*

Within any nation, are rich people happier? One might have thought the answer would be simple. When people have lots of money, they seem to have more opportunities to achieve whatever they desire: they can purchase more luxurious consumer goods and services; they can afford better healthcare, receive a better education, and are more likely to enjoy higher status, etc. And if for some reason rich people think that living in poverty will make them happier, they are free to dispose of their money at no cost.<sup>56</sup> These are no doubt the kinds of reasons that led Jeremy Bentham to assert: 'Money is the most accurate measure of the quantity of pain or pleasure that a person can be made to receive... It is from his money that a man derives the main part of his pleasures.'<sup>57</sup> But are things that simple?

It seems not. When we actually consider the extensive empirical evidence on this subject, rather than just uncritically accepting the perhaps 'commonsensical' assumptions of conventional economics, we find a much more nuanced relationship between income and well-being.<sup>58</sup> The evidence generally confirms that, on average, rich people report higher levels of subjective well-being than poor people.<sup>59</sup> But upon closer inspection, the research shows that, although more money increases well-being at low levels of income, not so far beyond the poverty line the correlation between income and well-being tends to fade, at times even to vanishing point.<sup>60</sup> The affects of increasing income are stronger within the poorest nations, for the reason

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important in the early stages of economic development, when the fulfilment of basic material needs was the main issue, but as societies grow wealthy, differences in well-being are less frequently due to income, and are more frequently due to factors such as social relationships and enjoyment at work).

<sup>55</sup> See Ed Diener et al, *Well-Being for Public Policy* (2009); Bok, *The Politics of Happiness*, above n 22.

<sup>56</sup> Bruno and Frey, above n 24, 73.

<sup>57</sup> Jeremy Bentham, 'Principles of Penal Law' in *The Works of Jeremy Bentham: Vol I* (2005) 408.

<sup>58</sup> See generally, Diener and Biswas-Diener, 'Will Money Increase Subjective Well-Being?' above n 29; Mihaly Csikszentmihalyi, 'If We Are So Rich, Why Aren't We Happy?' (1999) 54(10) *American Psychologist* 821; Suniya Luthar, 'The Culture of Affluence: Psychological Costs of Material Wealth' (2003) 74(6) *Child Development* 1581.

<sup>59</sup> See Frey, above 33, 27.

<sup>60</sup> See Robert Lane, *The Loss of Happiness in Market Democracies* (2000), especially Ch 4. On the cultural specificity of poverty, see, e.g., Amartya Sen, *Development as Freedom* (2001); Amartya Sen, *Commodities and Capabilities* (1985).

that more people subsist in conditions of material destitution. But, as David Myers puts it, 'within affluent countries, where nearly everyone can afford life's necessities, increasing affluence matters surprising little.'<sup>61</sup> Similarly, Frey and Stutzer claim that '[a]t low levels of income, a rise in income strongly raises well-being. But once an annual income of about US\$15,000 has been reached, a rise in income level has a smaller effect on happiness.'<sup>62</sup>

The diminishing correlation between income and well-being within nations has also been observed by Ronald Inglehart, in his 16-nation study of the United States, Canada, and Western Europe, where he concludes that the correlation between income and happiness is 'surprisingly weak (indeed, virtually negligible).'<sup>63</sup> Commenting on this weak or even non-existent relationship between income and happiness, Michael Argyle pays tribute to the theory of declining marginal utility of money: 'The reason for the rather weak effect of income [on happiness] in the USA may be that many Americans are above the level at which income affects happiness.'<sup>64</sup> It seems this reasoning now applies to most if not all the advanced capitalist societies.<sup>65</sup>

The central insight here, broadly expressed by Yale Professor, Robert Lane, is that 'the rich are no more satisfied with their lives than the merely comfortable, who in turn are only slightly, if at all, more satisfied with their lives than the lower middle classes.'<sup>66</sup> And there is now considerable research on this issue.<sup>67</sup> It seems that once a moderate threshold has been reached – which some theorists argue is essentially when 'basic needs' have been satisfied<sup>68</sup> – a higher income will have little impact on life satisfaction.<sup>69</sup> It is suggested that this research casts further doubt on the received wisdom that increases in GDP per capita will benefit affluent societies.

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<sup>61</sup> David Myers, *The American Paradox: Spiritual Hunger in an Age of Plenty* (2000) 131. Economists, Eric Posner and Cass Sunstein, concisely express the point as follows: 'happiness improves with wealth, but only to a point.' See Posner and Sunstein, above n 32, 2. See also, Ed Diener, Jeff Horwitz and Robert Emmons, 'Happiness of the Very Rich' (1985) 16 *Social Indicators Research* 263 (providing evidence that the very rich are only marginally happier than a random cross section of the population).

<sup>62</sup> Frey and Stutzer, above n 24, 83. Layard and colleagues suggest that US\$20,000 might be a more accurate figure. See Layard et al, above n 46, 164.

<sup>63</sup> Ronald Inglehart, *Culture Shift in Advanced Industrial Society* (1990) 242.

<sup>64</sup> Michael Argyle, 'Causes and Correlates of Happiness,' in Daniel Kahneman, Ed Diener and Norbert Schwarz, *Well-Being: The Foundations of Hedonic Psychology* (1999) 353.

<sup>65</sup> See generally, Robert Lane, *The Loss of Happiness in Market Democracies* (2000).

<sup>66</sup> *Ibid* 16.

<sup>67</sup> For a comprehensive review and analysis of this research, see Diener and Seligman, 'Beyond Money,' above n 54 (reviewing over 150 studies assessing the correlation between income and well-being).

<sup>68</sup> See Di Tella and MaCulloch, 'Happiness Adaptation to Income Beyond "Basic Needs,"' above n 38 217.

<sup>69</sup> See also, John Talberth, 'A New Bottom Line for Progress,' in *State of the World* (2008) 21 <[http://www.worldwatch.org/files/pdf/SOW08\\_chapter\\_2.pdf](http://www.worldwatch.org/files/pdf/SOW08_chapter_2.pdf)> at 10 September 2010 (noting that 'An

## 2.5. *The Correlation between Income and Well-Being over Time*

A final way to assess the correlation between income and well-being is to compare the well-being of an individual or a society over different points in time, in different financial circumstances. If we assume that increasing per capita incomes will have a direct and positive bearing on life satisfaction (as per the growth model), we would expect to see this relationship reflected over time as an individual or a society gets richer. Again, there is a large and growing empirical literature providing insight into this issue.<sup>70</sup>

As documented above, rich nations tend to report higher levels of subjective well-being than the poorest nations, where poverty is widespread. From this it can be fairly inferred that as a poor nation's economy grows over time and secures more basic material needs for its inhabitants, the well-being of those inhabitants also tends to rise.<sup>71</sup> This initially strong correlation between income and well-being is arguably the main reason the growth model is so deeply entrenched today. It is no wonder, given the many benefits derived from economic growth since the Industrial Revolution, that the imperative to growth structures our politics, our outlook, even our identities.<sup>72</sup> And since increasing income tends to increase well-being significantly when nations or individuals are very poor, it is easy to infer that, beyond poverty, further income will keep on increasing well-being in the same direct and positive fashion. That inference, however, turns out to be false.

In the United States and Britain, to begin with two of the most notorious examples, research shows that a 'life satisfaction paradox' has developed.<sup>73</sup> The 'paradox,' so-called, is this: over the last half century, average per capita incomes have grown several times over, but despite this tremendous rise in the material standard of living, inhabitants are demonstrably less or no more happy today than they were fifty years

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increasingly large and robust body of hedonics research confirms what people know intuitively: beyond a certain threshold, more material wealth is a poor substitute for community cohesion, healthy relationships, a sense of purpose, connection with nature, and other dimensions of human happiness').

<sup>70</sup> See generally, Holge Hinte and Klaus Zimmermann (eds), *Happiness, Growth, and the Life Cycle* (2010).

<sup>71</sup> While this suggests that there are powerful arguments for more economic growth in countries where a large proportion of the population lives in poverty, Clive Hamilton is correct to warn that 'this should not be construed as an unalloyed endorsement of growth at all costs. The nature of the growth process matters.' Hamilton, above n 9, 27; See also, Debal Deb, *Beyond Developmentality: Constructing Inclusive Freedom and Sustainability* (2009).

<sup>72</sup> See Hamilton, above n 9, especially Chap. 3, 'Identity.'

<sup>73</sup> I borrow this phrase from Tim Jackson (ed), *Sustainable Consumption* (2005) 10. The 'paradox' is sometimes also referred to as the 'Easterlin Paradox' or the 'Happiness-Income Paradox.' For the classic statement, see Richard Easterlin, 'Does Economic Growth Improve the Human Lot?', above 41. More recently, see Andrew Clark, Paul Frijters and Michael Shields, 'Relative Income, Happiness, and Utility: An Explanation for the Easterlin Paradox and Other Puzzles' (2008) 46(1) *J. of Econ. Literature* 95; Easterlin and Angelescu, 'Happiness and Growth the World Over,' above n 42.

ago.<sup>74</sup> Similarly, if we look to Japan, evidence indicates that between 1958 and 1991 real GDP per person increased six-fold, yet reported satisfaction with life did not change at all.<sup>75</sup>

Let us dwell on these points for a moment. Three of the richest economies in the world have grown considerably over the last fifty years and yet the well-being of their inhabitants, which surveys have quite consistently recorded, has tended to stagnate (or, in the case of the United States, decline).<sup>76</sup> In other words, the affluence delivered by economic growth within these nations has evidently stopped serving human well-being. *Getting richer is no longer making people happier.* As mentioned above, this phenomenon has been labelled the 'life satisfaction paradox,' a paradox because it fundamentally contradicts what the conventional economics of the growth model of progress would have predicted. And it calls for reflection: 'If the economy is up,' ask Clifford Cobb et al, 'why is America down?'<sup>77</sup> In his review of the scholarly literature, Clive Hamilton is surely right to insist: 'The implications of the figures cannot be brushed aside: if a sharp rise in personal incomes does not result in any increase in personal life satisfaction, why do we as societies give such enormous emphasis to economic growth?'<sup>78</sup>

Evidently, it is not just the USA, Britain, and Japan that must confront this deeply challenging state of affairs. Most other developed societies are showing distinct signs of confronting a very similar paradox, as evidenced by the recent studies based on the 'extended accounts' of the Index for Sustainable Economic Welfare (ISEW) or the Genuine Progress Indicator (GPI).<sup>79</sup> These analytical tools, among others (e.g. the Human Development Index, the Happy Planet Index, the Measure of Domestic Progress, etc.), have been developed in response to growing discontent with the inadequacies and narrowness of GDP as a measure of welfare.<sup>80</sup> As much more nuanced measures of welfare, the ISEW and the GPI take into consideration extremely important social and environmental factors that GDP, as a measure of welfare, does not and cannot reflect. As noted in the introduction, the ISEW and the GPI begin with total private consumption expenditure and then make deductions for such things as resource depletion, pollution, income inequality, loss of leisure,

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<sup>74</sup> See, generally, David Blanchflower and Andrew Oswald, 'Well-Being Over Time in Britain and the USA' (2004) *The Journal of Public Economics* 1359.

<sup>75</sup> Bruno Frey, *Happiness: A Revolution in Economics* (2008) 39.

<sup>76</sup> See Blanchflower and Oswald, above n 74.

<sup>77</sup> Clifford Cobb et al, 'If the Economy is Up, Why is America Down?' *The Atlantic Monthly* (1995) 1.

<sup>78</sup> Hamilton, above 9, 30.

<sup>79</sup> See generally, Philip Lawn, *Sustainable Development Indicators in Ecological Economics* (2006).

<sup>80</sup> Joseph Stiglitz, Amartya Sen and Jean-Paul Fitoussi, *Mis-Measuring Our Lives: Why GDP Doesn't Add Up* (2010).

'defensive expenditures' etc, and make additions for such things as public infrastructure, volunteering, and domestic work.<sup>81</sup> The aim of these indexes is to measure genuine progress as accurately as possible, not just total market activity.

What do these 'extended accounts' of welfare show? Avner Offer, in his well-documented text, *The Challenge of Affluence*,<sup>82</sup> helpfully reviews the key findings of the ISEW in relation to many nations. Offer shows that the American and British ISEW declined significantly between 1975 and 1990, even though GDP grew significantly.<sup>83</sup> Furthermore, ISEW measures are now available for Australia, Austria, Chile, Germany, Italy, the Netherlands, Sweden, as well as the UK and the USA. Offer reports that, 'All except Italy record ISEW growth until the 1970s, with stagnation or decline afterwards.'<sup>84</sup>

Although there is still room to improve the ISEW and the GPI, it is suggested that they are undoubtedly better measures of national progress than GDP.<sup>85</sup> It is heartening to observe that these types of extended accounts are approaching official recognition, albeit slowly.<sup>86</sup> The message they convey, however, is a rather disconcerting one, especially for the developed nations. After all, they show that economic growth since about the mid-1970s has done little to no good in terms of aggregate welfare, and in some societies has noticeably done overall harm. On that basis, Offer seems justified in concluding that 'the pursuit of further growth has been irrational. It is only myopia and habit which allow it to continue in the face of negative welfare returns.'<sup>87</sup>

In light of this evidence, the question about the effects of rising incomes on well-being over time can be answered as follows: getting richer over time makes people and societies better off *up to a point*, but once a moderate level of wealth has been attained – a level which the developed nations, as detailed above, already seem to have surpassed – getting richer makes little, if any, positive difference to well-being, and can even cause overall harm.

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<sup>81</sup> Herman Daly and John Cobb, *For the Common Good: Redirecting the Economy toward Community, the Environment, and a Sustainable Future* (1989).

<sup>82</sup> Avner Offer, *The Challenge of Affluence: Self-Control and Well-Being in the United States and Britain since 1950* (2006).

<sup>83</sup> *Ibid* 19.

<sup>84</sup> *Ibid*. There is some evidence that even the Italian ISEW is in decline. See Silvana D'Andrea, 'Italian Quality of Life' (1998) 44(1) *Social Indicators Research* 5.

<sup>85</sup> Philip Lawn, 'A Theoretical Foundation to Support the Index of Sustainable Economic Welfare (ISEW), Genuine Progress Indicator (GPI), and Other Related Indexes' (2003) 44(1) *Ecological Economics* 105; Philip Lawn, 'An Assessment of the Valuation Methods Used to Calculate the Index of Sustainable Economic Welfare (ISEW), Genuine Progress Indicator (GPI), and Sustainable Net Benefit Index (SNBI)' (2005) 2 *Environment, Development, and Sustainability* 185.

<sup>86</sup> See especially, Stiglitz, Sen, and Fitoussi, above n 80.

<sup>87</sup> Offer, above n 82, 20. See also, Philip Lawn, 'A Stock-Take of Green National Accounting Initiatives' (2007) 80 *Social Indicators Research* 427.

Before stating the implications the above findings may have for this thesis, it is important to consider the question of why it might be that, beyond a moderate threshold, more income ‘paradoxically’ stops contributing much to well-being; for understanding this paradox, so-called, might provide some insight into how best to respond to it.

## 2.6. Explaining the ‘Life Satisfaction Paradox’

Four of the more prominent explanations for the ‘life satisfaction paradox’ will be briefly addressed. First, some theorists, going at least as far back as Thorstein Veblen, have highlighted the fact that once a person’s basic needs are satisfied, *relative* income often has much more effect on subjective well-being than *absolute* levels of income.<sup>88</sup> This issue has been the subject of many sociological studies,<sup>89</sup> and the studies have tended to show that, not so far beyond the poverty line, people generally assess their individual well-being in relation to how others in a similar social group are doing, such that if our incomes rise relative to those around us we are likely to become happier; but if everyone else’s incomes rise at the same time as our own, we are less likely to become happier. Moreover, if your increase in income causes envy in those around you, your increased happiness might be offset by dissatisfaction in others, so that aggregate happiness across the nation may not change at all.<sup>90</sup> For these reasons, there may come a time when economic growth is wasteful or self-defeating,<sup>91</sup> much like when everyone stands on tip toes in a crowd and nobody’s position improves.<sup>92</sup>

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<sup>88</sup> Thorstein Veblen, *The Theory of the Leisure class* (1965 [1899]) (popularizing the concepts of ‘conspicuous consumption’ and ‘conspicuous leisure,’ emphasizing the importance of actions designed to display one’s relative position in society). This issue was revived and updated in the modern era by Richard Easterlin’s seminal paper, ‘Does Economic Growth Improve the Human Lot?’, above n 41. See also, Sara Solnick and David Hemenway, ‘Is More Always Better?: A Survey on Positional Concerns’ (1998) 37(3) *J. of Econ. Behavior & Organization* 373 (providing evidence that positional concerns are ‘extremely important’).

<sup>89</sup> For a clear statement of the issues, see Ed Diener et al, ‘The Relationship between Income and Subjective Well-Being: Relative or Absolute?’ (1993) 28 *Social Indicators Research* 195. For more recent studies, see Layard et al, ‘Does Relative Income Matter? Are the Critics Right?’, above n 46; Richard Ball and Kateryna Chernova, ‘Absolute Income, Relative Income, and Happiness’ (2008) 88(3) *Social Indicators Research* 497. See also, Robert Frank, *Choosing the Right Pond: Human Behavior and the Quest for Status* (1985).

<sup>90</sup> Tim Jackson (ed), *Sustainable Consumption* (2005) 10.

<sup>91</sup> See Fred Hirsch, *Social Limits to Growth* (1976); Kjell Brekke, Richard Howarth and Karine Nyborg, ‘Status-Seeking and Material Affluence: Evaluating the Hirsch Hypothesis’ (2003) 45(1) *Ecological Economics* 29. See also, Robert Frank, ‘Positional Externalities Cause Large and Preventable Welfare Losses’ (2005) 95(2) *Am. Econ. Rev.* 137.

<sup>92</sup> See also, Easterlin, ‘Will Raising the Incomes of All Increase the Happiness of All,’ above n 41 (answering the title question in the negative, on the grounds that the material norms on which

Second, other theorists point to the impact of 'hedonic adaptation'<sup>93</sup> and rising expectations.<sup>94</sup> The central idea is that as people get richer they generally become more accustomed to the pleasure of the goods and services their new income affords us. Accordingly, if people want to maintain the same level of happiness, they must achieve ever higher levels of income in the future just to stay in the same place, hence the metaphor of the 'consumerist treadmill.'<sup>95</sup> As Myers notes, 'Thanks to our capacity to adapt to ever greater fame and fortune, yesterday's luxuries can soon become today's necessities and tomorrow's relics.'<sup>96</sup>

Third, many ancient wisdom traditions, both 'philosophical' and 'spiritual,' tell us that materialistic values can be dangerous; that focusing on attaining material possessions and social renown can detract from what is meaningful about life.<sup>97</sup> Tim Kasser has recently explored the science beneath such ancient wisdom in his text, *The High Price of Materialism*.<sup>98</sup> He shows that scientific research on the effects of materialism yields clear and consistent findings: 'People who are highly focused on materialistic values [i.e. people who orientate their lives around the acquisition of money, fame, and image] have lower personal well-being and psychological health than those who believe that materialistic pursuits are relatively unimportant.'<sup>99</sup> What is more, Kasser shows that these relationships have been documented in samples of people ranging from the wealthy to the poor, from teenagers to the elderly, and from Americans to Russians, from Australians to South Koreans.<sup>100</sup> If this is true then today's consumer cultures are inculcating people with values that are not conducive to their own well-being. After reviewing the evidence, Kasser concludes that when people in affluent societies subscribe to materialistic values and organize their lives around the pursuit of wealth and possessions, 'they are essentially wasting their time as far as well-being is concerned. By concentrating on such a profitless style of life,

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judgments of well-being are based tend to increase in the same proportion as the actual income of the society).

<sup>93</sup> See, e.g., Shane Frederick and George Lowenstein, 'Hedonic Adaptation,' in Daniel Kahneman, Ed Diener and Norbert Schwarz, *Well-Being: The Foundations of Hedonic Psychology* (1999).

<sup>94</sup> See Richard Easterlin, 'Income and Happiness: Towards a Unified Theory' (2001) 111(473) *Economic Journal* 465 (arguing that 'people project current aspirations to be the same throughout the life cycle, while income grows. But since aspirations actually grow along with income [and roughly in proportion to income], experienced happiness is systematically different from projected happiness. Consequently, choices turn out to be based on false expectations'). As Bok puts it, 'people's aspirations are forever beyond their reach, leaving them perpetually unsatisfied.' Bok, above 22, 13.

<sup>95</sup> Tim Jackson (ed), *Sustainable Consumption* (2005) 10.

<sup>96</sup> David Myers, 'The Funds, Friends, and Faith of Happy People' (2000) 55(1) *American Psychologist* 56, 60.

<sup>97</sup> See generally, Goldian Vanenbroeck (ed), *Less is More: An Anthology of Ancient and Modern Voices Raised in Praise of Simplicity* (1991).

<sup>98</sup> Tim Kasser, *The High Price of Materialism* (2002).

<sup>99</sup> Ibid 22.

<sup>100</sup> Ibid 21-22.

they leave themselves little opportunity to pursue goals that could fulfil their needs and improve the quality of their lives.<sup>101</sup>

For present purposes, the final (and somewhat overlapping) reason for why income does not contribute much to well-being in affluent societies concerns the limits of market consumption: whatever it is that makes life meaningful, evidently it is not the limitless consumption of goods and services.<sup>102</sup> Robert Lane expresses the idea as follows: ‘the richer the society and its individuals become, *the less purchasable are the goals that bring them happiness* – although they may still pursue wealth with their accustomed vigor.’<sup>103</sup> And, indeed, continuing the pursuit seems to be the way of many individuals in affluent societies today: ‘The sad truth is that when people feel the emptiness of either material success or failure, they often persist in thinking that more will be better, and thus continue to strive for what will never make them happy.’<sup>104</sup> This ‘sad truth’ arguably manifests itself politically in affluent societies as an insatiable desire for economic growth.<sup>105</sup>

## 2.7 The Counter-Productivity of Growth in terms of Well-Being

Based on the evidence reviewed above, it is suggested that the growth model of progress ultimately rests upon a misunderstanding of human beings. Contrary to the economic conception of human beings as ‘rational maximizers of utility,’<sup>106</sup> evidence from various quarters shows that we are not one-dimensional consuming machines that simply convert money into well-being.<sup>107</sup> Accordingly, as later chapters will argue, we should not structure our political, legal, and economic institutions as if we were (our laws of property, in particular). Tim Jackson helpfully summarizes the social critique as follows:

Far from making us happier... the pursuit of material things damages us psychologically and socially. Beyond the satisfaction of our basic material needs for

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<sup>101</sup> Ibid 47-48.

<sup>102</sup> See, e.g., Tibor Scitovsky, *The Joyless Economy: The Psychology of Human Satisfaction and Consumer Dissatisfaction* (1976); Abraham Maslow, ‘A Theory of Human Motivation’ (1943) 50 *Psychological Review* 370.

<sup>103</sup> Robert Lane, *The Loss of Happiness in Market Democracies* (2000) 63 (my emphasis).

<sup>104</sup> Tim Kasser, *The High Price of Materialism* (2002) 59. See also, Tim Kasser and Allen Kanner (eds), *Psychology and Consumer Culture: The Struggle for a Good Life in a Materialistic World* (2003).

<sup>105</sup> A further explanation for the ‘life satisfaction paradox’ could also be phrased in terms of marginal costs increasing relative to marginal benefits. I will defer a discussion of this explanation, however, until the ‘economic’ critique of growth below.

<sup>106</sup> For one formulation of this ‘economic’ conception of human beings, see Richard Posner, ‘The Economic Approach to Law’ (1975) 53 *Texas L. R.* 757, 761.

<sup>107</sup> See Russell Korobkin and Thomas Ulen, ‘Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics’ (2000) 88(4) *Calif. L. R.* 1051.

housing, clothing and nutrition, the pursuit of material consumption merely serves to entrench us in unproductive status competition, disrupts our work/life balance and distracts us from those things that offer meaning and purpose to our lives.<sup>108</sup>

The review and analysis above does not claim to establish conclusively the validity of the social critique of growth. The point was only to provide a literature review and express the essential message, namely, that the affluent societies seem to have reached or exceeded a threshold point (i.e. the 'social limits to growth') beyond which more income/consumption stops tending to contribute to human well-being.<sup>109</sup> This message suggests that affluent societies could be doing better things with their time and energy than pursuing more wealth through further economic growth. After all, if increasing GDP per capita is no longer contributing much to well-being, organizing life (and law) around the attainment of it is merely a distraction from more meaningful and fulfilling pursuits, and therefore, it is suggested, counter-productive in terms of well-being. More specifically, the evidence cited above provides sociological support for the argument of this thesis that growth should no longer be the overriding policy objective when structuring property relations in affluent societies. Instead of pursuing growth, it is my argument that priority should be given to what the evidence above indicates are more specific welfare-enhancing objectives – such as ensuring the basic material needs of all are met and ensuring wealth is broadly distributed – even if doing so functions to inhibit growth. The question of whether, or to what extent, property relations can be legitimately reformed to achieve these (or other) policy objectives is taken up in the next chapter.

When all is said and done, the vast majority of individuals in affluent societies have essentially been freed for the first time in history from the threat of material destitution and, indeed, now live lives of relative comfort. What this means is that those individuals could now be confronting honestly what John Maynard Keynes called our 'permanent problem'<sup>110</sup> – the problem of what to *do* with the radical freedom that material comfort provides. This thesis makes no attempt to solve that problem; a problem which, in any case, is unlikely to have a general solution. The above sections do suggest, however, that the meaning of human existence does not and

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<sup>108</sup> Tim Jackson (ed), *Sustainable Consumption* (2005) 10.

<sup>109</sup> Manfred Max-Neef, 'Economic Growth and Quality of Life: A Threshold Hypothesis' (1995) 15(2) *Ecological Economics* 115.

<sup>110</sup> John Maynard Keynes, 'Economic Possibilities for Our Grandchildren,' in *Essays in Persuasion* (1963) 362.

cannot consist in the consumption and accumulation of ever more material things. Perhaps that is obvious, but what then of growth capitalism?

### 3. THE ECOLOGICAL CRITIQUE OF GROWTH

Despite evidence showing that growth seems to have stopped contributing much to human well-being in affluent societies, there is arguably an even greater concern that current economic activity and growth trends are ecologically unsustainable.<sup>111</sup> The following sections outline an ‘ecological’ critique of growth based on the leading scientific studies which have assessed the ecological impacts of human economic activity. It will be argued that (1) the affluent societies have reached or exceeded the ecologically sustainable ‘limits to growth’;<sup>112</sup> and (2) techno-efficiency improvements are not reducing the absolute ecological impacts of economic activity. These two points provide further foundational support for the argument of this thesis that lawmakers in the affluent societies should not continue to structure property relations with the aim of growing the economy.

#### 3.1. *A Scientific Review of the Ecological Impacts of Economic Activity*

The Living Planet Report 2008,<sup>113</sup> based on the scientific research conducted by the Global Footprint Network,<sup>114</sup> begins with the platitudinous reminder that our lives depend on the services provided by Earth’s natural systems; the report then proceeds to state its central finding: ‘we are consuming the resources that underpin those services much too fast – faster than they can be replenished. Just as reckless spending is causing recession, so reckless consumption is depleting the world’s natural capital to a point where we are endangering our future prosperity.’<sup>115</sup> The

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<sup>111</sup> The notion of ‘sustainability’ entered mainstream discourse as a result of the 1987 ‘Brundtland Report’ published by the World Commission on Environment and Development (WCED). See WCED, *Our Common Future* (1987) (stating that ‘sustainable development is development that meets the needs of the present without compromising the ability of the future generations to meet their own needs’). The vagueness of this definition, however – while arguably necessary to reach consensus in 1987 – left room for governments and international organizations to spread the message that growth is not inconsistent with a healthy environment, a position which remains dominant today. See Purdey, above n 13. In the following sections I follow Klaus Bosselmann and others in arguing that the concept of sustainability is only meaningful if related to the core idea of ecological sustainability. See Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (2008).

<sup>112</sup> See generally, Donella Meadows, Jorgen Randers and Dennis Meadows, *Limits to Growth: The 30-year Update* (2004).

<sup>113</sup> World Wildlife Fund (WWF), ‘Living Planet Report 2008,’ [http://assets.panda.org/downloads/living\\_planet\\_report\\_2008.pdf](http://assets.panda.org/downloads/living_planet_report_2008.pdf) at 15 march 2010.

<sup>114</sup> See Global Footprint Network, <[www.footprintnetwork.org](http://www.footprintnetwork.org)> at 15 November 2010.

<sup>115</sup> WWF, above n 113, 1.

report goes on to add: 'If our demands on the planet continue at the same rate, by the mid-2030s we will need the equivalent of two planets to maintain our lifestyles.'<sup>116</sup>

This is hardly news, of course. There has long been a broad consensus within the scientific community that human economic activity is degrading Earth's ecosystems. In 1992, for example, the Union of Concerned Scientists published their 'Warning to Humanity,'<sup>117</sup> which was endorsed by 1,700 of the world's leading scientists, including the majority of living Nobel laureates in the sciences. The warning begins:

Human beings and the natural world are on a collision course. Human activities inflict harsh and often irreversible damage on the environment and on critical resources. If not checked, many of our current practices put at serious risk the future that we wish for human society and the plant and animal kingdoms, and may so alter the living world that it will be unable to sustain life in the manner that we know. Fundamental changes are urgent if we are to avoid the collision our present course will bring.<sup>118</sup>

More recently, the consensus surrounding the fact of ecological degradation has been exemplified by the United Nations' publication of the Millennium Ecosystem Assessment in 2005, which was compiled and reviewed by over 2,000 leading scientists from 95 countries.<sup>119</sup> This massive scientific study reveals that approximately 60 per cent of global ecosystems services 'are being degraded or used unsustainably,' resulting in 'substantial and largely irreversible loss in the biodiversity of life on Earth.'<sup>120</sup> Looking uneasily toward the future, the study states: 'The consumption of ecosystems services, which is unsustainable in many cases, will continue to grow as a consequence of a three- to six-fold increase in world GDP by 2050.'<sup>121</sup> This is particularly concerning given that the study also acknowledges that 'the degradation of ecosystems services is already a significant barrier to achieving the Millennium Development Goals agreed to by the international community.'<sup>122</sup>

A sampling of a few other recent scientific studies will serve to reveal the depth and extent of the ecological crisis. Mathis Wackernagel and colleagues have

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<sup>116</sup> Ibid.

<sup>117</sup> Union of Concerned Scientists, '1992 World Scientists Warning to Humanity' <<http://www.ucsusa.org/about/1992-world-scientists.html>> at 15 March 2010.

<sup>118</sup> Ibid.

<sup>119</sup> Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being* (2005).

<sup>120</sup> Ibid 1.

<sup>121</sup> Ibid 2.

<sup>122</sup> Ibid. For a thorough review of the concept of sustainability in international law, see Bosselmann, above n 111, Chap. 1.

measured the 'ecological footprint'<sup>123</sup> of humanity and compared it to the 'carrying capacity'<sup>124</sup> of the planet. They concluded that the global ecological footprint exceeds sustainable carrying capacity by twenty per cent.<sup>125</sup> In 2010, the World Wildlife Fund reported that humanity's global ecological footprint is now exceeding sustainable carrying capacity by fifty per cent.<sup>126</sup> Of similar concern, the United Nations Global Environment Outlook 2007 (GEO4) provides details on, among other things, the reality of climate change, reporting that 11 of the 12 years between 1995-2006 were the hottest since 1850.<sup>127</sup> This rise in temperature has been strongly linked to greenhouse gases arising primarily from the human use of fossil fuels.<sup>128</sup> In terms of loss of biodiversity, the Living Planet Index reveals that over the past 35 years alone, Earth's wildlife populations have declined by approximately one third.<sup>129</sup> This list could go on but the point is made. Evidence of environmental devastation and decline abounds.<sup>130</sup>

Even this brief evidential review shows that there is a substantial body of scientific literature indicating that the high-impact, fossil-fuel-dependent, lifestyles practised in the developed world (and increasingly elsewhere) are environmentally unsustainable and certainly not universalizable.<sup>131</sup> Leading environmentalist, Bill McKibben, even believes that the 'consensus' which has solidified over recent

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<sup>123</sup> An 'ecological footprint' is a measure of the amount of renewable and non-renewable ecologically productive land area required to support the resource demands and absorb the wastes of a given population or specific activity. See Mathis Wackernagel, 'Tracking the Ecological Overshoot of the Human Economy' (2002) 99(14) *Proceedings of the National Academy of Sciences of the United States of America* 9266.

<sup>124</sup> 'Carrying capacity' can be defined as the maximum population of a given species that can be supported indefinitely in a defined habitat without permanently impairing the productivity of that habitat. See William Rees, 'Revisiting Carrying Capacity: Area-Based Indicators of Sustainability' (1996) 17(3) *Population and Environment* 195.

<sup>125</sup> Wackernagel, above n 123.

<sup>126</sup> WWF, 'Living Planet Report' (2010), <http://www.footprintnetwork.org/press/LPR2010.pdf> 7 at 10 November 2010.

<sup>127</sup> United Nations Environment Program, 'Global Environment Outlook 4' (2007) 59.

<sup>128</sup> See the Intergovernmental Panel of Climate Change, 'Climate Change 2007 – The Physical Science Basis' (2007) 112 (concluding that 'Most of the observed increase in global average temperatures since the mid-20<sup>th</sup> century is very likely due to the observed increase in anthropogenic greenhouse gas concentrations').

<sup>129</sup> WWF, 'Living Planet Report 2008,' above n 113, 2.

<sup>130</sup> For more state-of-the-art environmental research, see Worldwatch Institute, <<http://www.worldwatch.org/>> at 25 August 2010.

<sup>131</sup> See Thomas White, 'Sharing Resources: The Global Distribution of the Ecological Footprint' (2007) 64(2) *Ecological Economics* 402. See also, United Nations Development Program, 'Human Development Report' (2007/8) 15 <[http://hdr.undp.org/en/media/HDR\\_20072008\\_EN\\_Overview.pdf](http://hdr.undp.org/en/media/HDR_20072008_EN_Overview.pdf)> at 10 September 2010 (noting that 'There could be no greater challenge to our assumptions about progress than that of realigning economic activities and consumption with ecological realities'); Gro Brundtland, *Oslo Symposium on Sustainable Consumption* (stating, 'It is simply impossible for the world as a whole to sustain a Western level of consumption for all'), quoted in James Salzman, 'Sustainable Consumption and the Law' (1997) 27 *Environmental Law* 1243, 1246.

decades has transmogrified, in recent months, into something of a ‘panic,’<sup>132</sup> partly out of fear of approaching the ecological ‘tipping point’ beyond which feedback loops will be irreversible and unstoppable.<sup>133</sup> But even leaving to one side the controversial possibility of a tipping point, the best available evidence illustrates that the global economy has physically grown to such a size that it now exceeds the regenerative and absorptive capacities of Earth’s ecosystems. That is, human beings are now consuming natural capital and diminishing the capacity of the planet to support life in the future.<sup>134</sup>

### 3.2. *The Scapegoat of Over-Population*

In the face of evidence such as that cited above, some are quick to blame ‘over-population’ and argue that the environment is under such strain because there are too many people on the planet.<sup>135</sup> Currently the world population is approximately 6.8 billion and is increasing by about 70 million people each year.<sup>136</sup> Though birth rates are slowly declining in some regions – and have already essentially stabilized in many parts of the developed world<sup>137</sup> – the United Nations has predicted that the global population will keep rising to a peak of approximately 9.2 billion around mid-century.<sup>138</sup>

Rising global population is obviously of immense environmental concern.<sup>139</sup> The impact an economy has on the environment depends, in part, on the number of people there are, such that environmental impact will tend to increase with population

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<sup>132</sup> Bill McKibben, ‘Because the World Needs to Know’ (public lecture, University of Melbourne, 11 May 2009).

<sup>133</sup> On feedback loops and the tipping point, see New Economic Foundation, ‘100 Months: Technical Note’ (2008) <[www.neweconomics.org](http://www.neweconomics.org)> at 20 May 2009 (which calculates that 100 months from August 2008, atmospheric concentrations of greenhouse gases will begin to exceed a point whereby it will no longer be *likely* we will be able to avert potentially irreversible climate change). This indicates a much shorter period than previously thought in which to make the transition to a low-carbon economy.

<sup>134</sup> See Thomas Prugh and Robert Costanza, *Natural Capital and Human Economic Survival* (1995); Mathis Wackernagel, ‘National Natural Capital Accounting with the Ecological Footprint Concept’ (1999) 29(3) *Ecological Economics* 375.

<sup>135</sup> Concern about over-population has a long genesis. See Thomas Malthus, *An Essay on the Principle of Population* (1803). For a helpful discussion, see Worldwatch Institute, ‘Beyond Malthus: Sixteen Dimensions of the Population Problem’ (1998) <<http://www.worldwatch.org/node/847>> at 10 September 2010.

<sup>136</sup> See United Nations Department of Social and Economic Affairs, ‘World Population Prospects: The 2008 Revision’ (2008) <[http://esa.un.org/unpd/wpp2008/pdf/WPP2008\\_Highlights.pdf](http://esa.un.org/unpd/wpp2008/pdf/WPP2008_Highlights.pdf)> at 10 December 2010.

<sup>137</sup> Ibid.

<sup>138</sup> Ibid.

<sup>139</sup> See generally, Paul Ehrlich and Anne Ehrlich, *The Population Explosion* (1990).

size, other things being equal.<sup>140</sup> Stabilizing and reducing the global population, therefore, is certainly to be desired, but how to achieve this effectively and justly is an extremely difficult question. Using state coercion, as China has done with its 'one child family policy,' has reportedly had disturbing unintended side-effects, including a rise in female infanticide;<sup>141</sup> in China today males under the age of 20 outnumber females by 32 million, creating a domino effect of other related social problems.<sup>142</sup> Furthermore, the actual effectiveness of, or need for, a coercive policy is questionable, given that some of China's neighbouring nations, which have had no such policy, have experienced some of the lowest fertility rates in the world over the last 25 years.<sup>143</sup> There is also the question of whether coercive policies infringe illegitimately on basic human liberties.<sup>144</sup>

Leaving the issue of state coercion to one side, however, the position taken in this thesis is that to focus on population as the primary cause of the environmental crisis is to use population as a scapegoat; that is, as a means of deflecting attention away from what is arguably the more important environmental issue, namely, over-consumption in the developed nations.<sup>145</sup> Non-coercive measures to stabilize or reduce population worldwide should certainly be taken, such as reproductive education programs and the provision of free contraception; and the developed world should do more to assist the developing world in these matters. But it is suggested the developed nations cannot in good conscience lecture the developing nations about how expanding populations are putting immense strain on Earth's ecosystems *while at the same time indulging themselves in ever-higher levels of consumption*. If the developed nations are serious about reducing global impact on the environment, then before looking overseas they must show the world that they are prepared to step more lightly themselves. There is little sign of that happening, however, as the next section shows.

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<sup>140</sup> Ibid 58, 273 (discussing the 'I = PAT' identity, which holds that environmental impact (I) is a product of population (P), affluence (A), and technology (T)).

<sup>141</sup> See Andrew Simms et al, 'The Consumption Explosion' (2009) 10 <[www.neweconomics.org](http://www.neweconomics.org)> at 10 September 2010.

<sup>142</sup> Ibid.

<sup>143</sup> Ibid.

<sup>144</sup> Arguing for a non-coercive approach, see Bill McKibben, *Maybe One: A Case for Smaller Families* (1998).

<sup>145</sup> See generally, Tim Jackson (ed), *Sustainable Consumption* (2005).

### 3.2. *Technology, Efficiency, and the Myth of Decoupling*

Aside from blaming over-population, a second mainstream response to the ecological crisis is to claim that science and technology will save the day.<sup>146</sup> From this perspective, rather than focusing on reducing consumption or population, what primarily needs to happen is for scientific or technological advancements to make the production of commodities more efficient; that is, to make commodities progressively less dependent on material throughput, a process often referred to as ‘decoupling.’<sup>147</sup> By way of decoupling, the ecological impacts of economic activity can decrease, in theory, even as the economy grows, meaning that per capita incomes can grow indefinitely while remaining within ecological limits – or so the argument goes.<sup>148</sup>

In assessing the validity of this argument it is imperative to distinguish between ‘relative’ and ‘absolute’ decoupling.<sup>149</sup> Relative decoupling refers to a decline in the ecological impact per unit of economic output. Absolute decoupling refers to a decline in the ecological impact of total economic output. While relative decoupling may occur, making each commodity less ecologically intensive, if the total consumption of commodities increases then there may be no absolute decoupling; indeed, the absolute ecological impact of total economic activity may increase. Since the scientific research cited above showed that the global economy already exceeds the planet’s sustainable carrying capacity, it is clear that absolute decoupling is what is urgently needed. It is also clear, however, that absolute decoupling is not occurring.

Consider, for example, the energy intensity per unit of global economic output, where the evidence of relative decoupling is quite clear. Tim Jackson reports that the amount of energy needed to produce each unit of the world’s economic output has fallen more or less continuously in recent decades, with the global energy intensity per unit now 33 per cent lower on average than it was in 1970.<sup>150</sup> Unsurprisingly, this improved energy efficiency is also leading to relative decoupling in terms of carbon emissions intensities. The global carbon intensity per unit of economic output

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<sup>146</sup> As Mark Sagoff puts it, ‘Nature need not limit economic growth... as long as knowledge increases and the sun shines.’ Mark Sagoff, ‘Carrying Capacity and Ecological Economics’ (1995) 45 *Bioscience* 610, 614. See also, Bjorn Lomborg, *The Skeptical Environmentalist: Measuring the Real State of the World* (2001); Indur Goklany, *The Improving State of the World: Why We’re Living Longer, Healthier, More Comfortable Lives on a Cleaner Planet* (2007); Julian Simon and Herman Kahn, *The Resourceful Earth: A Response to Global 2000* (1984).

<sup>147</sup> See Tim Jackson, *Prosperity with Growth*, above n 7.

<sup>148</sup> See, e.g., Norman Myers and Julian Simon, *Scarcity or Abundance?: A Debate on the Environment* (1st ed, 1994).

<sup>149</sup> In what follows I draw upon more comprehensive discussions and literature reviews in Jackson, *Prosperity without Growth*, above n 7; Peter Victor, *Managing without Growth: Slower by Design, not Disaster* (2008).

<sup>150</sup> Jackson, *Prosperity with Growth*, above n 7, 69.

declined by almost a quarter from just over 1 kilogram of carbon dioxide per US dollar in 1980 to 770 grams of carbon dioxide per US dollar in 2006.<sup>151</sup>

However, despite declining energy and carbon intensities, Jackson shows that carbon dioxide emissions from fossil fuels have increased 80 per cent since 1970.<sup>152</sup> 'Emissions today,' he adds, 'are almost 40% higher than they were in 1990 – the Kyoto base year – and since the year 2000 they have been growing at 3% per year.'<sup>153</sup> Without entering into the intricacies of the emissions literature, the present point is simply that despite significant relative decoupling of energy and carbon intensities, absolute levels of carbon emissions are rising significantly.<sup>154</sup>

Peter Victor arrived at essentially the same conclusion when he reviewed studies of decoupling with respect to the total material resource requirements of Germany, the Netherlands, United States, and Japan – some of the most technologically advanced nations on the planet.<sup>155</sup> He reports that although a modest degree of decoupling occurred from 1975-1993, the decoupling was insufficient to prevent the total use of resources increasing during this period. He explains that '[t]his is because the rate of increase in GDP in each of the four countries was greater than the rate of decrease in material intensity.'<sup>156</sup> Globally the message is essentially the same:

Comparing 2002 with 1980 about 25 per cent less natural resources (measured in physical units) were used to produce one dollar of GDP. This relative decoupling of economic growth and resource use was insufficient to prevent the total quantity of resource extraction increasing, which it did by 36 per cent.<sup>157</sup>

In this context reference must be made to the related matter of the Environmental Kuznets Curve (EKC) hypothesis.<sup>158</sup> This hypothesis holds that the relationship between per capita GDP and environmental impact is represented by an inverted U-shaped curve, implying that environmental impact grows during low levels of per capita GDP, levels off at mid-level per capita GDP, and at high levels of per capita

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<sup>151</sup> Ibid.

<sup>152</sup> Ibid 171.

<sup>153</sup> Ibid.

<sup>154</sup> Ibid. See also, United Nations Development Program, 'Human Development Report' (2007/8), above n 131 (noting that 'efficiency gains have failed to prevent large aggregate increases in emissions'); Purdey, above n 13, 136-7 (reviewing evidence that carbon emissions per capita show a clear tendency to increase with income). See also, Blake Alcott, 'Jevons' Paradox' (2005) 54(1) *Ecological Economics* 9.

<sup>155</sup> Victor, above n 149, 55.

<sup>156</sup> Ibid.

<sup>157</sup> Ibid 55-6.

<sup>158</sup> For the first explicit statement of this hypothesis, see Gene Grossman and Alan Kruger, 'Environmental Impacts of a NAFTA Agreement' (1991) (National Bureau of Economic Research Working Paper, 3914).

GDP environmental quality improves. In essence, the reasoning beneath the hypothesis is as follows: (1) that wealthy countries have the financial luxury of worrying about environmental issues where poor countries must focus solely on providing for basic needs, irrespective of environmental impact; and (2) that as countries get richer their consumption habits tend to shift from 'goods' to 'services' – representing a shift from 'industrial' societies to 'post-industrial' or 'information' societies – which is claimed to have environmental benefits (due to decoupling).<sup>159</sup> This hypothesis is used to argue that there are no environmental limits to growth – that growth is ultimately good for the environment, even if at first it seems bad.<sup>160</sup>

A comprehensive review of the literature on EKC hypothesis is beyond the scope of this section,<sup>161</sup> but in broad terms its empirical status can be expressed as follows. Some studies have shown that where the environmental damage is generated and suffered within a nation (or within adjacent and cooperating nations) the EKC hypothesis can indeed be valid.<sup>162</sup> These limited circumstances can include wastewater discharge, sulphur dioxide emissions, and carbon monoxide emissions.<sup>163</sup> On the other hand, when the environmental problems cross national boundaries, most studies conclude that the EKC does not hold.<sup>164</sup> Most importantly, several studies have come to the conclusion that the EKC does not hold for carbon dioxide, arguably the greatest environmental problem.<sup>165</sup> Furthermore, a 2009 study by Holm and Englund has done much to debunk the widely held belief that a movement toward a 'service' or 'post-industrial' economy leads to reduced environmental impacts.<sup>166</sup> In a review of the evidence on this matter, they conclude that despite growth of the service sector during the last decades in the world's wealthier countries, overall resource consumption has increased (which confirms

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<sup>159</sup> See Wilfred Beckerman, *A Poverty of Reason: Sustainable Development and Economic Growth* (2002).

<sup>160</sup> As Beckerman puts it, 'although economic growth usually leads to environmental degradation in the early stages of the process, in the end the best – and probably the only – way to attain decent environment in most countries is to become rich.' Wilfred Beckerman, 'Economic Growth and the Environment: Whose Growth? Whose Environment?' (1992) 20(4) *World Development* 481, 482. See also, Lomborg, above n 146.

<sup>161</sup> For a recent discussion and review, see David Stern, 'Between Estimates of the Emissions-Income Elasticity' (2010) 69(11) *Ecological Economics* 2173.

<sup>162</sup> See Soumyananda Dinda, 'Environmental Kuznets Curve Hypothesis: A Survey' (2004) 49(4) *Ecological Economics* 431.

<sup>163</sup> But see Stern, above n 161, disputing the case for sulphur.

<sup>164</sup> Jie He and Patrick Richard, 'Environmental Kuznets Curve for CO<sub>2</sub> in Canada' (2009) 69(5) *Ecological Economics* 1083; Robert Ayres, 'Economic Growth: Politically Necessary but not Environmentally Friendly' (1995) 15(2) *Ecological Economics* 97 (stating that 'the regularity [of the EKC] only holds for a relatively small subset of environmental problems' and that any general proposition that economic growth is good for the environment is 'false and pernicious nonsense').

<sup>165</sup> Michael Common and Sigrid Stagl, *Ecological Economics: An Introduction* (2005) 249.

<sup>166</sup> Stig-Olof Holm and Göran Englund, 'Increased Ecoefficiency and Gross Rebound Effect: Evidence from USA and Six European countries 1960-2002' (2009) 68(3) *Ecological Economics* 879.

Victor's assessment above).<sup>167</sup> In another review of the data and methodologies used to estimate the EKC hypothesis, David Stern concludes that 'the statistical analysis on which the environmental Kuznets curve is based is not robust. There is little evidence for a common inverted U-shaped pathway that countries follow as their incomes rise.'<sup>168</sup> It is wrong, therefore, to assume that economies can 'grow their way out' of the environmental crisis.<sup>169</sup>

The message of this section is not that decoupling through techno-efficiency improvements is unnecessary – far from it. Decoupling has an absolutely vital role to play in the attainment of a sustainable society.<sup>170</sup> But the evidence shows that despite many examples of relative decoupling, growth in overall economic output has meant that absolute impacts on the environment are still increasing. It is fanciful, therefore, and arguably irresponsible, to claim that technology, efficiency, and decoupling are capable of solving the ecological crisis, when they are, at best, a partial solution. In order to achieve the absolute decoupling needed to achieve ecological sustainability, what is needed is a fundamental reassessment of the growth model itself, including, as this thesis will argue, the pro-growth conception of property law which the growth model has engendered.<sup>171</sup>

### 3.4. *Overshooting the Ecological Limits to Growth*

The scientific studies reviewed above directly and fundamentally challenge mainstream attitudes to economic growth.<sup>172</sup> The evidence shows that the developed nations are consuming Earth's resources at an unsustainable rate and causing severe and potentially irreversible damage to the ecosystems upon which the entire

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<sup>167</sup> Ibid. See also, Philip Lawn, 'Goods and Services and the Dematerialisation Fallacy: Implications for Sustainable Development Indicators and Policy' (2001) 2 *International Journal of Services Technology and Management* 363.

<sup>168</sup> David Stern, 'The Rise and Fall of the Environmental Kuznets Curve' (2004) 32(8) *World Development* 1419, 1435.

<sup>169</sup> Stern, 'Between Estimates of the Emissions-Income Elasticity,' above n 161.

<sup>170</sup> See, e.g., William McDonough and Michael Braungart, *Cradle to Cradle: Remaking the Way we Make Things* (2009).

<sup>171</sup> See Purdey, above 13; Joseph Guth, 'Law for the Ecological Age' (2008) 9 *Vermont Journal of Environmental Law* 431.

<sup>172</sup> United Nations Development Program, 'Human Development Report' (2007/8), above n 131, 15 (stating that 'One of the hardest lessons taught by climate change is that the economic model which drives growth, and the profligate consumption in rich nations that goes with it, is ecologically unsustainable. There could be no greater challenge to our assumptions about progress than that of realigning economic activities and consumption with ecological realities'). Typifying conventional responses to the environmental crisis, however, in the next paragraph of this report it is stated that 'it is not too late to cut green-house gas emissions without sacrificing economic growth.'

community of life depends.<sup>173</sup> Moreover, despite the developed nations having the greatest impact on the planet, as well as reaping most of the benefits of growth, it is also evident that environmental problems, such as climate change, are likely to affect the poorest nations on the planet disproportionately, at least at first.<sup>174</sup> Intellectually and morally – even in terms of economic self-interest<sup>175</sup> – the implications of all this are hard to escape: the developed nations should not be striving to grow their economies even more.

The evidence of over-consumption in the developed world is all the more challenging in light of fact that, in the poorest parts of the world today, great multitudes are, by any humane standard, *under-consuming*.<sup>176</sup> The global challenge, therefore, can be stated as follows: ‘To reach sustainability, humanity must increase the consumption levels of the world’s poor, while at the same time reducing humanity’s total ecological footprint.’<sup>177</sup> As noted above, what intensifies this challenge further is that the global population is expected to exceed nine billion by mid-century. Moreover, the high-impact ‘consumer class’ is fast expanding into many parts of the globe.<sup>178</sup>

In terms of the future of the planet’s ecosystems and biodiversity, this situation is extremely bleak. Obviously, it is also of deep humanitarian concern, especially when the gaze of future generations enters the equation.<sup>179</sup> The question, then, is whether more economic growth in the developed world will help *solve* these great problems of our age or only *exacerbate* them? It is suggested that the studies considered above now support the latter view, and since the threat they imply is about as serious as we could imagine, this is not evidence to pay lip-service to only to then continue pursuing growth ‘business as usual.’

Although law has taken many steps to respond to the ecological crisis,<sup>180</sup> Bosselmann is correct to describe the steps taken as ‘insufficient measures at the

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<sup>173</sup> Mathis Wackernagel, ‘National Natural Capital Accounting with the Ecological Footprint Concept’ (1999) 29(3) *Ecological Economics* 375.

<sup>174</sup> See U.N.D.P., ‘Human Development Report (2007/8),’ above n 131, 2, (using the term ‘apocalyptic’ to describe impact the environmental crisis could have on the poor, noting also that ‘In today’s world, it is the poor who are bearing the brunt of climate change’).

<sup>175</sup> See Nicholas Stern, *The Economics of Climate Change: The Stern Review* (2007).

<sup>176</sup> See World Bank, ‘World Development Indicators: Poverty Data,’ above n 5, 11.

<sup>177</sup> Meadows et al, above n 112, xv.

<sup>178</sup> Hellmuth Lange and Lars Meier, *The New Middle Classes: Globalizing Lifestyles, Consumerism and Environmental Concern* (2009).

<sup>179</sup> See generally, Axel Gosseries and Lukas Meyer (eds), *Intergenerational Justice* (2009).

<sup>180</sup> For a brilliant new examination and critique of environmentalism in law, see Lee Godden and Jacqueline Peel, *Environmental Law: Scientific, Policy and Regulatory Dimensions* (2009).

periphery.<sup>181</sup> The evidence reviewed above ratifies that assessment. In essence, this is the ecological basis upon which lawmakers should immediately reject the pro-growth assumptions which currently underlie property law in advanced capitalist societies and work towards rebuilding the edifice of property law upon the foundational idea of ecological sustainability.<sup>182</sup> Again, the possibility of such a transformation is explored in forthcoming chapters, once the macro-economic framework has been established.

#### 4. THE ECONOMIC CRITIQUE OF GROWTH

In an attempt to confront the growth model on its own terms, this chapter will now consider the ‘social’ and ‘ecological’ critiques of growth in the context of economic theory. The purpose of this ‘economic’ critique is to show how growth in the developed regions of the world is increasingly open to criticism from within the very economic framework that may once have justified it.<sup>183</sup>

##### 4.1. *Cost / Benefit Analysis at the Macro-Economic Level*

In light of the preceding critiques, it would seem that the term ‘economic growth’ needs to be reconsidered. According to micro-economic theory, activity is considered ‘economic’ if the additional benefits of engaging in it are greater than the additional costs.<sup>184</sup> For example, an extra unit of production by an individual firm is considered economic if the additional revenue generated is greater than the additional costs incurred; similarly, an additional hour of labour is considered economic if the consumption-related utility from the money earned is greater than the leisure-related utility forgone.<sup>185</sup> Within this micro-economic framework it is accepted that there will eventually come a point – an ‘optimal’ point – when the marginal costs of additional

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<sup>181</sup> Klaus Bosselmann, *When Two Worlds Collide: Society and Ecology* (1995) 10. See also, Bosselmann, *The Principle of Sustainability*, above n 111.

<sup>182</sup> See Joseph Guth, 'Cumulative Impacts: Death-Knell for Cost-Benefit Analysis in Environmental Decisions' (2008) 11 *Barry L. R.* 23 (arguing that the law must abandon its use of cost-benefit economic analysis to justify individual environmental impacts and instead adopt the goal of maintaining the ecological integrity of the biosphere); Joseph Guth, 'Resolving the Paradoxes of Discounting in Environmental Decisions' (2009) 18 *Transnational Law & Contemporary Problems* 95.

<sup>183</sup> A comprehensive ‘economic’ critique of growth is beyond the scope of this thesis. For present purposes, the following critique is limited to an application cost/benefit analysis to macro-economics, with the aim of highlighting the need for macro-economics to address questions of ‘scale.’ For more of the details, see Herman Daly, *Beyond Growth: The Economics of Sustainable Development* (1996). See also, Douglas Kysar, 'Sustainability, Distribution, and the Macroeconomic Analysis of Law' (2001) 43 *B.C. L. Rev.* 1.

<sup>184</sup> See generally, N. Gregory Mankiw, *Principles of Microeconomics* (2008) 5.

<sup>185</sup> *Ibid.*

production or consumption equal the marginal benefits.<sup>186</sup> This is sometimes aptly called the ‘when to stop rule’<sup>187</sup> – a rule which holds that if growth occurs beyond the optimal point it will be ‘uneconomic,’ in the sense that the costs begin to outweigh the benefits. Almost tautologically, micro-economists are the first to label uneconomic growth ‘irrational.’<sup>188</sup>

However, as Philip Lawn observes, ‘at the macro-economic level, growth in real GDP is labelled “economic” growth irrespective of whether it generates more additional benefits than costs.’<sup>189</sup> It may well be that what most people mean by economic growth is growth of the economy, but Lawn correctly points out that ‘growth of something which happens to be called “the economy” is not the same as “economic growth.”’<sup>190</sup> Properly understood, economic growth means growth that generates more benefits than costs – *all things considered* (not just the total dollar value of commodities) – from which it follows that growth that generates more costs than benefits must be judged ‘uneconomic’ growth.<sup>191</sup> But the conventional macro-economics of the growth model do not recognize a ‘when to stop rule’ and so have no place for the notion of an ‘optimal’ scale of the economy as a whole.<sup>192</sup> The growth model just assumes that a bigger economy is always better; that growth in GDP is always ‘economic.’<sup>193</sup> The preceding critiques cast considerable doubt on that assumption, for they suggest that as economies grow, the marginal costs of growth rise relative to the marginal benefits – even to the point where further growth can become ‘uneconomic.’

#### 4.2. *The Emerging Reality of Uneconomic Growth*

If markets functioned perfectly, perhaps a rise in GDP would always be ‘economic’ growth. But that is to make a notoriously implausible assumption.<sup>194</sup> Economists have

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<sup>186</sup> Ibid 6.

<sup>187</sup> See David Clark, *The Elgar Companion to Development Studies* (2006) 654.

<sup>188</sup> Gary Becker, ‘Irrational Behavior and Economic Theory’ (1962) LXX(1) *J. of Pol. Econ.* 1.

<sup>189</sup> See Philip Lawn, ‘Degrowth as a Solution to “Uneconomic” Growth’ (2008) 1 <<http://events.it-sudparis.eu/degrowthconference/themes/1First%20panels/Backgrounds/Lawn%20P%20Degrowth%20Paris%20april%202008%20abstract.pdf>> at 10 September 2010.

<sup>190</sup> Ibid.

<sup>191</sup> See Herman Daly, ‘Uneconomic Growth: In Theory, in Fact, in History, and in Relation to Globalization’ in Herman Daly, *Ecological Economics and the Ecology of Economics: Essays in Criticism* (1999) 8-24.

<sup>192</sup> For a discussion of the theoretical foundations of the growth model, see Sect. 2 in the Introduction to this thesis.

<sup>193</sup> Ibid.

<sup>194</sup> See Herman Daly and Joshua Farley, *Ecological Economics: Principles and Applications* (2004) 157-220 (discussing the pervasiveness of market failures).

long acknowledged that there are 'market failures.'<sup>195</sup> Indeed, in recent times much work has been undertaken to expose the extent and significance of those failures.<sup>196</sup> Conventional growth economics, based on GDP accounting, fail to internalize many significant externalities that can be associated with economic activity, such as loss of social capital or environmental degradation.<sup>197</sup> By failing to take such externalities into account, growth of the economy can seem 'economic' even when the economy has already exceeded its optimal scale, insidiously rendering any further growth 'uneconomic.'<sup>198</sup>

In broad terms, the economic critique of growth can be stated as follows. The 'extended accounts' of the ISEW and GPI, discussed earlier, are increasingly robust tools for exposing macro-economic externalities and internalizing them.<sup>199</sup> By doing so, those extended accounts seek to measure as accurately as possible the true costs and benefits of growth, thereby helping to determine when growth is 'economic' and when it is not. In many ways the extended accounts use orthodox economic frameworks and notions, such as cost / benefit analysis and externalities, to criticize growth policies purportedly based upon economic orthodoxy.<sup>200</sup> Significantly, doing so opens up theoretical space for the notion of uneconomic growth at the macro-economic level. Again, Lawn puts the situation well:

It is... critical that a distinction be drawn between 'economic' and 'uneconomic' growth; that indicators be established to determine what form of growth a nation is experiencing; that only 'economic' growth be encouraged; and that 'uneconomic' growth be addressed by making the transition to a steady-state economy (degrowth) at which time the sole emphasis of all economic activity should be on qualitative improvement not quantitative expansion.<sup>201</sup>

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<sup>195</sup> For example, see Francis Bator, 'The Anatomy of Market Failure' (1958) 72(3) *Quart. J. of Econ.* 351.

<sup>196</sup> For a review, see Lawn, 'A Stock-Take of Green National Accounting Initiatives,' above n 87.

<sup>197</sup> See Daly and Farley, above n 194, 233-44 (compiling studies showing the importance of full-cost accounting).

<sup>198</sup> A recent report commissioned by the German Federal Ministry for the Environment – the most comprehensive assessment ever made of the economic impact of environmental damage – shows that damage globally is already between \$US2.1. and \$4.8. trillion per year. See German Federal Ministry for the Environment and the European Commission, 'The Economics of Ecosystems and Biodiversity' (2008) <<http://www.teebweb.org/>> at September 10 2010. Since these costs are not taken into account by GDP accounts, nations are 'mis-measuring' their progress if they rely on the growth model. See Joseph Stiglitz, Amartya Sen and Jean-Paul Fitoussi, *Mis-Measuring Our Lives: Why GDP Doesn't Add Up* (2010).

<sup>199</sup> See Lawn, 'An Assessment of the Valuation Methods,' above n 85; Lawn, 'A Theoretical Foundation,' above n 85.

<sup>200</sup> See generally, Daly and Farley, above n 194.

<sup>201</sup> Lawn, 'Degrowth as a Solution to "Uneconomic" Growth,' above n 189.

As we have seen, indicators such as the ISEW and GPI already exist to inform us when a nation is experiencing uneconomic growth, and the message seems to be that the developed nations are entering or have already entered such a phase.<sup>202</sup> The implication seems to be that, just as an individual firm should downscale when the overall benefits of doing so would be greater than the overall costs – all things considered – so should the developed economies downscale.

#### 4.3. *Global Growth as the Solution to Global Poverty?*

Before closing this part of the discussion it is important to address the issue of global poverty. Governments around the world have committed themselves to meeting the Millennium Development Goals, the first of which is to halve the population of developing countries living below the '\$1 per day' poverty line by 2015.<sup>203</sup> This is surely one of the most important humanitarian challenges of our age, and one which potentially, at least, has an economic solution.

According to economic orthodoxy, the solution is growth.<sup>204</sup> To alleviate global poverty, growth is needed in the developing countries, but this is presumed to require continued growth in the developed economies also. After all, the argument goes, when the developed economies grow, there is more money available to invest in the developing economies; more money to buy commodities made in developing economies; and, indeed, more money to give in aid to the developing economies. Therefore, poverty reduction requires the fastest possible growth in the global economy. That is, the orthodox path to global poverty reduction is to continue growing 'business as usual.'

This 'business as usual' argument would have considerable weight if there were good reasons to think that it were sound, but a recent study by the New Economics

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<sup>202</sup> See Philip Lawn and Richard Sanders, 'Has Australia Surpassed its Optimal Macroeconomic Scale? Finding out with the Aid of 'Benefit' and 'Cost' Accounts and a Sustainable Net Benefit Index' (1999) 28(2) *Ecological Economics* 213; Lawn, 'A Stock-Take of Green National Accounting Initiatives,' above n 87; Daly, 'Uneconomic Growth,' above n 191.

<sup>203</sup> See United Nations Development Program, 'Millennium Development Goals,' <<http://www.undp.org/mdg/goal1.shtml>> at 10 September 2010.

<sup>204</sup> Making a representative statement of economic orthodoxy, Anne Krueger, second in charge at the International Monetary Fund, states: 'A healthy rapidly growing world economy is desirable for everyone – and it is vital if we are to see more rapid growth in Africa.... Poverty reduction is best achieved by making the cake bigger, not by trying to cut it up in a different way.' Anne Krueger, 'Letting the Future In: India's Continuing Reform Agenda' (Keynote speech to Stanford India Conference, 4 June, 2004) <[www.imf.org/external/np/speeches/2004/060404.htm](http://www.imf.org/external/np/speeches/2004/060404.htm)> at 10 September 2010. Douglas Kysar seems right to infer that, 'by relying on economic growth as a response to the problem of inequitable distribution, economists necessarily believe that the optimal scale of the economy is always "bigger."' See Kysar, above n 183, 65.

Foundation, suggestively entitled 'Growth Isn't Working,'<sup>205</sup> has rigorously exposed major flaws in the argument. The study shows that between 1990 and 2001, for every \$100 of growth in the world's income per person, just \$0.60 contributed to reducing poverty below the '\$1 per day' line. This means that to achieve \$1 of poverty reduction at that ratio, an additional \$166 of global production and consumption is required. Not only do these figures show that global growth is an extremely inefficient means of reducing poverty, they also imply that the associated environmental impacts of sufficient global growth to alleviate poverty would be unsupportable. As the report concludes:

It will be highly improbable to reconcile the objectives of poverty reduction and environmental sustainability if global growth remains the principal economic strategy. The scale of growth this model demands would generate unsupportable environmental costs; and the costs would fall disproportionately, and counter-productively, on the poorest – the very people the growth is meant to benefit.<sup>206</sup>

This conclusion provides further support for the view that the developed nations urgently need to move away from 'growth economies' toward systems in which institutions (including property) and public policies are designed, not to maximize growth, but to achieve social and environmental goals more directly. The theoretical structure of such a transition will be outlined the final part of this chapter.

## **5. THE STRUCTURE OF DEGROWTH**

The social, ecological, and economic critiques of growth have provided evidence and arguments in support of the proposition that continuing growth in the developed nations is: (1) increasingly wasteful, and arguably counter-productive, in terms of social well-being; (2) ecologically unsustainable; and (3) uneconomic. It was also argued that continued growth in the developed nations is an unreliable and ecologically unsupportable means of alleviating global poverty. Directed toward those developed nations, the following sections argue that an equitable down-scaling of production and consumption, or degrowth, is the most appropriate and desirable

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<sup>205</sup> David Woodward and Andrew Simms, 'Growth Isn't Working: The Unbalanced Distribution of Benefits and Costs from Economic Growth' (2006) <<http://www.neweconomics.org/>> at 15 October 2010.

<sup>206</sup> Ibid.

response to the failings of growth economics.<sup>207</sup> After outlining the social, ecological, and economic structure of degrowth, an attempt is made to explain the macro-economic feasibility of degrowth drawing on recent scholarship. The most significant feature of this macro-economic framework is that it does not accept that growth should be a dominant policy objective of developed nations – a feature which forthcoming chapters will argue has significant implications for how property systems should be legally constructed or reconstructed.

### 5.1. *Degrowth for Social Well-Being*

The social critique argued that growth of the economy is strongly correlated with well-being at low levels of income, but that once a society attains a moderate level of wealth, further growth has little, if any, positive impact on overall well-being. What this suggests is that once moderate wealth has been obtained, any time and energy expended on growing the economy is likely to be wasted as far as well-being is concerned. This arguably has significant implications for high income societies like those in the developed world today. Most notably, it suggests that those societies could dedicate considerably less time and energy to producing and consuming goods and services without negatively affecting overall well-being.<sup>208</sup> Indeed, it is likely that well-being would be positively affected if they did so, since a considerable amount of time and energy otherwise spent on wasteful production and consumption would be freed up for more meaningful and fulfilling activities.<sup>209</sup> Although trading money for time implies a lower material ‘standard of living’ (in terms of income / consumption), the above reasoning indicates that this would nevertheless lead to increased ‘quality of life’ (measured by subjective well-being).<sup>210</sup> On that basis, I conclude that developed societies could increase overall well-being by initiating a degrowth process of planned economic contraction, in the sense of developing and implementing policies to reduce wasteful production and consumption. Ideally, this process should continue until those societies produce and consume to an optimal degree – not too much, not too little. Whether a society has attained this optimal

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<sup>207</sup> See Valerie Fournier, 'Escaping the Economy: The Politics of Degrowth' (2008) 28(11/12) *International Journal of Sociology and Social Policy* 528.

<sup>208</sup> See, e.g., Clive Hamilton and Richard Denniss, *Affluenza: When Too Much is Never Enough* (2005) 153 (reporting that 90 per cent of those surveyed who voluntarily ‘live simply’ are happier with their changed lifestyle, despite having reduced income).

<sup>209</sup> For this reason some degrowth scholars argue that degrowth should not be deemed a ‘forced option’ in the face of the ecological crisis; instead, degrowth should be seen as a choice to be made even without the crisis, ‘simply to be human.’ See Fournier, above n 207.

<sup>210</sup> This point anticipates the ethics of consumption explored in Chapters Three and Four.

social state, of course, may be forever contestable and unclear, but I would argue that the notion of optimality itself guards against the mistake of thinking that more production and consumption are always going to improve well-being (which is the defining mistake of the growth model).<sup>211</sup> The notion of optimality also provides the theoretical space needed to argue that a downscaling of production and consumption could increase well-being, which is indeed an aspect of the case for degrowth.<sup>212</sup>

## 5.2. *Degrowth for Ecological Sustainability*

The ecological critique argued that the global economy already significantly exceeds the regenerative and absorptive capacities of Earth's ecosystems, a crisis driven by the developed nations which are demonstrably over-consuming their fair share of Earth's resources. This situation is especially troubling since the poorest nations still need to develop their economic capacities simply to provide for themselves a dignified standard of living. In response to the argument that techno-efficiency improvements will 'decouple' growth from ecological impact – and thus allow for 'sustainable development' or 'green growth' – evidence was presented that absolute ecological impacts are still increasing, despite the relative decoupling achieved by techno-efficiency improvements. For these reasons, I conclude that to achieve ecological sustainability, the developed nations need to initiate a degrowth process of planned economic contraction, in the sense of reducing the absolute level (not merely per unit level) of ecological impact caused by economic activity.<sup>213</sup> Ideally, this process should continue until ecological sustainability has been achieved, at which point the developed nations should adopt a 'steady-state' economic model.<sup>214</sup> In the poorest nations, a phase of clean, efficient, and equitable growth is still required to achieve a dignified standard of living – facilitated, ideally, by some global redistribution of wealth – but eventually those developing nations too will need to transition to a steady-state economy. The steady-state model is of a physically non-growing but qualitatively developing economy which is maintained by a sustainable

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<sup>211</sup> See Arrow Kenneth et al, 'Are We Consuming Too Much?' (2004) 18(3) *J. of Econ. Perspectives* 147, 155 (suggesting that 'No one can seriously claim to pinpoint the optimal point of consumption for an actual economy. However, theoretical considerations can identify factors that would cause current consumption to be different in a predictable direction from the optimal level).

<sup>212</sup> See Serge Latouche, 'Would the West actually be Happier with Less? The World Downscaled' (2003) *Le Monde Diplomatique (English Version)* <<http://www.hartford-hwp.com/archives/27/081.html>> at 10 September 2010.

<sup>213</sup> Meadows et al, *Limits to Growth*, above n 112.

<sup>214</sup> See generally, Herman Daly, *Steady-State Economics* (2nd ed, 1991); Herman Daly, *Beyond Growth: The Economics of Sustainable Development* (1996).

rate of resource throughput.<sup>215</sup> Within a steady-state economy, renewable resources would be harvested at rates that do not exceed regeneration rates; the rate of depletion of non-renewable resources would not exceed the rate of creation of renewable substitutes; and waste emission rates would not exceed the natural assimilative capacities of ecosystems into which they are emitted.<sup>216</sup> These guiding principles would help ensure that an economy remains within the sustainable carrying capacity of the environment.

### 5.3. *Degrowth for Optimal Macro-Economic Scale*

The economic critique began by pointing out that growth of an economy, measured by a rise in GDP, is not 'economic growth' unless the benefits of growth exceed the costs, all things considered. The critique then argued that most of the developed nations had entered or were entering a phase of 'uneconomic' growth, that is, a phase in which the costs of growth were exceeding the benefits, all things considered. This argument was based primarily on the extended accounts of the ISEW and GPI, which are tools that seek to internalize many of the significant social and environmental externalities that GDP, as a measure of progress, fails to take into account. Since the ISEW and GPI indicate that the developed economies have already exceeded their optimal macro-economic scale, I conclude that to achieve optimality those economies should initiate a degrowth process of planned economic contraction, a process which could be described as 'economic' degrowth. This would not involve deliberately reducing GDP per capita for its own sake, however, since degrowth for its own sake is no more sensible than growth for its own sake.<sup>217</sup> Rather, degrowth for optimal macro-economic scale would involve explicitly giving up the pursuit of growth and directly pursuing more specific welfare-enhancing objectives, such as eliminating poverty and protecting the environment, even if this led to lower GDP per capita. Planned economic contraction should continue until the costs of degrowth are equal to the benefits, a situation which would represent an optimal macro-economic scale and ideally would be maintained.

At this stage the question may arise as to whether optimal production and consumption for social well-being, steady-state economics, and optimal macro-

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<sup>215</sup> Ibid.

<sup>216</sup> Herman Daly, 'Toward Some Operational Principles of Sustainable Development' (1990) 2(1) *Ecological Economics* 1, 2; Herman Daly, *Ecological Economics and Sustainable Development: Selected Essays of Herman Daly* (2007).

<sup>217</sup> Latouche, *Farewell to Growth*, above 21, 7.

economic scale are consistent goals. I acknowledge that they are not, necessarily. After all, it is conceivable, at least, that a certain level of production and consumption may maximize social well-being and yet not be ecologically sustainable. This partly depends on how the terms are defined, however, since if social well-being were defined so as to include future generations, as it arguably should be, then there need be no conflict. Without addressing the intricacies of this issue, the position taken in this thesis is that ultimately ecological sustainability should be prioritized over the maximization of social well-being of present generations, although there is no reason, it should be noted, why any such conflict must arise.<sup>218</sup>

#### 5.4. *The Feasibility of a Macro-Economics beyond Growth*

The final issue to be considered in this foundational chapter concerns the feasibility of a macro-economics beyond growth, for even if the above arguments are accepted, there might still be (and probably are) doubts as to whether planned economic contraction, or degrowth, is a feasible macro-economic policy. After all, the logic of capitalism is arguably dependent upon growth,<sup>219</sup> and as the recent financial crisis shows, an economic system dependent on growth that suffers *unplanned* economic contraction (i.e. recession) is not to be desired.<sup>220</sup> Among other problems, recession causes rates of unemployment to rise, which leads to distressing economic insecurity and notoriously gives rise to a host of other social problems.<sup>221</sup> And aside from that, growth is typically assumed to be the *solution* to unemployment, as well as the solution to other problems, like poverty and environmental degradation. How do these issues sit within a macro-economics beyond growth? Is a macro-economics beyond growth even possible? These are important, foundational issues for a post-growth jurisprudence of property, and so must be addressed.

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<sup>218</sup> See Kirk Brown and Tim Kasser, 'Are Psychological and Ecological Well-being Compatible? The Role of Values, Mindfulness, and Lifestyle' (2005) 74(2) *Social Indicators Research* 349; Jeffrey Jacob, Emily Jovic and Merlin Brinkerhoff, 'Personal and Planetary Well-being: Mindfulness Meditation, Pro-environmental Behavior and Personal Quality of Life in a Survey from the Social Justice and Ecological Sustainability Movement' (2009) 93(2) *Social Indicators Research* 275; Jeffrey Jacob and Merlin Brinkerhoff, 'Mindfulness and Subjective Well-Being in the Sustainability Movement: A Further Elaboration of Multiple Discrepancy Theory' (1999) 46 *Social Indicators Research* 341.

<sup>219</sup> Joel Magnuson, *Mindful Economics: How the U.S. Economy Works, Why it Matters, and How it Could be Different* (2008).

<sup>220</sup> See generally, Joseph Stiglitz, *Freefall: America, Free Markets, and the Sinking of the World Economy* (2010).

<sup>221</sup> For example, see Liliana Winkelmann and Rainer Winkelmann, 'Why Are the Unemployed so Unhappy? Evidence from the Panel Data' (1998) 65 *Economica* 1; Andrew Clark and Andrew Oswald, 'Unhappiness and Unemployment' (1994) 104 *Economic Journal* 648.

Surprisingly, very little sustained attention has been given to these issues, although during the writing of this thesis an in-depth analysis was published by the Canadian economist, Peter Victor.<sup>222</sup> Although Victor focuses primarily on the Canadian economy, it can be fairly assumed (and he would insist) that his conclusions have relevance to other advanced capitalist societies since they are all governed by essentially the same macro-economic growth paradigm.<sup>223</sup> After reviewing the foundations of growth scepticism, Victor considers the familiar argument that growth is needed to achieve important policy objectives, such as protecting the environment and eliminating unemployment and poverty. In a thorough review of the evidence since 1980, he shows that recent decades of unprecedented economic growth have not eliminated unemployment or poverty in Canada; that distributions of wealth have become more unequal; that growth has generally exacerbated, not solved, environmental problems, and that greenhouse gases are still growing.<sup>224</sup> On the basis that growth has been a disappointing tool for achieving these important policy objectives, Victor reasonably turns his attention to the question of whether those objectives could be better achieved in an advanced economy without relying on growth.

Victor uses an interactive systems model to explore the possibility of a macro-economic framework that is not based on growth. This model allows him to consider changes in key macro-economic variables, such as output, consumption, public spending, investment, employment, trade, and so on, in order to estimate future GDP in various scenarios, while also keeping an account of unemployment, greenhouse gas emissions, and poverty levels. By simulating a variety of scenarios, Victor illustrates that 'no growth' could be disastrous if implemented carelessly, bringing hardship to many; just as growing 'business as usual' would arguably be disastrous.<sup>225</sup> But he also illustrates that slower growth, leading to stability around 2030, can also be consistent with attractive economic, social, and environmental outcomes, including full employment, virtual elimination of poverty, more leisure, considerable reduction in greenhouse gas emissions and fiscal balance.<sup>226</sup> Furthermore, by comparing various low/no growth scenarios, Victor also shows that various attractive options are available. For example, some scenarios with higher investment seem more compatible with a future in which renewable energy and

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<sup>222</sup> Victor, *Managing without Growth*, above n 149. See also, Jackson, *Prosperity without Growth*, above n 7.

<sup>223</sup> See Purdey, above n 13.

<sup>224</sup> Victor, above n 149, Chapter 9.

<sup>225</sup> *Ibid* 183.

<sup>226</sup> *Ibid*.

efficient technology become widely adopted. Other scenarios, where GDP and GDP per capita are lower, may not adopt those measures so quickly, but the lower incomes might compensate in terms of reduced ecological impact.<sup>227</sup>

On what basis does Victor draw these conclusions? The two most important features of a macro-economics beyond growth relate to changes in investment and the structure of the labour market. Restructuring tax policies and redirecting public spending could be effective ways of changing investment strategies to realize the attractive hypothetical scenarios Victor envisages (including a shift in investment from private to public goods). This raises many complex issues, some of which will be explored in more detail in the final chapter of this thesis. For now, however, suffice it to say that Victor's model shows that some social policies (e.g. poverty elimination) and environmental policies (e.g. carbon taxes) could become feasible and more politically attractive once a government gives up the policy of maximizing economic growth.

But this does not explain how the economy could function and be stable without growing and perhaps even shrinking to an extent. This is where a restructure of the labour market becomes essential. In a non-growing but qualitatively developing economy, technological advances would presumably still enhance the productivity of workers over time; but this could lead to increasing rates of unemployment, since less labour would be needed to produce the same (non-growing) economic output. This phenomenon, along with increases in population, are the main reasons why conventional macro-economics insists that growth is essential; that is, it is needed to avoid unemployment spiralling out of control. In a macro-economic framework not based on growth, however, a stable system could still be achieved, but through the alternate route of reducing the work week and sharing work more equally amongst the population.<sup>228</sup> Again, some of the complex policy issues that overall work reduction involves will be discussed in more detail in the final chapter (and various justifications for privileging time over income will be given some attention in Chapters Three and Four). For now the critical point to note is that work reduction is one of the defining characteristics of a desirable macro-economics beyond growth. This approach implies that average material standard of living would remain at a constant or mildly fluctuating level in a non-growing economy, since increases in productivity would result in more leisure rather than more income. This obviously contrasts

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<sup>227</sup> Ibid.

<sup>228</sup> As noted in the Introduction, this argument has its roots in the work of John Stuart Mill. John Stuart Mill, *Principles of Political Economy: With Some of their Applications to Social Philosophy* (2004 [1848]) Bk. IV, Chap. VI.

sharply with the growth economics practised in advanced capitalist societies today, where increases in productivity are almost always used to increase overall material output rather than reduce overall labour input.<sup>229</sup>

It is unfortunate that Victor focuses only on 'managing without growth' and does not specifically address the need for a period of degrowth, especially since the logic of his own analysis seems to require it (a point he gets tantalizingly close to acknowledging).<sup>230</sup> Nevertheless, in important respects degrowth is implicit to his argument, in the sense at least that he advocates a dedicated reduction in wasteful production and consumption as well as an absolute reduction in the ecological impacts of economic activity, not just relative decoupling. Taking Victor's analysis a few steps further, however, it would seem that some extra reductions in working hours, permitted by extra reductions in per capita income / consumption, could allow for a period of degrowth without inducing the damaging unemployment and economic insecurity that normally follow economic contraction and while still providing for a decent standard of living for all citizens. Whatever the case, the vital conclusion that Victor arrives at is that a stable and functional macro-economic framework does not necessitate the never-ending pursuit of growth, and that conclusion is a hugely important step in the right direction.<sup>231</sup>

In summary, the question of whether a macro-economics beyond growth is feasible must, in all honesty, be left open; at least, we cannot be certain it is feasible, because such a framework has never been implemented. And there are certainly limitations to Victor's model, which he is first to acknowledge.<sup>232</sup> Nevertheless, Victor has got the debate off to a rigorous and promising start, and the figures seem to add up. Furthermore, in coming years we can expect his analysis to be refined and developed, thereby providing further support for a macro-economics beyond growth. Tim Jackson and Philip Lawn, among many others in the degrowth and ecological economics movements, are also advancing the cause considerably.<sup>233</sup> Perhaps the most compelling grounds for thinking that such a framework is feasible, however, is

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<sup>229</sup> See, e.g., John De Graaf et al, *Affluenza: The All-Consuming Epidemic* (2nd ed, 2005) (discussing the 'remarkable choice' that, since World War II, most North Americans have taken all their productivity gains per hour as increased consumption, not increased leisure).

<sup>230</sup> Victor, above n 149, 185.

<sup>231</sup> In an interview at the 2<sup>nd</sup> International Degrowth Conference (Barcelona) Victor agrees that degrowth 'is possible' and cites 'shorter working hours' as the path. See <http://www.degrowth.eu/v1/index.php?id=111> at 10 September 2010.

<sup>232</sup> Victor, above n 149, 183.

<sup>233</sup> See Jackson, *Prosperity without Growth*, above n 7; Philip Lawn, 'Facilitating the Transition to a Steady-State Economy: Some Macroeconomic Fundamentals' (2010) 69(5) *Ecological Economics* 931.

the mounting evidence indicating that it is fast becoming absolutely necessary.<sup>234</sup> Continued exponential growth on a finite planet is a straightforward recipe for ecological (and therefore humanitarian) catastrophe, which suggests that whatever risks there are to experimenting with a macro-economics beyond growth, there are infinitely greater risks to persisting blindly with conventional growth economics. To put it proverbially, if we do not change direction, we are likely to end up where we are going.<sup>235</sup>

## 6. CONCLUSION: BEYOND THE GROWTH MODEL OF PROGRESS

This chapter has argued that the growth model of progress is a highly defective model and should be rejected, at least in its application to the developed world. In particular, the growth model should not be used to judge or shape policies and institutions in over-consuming societies, a point this thesis will develop in the context

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<sup>234</sup> See Philip Lawn, 'To Operate Sustainably or not to Operate Sustainably? That is the Long-Run Question' (2004) 36 *Futures* 1.

<sup>235</sup> Promisingly, there are some signs that growth scepticism is entering mainstream political discourse in advanced capitalist societies and beyond. Perhaps the best way to exemplify this trend is to note cases where growth scepticism is being acknowledged and discussed even in 'conservative' political circles, for it is there that growth economics have traditionally found their most ardent supporters. In 2007, for example, the UK Conservative Party issued a landmark report, *Blueprint for a Green Economy*, one of the first serious attempts by a major political party in the industrialized world to refocus attention away from economic growth and towards a much broader and more inclusive conception of well-being. In a startling admission, the authors state: 'beyond a certain threshold – a point which the UK reached some time ago – ever increasing material gain can become not a gift but a burden. As people, it makes us less happy, and the environment upon which all of us, and our economy, depend is increasingly degraded by it.' See John Gummer and Zac Goldsmith, *Blueprint for a Green Economy: Submission to the Shadow Cabinet* (2007) 8. More recently, British Prime Minister, David Cameron, has stated, 'It's time we admitted that there's more to life than money and its time we focused not just on GDP but on GWB – general well-being.' See <<http://www.guardian.co.uk/politics/2010/nov/14/david-cameron-wellbeing-inquiry?intcmp=239>> at 16 November 2010. Another prominent example of late has come from the President of France, Nicolas Sarkozy – hardly known for his progressive politics – who commissioned Joseph Stiglitz, Amartya Sen, and Jean-Paul Fitoussi to develop indicators of national progress that go beyond economic indicators. This move opens up political space for governments to pursue policies that may enhance well-being even if they inhibit growth. For the report, see Joseph Stiglitz, Amartya Sen and Jean-Paul Fitoussi, *Mis-Measuring Our Lives: Why GDP Doesn't Add Up* (2010). For an earlier example, one could cite Ruud Lubbers, a conservative politician who served as Prime Minister of Holland from 1982-1994, who stated: 'It is true that the Dutch are not aiming to maximize gross national product per capita. Rather, we are seeking to attain a high quality of life, a just, participatory and sustainable society.' See Ruud Lubbers, 'The Dutch Way,' 14 *New Perspectives Quarterly* (1997) 15. For a review of some of the more radical manifestations of growth scepticism in contemporary politics, see Valerie Fournier, 'Escaping the Economy: The Politics of Degrowth' (2008) 28(11/12) *International Journal of Sociology and Social Policy* 528 (discussing the emergence of degrowth politics in Europe, especially in France, Belgium, and Italy); Baris Baykan, 'From Limits to Growth to Degrowth within French Green Politics' (2007) 16(3) *Environmental Politics* 513. See also, Stavros Dimas' closing speech in the *Beyond GDP* conference in November 2007, organized by the European Commission et al, noting that 'the main achievement of this conference has been to clearly demonstrate the political consensus on the need to go beyond GDP.' See 'Summary Notes from the Beyond GDP Conference' (2007) 9 available at <[http://www.beyond-gdp.eu/proceedings/bgdp\\_proceedings\\_summary\\_notes.pdf](http://www.beyond-gdp.eu/proceedings/bgdp_proceedings_summary_notes.pdf)> at 15 October 2010.

of property jurisprudence. Evidence and arguments were provided for why conventional growth economics should be replaced by a macro-economic approach beyond growth, one designed to initiate a degrowth process of planned economic contraction with the aim of eventually stabilizing in an ecologically sustainable and socially desirable steady-state economy. The main conclusion, in other words, is that the developed nations should give up the pursuit of growth and instead pursue welfare-enhancing objectives more specific than growth, such as protecting the environment, eliminating poverty, and lessening inequalities, even if this inhibits growth. Relying on Victor, Jackson, ecological economics, and degrowth scholarship, it was also argued that such a macro-economic framework is viable and desirable. Having outlined the macro-economic framework within which this thesis is situated, it is now time to consider in some detail various issues in property jurisprudence which are raised by the prospect of transitioning, by way of degrowth, to a steady-state economy.



The state can withdraw from central planning but it cannot withdraw from its role in defining market structures and property entitlements. – **Karl Klare**

Property implies a vision of the social world. – **Joseph Singer**

## Chapter Two

# CRITICAL PROPERTY THEORY: POLITICIZING THE ECONOMY

## 1. INTRODUCTION

There are some signs, as noted toward the end of the last chapter, that growth scepticism is slowly becoming a more significant oppositional force in contemporary political discourse. In coming years, should the costs of growth continue to rise relative to the benefits, that scepticism is almost certain to spread and intensify, weakening the growth imperative which traditionally has been so influential in keeping environmentalists and other progressive reformers at bay.<sup>1</sup> Nevertheless, even if growth scepticism were to spread and intensify, any attempt by governments to implement a macro-economics beyond growth would confront many great challenges. Maintenance and protection of ecological integrity, on the one hand, and redistribution of wealth to eliminate poverty and lessen inequalities, on the other, are the main policy objectives which the last chapter suggested were implied by the idea of a degrowth transition toward a steady-state economy. These policy objectives, however – even if they are accepted as valid in themselves – will almost certainly give rise to the objection that the institutional restructuring presumably needed to achieve them would interfere illegitimately with established property rights (including the distribution thereof) and therefore be unjustifiable. After all, one of the most entrenched beliefs in neoliberal political thought today is that governments should protect existing private property rights and enforce voluntarily entered contracts, but otherwise presumptively stay out of the ‘free market’ economy.<sup>2</sup> According to this

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<sup>1</sup> As the President of the European Commission, Jose Barroso, has recently stated: ‘It is difficult, and I’m sure that everyone will agree, to make tough decisions that promote long-term well-being if the short-term consequence is a drop in GDP.’ See Jose Barroso, ‘The Challenges of Modern Societies,’ in *Beyond GDP: Measuring Progress, True Wealth, and the Well-Being of Nations* (2009) 24.

<sup>2</sup> Arguably the clearest and purest statement of this view in political theory remains Robert Nozick, *Anarchy, State and Utopia* (1974). See also, Ludwig von Mises, *Critique of Interventionism* (1976 [1929]); Friedrich von Hayek, *The Constitution of Liberty* (1960); Milton Friedman, *Capitalism and Freedom* (1962). For recent expressions of this view in legal scholarship, see Richard Epstein,

dominant view, strong and secure private property rights facilitate the maximization of economic growth and protect individuals from state power, and for either or both of those reasons it is widely believed that property rights should not be interfered with, redistributed, or regulated by the state.<sup>3</sup> This ‘property rights’ objection to state-initiated structural reform has the potential to block any movement toward a degrowth society; indeed, it may be one significant reason why the degrowth movement, or growth scepticism more generally, has had little impact to date on legal, political, and economic policies and institutions. It is surprising, therefore, and unfortunate, that so little has been written on property jurisprudence from within or in relation to this emerging degrowth tradition, especially given that the laws of property are so central to the growth economies of advanced capitalism.<sup>4</sup>

In the hope of contributing to this underdeveloped area of degrowth scholarship, this chapter focuses attention on the ‘property rights’ objection to degrowth. The goal is to understand whether, or to what extent, legal property relations in advanced capitalist societies could be restructured for the purpose of achieving the environmental and redistributive goals of the degrowth movement. This chapter will not, however, explore in any detail what specific property reforms might be needed to initiate the transition to a degrowth society, since that issue will be taken up in the final chapter. Instead, the present inquiry examines the preliminary issue of whether significant restructuring of property relations is even a democratically available option, or whether, on the contrary, such restructuring would be *prima facie* objectionable on the grounds that it would involve illegitimate interference with established property rights as protected by law. That said, the following discussion of property reform in

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*Skepticism and Freedom: A Modern Case for Classical Liberalism* (2003); Randy Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004). See also, Wayne McIntosh and Laura Hatcher (eds), *Property Rights and Neoliberalism: Cultural Demands and Legal Actions* (2010); Jonathan Wolff, 'Libertarianism, Utility, and Economic Competition' (2006) 92(7) *Virginia L. R.* 1605.

<sup>3</sup> This view finds some of its most ardent advocates in the so-called ‘property rights movement’ in the United States. For a discussion, see William Van Vactor, 'The Backlash to Land Use Regulation Continues: An Analysis of Oregon's Measure 37' (2005) 26 *Journal of Land, Resources, & Environmental Law* 221.

<sup>4</sup> As noted in the introduction, the only sustained discussion of property from within the degrowth movement is Pascal van Griethuysen, 'Why are we Growth-Addicted? The Hard Way towards Degrowth in the Involutionary Western Development Path' (2009) *J. Clean. Prod.* 1 (arguing in the context of political and economic theory that current property institutions in advanced capitalist societies function to systematically ‘lock-in’ growth economics). Rather than engaging van Griethuysen directly, this chapter seeks to show by way of close legal analysis that, since capitalist societies are not ‘locked in’ to current property institutions, they are not ‘locked in’ to growth economics. For the most explicit statement of growth scepticism in legal scholarship, see Joseph Guth, 'Law for the Ecological Age' (2008) 9 *Vt. J. of Environ. L.* 431 (arguing that lawmakers will not be able to adequately protect the environment if they continue assuming that economic growth is always of net benefit to society, despite the ecological harm it produces). While I am sympathetic to Guth’s analysis, it does not address the social and distributive aspects of growth scepticism which this thesis argues are as important as the ecological ones (and, in many ways, cannot be understood in isolation of them).

general is still framed by the environmentalist and redistributive motivations of the degrowth movement in particular.

In examining the complex issues surrounding property reform, the present chapter draws on the vast intellectual reserves of legal realism and critical legal studies, as well as more recent scholarly movements such as the ‘social relations’ approach to property.<sup>5</sup> Particular intellectual debts are owed to Robert Hale, Duncan Kennedy, Joseph Singer, Margaret Radin, Michael Robertson, and Eric Freyfogle.<sup>6</sup> None of these property theorists has written anything on growth scepticism, as such – although Freyfogle, at times, can be interpreted as a growth sceptic<sup>7</sup> – however it is part of the argument of this thesis that the works of these theorists might acquire a new significance when explicitly infused with the insights of degrowth and steady-state economics.

## 2. THE ‘PROPERTY RIGHTS’ OBJECTIONS TO STATE INTERVENTION IN THE ECONOMY

This chapter begins with the assumption that any degrowth transition to a steady-state economy will not spontaneously occur but will require significant restructuring of the economy, achievable only by committed state action.<sup>8</sup> As noted above, there will be some who consider the prospect of state-initiated restructuring of the economy to be incompatible with established property rights. More specifically, proponents of ‘free market’ capitalism offer two of the most influential arguments for state non-intervention in the economy – non-intervention with private property, in particular. The first arises out of the tradition of Jeremy Bentham and Adam Smith and holds that non-intervention with private property promotes the common good by internalizing the benefits of productive activity (thus providing an incentive to produce) and by leaving individuals free to engage in ‘wealth maximizing’ market exchanges.<sup>9</sup>

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<sup>5</sup> See generally, Joseph Singer, *Entitlement: The Paradoxes of Property* (2000).

<sup>6</sup> See supporting footnotes below.

<sup>7</sup> See, e.g., Eric Freyfogle, *The Land we Share: Private Property and the Common Good* (2003) 264 (noting that ‘Lawmakers commonly overemphasize the goal of fostering enterprise; they give too much weight to the desire of landowners to retain expansive development rights, thereby discounting other social goals’).

<sup>8</sup> This is not meant to imply, however, that the success of the degrowth movement depends solely on ‘top down’ politics. In Chapter Four it will be argued that committed state action in the name of degrowth and steady-state economics will not eventuate until the consumerist desire for ever-increasing levels of consumption is overcome at the socio-cultural level. But the details of this argument must be deferred.

<sup>9</sup> See generally, Jeremy Bentham, *The Works of Jeremy Bentham* (1843); Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (1976 [1776]) (arguing that interference with or redistribution of private property would destroy the incentive to produce and thus ultimately harm everyone, even those the interference or redistribution was intended to benefit). On ‘wealth

Call this the 'utilitarian' or 'economic' argument for state non-intervention. The second main argument for state non-intervention arises out of the tradition of John Locke and holds that non-intervention with private property protects individuals from state power.<sup>10</sup> Locke argued that property rights arise and exist independently of the state and that the very purpose of the state is to protect property rights from interference.<sup>11</sup> Call this the 'libertarian' argument for state non-intervention.

In light of the evidence (reviewed in the previous chapter) which indicates that growth of the developed economies is no longer contributing much to social well-being and, indeed, that growth is severely degrading and destabilizing planetary ecosystems, any claims that the property structures of advanced capitalism are efficiently promoting the common good are increasingly open to contestation. Indeed, if the costs of growth become even more pronounced in coming years (and the relative benefits continue diminishing), the utilitarian and economic arguments for non-intervention in the economy are likely to appear increasingly problematic, if not perverse, and thereby lose the persuasive force they currently enjoy. There may even come a time, if it has not already arrived, when extensive state intervention in the economy is demanded by the very same utilitarian or economic considerations that may once have opposed intervention.<sup>12</sup> The libertarian argument for non-intervention, however, may prove to be more robust, at least in the sense that it is not dependent on the contingencies of utilitarianism or economic theory, necessarily.<sup>13</sup> For these reasons, this chapter will generally limit itself to examining the property rights objection to state intervention which arises out of the libertarian tradition.<sup>14</sup>

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maximization,' see Richard Posner, 'Wealth Maximization Revisited' (1985) 2 *Notre Dame J. L. Ethics & Pub. Policy* 85.

<sup>10</sup> See generally, John Locke, *Two Treatises of Government* (New ed, 1993 [1690]).

<sup>11</sup> *Ibid*, Chap. 7 (arguing that 'Government has no other end but the preservation of property').

<sup>12</sup> It is important to note that this is a possibility that utilitarians and economists are required to accept by the logic of their own arguments, since anything is justified from those perspectives, including state intervention in the economy, if it could be shown to maximize utility or wealth, respectively. See, e.g., Richard Posner, *The Economics of Justice* (1981) 13 (arguing that forced exchanges can be wealth-maximizing and therefore justified if they achieve the results people would bargain for in the absence of transaction costs). See also, Eyal Zamir, 'The Efficiency of Paternalism' (1998) 84 *Va. L. R.* 229. Due to this theoretical openness to state intervention in situations of 'market failure,' libertarians like Robert Nozick and, to a slightly lesser extent, Richard Epstein, claim that neither utilitarianism nor economic theory can provide secure foundations for a libertarian position. See Nozick, above n 2, at 59-62. See also, Richard Epstein, 'Nuisance Law: Corrective Justice and its Utilitarian Constraints' (1998) 8 *J. Legal Stud.* 49, 74-5.

<sup>13</sup> *Ibid*.

<sup>14</sup> Although this chapter focuses on the libertarian objections to state intervention in the economy, the analysis, it is suggested, has a much broader application. See John Meyer, 'The Concept of Private Property and the Limits of the Environmental Imagination' (2009) 37(1) *Political Theory* 99 (arguing that the influence of libertarianism in property theory goes well beyond its explicit proponents, shaping the views of an otherwise diverse array of theorists and activists). By focusing on libertarian property theory, then, the aim is not simply to expose its analytical errors, but to use those errors instructively to present an alternative understanding of property.

As it stands, however, the libertarian objection to state intervention cannot be answered because it is too broadly stated, so for clarity's sake it will be broken down into three more precise objections: the 'conceptual' objection; the 'private sphere' objection; and the 'neutrality' objection.<sup>15</sup> The greater part of this chapter will be dedicated to defining and then critically discussing these three important objections. After doing so, the 'duty not to harm,' which it can be argued must attach to private property rights in some form, will be considered and its transformative potential explored.<sup>16</sup> A brief statement will also be made on how the insights of critical property theory impact on questions of taxation. The chapter will close by highlighting the significance critical property theory has for the degrowth movement.<sup>17</sup>

### 3. THE 'CONCEPTUAL' OBJECTION

Some degrowth scholars have argued that private property / market systems are incompatible with any transition to a degrowth or steady-state economy and that, to be successful, such a transition will necessitate the abolition of private property and the institution of some form of state socialism.<sup>18</sup> While sympathetic to many aspects of the critique of capitalism presented by these theorists, I feel that they have inadequately explored, or insufficiently understood, the possibilities of legally restructuring private property / market relations for the purposes of degrowth. This has resulted in their premature, and arguably counter-productive, leap to state socialism.

As noted in the introduction, the post-growth jurisprudence of property being proposed in this thesis does not seek to discard the central organizing institutions of 'private property' and 'the market,' but rather seeks to give them a radically new content. Critical jurist, Roberto Unger, would describe the approach of giving existing institutions new content as 'internal development' or 'revolutionary reform,'<sup>19</sup> and he

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<sup>15</sup> Michael Robertson has structured a discussion of worker cooperatives in similar terms, to which I am indebted. See Michael Robertson, 'Reconceiving Private Property' (1997) 24(4) *J. of Law and Society* 465.

<sup>16</sup> See generally, Murry Raff, 'Environmental Obligations and the Western Liberal Property Concept' (1998) 22 *Melbourne U. L. R.* 657.

<sup>17</sup> Since this chapter is quite long, in the interests of clarity I have included several 'summaries' along the way.

<sup>18</sup> See, e.g., Takis Fotopoulos, 'Is Degrowth Compatible with a Market Society?' (2007) 3(1) *International Journal of Inclusive Democracy* 1 <[http://www.inclusivedemocracy.org/journal/vol3/vol3\\_no1\\_Takis\\_degrowth.htm](http://www.inclusivedemocracy.org/journal/vol3/vol3_no1_Takis_degrowth.htm)> at 10 September 2010 (arguing that the reformist approaches of mainstream Green parties have 'by now proven bankrupt' and that degrowth, while needed, is incompatible with a market society). More generally, see David Pepper, *Eco-Socialism: From Deep Ecology to Social Justice* (1993).

<sup>19</sup> Roberto Unger, 'The Critical Legal Studies Movement' (1983) 96(3) *Harv. L. R.* 561, 580, 666.

has argued forcefully that this can bring about significant structural change not just reformist tinkering, given the political will.<sup>20</sup> Proceeding on that basis, this thesis will explore whether a post-growth property system could be achieved by fundamentally reworking some basic grounds-rules of a private property / market system.<sup>21</sup>

This approach, however, faces a ‘conceptual’ objection. The objection is that one cannot significantly alter the rights, powers, liberties, and duties which are commonly associated with private property and blithely claim that what results is still a private property system.<sup>22</sup> After all, one cannot significantly change the shape of a circle and be confident that one will still end up with a circle.<sup>23</sup> The objection, in other words, is that any notion of a private property / market system ‘beyond growth’ is misconceived from the outset, because the presumably significant institutional reforms needed to realize a degrowth or steady-state economy would move the system outside the concept of private property altogether; that is, outside the intrinsic institutional structure of a private property / market system.

This objection deserves attention because for the foreseeable future, at least, any reform program that seeks to abolish private property as a central institution of developed societies is unlikely to gain much political traction or popular support. As Joseph Singer notes, ‘At the start of the twenty-first century, faith in private property as mode of social and economic organization is as strong as it has ever been.’<sup>24</sup> Degrowth scholars, even those of idealist or utopian persuasions, ought to bear this in mind when developing their political agendas. There needs to be a balance between the indispensable ‘idealist’ or ‘utopian’ strain which conceives of futuristic and ‘wholly other’ possible worlds, and the equally indispensable ‘pragmatic’ strain which focuses on being as politically effective as possible in the context we find ourselves in today.<sup>25</sup> That pragmatic strain, I believe, calls for the internal development of private property not its abolition, although this chapter will try to show that this approach need not clash with the more idealist strain in any significant way.

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<sup>20</sup> Ibid.

<sup>21</sup> Perhaps it would be more accurate to refer to a ‘predominantly’ private property / market system because the reality is that property systems are never ‘pure’ manifestations of a single property form, but, to varying degrees, are always ‘mixed economies.’ Mixed economies include private, common, and public forms of property, as well as forms which may not sit neatly in that traditional tripartite division. For a discussion of mixed economies, see Jeremy Waldron, *The Right to Private Property* (1988) 44-6. See also, Charles Geisler and Gail Daneker (eds), *Property and Values: Alternatives to Public and Private Ownership* (2000).

<sup>22</sup> One could attribute this type of objection to Friedrich von Hayek. See, e.g., Friedrich von Hayek, *Law, Legislation, and Liberty: A New Statement of the Liberal Principles of Justice and Political Economy* (1973).

<sup>23</sup> See Robertson, ‘Reconceiving Private Property,’ above n 15, at 467.

<sup>24</sup> Singer, above n 5. 1.

<sup>25</sup> On property and pragmatism, see Margaret Radin, *Reinterpreting Property* (1993) 1-34.

Given how entrenched private property is, however, a suspicious reader might think that the critical methodology being applied in this thesis – that of giving existing institutions new content – is merely a transparent attempt at what Charles Stevenson would call ‘persuasive definition,’ that is, ‘an attempt to give a new conceptual definition to a familiar word without substantially changing its emotive meaning... with the conscious or unconscious purpose of changing, by this means, the direction of people’s interests.’<sup>26</sup> Such a suspicion, however, rests upon the assumption that private property once had a settled descriptive meaning that is now being altered, which is false. There is not and never has been a settled descriptive meaning of private property.<sup>27</sup>

#### 4. RESPONSE TO THE ‘CONCEPTUAL’ OBJECTION

A picture held us captive. And we could not get outside of it, for it lay in our language and language seemed to repeat it to us inexorably.<sup>28</sup> – Ludwig Wittgenstein

##### 4.1. *The Indeterminacy of Private Property*

In philosophical terms, the ‘conceptual’ objection arises out of a ‘conceptualist’ or ‘essentialist’ view of private property. Put simply, this view holds that there is a concept of private property that, in fact, is the right one or the only one; in other words, that there is a conception of private property that is *the* concept of private property.<sup>29</sup> Prominent libertarian property theorist, Richard Epstein, is one of those who has articulated such an essentialist view. He thinks it is obvious that private property means ‘the exclusive rights of possession, use, and disposition’<sup>30</sup> with respect to a particular resource, and he thinks this definition is sufficiently precise to answer most juridical questions concerning the meaning of property.<sup>31</sup> This conception of property arguably has its roots in the work of the 18<sup>th</sup> century English jurist, William Blackstone, who famously defined the right of private property as ‘that sole and despotic dominion that one man claims and exercises over the external

<sup>26</sup> Charles Stevenson, ‘Persuasive Definitions’ (1938) 47 *Mind* 331. See also, Waldron, above n 21, 51.

<sup>27</sup> See, e.g., Francis Philbrick, ‘Changing Conceptions of Property in Law’ (1983) 86 *U. Pa. L. R.* 691; Terry Anderson and Peter Hill, ‘The Evolution of Property Rights: A Study of the American West’ (1975) 18 *J.L. & Econ.* 163; Herbert Gintis, ‘The Evolution of Private Property’ (2007) 64(1) *J. of Econ. Behavior and Organization* 1. And the debate of the meaning of property continues. See, e.g., Alexandra George, ‘The Difficulty of Defining “Property”’ (2005) 25(4) *Oxford J. of Leg. Stud.* 793.

<sup>28</sup> Ludwig Wittgenstein, *Philosophical Investigations* (1953) 48.

<sup>29</sup> Margaret Radin, ‘The Consequences of Conceptualism’ (1986) 41 *U. Miami L. R.* 239.

<sup>30</sup> Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) 304.

<sup>31</sup> *Ibid.*

things of the world, in total exclusion of the right of any other individual in the universe.<sup>32</sup> The assumption which Blackstone, Epstein, and most libertarian theorists seem to share is that private property essentially means individual freedom to ‘do as one pleases’ with the resources one owns and that the state must not interfere with that freedom, except in very rare circumstances.<sup>33</sup> The common saying, ‘my home is my castle,’ suggests that this conception of property long ago took hold in popular consciousness.<sup>34</sup>

That conception, however, is simplistic and misleading, as the legal realists showed long ago.<sup>35</sup> In the context of property theory, legal realism received one of its most celebrated and mature expressions in Tony Honore’s article, ‘Ownership.’<sup>36</sup> Honore argued that owning private property is a much more complicated affair than simply having ‘sole dominion’ over a particular resource. Private property is not a single, determinate right to control a resource, he argued, but a ‘bundle’ of rights, liabilities, powers, and duties.<sup>37</sup> With respect to any particular resource, that bundle could include some or all of the following ‘standard incidents’ of ownership: (1) A right to the possession of resource X; (2) A right to use X; (3) A right to manage X (that is, to determine the basis on which X is used by others if it is so used); (4) A right to the income that can be derived from permitting others to use X; (5) A right to the capital value of X; (6) A right to security against the expropriation of X; (7) A power to transmit X by sale, or gift, or bequest to another; (8) The lack of any term on the possession of any of these rights, etc; (9) A duty to refrain from using X in a way that harms others or the property of others; (10) A liability that certain judgments against the owner may be executed on X (for example, having X taken away for repayment of a debt); (11) Some sort of expectation that, when rights that other people have in X come to an end of their term or lapse for any other reasons, those rights will automatically return to the owner.<sup>38</sup>

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<sup>32</sup> William Blackstone, *Commentaries on the Laws of England* (1982). In a recent article, Larrisa Katz has echoed this definition by defining an owner as the ‘exclusive agenda setter for the thing owned.’ See Larrisa Katz, ‘Exclusion and Exclusivity in Property Law’ (2008) 58(3) *U. Toronto L. R.* 275, 275.

<sup>33</sup> As Epstein asserts, ‘All regulations, all taxes, and all modifications of liability rules are takings of private property prima facie compensable by the state.’ See Epstein, above, n 30, 95. See also, Richard Epstein, ‘Property as a Fundamental Civil Right’ (1998) 29 *California Western L. R.* 187.

<sup>34</sup> Liam Murphy and Thomas Nagel have argued that there is an ‘everyday libertarianism’ at work in popular thinking about property and taxation. See Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (2002) 31-3.

<sup>35</sup> See, e.g., Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning, and Other Legal Essays* (1923); Felix Cohen, ‘Dialogue on Private Property’ (1954) 9 *Rutgers L. R.* 357.

<sup>36</sup> Tony Honore, ‘Ownership’ in Tony Honoré, *Making Law Bind: Essays Legal and Philosophical* (1987) 161.

<sup>37</sup> *Ibid.* See also, Hohfeld, above n 35.

<sup>38</sup> Honore, above n 36, 165-6.

One important feature of Honore's article is that it does not claim that the 'standard incidents' listed above are *necessary* or *intrinsic* to the concept of private ownership. In fact, Honore made a particular point of noting that he was describing what he called the 'liberal concept of full individual ownership,'<sup>39</sup> acknowledging that there could be different conceptions of ownership. He also noted that often an 'owner' can still be identified even though particular incidents or 'sticks' in the bundle have been disaggregated from the bundle.<sup>40</sup> For example, an owner of a house may disaggregate the right to possess (or occupy) the house by leasing it to someone for a specified period. The leaseholder then acquires one of the incidents of ownership – a property right – but does not thereby become the owner. This ability to disaggregate sticks from the bundle also leaves room for there to be different categories of private property. For example, owning a factory might include a different bundle of rights from owning a family home; owning a song might include a different bundle of rights from owning an investment property; owning a wedding ring might include a different bundle from owning shares in a transnational corporation.<sup>41</sup>

Honore's 'bundle of rights' conception of ownership is hardly a complete or uncontroversial picture of private property.<sup>42</sup> Indeed, it has significant limitations of its own.<sup>43</sup> Nevertheless, what even Honore's critics find hard to deny is that the bundle of rights conception of ownership has shown that owning private property does not necessarily imply a certain, specified set of rights, powers, liberties, and duties – and therein lies the enduring value of Honore's contribution to property jurisprudence. He convincingly showed that ownership is a *concept* that has many *conceptions*.<sup>44</sup> What this means is that ownership can take the shape of many different 'bundles,' and so it should not be conceived of as a fixed, static, or homogenous category, especially since each bundle can be disaggregated into isolated 'sticks.' Furthermore, the sticks themselves – such as the 'right to use,' the 'right to exclude,' the 'power to transfer,' or the 'duty not to harm' – are far from absolute or self-defining, making the

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<sup>39</sup> Ibid 161.

<sup>40</sup> Ibid 165.

<sup>41</sup> See Margaret Radin, 'Property and Personhood' (1982) 34(5) *Stanford L. R.* 957 (arguing that property holdings intimately connected with 'personhood' deserve more protection in law than 'fungible' property). See also, Robertson, 'Reconceiving Private Property,' above n 15 (arguing that private property should not be treated as a homogenous block).

<sup>42</sup> See, e.g., Tony Arnold, 'The Reconstitution of Property: Property as a Web of Interests' (2002) 26 *Harv. Envtl. L. R.* 281; James Penner, 'The Bundle of Rights Picture of Property' (1995) 43 *UCLA L. R.* 711; Jeanne Schroeder, 'Chix Nix Bundle-O-Stix: A Feminist Critique of the Disaggregation of Property' (1994) 93(2) *Michigan L. R.* 239.

<sup>43</sup> One noteworthy limitation of the 'bundle of rights' theory is that it 'dephysicalizes' the meaning of property and in doing so can obscure the fact that what is often being discussed is the use of a natural resource. See Nicole Graham, *Landscape: Property, Environment, Law* (2010).

<sup>44</sup> See also, Waldron, above n 21, 47-53.

institutional meaning of private property all the more variable.<sup>45</sup> It follows that the way in which a person legally owns their private property may shape a society as significantly as the decision to recognize private property itself.<sup>46</sup> For this reason it would seem that the problem of defending or criticizing private property is inseparable from the legal problem of institutionalizing a particular conception of it. In the words of Richard Tawney, 'It is idle, therefore, to present a case for or against private property without specifying the particular forms of property to which reference is made.'<sup>47</sup>

The 'bundle of rights' theory is one of the great legacies of legal realism to which absolutist and essentialist property theorists have never developed a satisfactory response. It is also the legacy from which a post-growth jurisprudence of property could potentially emerge, for it promisingly demonstrates that there can be private property systems that are very different from capitalism as we know it, since owning private property can mean a great many things. Later in the thesis the possibility will be explored that private property could be reconfigured into various different bundles and the sticks redefined so as to initiate a degrowth transition toward a socially desirable, ecologically sustainable, steady-state economy. For now, however, the point is simply that private property is an indeterminate concept that has many conceptions.

#### 4.2. *The Indeterminacy of the Free Market*

Significantly, a similar anti-essentialist critique can be levelled at the concept of 'the market.' It may seem at first blush that 'the market' is a self-defining concept that means what it means and nothing else: the market simply means the social space where economic actors voluntarily negotiate the exchange of property rights and secure mutual agreements by way of 'free contract.' Free contract simply means not being forced to contract against one's will; being free to contract if one wishes to do so; and, if one does contract, having the agreement enforced in accordance with its

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<sup>45</sup> Some have argued that the disaggregation of property renders the concepts of private property and ownership meaningless. See, e.g., Thomas Grey, 'The Disintegration of Property' in J. Roland Pennock and John Chapman (eds), *XXII NOMOS: Property* (1980); Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge L. J.* 252. But as Joseph Singer has written, 'Demonstrating that ownership can be deconstructed does not deprive it of force as an organizing category.' Singer, *Entitlement*, above n 5, 83. See also, Waldron, above n 21, 49-50 (employing Wittgenstein's notion of 'family resemblances' to defend private property from charges of meaninglessness).

<sup>46</sup> See John Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (1994) 4.

<sup>47</sup> Richard Tawney, *The Acquisitive Society* (1920) 54.

terms.<sup>48</sup> Upon further reflection, however, these formulations are much too abstract to generate specific conclusions about the institutional structure of an economy based on notions of ‘the market’ or ‘free contract.’ For example, since freedom of contract implies the freedom not to contract, this requires a legal line to be drawn between contracts that are voluntarily entered into and contracts obtained illegitimately through an unfair coercive imposition of power by one party on the other (i.e. obtained under ‘duress’).<sup>49</sup> But as the legal realist, Robert Hale, argued, *all* contracts involve mutual coercion to some degree, since all economic negotiations implicitly or explicitly involve the threat to withhold what the other party wants or needs.<sup>50</sup> Consider an employment negotiation: an owner of a business has the right to withhold wages; a non-owner (potential employee) has the right to withhold labour; in trying to get the best deal, each clearly tries to coerce the other (by implicitly or explicitly threatening to ‘leave the bargaining table’). But suppose the non-owner would face starvation or not be able to pay rent or buy necessary medicine if he or she does not sign the employment agreement offered by the business owner; in such circumstances, it is at least arguable that signing the agreement would be made under conditions of ‘economic duress’ and not be a ‘free contract’ at all.<sup>51</sup> Without entering into the subtleties of Hale’s sophisticated analysis of economic duress,<sup>52</sup> the present point is simply that whether unequal bargaining power amounts to ‘duress’ is a matter of degree.<sup>53</sup> In establishing and maintaining a system of free contract,

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<sup>48</sup> Exemplifying the view that ‘the market’ and ‘free contract’ are concepts that mean one and only one thing, Janos Kornai claims that ‘[t]he notion of a free economy... implies a certain configuration of property rights and a certain institutional and political structure.’ See János Kornai, *The Road to a Free Economy* (1st ed, 1990) 22.

<sup>49</sup> See generally, Duncan Kennedy, ‘Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power’ (1981) 41 *Maryland L. R.* 563.

<sup>50</sup> See Robert Hale, ‘Bargaining, Duress, and Economic Liberty’ (1943) 43(5) *Columbia L. R.* 603; Robert Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’ (1923) 38(3) *Political Science Quart.* 470. Arguably it is the enforcement of contract law as much as property law that is the basis of neoliberal thought. On this point, see Brendan Edgeworth, *Law, Modernity, Postmodernity: Legal Change in the Contracting State* (2003). Furthermore, contract law is intimately connected to property law in the sense that several sticks in an owner’s bundle of property rights (e.g. rights to exclude, use, transfer, etc.) are in many ways shaped by contract law. For example, see Thomas Miceli, C.F. Sirmans and Geoffrey Turnbull, ‘The Property-Contract Boundary: An Economic Analysis of Leases’ (2001) 3(1) *Am. L. & Econ. Rev.* 165; See also, Merrill Thomas and Smith Henry, ‘The Property/Contract Interface’ (2001) 101(4) *Columbia L. R.* 773.

<sup>51</sup> In this context, Hale was fond of quoting Oliver Wendell Holmes, Jr.: ‘It is always for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called.’ See *Union Pac. Ry. Co. v. Public Serv. Comm’n*, 248 U.S. 67, 70. Please note, however, this is not a comment on the current laws of duress in any particular jurisdiction but a comment on the necessity, in every market society, of law determining the blurry issue of voluntariness.

<sup>52</sup> For a discussion, see John Dawson, ‘Economic Duress: An Essay in Perspective’ (1947) 45(3) *Michigan L. R.* 253.

<sup>53</sup> See Kennedy, ‘Distributive and Paternalist Motives in Contract and Tort Law,’ above n 49.

therefore, the critical question is not a black and white one of freedom versus coercion. Rather, the question is about the *structure* of mutual coercion – that is, the structure of power relations in bargaining – and such a structure can take any number of legal forms, each of which could fall under the rubric ‘free contract’ or ‘free market,’ depending on how the essentially contested idea of ‘freedom’ is defined.<sup>54</sup> As Gerald Frug puts it, ‘[t]here is no such thing as the “free market.” There are only alternative possible markets, each of which restrains as well as enhances human freedom.’<sup>55</sup>

Furthermore, the institutional possibilities open to a market-based society are not limited to the multitudinous ways that freedom of contract can be defined. For there to be a market at all, there must be a body of rules (often highly variable and intricate) that determine: (1) the nature and identity of eligible economic actors (which people and what artificial entities can own and trade property); (2) what can be objects of property (and what cannot be objects of property); (3) the types and distribution of property entitlements (who owns what and in what way); (4) the ways in which exchange can be effected and property entitlements transferred (the laws of contract, the laws of inheritance and bequest, tax policies, etc.); and (5) what happens when property rights conflict (either with other property rights or with other legal rights).<sup>56</sup> The answers a society gives to these questions are by no means merely technical details of limited significance. To take the first example above, one of the most fundamental choices which must be made in a market society is what kind of entities can be the independent market actors. Michael Robertson considers the range of possibilities:

The actors could be confined to individual human beings. One way to expand the category of market actors is to allow groups of human beings to participate, but then we have to choose what types of groups will be recognized: families, tribes, partnerships, producers co-operatives? We can choose to expand the category of market actors even further by allowing non-human entities to participate, but again we have to decide what types of non-human entities should be allowed to do this: business corporations, municipalities, churches?<sup>57</sup>

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<sup>54</sup> The implications of this insight are potentially radical. As Duncan Kennedy states, ‘It is possible, for example, to argue on the most technical grounds for strict scrutiny of the voluntariness of consumer agreements, and for compulsory terms and set prices wherever voluntariness is in doubt. If one takes this approach seriously, there is little of the reformers’ program that can’t be restated as the implementation of freedom of contract, rather than its displacement by a new regime.’ *Ibid* 583.

<sup>55</sup> Gerald Frug, ‘The Ideology of Bureaucracy in American Law’ (1983) 97 *Harv. L. R.* 1276, 1365.

<sup>56</sup> See Karl Klare, ‘Legal Theory and Democratic Reconstruction: Reflections on 1989’ (1991) 25 *U. Brit. Colum. L. R.* 69, 78.

<sup>57</sup> Robertson, ‘Reconceiving Private Property,’ above n 15, 469.

Robertson is correct to point out here that 'none of these choices is *required* by the abstract definition of a free market, but that each choice is very significant in terms of the type of society which will result.'<sup>58</sup> And even when a choice is made, say, to allow corporations to trade in the market, this gives rise to a whole new set of institutional questions about the nature of those entities, which again calls for an array of socially significant decisions to be made that simply cannot be analytically deduced from the meaning of 'the corporation.'<sup>59</sup>

One final way of illustrating the variability of property and market concepts is to consider what happened after the collapse of the Soviet Union in 1989 when Eastern European nations decided to reject centralized state planning and opt for systems based on private property and market exchange. If 'private property' and 'the market' were concepts that had a determinate institutional structure built into their core meanings then there could be only one form of private property / market system to create. In such circumstances, the Eastern European nations would only have needed to make the fundamental policy decision to adopt such a system and the rest of the institutional details would have logically followed as a matter of conceptual necessity. But it quickly became clear that those nations were faced with an exceedingly wide range of institutional possibilities. Not only were very different models represented by, say, the U.S. economy on the one hand, and the Swedish economy on the other, but there was no reason to think that the existing models exhausted the range of possibilities.<sup>60</sup> By defining property entitlements and market structures in different ways, new and unique forms of private property / market systems could have been created. As Karl Klare notes in this context, 'A wide range of legal structures is compatible with the basic choice for a liberal, democratic, market-based system, and the variations between these legal structures have highly significant consequences for the power relations within society.'<sup>61</sup> One might add, in anticipation of later discussions, that the possible institutional variations of the private property / market paradigm also have potentially significant consequences for how a society as a whole relates to the natural environment. Which variation a society institutionalizes involves making many complex choices about what kinds of governance arrangements it wishes to create in relation to tracts of land, flows of water, wild species, etc. These choices cannot be avoided by contending that a private property / market system *inherently* implies a certain, specified set of

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<sup>58</sup> Ibid.

<sup>59</sup> Sally Wheeler, *Corporations and the Third Way* (2002) (exploring alternative corporate models).

<sup>60</sup> See Sarah Hale, Will Leggett and Luke Martell, *The Third Way and Beyond: Criticisms, Futures, Alternatives* (2004); Anthony Giddens, *The Third Way and its Critics* (2000).

<sup>61</sup> Klare, 'Legal Theory and Democratic Reconstructions,' above n 56, 74.

governance arrangements, because, for the reasons outlined above, there are many different legal structures consistent with the generic notion of a private property / market system.<sup>62</sup> Choice is necessary; different choices are possible.

### 4.3. Summary

My response to the specifically ‘conceptual’ objection to reform has been to show that property and market concepts are indeterminate concepts that have many conceptions, meaning that it is at least theoretically possible for there to be private property / market systems that are radically different to capitalism as we know it.<sup>63</sup> My suspicion is that those who argue or assume otherwise are ‘held captive’ (to borrow Wittgenstein’s phrase) by a particular, unduly narrow picture of what property and market concepts mean.<sup>64</sup> As Tawney put it, ‘The course of wisdom is neither to attack private property in general nor to defend it in general; for things are not identical in quality, merely because they are identical in name.’<sup>65</sup> I would argue that once people free their imaginations of the assumption that a private property / market system necessarily implies the pro-growth economies of advanced capitalism, it becomes clear that radically different private property / market systems are possible. This opens up space for the ‘internal development’ or ‘revolutionary reform’ of current property and market structures, and it is my contention that within this space a private property / market system ‘beyond growth’ could potentially take form, a point to be developed throughout this thesis.

## 5. THE ‘PRIVATE SPHERE’ OBJECTION

Even if it is accepted that there can be great variations within the paradigm of a private property / market system, state intervention in the economy for the purposes of restructuring property and market relations might nevertheless be objected to on the basis of the private / public distinction. Liberal theorists, from Locke through Kant

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<sup>62</sup> See Klaus Bosselmann, ‘The Way Forward: Governance for Ecological Integrity’ in Laura Westra, Klaus Bosselmann and Richard Westra (eds), *Reconciling Human Existence with Ecological Integrity* (2008).

<sup>63</sup> As Carol Rose puts it, in creating a private property / market system there is an ‘enormous potential for experiment and novelty.’ See Carol Rose, ‘Whither Commodification,’ in Martha Ertman and Joan Williams (eds), *Rethinking Commodification: Cases and Readings in Law and Culture* (2005) 417. See also, Jonnette Hamilton and Nigel Bankes, ‘Different Views of the Cathedral,’ in Aileen McHarg et al (eds), *Property and the Law in Energy and Natural Resources* (2010) 25 (describing private property as ‘extremely malleable’).

<sup>64</sup> See Fotopoulous, above n 18.

<sup>65</sup> Tawney, above n 47, 54.

to Rawls and beyond,<sup>66</sup> have sought to limit the role of the state by dividing social space into a 'public sphere' – where democratically mandated state action is legitimate and often desirable – and a 'private sphere' – where the coercive apparatuses of the state have no right to govern and where individual freedom is said to reign supreme. According to this extremely influential perspective, the economy falls firmly within the 'private sphere,' implying that the state must 'stay out' of the economy and not interfere with an individual's property and market rights. On that basis it could be objected that any legal restructuring aimed at initiating the transition to a degrowth or steady-state economy – which presumably would require the state to enter the 'private sphere' and reconfigure property and market rights – would exceed the proper boundaries of state action. It will now be argued that there are various significant problems with this objection.

## 6. RESPONSE TO THE 'PRIVATE SPHERE' OBJECTION

There is no non-arbitrary way to differentiate the law *constituting* the market, from the law supposedly *regulating* or *intervening in* the market.<sup>67</sup> – **Stuart Banner**

### 6.1. *The Public Dimensions of Private Property*

In the context of property and market theory, at least, the 'private sphere' objection to state intervention in the economy is analytically confused.<sup>68</sup> The objection assumes that in the absence of state involvement in the economy, a private property / market system would be self-regulating, in the sense that pre-existing and determinate property rights would be either enjoyed harmoniously in private or exchanged through voluntary contracting in the 'free market.' The 'night-watchman' state would only need to get involved to protect and enforce those pre-existing property and market rights.<sup>69</sup>

The problem with this way of looking at things is that it relies on the very same 'essentialist' or 'conceptualist' reasoning which the previous sections showed was defective. The only way that the state could 'stay out' of the private property / market system would be if the organizing concepts 'private property' and 'the market' had

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<sup>66</sup> See generally, Ellen Frankel Paul, Fred D. Miller and Jeffrey Paul (eds), *Liberalism: Old and New* (2007).

<sup>67</sup> Stuart Banner, 'Conquest by Contract: Wealth Transfer and Land Market Structure in Colonial New Zealand' (2000) 34 *Law & Soc'y Rev.* 47, 53.

<sup>68</sup> See generally, Duncan Kennedy, 'The Stages of the Decline of the Public/Private Distinction' (1982) 130(6) *U. of Pa. L. R.* 1349.

<sup>69</sup> Nozick, above n 2.

determinate institutional structures built into their essential meanings. But if those organizing concepts are indeterminate concepts that have many diverse conceptions, as they demonstrably are, then for those concepts to become concrete conceptions in legal reality the state must be always and necessarily involved in defining property rights and market structures. ‘Hands off’ simply is not an option, as the following hypothetical seeks to make clear.

Imagine X buys some land next to a river, erects a sawmill on the land, and then dams the river to supply hydro-power for the mill. One year later, however, a competitor, Y, constructs a similar dam and mill one kilometre upstream, reducing river flow to X’s mill and thereby damaging X’s business. X sues, complaining that his property rights and expectations are being illegitimately interfered with by Y. In defence, Y claims that she is simply exercising her property rights in the same way X is, which she claims is reasonable.<sup>70</sup> Suppose further, perhaps, that an environmental organization, Z, brings an action claiming that the dams of X and Y are illegitimate uses of their property because cumulatively they have reduced the river flow so greatly that it no longer reaches the sea, harming biodiversity and ecosystems in potentially irreversible ways.<sup>71</sup> How is this case to be ‘properly’ decided?<sup>72</sup>

Libertarians would claim that the state should stay out of the private sphere unless property rights are in need of protection, but that explanation gets us absolutely nowhere. In the above hypothetical – which, given a moment’s thought, could represent a thousand examples in the murky waters of everyday legal reality<sup>73</sup> – how do we know who has what property rights or whether they are being interfered with? Should X be protected from Y’s actions or would that require ‘state interference’ with Y’s private property? Should Y be free to act as she has or is she tortiously interfering with X’s private property? Is the harm that X and Y are causing to the river system an acceptable consequence of their use of private property? In thinking about these questions it is important to appreciate there is no single solution that is obviously ‘pro’ private property, since private property rights lie on both sides of the dispute. In such circumstances, which are far from exceptional, the issue is not whether to protect private property, as such; the issue is about what *form* of private

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<sup>70</sup> Up to this point, the hypothetical is based on the case of *Palmer v Mulligan* (discussed in the Introduction, Sect. 2.2).

<sup>71</sup> For present purpose I will ignore the question of standing. But see, Christopher Stone, *Should Trees Have Standing?: Law, Morality, and the Environment* (3rd ed, 2010).

<sup>72</sup> The point of this hypothetical is not to explore the intricacies of existing riparian property law in any particular jurisdiction but, more generally, to bring to the surface certain theoretical complexities inherent to the idea of property in law.

<sup>73</sup> See Joseph Singer, *Property Law: Rules, Policies and Practices* (5th ed, 2010).

property to protect.<sup>74</sup> And this raises questions not only about how best to shape the property relationships between owners, but also how best to shape the matrix of property relationships between owners, the wider community, and nature, more generally.<sup>75</sup>

Conceptual analysis alone, however, cannot answer these questions, because, as we have seen, private property is a concept that has many conceptions. That is, we cannot just think carefully about the concept of private property and expect the appropriate institutional details to follow as a matter of logic. Those institutional details do not exist independently of the state in some Platonic form but must be created by the state;<sup>76</sup> and in a modern market society (even a so-called ‘unregulated’ or ‘deregulated’ or ‘free market’ society) those institutional details consist of an incredibly complex, variable, and evolving legal framework.<sup>77</sup> When examining such a complex legal framework it is often impossible to differentiate the law *constituting* a property system from the law supposedly *regulating* or *intervening in* a property system.<sup>78</sup> As Joseph Singer writes:

When we understand the role that property law plays in managing the tensions within the property concept, it becomes clear that it is impossible to create a precise, logical distinction between government actions that constitute deregulatory recognition of existing property rights and those that constitute regulatory limits on property rights. Rather, most of the law of property could be alternatively characterized as regulatory or deregulatory, depending on how we look at it.<sup>79</sup>

This is especially so when property rights conflict, as they often do, at which times the state has no option but to get involved in the private property system and determine its nature.<sup>80</sup> The libertarian ideal of a self-regulating private property system, therefore, is simply incoherent.

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<sup>74</sup> See Eric Freyfogle, ‘Goodbye to the Public-Private Divide’ (2006) 36 *Environmental Law* 7, 11.

<sup>75</sup> See Arnold, above n 42.

<sup>76</sup> As Jeremy Bentham put it, ‘Property and law are born together, and die together. Before laws were made, there was no property; take away laws, and property ceases.’ See Jeremy Bentham, *A Theory of Legislation* (1931) 113.

<sup>77</sup> See John Braithwaite, ‘Neoliberalism or Regulatory Capitalism’ (2005) *Regulatory Institutions Network (Occasional Paper 5)* 1 (arguing that those who think we are in an era of ‘unregulated’ neoliberalism are wrong, for the reciprocal relationship between corporatization and regulation creates a world in which there is more governance of all kinds).

<sup>78</sup> See Banner, above n 67, 53.

<sup>79</sup> Singer, *Entitlement*, above n 5, 61.

<sup>80</sup> As Judge Harlan Stone put it in the U.S. Supreme Court case of *Miller v Schoene*: ‘The state was under the necessity of making a choice between the preservation of one class of property and that of the other wherever both existed in dangerous proximity. It would have been none the less a choice if, instead of enacting the present statute, the state, by doing nothing, had permitted serious injury to the

The libertarian assertion that private property resides solely in the ‘private sphere’ runs into further problems when it is recognized that private property is ultimately private governing power backed up by state force. Felix Cohen famously characterized private property as follows:

To the world:

Keep off X unless you have my permission, which I may grant or withhold.

Signed: Private Citizen.

Endorsed: The State.<sup>81</sup>

Private property, understood in this way, would not raise so many concerns in a society where everyone owned enough productive assets to secure themselves a decent livelihood. But in a society where the vast majority of people do not have property rights in any means of production, and thus have no option but to earn wages from those who do, private property threatens to exclude people from the resources they need to survive.<sup>82</sup> To gain access to those resources, non-owners of productive assets have to agree to the terms of employment largely dictated by the owners, and in this way private property rights provide owners not simply with power over things, but also with power over people. As Alexander Hamilton declared, ‘[a] power over a man’s subsistence amounts to a power over his will.’<sup>83</sup> This point was articulated forcefully by Morris Cohen who wrote, ‘The extent of the power over the life of others which the legal order confers on those called owners is not fully appreciated by those who think of the law as merely protecting men in their possession.’<sup>84</sup> This line of reasoning was also developed by Robert Hale, whose view was that ‘every lawful economic power becomes a type of political power, and every economic inequality poses a question of political inequality.’<sup>85</sup>

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apple orchards within its borders to go on unchecked. When forced to such a choice the state does not exceed its constitutional powers by deciding upon the destruction of one class of property in order to save another...’ *Miller v Schoene* 276 U.S. 272, 279 (1928).

<sup>81</sup> Cohen, above n 35, 374.

<sup>82</sup> See Michael Robertson, ‘Liberal, Democratic, and Socialist Approaches to the Public Dimensions of Private Property’ in Janet McLean (ed), *Property and the Constitution* (1999) (arguing that if liberals, including libertarians, are concerned about power relations in society, they should not merely guard against the abuse of state power, but must also be aware that concentrations of private property can give rise to abuses of power between citizens which it is the state’s role to guard against).

<sup>83</sup> Quoted in Warren Samuels, ‘The Economy as a System of Power and its Legal Bases: The Legal Economics of Robert Lee Hale’ (1972) 27 *U. Miami L. R.* 261, 299.

<sup>84</sup> Morris Cohen, ‘Property and Sovereignty’ (1927) 13 *Cornell L. Q.* 8, 13.

<sup>85</sup> See Samuels, above n 83, 295. See also, Robert Hale, ‘Hale Papers: Folder 80-16,’ quoted in Samuels, at 298-9: ‘We live... under two governments, “economic” and “political.” In many matters of everyday life our liberty is restricted by requirements laid down by those who have superior economic power.’

Moreover, from an ecological perspective, the public dimensions of private property are also apparent when it is remembered that private property provides various degrees of ‘private governing power’ over natural resources – resources which cannot be properly conceived of as isolated units of economic value since they are parts of an *interrelated* biosphere upon which the entire community of life relies. As Myrl Duncan explains:

One individual’s interest in land cannot be defined without taking into account the interests of neighbors and the larger human and natural communities. For example, filling (or draining) a wetland might be considered a property interest belonging to the owner... Yet in wiping out the wetland the owner affects drainage on the rest of his land... and may well affect the drainage of his neighbor’s land... He also harms the public and the larger environment by impairing nature’s water filtration system and destroying wildlife habitat.<sup>86</sup>

When the public dimensions of private property are recognized, private property, so-called, does not necessarily become unjustifiable; it only ceases to be a purely ‘private’ matter. In short, the laws which give shape to the abstract idea of private property require both state definition and state enforcement, and so private property is inescapably a *public* matter – one of great social, ecological, political, and economic importance.

## 6.2. *The Free Market as a Regulatory System*

As with private property, so too with freedom of contract and market relations.<sup>87</sup> It was noted above that libertarians tend to conceive of the marketplace as a social space where private individuals, uninhibited by state regulation, negotiate the exchange of property rights and secure mutually beneficial agreements by way of free contact. According to this picture, the marketplace is ‘self-regulating’ because it is governed by the free decisions of individuals not the coercive regulatory forces of the state.<sup>88</sup> Since what constitutes a ‘free contract’ is not self-defining, however, and

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<sup>86</sup> Myrl Duncan, ‘Reconceiving the Bundle of Sticks: Land as a Community-Based Resource Essay’ (2002) 32 *Envil. L.* 773, 775-6.

<sup>87</sup> For an early expression of the views developed below, see Morris Cohen, ‘The Basis of Contract’ (1933) 46 *Harv. L. R.* 553. See also, Clare Dalton, ‘An Essay in the Deconstruction of Contract Doctrine’ (1985) 94(5) *Yale L. J.* 997.

<sup>88</sup> As Arthur Perry once put it: ‘Laborers are everyway the economical equals of capitalists. Labourers offer a service to capitalists, and capitalists offer a service to laborers. They stand man to man. They exchange to the mutual advantage of both, and one is as independent as the other.’ See Arthur Perry, *Political Economy* (18th ed, 1883) 267.

since market transactions do not occur in abstract space but in a specific social context, the state again finds itself necessarily implicated in the so-called 'private sphere' of the marketplace. In defining and enforcing private property rights, for example, the state also creates and structures a system of mutual coercion and thereby influences the nature of market relations, a point Stuart Banner concisely expressed as follows: 'Law does not intervene in markets; law *constitutes* markets.'<sup>89</sup> Similarly, the state must also determine the point at which the mutually (but potentially very unequal) coercive relationships inherent in every bargain crosses the line and becomes one of 'duress,' again implicating the state in the market in important ways.<sup>90</sup> For these reasons, among others, the meaning of 'freedom' in 'freedom of contract' is primarily a function of law, and not, as libertarians would have it, a well defined sphere of private influence within which the law must stay out.<sup>91</sup>

This analysis breaks down the distinction between a 'free market' and a 'regulatory system.'<sup>92</sup> A brief analysis of minimum wage laws should clarify this important point. From one perspective, minimum wage laws – which are an example of state intervention in the economy – infringe upon the principle of freedom of contract and, according to some, hurt those they are meant to help.<sup>93</sup> Individuals should be free to contract upon whatever terms they choose, the argument might go, and the state should not use its coercive powers to regulate the marketplace in such ways. But suppose minimum wage laws are abolished and an underclass of labourers find themselves coerced into signing employment agreements paying wages of \$2 per hour. Assuming no gun was at the heads of these labourers, it could be argued that enforcing those employment agreements is simply upholding freedom of contract (i.e. 'the will of the parties').<sup>94</sup> It could also be argued, however, that a person would never agree to work for \$2 per hour unless they were under economic duress, in which case minimum wage laws would seem to promote freedom of contract (by prohibiting exploitative 'unfree' contracts) not infringe upon it. Put

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<sup>89</sup> Banner, above n 67, 50.

<sup>90</sup> See Dalton, above n 87, (showing that the state is implicated in the marketplace not only in relation to 'duress,' but in every aspect of contract law and market construction, including fraud, implied terms, mistake, misrepresentation, unconscionable bargains, etc.).

<sup>91</sup> Robert Hale, *Freedom through Law: Public Control of Private Governing Power* (1952).

<sup>92</sup> See Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (1992).

<sup>93</sup> See Milton Friedman, *Capitalism and Freedom* (1962) 180.

<sup>94</sup> See Richard Epstein, 'In Defence of the Contract of the Will' (1984) 51(4) *U. Chi. L. R.* 947. The point was expressed as follows in the case of *Adair v. United States*: 'The right of a person to sell his labor upon such terms as he deems proper is, in its essence, the same as the right of the purchaser of labour to prescribe the conditions upon which he will accept such labor from the person offering to sell it... In all such particulars the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract which no government can legally justify in a free land.' *Adair v. United States* 208 U.S. 161, 175 (1908).

otherwise, state regulation by way of minimum wage laws (or some other form of intervention) is arguably required to *create* a genuinely free market when bargaining power is sufficiently unequal. Hale expressed this point in more general terms as follows: ‘To preserve individual liberty, it is not enough to keep the state from crushing it; it is equally essential to invoke the power of the state to keep other individuals from crushing it.’<sup>95</sup> This point is as true today as it was when Hale articulated it.

It is also important to recognize that if the state intervenes in private market relations in an attempt to balance private bargaining power (e.g. by creating minimum wage laws) or to better protect the environment (e.g. by regulating land use), it does not inject state-based coercion for the first time into those relations; it merely changes the relative distribution of power relations in society which are always and necessarily state-dependent. Whether such intervention might actually increase net freedom in society, or better advance the common good, is a question that certainly cannot be answered deductively by recourse to abstractions like ‘freedom of contract’ or ‘private property.’<sup>96</sup> Hale, again, put the matter exactly: ‘there is no *a priori* reason for regarding planned governmental intervention in the economic sphere as inimical to economic liberty, or even to that special form of it known as free enterprise.’<sup>97</sup>

### 6.3. Summary

The libertarian demand for state non-interference in the so-called ‘private sphere’ – where property and market rights are said to be sacrosanct and self-regulating – is an impossible demand, and thus incoherent. If there are objections to degrowth reform, therefore – and this has been my main point – it cannot simply be because it would require state involvement in the economy. The state is necessarily implicated in the economy because (among other things) it must provide details on which incidents of ownership will form the ‘bundle,’ what each incident entails, and in which circumstances. The state must also determine other important ground-rules to the economy, such as ‘What can be property?’ ‘What kind of entities can be agents in the market?’ ‘What happens when property rights conflict?’, ‘At what point do the social or ecological costs of private land use become unjustifiable?’ ‘When does coercion in

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<sup>95</sup> Robert Hale, ‘Hale Papers: Folder 91-4,’ quoted in Samuels, above n 83, 301. See also, Robertson, ‘Liberal, Democratic, and Socialist Approaches,’ above n 82.

<sup>96</sup> See Barbara Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (1998) 18. This analysis is significant because it goes some way to removing the burden of proof that ‘regulators’ are so often expected to meet. If there is state intervention either way, new regulation does not have to meet some extra burden to justify intervention.

<sup>97</sup> Hale, ‘Bargaining, Duress, and Economic Liberty,’ above n 50, 628.

bargaining become duress?’ etc. Radically different private property systems could emerge depending on what considerations are taken into account when answering these complex questions. What if, for example, growth economics were to lose its hold on the legal consciousness and the influence of degrowth and steady-state economics were to come to the fore? Lawmakers, it is suggested, might conclude that property and market concepts should no longer be defined and defended in order to grow the economy and should instead be reconstructed (in ways considered later in the thesis) to pursue more specific social or ecological objectives, even if this slows or negatively affects growth rates. I have shown, first, that this is not a conceptual impossibility, and second, that such a policy could not be objected to simply on the grounds that it would involve state intervention in the ‘private sphere.’ Lawmakers would indeed need to be involved in the economy should they wish to create a post-growth property system, but lawmakers are always and necessarily involved in defining property entitlements and market structures, so there is a sense in which such involvement would just be different. As Joseph Singer puts it, ‘The question is not whether to regulate; the question is what kind of property system to create in the first place.’<sup>98</sup> The laws defining, shaping, and governing a private property / market system are necessarily public, political creations. Talk of ‘private’ property makes that easy to forget.

## 7. THE ‘NEUTRALITY’ OBJECTION

The ‘private sphere’ objection to state intervention in the economy seems to have a particular hold on those who think that ‘private property’ and the ‘free market’ are essentially self-defining concepts with determinate institutional structures. From that perspective – often associated with ‘natural rights’ theorists<sup>99</sup> – the state is not needed to create or define property and market rights and may not lawfully abridge them. Consequently, the role of the state is confined to enforcing and protecting pre-existing rights. Drawing on various strands of critical legal theory, the analysis above showed that there are major flaws to that conceptual framework.<sup>100</sup> In a sentence, the private / public distinction collapses because property and market concepts are

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<sup>98</sup> Singer, *Entitlement*, above n 5, 7.

<sup>99</sup> See generally, Richard Tuck, *Natural Rights Theories: Their Origin and Development* (1979). For a critique, see Mark Tushnet, ‘Essay on Rights’ (1983) 62 *Tex. L. R.* 1363; Morton Horwitz, ‘Rights’ (1988) 23 *Harv. C.R.-C.L. L. R.* 393.

<sup>100</sup> For a discussion of how the critique of the public / private divide has changed the nature of what regulation means and, indeed, the nature of the state, see David Campbell and Sol Picciotto, *New Directions in Regulatory Theory* (2002); Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Austral. J. of Leg. Phil.* 1.

indeterminate and sometimes self-conflicting abstractions that require state definition and enforcement.

Within the ‘legal positivist’ strand of liberalism, however, some might accept that the state is indeed required to enter the private sphere and define legal rules governing private property, voluntary contracting, and market relations – since they are not self-defining – but argue that the rules set up by the state must be *neutral*.<sup>101</sup> Legal rules that are neutral, it could be argued, would simply protect people in their legitimate possessions and facilitate the voluntary and mutually beneficial exchange of private property rights in a free market. This would allow individuals to pursue their own preferences and visions of the good life without having the state impose its preferences or values upon them.<sup>102</sup> This perspective gives rise to a ‘neutrality’ objection to state intervention in the economy. The objection is that it is wrong for politicians or ‘activist’ judges to use the politico-judicial process to restructure property and market relations, since that would involve imposing their subjective preferences and values (i.e. their ‘politics’) on others. In particular, it is wrong to use that process to artificially generate a distribution of wealth and power other than that which naturally results when individuals voluntarily exchange their property rights in a free market. Since this thesis is advocating the reconfiguration of property and market rights precisely in order to generate degrowth and steady-state outcomes – outcomes based on a particular set of environmentalist and distributive value judgements – it is not neutral, as defined.

Given the complexity and importance of the issues raised by this ‘neutrality’ objection to reform, it will now be considered in some detail. The analysis begins by arguing that private property / market systems are inherently political and thus inevitably non-neutral, as defined. Some space will then be dedicated to examining Robert Nozick’s entitlement theory of justice, for the purpose of showing that non-distributive theories of the state are just as value-laden as redistributive theories.<sup>103</sup> The purpose of the entire chapter, I reiterate, is to explore what space there is for private property / market systems to be restructured for the purpose of pursuing the

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<sup>101</sup> See Patrick Neal, ‘Liberalism and Neutrality’ (1985) 17(4) *Polity* 664. For a discussion in the context of worker cooperatives, see Robertson, ‘Reconceiving Private Property,’ above n 15. For a discussion of the attempt by Law & Economics scholars to achieve neutrality in law, see Morton Horwitz, ‘Law and Economics: Science or Politics’ (1979) 8 *Hofstra L. R.* 905.

<sup>102</sup> As Ronald Dworkin argues, ‘government must be neutral on what might be called the question of the good life.’ See Ronald Dworkin, ‘Liberalism,’ in Stuart Hampshire (ed), *Public and Private Morality* (1978) 127. See also, Robert Ellickson, ‘Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights’ (1986) 64 *Wash. U. L. Q.* 723, 724 (noting that ‘Property rules serve the libertarian goal of enabling a landowner to determine his own values and priorities’).

<sup>103</sup> Later sections will focus more closely on certain ecological aspects of property reform, in particular, the transformative potential of the ‘duty not to harm.’

broad redistributive and ecological policy objectives, which the last chapter showed were implicit to the degrowth movement.

## 8. RESPONSE TO THE 'NEUTRALITY' OBJECTION

Concepts can only be given meaning by reference to considerations of policy and morality.<sup>104</sup> – **Joseph Singer**

### 8.1. *The Ground-Rules of a Private Property / Market System*

The 'neutrality' objection is predicated on the assumption that the outcome of market transactions is just because it is the natural result of free individuals voluntarily exchanging property rights on mutually beneficial terms. The outcome is said to be just because the procedure ('free contract') is said to be just. Put otherwise, the objection assumes that the distribution of wealth and power in a market-based society is just and should not be interfered with because it is determined by free individuals pursuing their own conception of the good life in a competitive but non-coercive marketplace. As one theorist put it:

[C]ompetition is the general rule; and the effect of unrestrained competition is to distribute the value of the product equally among its various producers, leaving neither to any of them, nor to the consumer, any ground of complaint. Each receives in exact proportion to the labor which he has bestowed; the labor of all was equally necessary to present the article in its finished state; and he who finally consumes it, therefore, justly pays all by rendering an equivalent amount of labor.<sup>105</sup>

That each market exchange is mutually beneficial is evident (according to this view) from the fact that 'neither [party] would make the exchange back again.'<sup>106</sup> The end-state of all market exchanges, it would seem to follow, must also be mutually beneficial.<sup>107</sup> On these grounds it is often argued that using law to alter the outcome of market transactions (by redistributing wealth, for example) would illegitimately or counter-productively interfere with the decisions of free individuals engaging in mutually beneficial market activity. Libertarians like Robert Nozick argue that state

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<sup>104</sup> Joseph Singer, 'Legal Realism Now' (1988) 76(2) *Calif. L. R.* 467, 500.

<sup>105</sup> Francis Bowen, *American Political Economy*, quoted in Duncan Kennedy, 'The Role of Law in Economic Thought: Essays on the Fetishism of Commodities,' (1985) 34 *Am. Uni. L. R.* 939, 946.

<sup>106</sup> Francis Wayland, *The Elements of Political Economy*, quoted in Kennedy, 'The Role of Law in Economic Thought,' above n 105, 945.

<sup>107</sup> See Smith, above n 9.

redistribution of wealth is not just theft but a form of slavery.<sup>108</sup> It is theft because it takes property from some people without their consent and gives it to others; it is a form of slavery because people labour for their property and so to take property from some and give it to others is effectively forcing some people to labour for others.<sup>109</sup> Legal economists from Bentham to Posner argue that redistributing wealth tends to diminish incentives and be counter-productive, such that the best way to help the poor is not to slice the economic pie differently but bake a bigger pie.<sup>110</sup> These are the types of arguments put forward by those who believe that the state's role in a free and just economy is limited to protecting and enforcing property and contract rights – more specifically, that the state's role does not include redistributing wealth or trying to affect the end-state of free market transactions.<sup>111</sup>

The indeterminacy of property and market concepts, however, means that such arguments cannot be coherently maintained.<sup>112</sup> As outlined above, the state is required to make all sorts of definitional choices about how to give content to generic notions such as 'private property' and 'free contract,' and we have seen that those choices have significant implications for what kind of society results. Since there are countless ways the background rules of property and contract can be defined, it makes no sense to say the outcome of market transactions are just unless those background rules which structure the marketplace are just. What the legal realists and critical legal scholars made perfectly clear, however, is that those definitional choices about what property and market concepts mean can never be *neutral*, as such.<sup>113</sup> This is because those choices always distribute wealth and power between individuals, groups, and interests in society, and there is no objective or apolitical standpoint from where those distributive choices can be made.<sup>114</sup> Therefore, defining property and market ground-rules means that lawmakers (i.e. judges and politicians, as well as administrative and regulatory agencies) are inevitably involved in making political, value-laden decisions, many of which have unavoidable distributive and

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<sup>108</sup> Nozick, above n 2, 169.

<sup>109</sup> Ibid.

<sup>110</sup> See generally, Bentham, above n 9; Posner, above n 9. But see also, Lucian Bebchuk, 'Pursuit of a Bigger Pie: Can Everyone Expect a Bigger Slice' (1979) 8 *Hofstra L. R.* 671.

<sup>111</sup> But see above, n 12 (noting that economists generally encourage state intervention in situations of 'market failure').

<sup>112</sup> See, e.g., Duncan Kennedy, 'Cost-Benefit Analysis of Entitlement Problems: A Critique' (1980) 33 *Stan. L. R.* 387 (showing that cost / benefit analysis cannot provide the determinacy claimed by Law & Economics scholars because the 'efficient' outcome partly depends on how lawmakers define property entitlements).

<sup>113</sup> See generally, David Kairys, *The Politics of Law: A Progressive Critique* (Revised, 1990).

<sup>114</sup> For powerful statements of anti-foundationalism in legal theory, see Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989); Joseph Singer, 'The Player and the Cards: Nihilism and Legal Theory' (1984) 94(1) *Yale L. J.* 1; Joseph Singer, 'Critical Normativity' (2009) 20 *Law & Critique* 27.

ecological implications and which can deeply affect the nature of the resultant society.<sup>115</sup> Several points here need elaboration.

Sometimes the laws governing a private property / market system can seem neutral because they apply to everyone. Since law applies to everyone, everyone is left to pursue their own goals within that neutral legal framework. The outcome of free transactions within a neutral framework, the argument goes, must be just because the procedure ('free contract') is presumably just. However, when it is recognized that property, market, and contract concepts can take many forms, it becomes clear that the legal framework that governs the market exchange of property rights can also take many forms, and that framework inevitably affects people differently. This impacts on market outcomes and, by extension, social, ecological, legal, political, and economic outcomes.

Duncan Kennedy uses the analogy of basketball to explain this important point well.<sup>116</sup> The rules of basketball (like law) seem to apply to all players equally, and in a sense, of course, they do. If the rules stipulate that kicking the ball is not permitted, then no player is allowed to kick the ball. In this sense, the rules can be characterized as neutral because they make no distinction between people (assuming there are no biases in enforcement). But different rules would impact on people in different ways, affecting the relative ability of each player and this would impact on the outcome of the game. For example, lowering the height of the hoop would affect, in complex ways, the relative 'ability' of each player, perhaps advantaging shorter players; lengthening the game or the court might advantage the fittest or the fastest players; making the ball heavier might advantage the strongest players; making the rules more complex might advantage the smartest players; drafting the rules in very general terms might give the referee more discretion; and so on. Someone has to write the rules – since they are not self-defining – and there could be (and are) various versions of the rules, each of which are recognizably the game basketball, despite the variations. But there is no way the rules can be written or interpreted in a way that is neutral between players, since every choice of rules affects the relative abilities of each player; and by affecting the abilities of each player, the rules can significantly influence (without determining, as such) the outcome of the game. Whatever choices are made, players are still competing against each other in the context of background rules that apply to all; but the nature of those background

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<sup>115</sup> On the inherent normativity of law, see Maksymilian Del Mar and Zenon Bankowski (eds), *Law as Institutional Normative Order* (2009).

<sup>116</sup> See Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!' (1991) 15(4) *Legal Stud. F.* 327, 328.

rules will impact on the outcome of the game. Therefore, there is no sense in which one particular outcome could be described as ‘natural’ or ‘neutral,’ since the outcome is partly a function of a malleable set of rules.

Kennedy’s point is that the rules of property, contract, and tort law (along with criminal law rules that reinforce them in some cases) are ‘rules of the game of economic struggle.’<sup>117</sup> As such, those rules differentially and asymmetrically empower individuals and groups in the market, affecting, among other things, how those individuals and groups bargain over the fruits of cooperation in production. ‘To the extent that the rules affect the outcome, forcing the parties to settle for  $x$  rather than  $y$  percent of the joint product, the state is implicated in the outcome. It is the author of the distribution even though that distribution appears to be determined solely by the ‘voluntary’ agreement of the parties.’<sup>118</sup> One of Kennedy’s most important contributions to critical legal scholarship is his insistent and penetrating reminder that there is an enormous variation of imaginable ways in which the ground-rules or basic structures of a market-based society can be defined. ‘In almost any type of situation, we can imagine modifying them so far in one direction or another that the outcome of struggles in that type of situation will also be dramatically modified. In this sense, law is at least partially responsible for the outcome of every distributive struggle between the classes.’<sup>119</sup>

Kennedy’s point about the distributive implications of various property and market structures can be expanded by noting that law is also responsible for determining the permissible impact that economic activity can have on the natural environment. Modifying the background structures within which economic activity occurs can, and probably will, affect the ways in which a private property / market system, as a whole, relates to nature. Since private property / market systems can take so many forms, however, the legal construction of a particular version requires lawmakers to make judgements about the ‘proper’ way human beings should relate to nature.

These distributive and ecological points which are developed below are lost on those who think of property, contract, and market rules as constituting a neutral framework within which individuals can pursue their own conception of the good life.<sup>120</sup> We cannot say that a particular distribution of wealth and power is just, or a particular market relationship to nature is just, unless the property, contract, and

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<sup>117</sup> Ibid 327.

<sup>118</sup> Ibid 329.

<sup>119</sup> Ibid 331.

<sup>120</sup> Anatole France put the point sardonically: ‘The law, in its majestic equality, forbids rich and poor alike to sleep under bridges, to beg in the streets, and to steal bread.’ See Anatole France, *The Red Lily* (2009) 51.

market rules constituting and governing the marketplace are just, and those background rules are not inherently just but always contestable, partly because there are so many possibilities. Since there are so many possibilities, however, and since the correct or best one is not deducible from conceptual analysis, the choice of rules is ultimately a value-laden question of policy. The corollary of this – one highly relevant to the central argument of this thesis – is that lawmakers are entitled to structure market relations and property entitlements with the explicit purpose of achieving a certain end-state or promoting certain values. They are entitled to do so because the state will be affecting the end-state and promoting certain values *whatever* it does, even if it seems to be doing nothing by simply conserving the status quo.<sup>121</sup> Some examples may help to clarify these points.

## 8.2. *The Politics of Private Property*

The neutrality objection, as defined, holds that lawmakers should not define property rights with an eye to affecting the distributive outcome or end-state of free market transactions.<sup>122</sup> Building upon the discussion above, it will now be shown that the neutrality presupposed by this objection is unattainable. Choosing particular examples to express this point is somewhat arbitrary, however, since critical property theorists have shown that almost any rule of property law could be moulded into various forms, with each variation having different implications on the distribution of wealth and power in society.<sup>123</sup> But to begin with a classic example – useful because it clearly expresses a point which could be made in countless different contexts or scenarios – consider the on-going and defining clash between capital and labour over the distribution of the fruits of economic cooperation. Does property law merely provide a neutral framework within which the parties bargain for their fair share of the product? Or does property law directly and necessarily affect the distribution of the product?

One way to gain insight into this issue is to imagine a case in which a court must determine whether or not a factory owner's 'bundle of rights' includes the 'right to

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<sup>121</sup> Eric Freyfogle expands on the point of 'omissions' as follows: 'When the law affirmatively constrains a particular land use – as nuisance law does, for instance – it openly favors one land use (the use being protected) at the expense of another (the use being constrained). Yet even when the law remains silent, allowing both competing land uses to proceed, it nonetheless resolves a land-use dispute and therefore also incorporates a policy judgement.' See Freyfogle, *The Land We Share*, above n 7, 20.

<sup>122</sup> For example, see Louis Kaplow and Steven Shavell, 'Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income' (1994) 23(2) *J. of Leg. Stud.* 667 (arguing that governments should not seek to distributive wealth by reconfiguring private law rules, since whatever goals are being sought by such reconfiguration, they could be achieved more efficiently through taxation).

<sup>123</sup> See generally, Singer, *Entitlement*, above n 5.

exclude' union organizers from the workplace. Confronted by this scenario, the court cannot just formalistically or mechanically apply the meaning of property concepts to the dispute in question and objectively arrive at a neutral, non-distributive solution. It cannot do that because, as we have seen, the meaning of 'ownership' is indeterminate. In this scenario, the court has to make a policy decision about what it means to own a factory in this particular society. Does the owner have a right to exclude the union organizers? Or does a worker's right to organize trump that interest? Property law must provide an answer to such questions and in doing so it necessarily shapes the contours of social relations within a society.<sup>124</sup> If the court rules that the owner can exclude the union organizers, this may strengthen the bargaining position of the owner when it comes to negotiating wages. On the other hand, if union organizers are permitted to enter the workplace for organizational purposes, this may strengthen the bargaining position of the workers and lead to higher wages.

The point is that there is no way that the court can determine this issue without being implicated in value-laden questions, not only about the nature of property law, but more fundamentally about how wealth and power should be distributed in a society.<sup>125</sup> Whichever way the case is decided, the distributive result could arguably be described as being a product of 'voluntary contracting,' but the distribution could well be different in each case. It would be arbitrary, therefore, to label one particular outcome as the 'natural' or 'neutral' result of voluntary contracting when any and every distribution is partially a function of property law. John Christman expresses the point concisely: 'Distributive justice must concern itself not just with "who has what" but with the nature of "having."' <sup>126</sup> And as the above example shows, the nature of 'having' partially determines 'who has what.'

This critical analysis of property law can be extended by considering what happens when property rights conflict. In such circumstances, courts have no option but to determine which property rights prevail and to what extent. Recall the case of *Lenk v. Spezia*,<sup>127</sup> discussed in the Introduction, which involved the beekeeper (Lenk)

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<sup>124</sup> See generally, Joseph Singer and Jack Beermann, 'The Social Origins of Property' (1993) 6 *Can. J. L. & Juris.* 217.

<sup>125</sup> As Kennedy writes in this context: 'Looked at in this way, judges influenced the distribution of income between workers and owners when they decided whether or not a secondary boycott (union refuses to deal with employer X to induce him to stop dealing with employer Y, with whom the union has a dispute) was legal or illegal. When Congress much later outlawed secondary boycotts, it changed the balance of power between labor and capital. And when judges today decide in doubtful cases whether a particular tactic falls into that category, they are deciding the distributive consequences of the statute.' Kennedy, 'Stakes of Law,' above n 116, 329.

<sup>126</sup> Christman, above n 46, 4.

<sup>127</sup> *Lenk v Spezia* 95 Cal. App. 2d 296 (CA, 1949).

and the tomato farmer (Spezia). Lenk wanted to continue using his land to harvest honey, as he had done for thirty-eight years. Spezia was an industrial farmer of tomatoes who had started using pesticides to protect his tomatoes from insects. A conflict arose because Spezia's land use clashed with Lenk's land use, insofar as Spezia's use of pesticides was killing Lenk's bees. Whose property rights were to prevail in these circumstances and to what extent? Once again, such disputes cannot be resolved by conceptual analysis alone, so courts inevitably have to base their decisions and 'take a stand' on policy grounds. Leaving the merits of this particular case to one side, the immediate point is that whether the court protected Spezia's industrial use of land (as it did) or Lenk's more agrarian use of land, neither policy could be regarded as a neutral decision. Whichever way the case was decided, *law would be privileging certain values and promoting a certain form of life*.<sup>128</sup> When we remember that private property can take any number of forms, it becomes clear that property law has a much greater 'causal' role in shaping society than conventional liberal theory acknowledges. It is important to add that if a governing legislature concludes that certain property disputes were incorrectly decided by the courts, it could always pass a statute reversing such decisions, for example, by prohibiting certain pesticides or regulating their use, etc. Similarly, a legislature could, and often does, pre-empt such issues and act before any such disputes even get to court.<sup>129</sup> Whether such legislation would be 'regulating' property or 'protecting' property depends on one's perspective, a point which again blurs the distinction between the 'free market' and 'regulatory systems' and makes any dogmatic call for 'deregulation' just seem confused.<sup>130</sup>

I would like to dwell on this example of land use for a moment longer because it raises an important point about the somewhat limited focus of much critical property theory. Traditionally, critical legal scholars focused almost all of their attention on issues of distribution of wealth and power between classes, races, and genders.<sup>131</sup> Undeniably, these are concerns of the highest order, and many of the insights of critical legal studies remain relevant today. Nonetheless, critical legal scholars paid relatively little attention to ecological concerns, and as the evidence of environmental degradation has mounted in recent decades this short-coming seems increasingly significant and in need of redress. Fortunately, the analytical tools and perspectives

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<sup>128</sup> This point will take centre stage in the next two chapters.

<sup>129</sup> See generally, Mark Stallworthy, *Understanding Environmental Law* (1st ed, 2008) (noting that 'regulatory regimes... have predominantly supplanted common law as the main legal mechanism for environmental protection).

<sup>130</sup> See Giandomenico Majone (ed), *Deregulation or Re-regulation?: Regulatory Reform in Europe and the United States* (1990).

<sup>131</sup> See generally, David Kairys, *The Politics of Law: A Progressive Critique* (Revised ed, 1990).

provided by critical legal scholars (including the legal realists) are highly relevant to environmental issues and prove enlightening when applied in this different context. Green property theorists have been engaged in such an undertaking for some time,<sup>132</sup> and the emerging Earth jurisprudence movement promises further contributions.<sup>133</sup> In later sections and chapters, some of this scholarship will be explored in more detail. Presently, however, I would simply like to explain how some of the insights of critical property jurisprudence discussed above can be recontextualized to show their ecological significance.

In the examples above, it was shown how defining property entitlements necessarily has distributive implications. But those examples generally pertained to the distribution of wealth and power between present generation labourers and capitalists; or between present generation owners of land; or between present owners and their contemporary community. While those examples still raise ecological questions, in themselves – some of which have already been brought to the surface – critical property theory greatly expands its scope and significance when inter-generational questions enter the distributive equation. One of the defining themes of environmentalism is that present economic activity is jeopardizing the prospects of future generations to satisfy their legitimate needs by damaging ecosystems and impacting on biodiversity in potentially irreversible ways.<sup>134</sup> This is often and properly discussed as a question of distributive justice – inter-generational justice.<sup>135</sup> Accordingly, since defining property rights is necessarily a distributive task, there is no reason to think that when those rights are defined the interests of future generations should not be part of the equation.

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<sup>132</sup> The literature is now vast. As well as examples already cited, other prominent examples include: David Hunter, 'An Ecological Perspective on Property' (1988) 12 *Harv. Envtl. L. R.* 311; Peter Byrne, 'Green Property' (1990) 7 *Constitutional Commentary* 239; Eric Freyfogle, 'Ownership and Ecology' (1993) 43 *Case Western Reserve L. R.* 1269; Joseph Sax, 'Property Rights and the Economy of Nature' (1993) 45 *Stan. L. R.* 201; Terry Frazier, 'The Green Alternative to Classical Liberal Property Theory' (1995) 20 *Vt. L. R.* 299; Terry Frazier, 'Protecting Ecological Integrity within the Balancing Function of Property Law' (1998) 28(1) *Environmental Law* 53; Lynda Butler, 'The Pathology of Property Norms: Living Within Nature's Boundaries' (2000) 73 *S. Cal. L. R.* 927; Carl Circo, 'Does Sustainability Require a New Theory of Property Rights?' (2009) 58(1) *U. Kan. L. R.*; David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (2011, forthcoming).

<sup>133</sup> See generally, Peter Burdon (ed), *An Invitation to Wild Law* (2011, forthcoming).

<sup>134</sup> See generally, World Commission on Environment and Development, *Our Common Future* (1987). It is worth reiterating that international environmental statements such as *Our Common Future*, while they express concern for future generations, do not see economic growth as incompatible with sustainability. See Klaus Bosselmann, *The Principle of Sustainability: Transforming Law and Governance* (2008) 1.

<sup>135</sup> See generally, Axel Gosseries and Lukas Meyer (eds), *Intergenerational Justice* (2009); Edith Weiss, 'Our Rights and Obligations to Future Generations for the Environment' (1990) 84 *American Society of International Law* 198.

The central point being advanced in this section is that examples like those given above are not exceptional or isolated incidents but the norm. Whenever lawmakers determine the content of property law they are implicated in the distribution of wealth and power both within and between generations, and determining the 'proper' distribution is necessarily a value-laden exercise. As Chief Justice Joseph Weintraub put it, 'Property rights serve human values. They are recognized to that end, and are limited by it.'<sup>136</sup> Each incident of ownership (e.g. the right to use, the right to exclude, the power to transfer, the duty not to harm, etc.) can take many forms, and when lawmakers are called upon to determine the content of each incident they are necessarily engaged in political (non-neutral) activity, in the sense that whatever they do – even if they do nothing – they will benefit some individuals, groups, and interests in society more than others. Seen in this light, property law is an important vehicle for normatively structuring relations of wealth and power in a society and a means of expressing the relations of responsibility that a society wants to encourage.<sup>137</sup>

Examples of the political nature of property would proliferate if we expanded our understanding of the laws of property to include environmental protection laws, zoning laws, consumer protection laws, workplace safety rules, banking rules, building codes, etc. Although almost no one would call for the wholesale abolition of these bodies of law, there is considerable, often heated, political debate over the 'proper' form and scope of those laws. And this should be of no surprise. Each of them functions to shape the meaning of property entitlements (among other things) in a society, and in various, complex, and often subtle ways, they all have distributive and ecological effects. Property law, therefore, is an inherently political creature. What this means, of course, is that the post-growth jurisprudence of property being advanced in this thesis is itself a 'politics' of property, and inevitably so. It also follows, however, that those who claim that the state should simply conserve the existing property regime are not promoting 'neutrality' in any coherent sense, but are themselves consciously or unconsciously promoting a particular politics of property also. The epithet 'politics,' therefore, ought to lose all the pejorative connotations it is sometimes given by conservative thinkers on the grounds that there is no 'apolitical' property law that can be differentiated from the 'political.'<sup>138</sup> In short, the laws of property law are political all the way down.

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<sup>136</sup> *State v Shack* 277 A2d 369, 372 (NJ, 1971).

<sup>137</sup> See Jennifer Nedelsky, 'Reconceiving Rights as Relationship' (1993-4) 1 *Rev. Const. Stud.* 1.

<sup>138</sup> See Stanley Cavell, 'Politics as Opposed to What?' (1982) 9(1) *Critical Inquiry* 157.

### 8.3. *Politicizing the Economy in General*

A brief discussion of contract law should suffice to show how critical jurisprudence has politicized not just the property system but the economy in general. Freedom of contract is sometimes claimed to be a neutral doctrine of law because it seems to allow for individuals to determine their own, mutually beneficial agreements without having the terms of exchange intrusively determined by the state. From a libertarian perspective, the state's fundamental obligation in relation to contract law is to respect the 'will of the parties' by enforcing the terms of exchange as stipulated in the contract. From an economic perspective, any interference with 'voluntary contracting' inhibits mutually beneficial exchanges and is therefore presumptively unjustified, since every exchange forgone would make both potential parties worse off than they would otherwise have been. According to these views, contract law is not a proper instrument for redistributing wealth and power, in the sense that those who are responsible for designing the rules of contract law – that is, courts and legislatures – should not do so with an eye to their distributive effects or in an effort to coercively achieve a 'fair' distribution of wealth and power. After all, it could be argued, in a 'free market' a fair distribution is what is naturally produced when free individuals are left alone to engage in voluntary contracting.<sup>139</sup>

The problem, of course, as we have seen, is that what constitutes 'voluntary contracting' is not self-defining. The state must define its meaning, but it cannot do this objectively with reference to concepts alone (since they are indeterminate), so it must do so politically with reference to policy (which gives content to indeterminate concepts). Most people accept that only contracts entered into voluntarily should be respected and enforced, but the critical point made in a different context above is that it is not always easy to determine when circumstances deprive an agreement of its voluntariness. Everyone would agree that in circumstances of physical duress – 'sign this or else you'll be beaten' – a contract should not be enforced. But as earlier discussions demonstrated, coercion of some sort is involved in every contractual negotiation. Often that coercion is purely economic – 'sign this or you'll not get what I have' – but in the face of hunger, outstanding rent payments, debts, etc., economic coercion can often be extremely strong, even compelling. As Hale wrote, 'the power which one party to a transaction has over the other party may greater exceed the power which the latter has to resist – may so greatly exceed it, in fact, as to justify us

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<sup>139</sup> See, e.g., Hayek, above, n 2; Friedman, above n 2; Nozick, above n 2.

in referring to him who possesses it as “governing” the other.’<sup>140</sup> A complex question arises, therefore, about when legally permissible economic coercion crosses the line and becomes legally impermissible economic duress, thereby vitiating the voluntariness of the contract. Again, this is a political question, and an extremely important one. The state is obliged to draw a legal line, but *where* to draw the line is an undertaking that can never be neutral, since it will always have distributive implications and affect different people and interests differently.

This point can be unpacked by again considering an employment contract. When a state dictates that employment contracts must have parental leave provisions, sick pay provisions, annual leave provisions, minimum wage provisions, etc. it is distributing wealth and power from employers to employees. Abolishing or weakening such provisions would do the reverse. Some might oppose such state-imposed terms on the grounds that they are a violation of ‘freedom of contract,’ but if we take the notion of economic coercion seriously, it can be argued that such mandatory terms do not violate freedom of contract but are actually required to realize it, in the sense that the mandatory terms would be unconditionally insisted upon by free individuals if there was a sufficiently balanced distribution of power in bargaining. The present point is not that such state-imposed terms are justified or unjustified. The point is that in defining freedom of contract the state has no choice but to take a stand on the politically controversial issue of the legitimate distribution of private bargaining power in the marketplace. And it should not be presumed that state ‘non-interference’ in the marketplace is the best way to promote freedom of contract. When there is an imbalance in bargaining power, it is just as likely that the state is required to enter the marketplace to ensure that bargaining satisfies the requirements of a genuinely free contract.<sup>141</sup>

Before proceeding there is another, related point that deserves some attention. The state impacts on the outcome of bargaining not only in how it defines property rights and freedom of contract, but also by determining what *alternatives* there are to bargaining. A person’s bargaining strength depends significantly upon the availability

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<sup>140</sup> Robert Hale, ‘Hale Papers: Folder 80-16,’ quoted in Samuels, above n 83, 296.

<sup>141</sup> Essentially this issue was at the heart of the U.S. case of *Coppage v Kansas* 236 U.S. 1 (1915). This case arose because the Kansas state legislature had passed a statute outlawing ‘yellow dog’ contracts (i.e. contracts in which employees agreed, as a condition of employment, not to engage in union activities). Again, without going into the merits of the judicial decision, the point is that the court was forced to determine what the indeterminate notion of ‘freedom of contract’ meant and in doing so it was implicated in the distribution of wealth and power. The same point could be made in many other contexts. For example, should employers be able to hire substitute workers during a strike? If an employer is ‘legally privileged’ to do so, striking may be an ineffectual bargaining strategy, weakening the employees’ position. If the law forbids this practice, the balance of bargaining power shifts toward the employees, since the employer must negotiate from a closed plant. When the law decides such questions, it distributes wealth and power. See Kennedy, ‘The Stakes of Law,’ above n 116, 431.

or nature of alternatives, and I do not mean the availability of entering alternative bargains (though that can be very important too); I mean what realistic opportunity there is not to bargain at all, at least not immediately. The laws of property will coerce people into the wage-system under penalty of starvation if those people have no alternative means of providing for themselves and their dependants. If there is an alternative, however, this provides a prospective employee with significantly more bargaining power, since the employee has the option of strategically leaving the bargaining table altogether (at least for a time, perhaps). This may well affect the terms and conditions put on the table in the first place, which in turn will probably affect the resultant distribution of wealth and power in a society. The point is that lawmakers are partially responsible for the availability and nature of alternatives to bargaining.

The presence or absence of an unemployment benefit, for example, can be deemed a partial alternative. If there is no such benefit or its provision is highly uncertain or draconian, a person is likely to accept work under any terms and conditions (even if exploitative) rather than risk having no income at all. The availability of state housing may also provide something of a 'safety net' which may provide some sense of security from destitution. State funded 'soup kitchens' may do the same. To some extent, a society with even these minimal 'alternatives' will provide more bargaining power to those who are economically insecure than a society with no safety nets at all. A more radical policy, gaining some attention in parts of Europe and elsewhere, would be to introduce a Basic Income or Citizen's Wage which would unconditionally guarantee every permanent resident with a weekly or monthly stipend sufficient to provide for one's most basic material needs.<sup>142</sup> Such an initiative would arguably change the nature of bargaining significantly, since everyone would be able to leave the bargaining table unless decent terms and conditions were provided. I will not here try to defend any of these policies or the countless other possibilities which could shape the nature of 'alternatives' to bargaining in a society. My point is only that the availability of alternatives – which is primarily a function of law – can affect bargaining position in a society and thus have distributive implications.

The examples of property, contract, and market rules discussed above do not come close to exhausting the range of issues in which lawmakers are implicated in the value-laden construction of a private property / market system. The examples

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<sup>142</sup> The notion of Basic Income is explored further in final chapter.

provided were but fragmentary reflections of a general situation. The central theme permeating the discussion so far has been that capitalism as we know it is not the only version of a private property / market system available and that the type of system chosen by lawmakers – even if the choice is to maintain the status quo – is a value-laden decision for which those lawmakers must take responsibility (and, by extension, be held accountable). It is certainly no excuse for lawmakers to say that existing inequalities of wealth and power in a society, or the existing societal relationship to nature, are simply the neutral or natural outcome of ‘market forces,’ because those forces flow through malleable, legally constructed channels.

Perhaps Hale, making a comment on distributive justice, deserves the last word on this point:

[A]s there is no one set of inequalities that must necessarily flow from property and contract, it cannot be asserted dogmatically that a statutory rearrangement of the existing inequalities will necessarily involve more restrictions on liberty and more impairment of property rights than the reverse. It may merely have the effect of weakening the liberty and property of the more favored to strengthen the liberty and property of the less favored.<sup>143</sup>

#### 8.4 *The Question of Historical Entitlement*

‘Get off this estate.’

‘What for?’

‘Because it is mine.’

‘Where did you get it?’

‘From my father.’

‘And where did he get it?’

‘He fought for it.’

‘Well, I’ll fight you for it.’<sup>144</sup>

One final way to deconstruct the ‘neutrality’ objection is to accept the political theory upon which it is based (or could be based) and see what force the objection has on its own terms. This assessment could be made by turning to the libertarian theory of Robert Nozick, who famously argued in *Anarchy, State, and Utopia* that a state is justifiable only if its role is limited to the narrow, purportedly *non-distributive* functions

<sup>143</sup> Quoted in Samuels, above n 83, 337. I would only add that such legal ‘rearrangement’ need not only concern itself with notions such as ‘liberty’ and ‘property’ but also with notions such as ‘environment.’

<sup>144</sup> From Carl Sandburg’s, ‘The People, Yes,’ quoted in Barry Price and Roslyn Simowitz, ‘In Defense of Government Regulation’ (1986) 20(1) *J. of Econ. Issues* 165.

of protection against force, theft, fraud, and the enforcement of contracts. It was demonstrated above that it is simply impossible for a state to fulfil even those narrow functions without making distributive decisions, but those arguments will not be repeated here. Instead, it will be argued that Nozick's theory, even on its own terms and assumptions, leaves considerable room for regulatory or interventionist policies, an implication of his theory that is not widely appreciated.<sup>145</sup>

Nozick's 'historical entitlement theory of justice' is based on three principles of justice (which, for the purposes of this section, will be accepted as valid): (1) *the principle of justice in acquisition*, which defines how things not previously owned can be justly acquired; (2) *the principle of justice in transfer*, which defines how things already owned may be justly transferred from one person to another; and (3) *the principle of rectification*, which holds that no one is entitled to property except by (repeated) applications of 1 and 2.<sup>146</sup> This entitlement theory of justice is 'historical,' Nozick explains, because 'whether a distribution is just depends on how it came about.'<sup>147</sup> He opposes his theory to 'patterned' or 'end-state' theories of justice – John Rawls', in particular – which judge the legitimacy of a particular distribution not by how it came about as by how it ends up.<sup>148</sup> The most significant consequence of Nozick's theory is that a state has no right to intervene and tamper with a distribution of wealth if that distribution arose from the free decisions of individuals acting in accordance with the three principles of justice. In particular, Nozick's central libertarian claim, for which he is infamous, is that 'the state may not use its coercive apparatus for the purpose of getting some citizens to aid others.'<sup>149</sup>

Ever since its publication in 1974, Nozick's theory has been the subject of sustained and often devastating criticism.<sup>150</sup> Those criticisms will not be reviewed here. Rather, I want to focus on one aspect of Nozick's theory that has received less attention than it deserves, namely, how its non-distributive claims are wholly dependent upon the assumption that the current distribution of wealth is a result of historic justice in acquisition and transfer. As stated above, Nozick's theory holds that a distribution is just if and only if it is a result of people acquiring and transferring

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<sup>145</sup> Nozick, above n 2. Although the analysis below is limited to Nozick, it will become clear that the argument is applicable to all private property systems that accept that the state has a role to play in rectifying historic transgressions of property rights (e.g. theft, fraud, etc.).

<sup>146</sup> Nozick, above n 2, 151.

<sup>147</sup> Ibid 153.

<sup>148</sup> Nozick criticizes 'patterned' theories on the grounds that they would require constant redistributions to preserve the proper pattern of holdings, which Nozick argues is incompatible with a respect for individual liberty. Nozick's 'Wilt Chamberlain' example is designed to illustrate this point. Ibid, 160-3.

<sup>149</sup> Ibid ix.

<sup>150</sup> For a review and development of the most prominent criticisms, see Jonathan Wolff, *Robert Nozick: Property, Justice and the Minimal State* (1991).

property in accordance with the principles of justice in acquisition and transfer. In such circumstances, Nozick argued, the state must not use its coercive apparatus to redistribute wealth. Nozick's theory also holds, however, that if the principles of justice in acquisition and transfer are ever breached, 'the principle of rectification comes into play.'<sup>151</sup> This third principle, which seeks to 'rectify' any historic violations of property rights, is absolutely necessary to Nozick's theory, as he was the first to admit; yet it is the point at which his entire project comes undone. At first Nozick made it sound as if the principle of rectification was of no great significance, just a matter of making a few minor distributive adjustments here and there to correct isolated incidents of historic injustice. But in the fullness of time he came to acknowledge, albeit in passing, that his theory of a non-distributive state placed great justificatory weight upon something too fragile to bear it. The essential critique can be stated quite briefly.

Here is Nozick outlining the principle of rectification:

This principle uses historical information about previous situations and injustices done in them (as denied by the first two principle of justice and rights against interference), and information about the actual course of events that flowed from these injustices, until the present, and it yields a description (or descriptions) of holdings in the society. The principle of rectification presumably will make use of its best estimate of subjunctive information about what would have occurred (or a probability distribution over what might have occurred, using the expected value) if the injustice had not taken place. If the actual description of holdings turns out not to be one of the descriptions yielded by the principle, then one of the descriptions yielded by the principle must be realized.<sup>152</sup>

When Nozick concludes that 'one of the descriptions yielded by the principle must be realized,' what he means, of course, is that the state is not just entitled but obligated to make redistributive transfer payments if, on the balance of probabilities, such redistribution would rectify or help rectify historic injustices. Accordingly, Nozick is forced to concede (with his emphasis) that 'one *cannot* use the analysis and theory here to condemn any particular scheme of transfer payments [from some citizens to others], unless it is clear that no considerations of rectification of injustice could apply to justify it.'<sup>153</sup> In this passage Nozick admits that there is ample space *within* his theory for a scheme of 'transfer payments' from some citizens to others, if the

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<sup>151</sup> Nozick, above n 2, 230.

<sup>152</sup> Ibid 152-3.

<sup>153</sup> Ibid 231.

principle of rectification could apply to justify it. Of even greater significance, however, is the striking presumption that Nozick sets up in *favour* of transfer payments. He does not say that we must condemn all transfer payments unless it is clear that they are justified by considerations of rectification; he says we cannot condemn transfer payments unless it is clear that considerations of rectification do not justify them. And so the Nozickian burden of proof is on those who oppose transfer payments, not on those who would make them. What this means, given the limits of historical knowledge, is that it will often be very difficult *on Nozick's own terms* to condemn any scheme of transfer payments made in rectification of historic injustices. This conclusion directly contradicts Nozick's primary thesis that 'the state may not use its coercive apparatus for the purpose of getting some citizens to aid others.'<sup>154</sup> Nozick conceded that actually it both could and should (for purposes of rectification).

That first concession is followed immediately by a second one, related to the first. To use Nozick's words again: 'Although to introduce socialism as the punishment for our sins would be to go too far, past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them.'<sup>155</sup> What is most interesting about this passage is not that Nozick again acknowledges the legitimacy of 'a more extensive state,' but that he is only prepared to rule out socialism as a means of rectifying past injustices. It would seem to follow that there is room *within* Nozick's theory for highly redistributive versions of the welfare state, provided only that socialism is not introduced. This point suggests that the reputation of *Anarchy, State, and Utopia* as a radical defence of the minimalist, non-distributive state is in need of revision. The pure libertarian assumptions needed to justify such a state leave room for very different political positions when applied to the real world.

The third and greatest of Nozick's concessions, however, is contained in the following passage, where the self-destruction of his non-distributive project is plainest:

Perhaps it is best to view some patterned principles of distributive justice as rough rules of thumb meant to approximate the general results of applying the principal of rectification of injustice. For example, lacking much historical information, and assuming (1) that victims of injustice generally do worse than they otherwise would and (2) that those from the least well-off group in the society have the highest probabilities of being the (descendants of) victims of the most serious injustice who are owed compensation by those who benefited from the injustices (assumed to be those better off, though sometimes the perpetrators will be others in the worst-off

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<sup>154</sup> Ibid ix.

<sup>155</sup> Ibid 231.

group) then a *rough* rule of thumb for rectifying injustices might seem to be the following: organize society so as to maximize the position of whatever group ends up least well-off in the society.<sup>156</sup>

Recall that Nozick set out to argue against any state more extensive than the minimal state,<sup>157</sup> against John Rawls,<sup>158</sup> and against the redistributive transfer payments required by ‘patterned’ theories of distributive justice.<sup>159</sup> Except for two pages in the middle of his lengthy book, those are indeed the arguments Nozick presented. But in the two pages where Nozick fleetingly discusses the rectification principle, the logic of his own analysis fundamentally undermined his entire project. By way of review, Nozick first conceded that ‘one *cannot* use the analysis and theory here to condemn any particular scheme of transfer payments [from some citizens to others], unless it is clear that no considerations of rectification of injustice could apply to justify it.’<sup>160</sup> We noted the implicit presumption here that the burden of proof is on those who *oppose* transfer payments, which is significant given how difficult that burden would be to meet due to the limits of historical knowledge. Second, Nozick conceded that, ‘Although to introduce socialism as the punishment for our sins would be to go too far, past injustices might be so great as to make necessary in the short run a more extensive state in order to rectify them.’<sup>161</sup> Far from showing the sole justifiability of a minimalist, non-distributive state, which the first two parts of his book purported to show, it turns out his underachieving theory merely excluded socialism from the list of justifiable options. And third, Nozick conceded that to rectify historic injustice, society should be organised ‘so as to maximize the position of whatever group ends up least well-off in the society,’<sup>162</sup> which, of course, is essentially the ‘patterned’ theory of justice put forward by John Rawls.

I am now in a position to relate this discussion back to the ‘neutrality’ objection. The purpose of this critical review of Nozick’s historical entitlement theory of justice was to problematize further the claim that a ‘neutral’ state, respectful of property rights, would not interfere with the distributive outcome of free market transactions. Leaving to one side the earlier critique (which showed that the state is necessarily implicated in distributive decisions when defining property and contract rights), the discussion of Nozick raises the question of the justice of the market’s *initial*

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<sup>156</sup> Ibid 230-1.

<sup>157</sup> Ibid ix-xi.

<sup>158</sup> Ibid xi.

<sup>159</sup> Ibid xi, 155-6.

<sup>160</sup> Ibid 231

<sup>161</sup> Ibid.

<sup>162</sup> Ibid.

*distribution*. If an initial distribution is just, it is at least arguable that the outcome of free market transactions flowing from that initial distribution is also just. If an initial distribution is unjust, however – i.e. a result of historical injustice – it is hard to imagine how the outcome of free market transactions could be just. In the latter case, even on the strictest libertarian terms, some redistribution seems called for to help ‘rectify’ historic injustice.

Interestingly, this line of reasoning turns the conventional view of redistribution on its head. Redistribution is typically thought of as being a threat to property rights. But when it is recognized that respecting property rights presumptively involves rectifying past violations of property rights, it becomes clear, as Nozick showed all too well, that redistribution is not always a *threat* to property rights but may in fact be required to *respect* property rights. It would take me well beyond the scope of this thesis to engage history and try to make a detailed assessment of how far the current distribution of wealth and power in any society is a result of historic injustice. My point is simply that redistribution cannot be fairly opposed until a judgement is made on the question of historic injustice, and that is a political question of the highest order. The purpose of raising the large, thorny question of historic injustice is not to answer it, but to suggest, first, that how it is answered is likely to affect, in significant ways, the legitimacy of redistributive programs (among other things); and second, that it is a questions of judgement which cannot be answered objectively but must be fought out in the non-neutral realm of politics where no clear-cut formula can provide the answer. It is certainly not a ‘neutral’ view of property rights to claim that the current distribution should be presumed just and not be interfered with.

I would like to close this section with a subtler point. Any distribution of wealth and power may be contaminated by overt instances of historic injustice, such as theft or fraud, and in such instances a respect for property rights calls for rectification. That much is obvious, even if the actual process of rectification is controversial and complex. In earlier sections of this chapter, however, it was demonstrated that distribution is also affected by the balance of power in bargaining, which in part is a function of law. Now, if the legal structure of the marketplace place was or is to some extent unjust – entailing, for example, elements of racial or gender discrimination – then the distributive outcome of market transactions will almost certainly be, to some extent, unjust also (leaving overt instances of theft or fraud to one side). My point is that an unjust balance of bargaining power may provide grounds for a redistribution of wealth (and power), in order to rectify such historic injustice. Put more directly, redistribution of wealth may be required today in the name of property rights, not in violation of them.

One problem with this approach, I hasten to add, is that determining what the distribution would have been in the absence of such injustices may often raise questions of incalculable difficulty, making the question of how best to rectify them highly uncertain. But, as Nozick (that radical redistributionist) would insist, a rough rule of thumb for rectifying injustices might be to ‘organize society so as to maximize the position of whatever group ends up least-well off in the society.’<sup>163</sup> Though I leave open the question of how best to rectify historic injustice, it seems fair to conclude that making *some* attempt at rectification along the lines suggested by Nozick (and Rawls) is much more likely to achieve, or move toward, justice than leaving the current distribution as it is. As Joseph Singer writes, ‘No response can ever be adequate, yet not to respond may be more inadequate still.’<sup>164</sup>

### 8.5 Summary

In the preceding sections I responded to the ‘neutrality’ objection to reform by arguing at length that the neutrality it presupposes is impossible to achieve. This point was demonstrated variously by showing that changing the background regime of property, contract, or market rules could change the outcome of market transactions. On that basis it was argued that it would be arbitrary to label any one market outcome ‘natural’ or ‘inevitable’ or ‘neutral,’ since every outcome is a function of law. Every outcome is a function of law because the central organizing concepts of ‘private property’ and ‘free contract’ have many conceptions, meaning that there are numerous ways to legally structure the marketplace and thus numerous distributions (both generational and inter-generational) that could result from market transactions. Moreover, even if the structure of the marketplace were deemed just, it would not produce a just end-state unless it were assumed that the initial distribution was just, and given the ubiquity (and, at times, ambiguity) of historic injustice, that would be to make a highly contentious, if not wildly implausible, assumption. What all this means, in short, is that *maintaining* the status quo is as much a value-laden, political decision as *reforming* it is. There is certainly nothing ‘neutral’ about maintaining the status quo, since that policy privileges certain interests over others in exactly the same way that reforming the status quo would, only the interests (or interpretation thereof) would be different. The question, then, becomes which interests to privilege and in which ways, and those are properly, indeed, inescapably, political decisions. It follows that there can be no objection to democratically mandated degrowth reform simply on the

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<sup>163</sup> Ibid.

<sup>164</sup> Singer, *Entitlement*, above n 5, 181.

grounds that it would involve lawmakers deliberately shaping property, contract, and market rules to privilege some interests over others, since every position involves privileging some interests over others. In the apt words of Joseph Singer, ‘Property implies a vision of the social world.’<sup>165</sup> Employing Singer’s terminology, the central argument of this thesis could now be rephrased as follows: *Current property relations in advanced capitalist societies imply a vision of the social world based on growth economics. By rejecting growth economics and infusing property relations with a vision of degrowth toward a steady-state, a new private property / market system ‘beyond growth’ could legitimately arise.*

## **9. THE EVOLUTION OF PRIVATE PROPERTY AND THE TRANSFORMATIVE POTENTIAL OF THE ‘DUTY NOT TO HARM’**

The chapter so far has established three central points, corresponding to the three objections which have structured the discussion. Those points are: (1) that due to the indeterminacy of property, contract, and market concepts, significant reform of a private property / market system is not a conceptual impossibility; (2) that the state is necessarily involved in defining property entitlements and market structures, a point which fundamentally blurs the private / public distinction; and (3) that defining those property entitlements and market structures implies a vision of the social world and therefore cannot be done in such a way that is neutral between conceptions of the good life. These three points open up the theoretical space needed for the ‘internal development’ of private property / market systems, since together they suggest that if a state’s social vision changes – perhaps due to public pressure<sup>166</sup> – so will the manner in which the state defines and interprets property, contract, and market rules. In this way, among others, private property / market systems can and do evolve.<sup>167</sup>

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<sup>165</sup> Ibid, 142. In an earlier publication Singer elaborates on what he means by a ‘social vision.’ Paraphrasing Singer, the phrase can be understood to have three different but related aspects: (1) A social vision creates a picture of the social world. That picture gives us our fundamental images about the relations among individuals and between individuals and the community. It directs our attention in a particular way; it tells us what is important to see in social life. Adopting a new social vision may redirect our attention to important facts that might otherwise have been obscured from our view; (2) a social vision tells us what counts as a relevant contribution to moral discourse. In this way a social vision may establish the terms of debate; and (3) a social vision may include a normative commitment to a particular form of social life. It may include judgements about how society should be organized and what relationships are good and to be fostered. See Joseph Singer, ‘The Reliance Interest in Property’ (1988) 40(3) *Stanford L. R.* 611, 627-8. For the purposes of this thesis, it is important to clarify that a ‘social vision’ also provides us with an image of the proper human relation to natural environment, a clarification Singer would presumably endorse.

<sup>166</sup> See Chapter Four.

<sup>167</sup> See also, Eric Freyfogle, ‘Taking Property Seriously,’ in Grinlinton and Taylor (eds), above n 132.

It is the argument of this thesis that such a process of legal evolution could lead to a property system beyond growth, so that process deserves some more attention. Building upon earlier discussions, the first section problematizes further the very notion of regulation by defining and discussing the ‘baseline problem’ and the ‘duty not to harm.’ The second section considers whether compensation is owed when wrongly held property rights are taken away.

### 9.1. *Understanding Reform as Maintenance and Protection*

Due to conceptual indeterminacy, it is impossible to determine mechanically when regulatory reform goes ‘too far’ – that is, interferes with legitimate property rights – simply by formally defining ‘property’ and then looking into whether or not it has been ‘taken.’<sup>168</sup> But how, then, *can* we determine the scope of legitimate reform? Suppose, for example, that a state decides to impose stricter and more ecologically sensitive property rules in relation to land and water use, such as prohibiting ‘intensive’ farming; limiting water extraction from rivers; curtailing urban sprawl; or enacting a moratorium on any further logging of native forests. Would such policies interfere illegitimately with the established private property rights of current landowners? Put otherwise, in what circumstances would state compensation need to be paid to those owners? More details are needed, obviously, but how should we begin thinking about these issues?

Eric Freyfogle, discussing the regulation of land use, sets the analysis off in the right direction: ‘First there is the matter of property: what are the exact private rights possessed by the landowner who is challenging the regulation? Once that’s answered we move to the second issue: Has all or some portion of this property been taken?’<sup>169</sup> Freyfogle notes that it is all too easy to skip over the first issue and jump to the second. ‘We ceaselessly talk about “takings” and how to define this term. We talk rarely about the rightful scope of property rights as a matter of public policy and how lawmakers might best keep it up to date.’<sup>170</sup>

Freyfogle’s point is highly significant, I believe, and one not limited to American ‘takings’ jurisprudence but applicable to all capitalist economies: we need to talk more about the ‘rightful scope’ of private property rights. By doing so we would draw

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<sup>168</sup> Although I will occasionally use terminology that is specific to American ‘takings’ jurisprudence, the question of when the state goes ‘too far’ and violates private property rights is clearly relevant to all private property systems with ‘just compensation’ clauses.

<sup>169</sup> Eric Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (2007) 67.

<sup>170</sup> *Ibid.*

more attention to the question of whether some proposed state intervention in the property system would *change* the prior regime or whether it would just *maintain and enforce* the ‘rightful scope’ of the prior regime. The answer we give to this question is critical. Landowners, for example, cannot claim that a regulation unjustly interferes with their private property rights and should result in compensation if those landowners never had (or should never have had) the rights to do what the regulation prohibits. But whether those rights exist (or should exist) is not always clear. This is sometimes called the ‘baseline problem’<sup>171</sup> – the problem of determining the baseline of existing property rights against which to measure regulatory interference – and for reasons outlined below I believe it contains the seeds for a radical politics of property.

Margaret Radin has done some important work diagnosing this ‘baseline problem.’ Consider an example of hers that clarifies the issue:

Suppose Susan is engaging in some activity on her land that has the effect of lowering the value of the neighboring land in some way. Then the government regulates land use in such a way as to deny Susan the right to engage in the activity, thereby lowering the value, at least to her, of her land. Can Susan claim that she is owed compensation for a taking of her property right? First we have to show whether Susan really possessed a property right to engage in the activity in question. If not, government regulation to prevent the activity is an action of corrective justice vis-à-vis the neighbors, and not a taking from Susan.<sup>172</sup>

To question whether Susan really possessed a property right to engage in the activity in question is to acknowledge, as everyone must, that property rights are not absolute but in some sense always limited.<sup>173</sup> Popular imagery aside, ownership does not and cannot entail the right to ‘do as one pleases’ with the property one owns, for that would be plainly self-defeating. It would allow others to use their property in such a way that harmed one’s own property or indeed oneself, and thus even hard-nosed libertarians like Epstein accept that the ownership of property necessarily entails a ‘duty not to harm.’<sup>174</sup> Property rights are inherently limited, therefore, since the ‘duty not to harm’ – which itself is not absolute – places limits on the ‘right to use,’ as Hohfeldian analysis showed long ago.<sup>175</sup>

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<sup>171</sup> See, e.g., Cass Sunstein, ‘Lochner’s Legacy’ (1987) 87 *Colum. L. R.* 873; Kennedy, ‘Cost/Benefit Analysis of Entitlement Problems: A Critique,’ above n 112.

<sup>172</sup> Radin, *Reinterpreting Property*, above n 25, 148.

<sup>173</sup> *Ibid* 98-119.

<sup>174</sup> See, e.g., Epstein, *Takings*, above n 30, 112-21.

<sup>175</sup> Hohfeld, above n 35.

One important consequence of this is that state regulation which prevents 'harmful use' cannot be considered a 'violation' of property rights, since property holders simply do not have the unqualified right to harm others or the property of others.<sup>176</sup> In other words, such preventative action by the state would not be 'taking' anything that owners ever held (or properly held), from which it follows that in such circumstances no right to compensation could arise. 'It is by no means clear,' Murray Raff correctly notes, 'why the right of a property owner to beneficial use of the property extends to environmental destruction and why the owner should be compensated for desisting from it.'<sup>177</sup> What this means, also, is that regulation of the property system which prevents 'harmful use' should not be understood to be *changing* the prior regime, but only *maintaining and enforcing* the 'rightful scope' of the prior regime in which the duty not to harm was always recognized.

In ways implied earlier, this blurs the distinction between 'property' and 'regulation.'<sup>178</sup> According to the libertarian model, regulation is normally conceived of as something that *interferes* with property rights. But when the state intervenes in the property system to stop 'harmful use,' then such intervention is not so much the *regulation* of property as it is the *maintenance* of the 'rightful scope' of property, even the *protection* of property. And this more accurate reframing of the issue could be of rhetorical significance to reformers, especially in today's neoliberal political climate where 'regulation' is such a dirty word.

Exactly what constitutes 'harm,' in this juridical sense, is indeterminate and often contentious, of course, but that just means it is a concept that can and should be defined collectively through democratic processes; that is, defined politically for the common good. As Freyfogle notes, 'Harm... is an elastic, vague concept that we can define in whatever way we deem wise. By redefining harm we can [for example] challenge and end land uses we don't want.'<sup>179</sup> He adds, however, with an air of caution, that 'government wields breathtaking power when it can define harm however it sees fit.'<sup>180</sup> This is surely true, but as the biosphere continues to be degraded it could well be argued that today there are far greater risks in the government not doing enough to enforce the 'duty not to harm' than there are in its doing too much.

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<sup>176</sup> Raff, above n 16.

<sup>177</sup> Ibid 659.

<sup>178</sup> Joseph Singer has perhaps done most to blur this distinction. See, especially, Singer, *Entitlement*, above n 5.

<sup>179</sup> Freyfogle, *On Private Property*, above n 169, 115.

<sup>180</sup> Ibid.

Another important implication of the duty not to harm is how clearly it illustrates the evolving, context-dependent nature of property rights. Libertarians tend to conceive of property rights as static and acontextual. Nozick, for example, conceives of property rights as rights that are created in a ‘moment’ of historical acquisition or transfer, such that the meaning and scope of those rights thereafter remain static.<sup>181</sup> The world may change, but property rights stay the same. When it is recognized that what constitutes ‘harm’ is not static, however, it becomes clear that the assumption that property rights are static is confused in that it fails to appreciate the internal dynamics of private property rights. The legal meaning of ‘harm’ is not static for at least two reasons.

The first reason is because human values change, and thus what once may have been considered permissible may come to be considered impermissible, and vice versa. In the introduction to this thesis the two cases of *Palmer* and *Sanderson* were discussed.<sup>182</sup> To reiterate briefly, prior to *Palmer*, common law tended to enunciate an agrarian view of property, a view that protected ‘quiet enjoyment’ and enforced the no harm principle strictly; beginning with *Palmer* and *Sanderson*, on the other hand, the common law started enunciating a pro-growth conception of property, one that was less concerned about the right to remain undisturbed and more concerned about the right to use one’s property rights for maximum financial gain. Harms that may once have been legally prohibited in an agrarian age came to be considered regrettable (and uncompensated) necessities in an industrial age which assumed the net social benefit of growth.<sup>183</sup> In much the same way, one could argue, the possibility seems quite open for the scope and nature of property rights to evolve once more, should an age arrive in which lawmakers revise their view on what constitutes harm. This point illustrates perfectly what Unger calls the mechanism of ‘internal development,’<sup>184</sup> since the duty not to harm which is ‘internal’ to private property can be the catalyst for the ‘development’ or ‘reform’ of private property, and in potentially significant ways.

The second reason the meaning of ‘harm’ can change is because human beings live in a world of imperfect knowledge, such that actions which may have seemed innocuous at first may, in the fullness of time, be demonstrably harmful in ways which were entirely unanticipated, even unforeseeable. One important manifestation of this

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<sup>181</sup> See Singer, *Entitlement*, above n 5, 91, 73-4 (criticizing Nozick’s ‘fixed’ conception of property rights).

<sup>182</sup> See Introduction, Sect. 2.2.

<sup>183</sup> See generally, Morton Horwitz, *The Transformation of American Law, 1780-1860* (1977).

<sup>184</sup> Unger, above n 19.

point is the problem of ‘cumulative impacts.’<sup>185</sup> Consider the riparian example discussed earlier in this chapter. One sawmill owner dams a river in such a way that no significant damage is caused to the river system. Later, another owner does the same, then another, and another, etc. In isolation, the acts do no discernable harm; cumulatively, they destroy the river system. When the first owner dammed the river, therefore, it can be argued that building a dam was within the ‘rightful scope’ of his property rights. When it later became clear that many such actions were destroying the river system, the ‘rightful scope’ of property rights arguably changed. For this reason, among others, it is clear that property rights are not static or acontextual entities but evolving creatures of legal convention that are properly shaped by context. The most prominent example of cumulative impacts today is the problem of carbon emissions. Without engaging this hugely complex issue here, the above analysis suggests that if a state accepts that emissions arising from currently accepted uses of property are actually causing unacceptable harm to the planet’s ecosystems, that state would be justified in amending the ‘rightful scope’ of property rights by enforcing the evolving duty not to harm. Again, this should not be conceived of as an ‘exterior’ restraint upon property rights, but a restraint arising from environmental and social obligations ‘interior’ to any coherent understanding of property in law.

In terms of the argument of this thesis, the upshot of this analysis is that as the various costs (harms) associated with growth intensify over coming years, the meaning of the duty not to harm should properly expand, thus narrowing the rightful scope of property rights. By intervening in the property system to enforce this duty not to harm, the analysis above suggests that the state would not be *changing* the prior regime, properly understood, but only *maintaining* or *enforcing* the ‘rightful scope’ of the prior regime in which the duty not to harm was always recognized. Put otherwise, laws prohibiting certain forms of environmental or social harm cannot be properly understood to be limiting property rights; such laws merely describe more clearly, in relation to a new situation or context, the inherent limits on ownership that already existed in the form of a duty not to harm.<sup>186</sup> Accordingly, such preventative action or maintenance would not be ‘taking’ anything that owners ever held (or properly held), from which it follows that in such circumstances no right to compensation should arise.<sup>187</sup>

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<sup>185</sup> Joseph Guth, ‘Cumulative Impacts: Death-Knell for Cost-Benefit Analysis in Environmental Decisions’ (2008) 11 *Barry L. R.* 23.

<sup>186</sup> See Freyfogle, *The Land We Share*, above n 7, 83.

<sup>187</sup> See Sax, above n 132, 1449-51 (discussing the general rule that loss of property rights due to legal evolution does not generate a right to compensation).

When deciding whether this type of analysis applies to a particular situation there is no mechanical formula that can be applied. Any such decision requires a contextualized normative judgement about what kind of restraints a society thinks it appropriate to expect of owners, in light of evolving social and ecological circumstances.<sup>188</sup>

## 9.2. *The Wrongful Holding of Property Rights*

The evolving, context-dependent nature of the duty not to harm, however, does not exhaust the reformative potential of the ‘baseline problem.’ Radin discusses another (closely related) aspect to the problem, which she calls the ‘wrongful delineation of property rights.’<sup>189</sup> This time the question she raises is how to deal with the issue of state responsibility for the wrongful holding of property rights. Again, she provides an example that clarifies the issue:

Consider the easy case in which we have all come to realize that previously recognized property rights were wrongful: slavery. It seems that it would be inappropriate to offer compensation to the disposed slave owners at the time of emancipation, even though their financial statements collectively showed considerably less net worth after emancipation. ... We should not accept for compensation purposes the very baseline that abolition recognizes as wrongful.<sup>190</sup>

What is significant about this example is that the reasoning it contains can be generalized to other, less extreme, cases. Consider, for example, the supposed rights of industrial farmers to use their land ‘intensively,’ of employers to maintain an unsafe workplace, of landlords to rent uninhabitable and unsafe housing, and of industrial producers to pollute air and water. Even if positive law has previously recognized these supposed rights, Radin points out that ‘once we decide that positive law has been wrong to do so, and that no such property rights do or should exist, it seems to contradict that recognition to turn around and grant compensation as if the property rights did exist after all.’<sup>191</sup> Arguably, then, any rights owners have or think they have to use their property in unsustainable or socially harmful ways are held wrongly and can be justly curtailed through democratic processes.

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<sup>188</sup> Radin, *Reinterpreting Property*, above n 25, 149.

<sup>189</sup> *Ibid* 150.

<sup>190</sup> *Ibid*.

<sup>191</sup> *Ibid*.

This analysis should unsettle all those property holders who are currently engaged in unsustainable or socially harmful practices (and it should give hope to the rest of us), for it suggests that when lawmakers come to recognize the wrongfulness of those practices, the previously recognized property rights permitting those practices will be curtailed or abolished, *without compensation* – much like what happened to the slave trade, and perhaps for similarly good reasons. And although powerful economic agents will cry out piously about the alleged sanctity of their property rights should any radical reformation of property threaten the status quo, if democracy prevails we may one day look back upon the ‘old property’ of today and wonder how it could ever have been tolerated for so long.

### 10. A COMMENT ON CRITICAL TAX THEORY

There are no property rights antecedent to the tax structure.

– Liam Murphy and Thomas Nagel

In anticipation of discussions later in the thesis, this chapter will close with a short statement on how critical property theory impacts on how taxation should be understood. Libertarians tend to understand taxation as justified only to the extent that it provides the state with resources to fund the institutions needed to protect property rights and enforce contracts, such as a national defence force, a domestic police force, a judiciary, etc.<sup>192</sup> Beyond these limited grounds, any further taxation is deemed *prima facie* objectionable on the grounds that it would intrude on individual property rights. This view treats ‘pre-tax’ income as the natural baseline of property rights against which to evaluate justice in taxation, and asserts that the state may only tax so much of that ‘pre-tax’ income as is needed to fund a minimal state. Less extreme positions may allow for a more extensive state of some form, but it would be fair to say that ‘pre-tax’ income is generally presumed to be the baseline of property rights against which people evaluate justice in taxation. This view of taxation is a manifestation of what Liam Murphy and Thomas Nagel call ‘everyday libertarianism,’ and in recent years those two theorists have presented a provocative case against such a view, particularly in their text, *The Myth of Ownership: Taxes and Justice*.<sup>193</sup> To monstrously oversimplify an intricate text, the argument essentially goes like this.

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<sup>192</sup> See David Duff, ‘Private Property and Tax Policy in a Libertarian World: A Critical Review’ (2005) 18 *Can. J. L. & Juris.* 23.

<sup>193</sup> Liam Murphy and Thomas Nagel, *The Myth of Ownership: Taxes and Justice* (2002). The argument of Murphy and Nagel’s text is based on the view that property rights are creatures of legal convention,

(1) Pre-tax income means income in the absence of taxes; (2) In the absence of taxes there would be no state, since every state depends on funding; (3) In the absence of a state there would be no defined or enforceable property system; (4) In the absence of a defined and enforceable property system there would be considerable insecurity of possession, since it can be assumed that social conflict would regularly erupt over the question of who rightfully has access to and control over which resources and when, making things like planning, cooperation, exchange, and production virtually impossible, or pointless; (5) In the absence of planning, cooperation, exchange, and production, economies would produce very little wealth and income; (6) Therefore, in the absence of taxes there would be very little wealth and income. (7) If, however, there would be very little wealth and income in the absence of taxes, we should not presume the distributive justice of pre-tax income, since that distribution is a function of the state's definition and enforcement of property, contract, and market rules which are dependent on taxes. (8) Instead, justice in taxation ought to be a matter of the distribution of after-tax incomes, not a matter of the distribution of tax burdens measured against the baseline of pre-tax incomes.<sup>194</sup>

This complex argument could be rephrased and simplified somewhat to situate it a little more clearly in the context of this chapter. If the state is needed to define and protect property rights (as this chapter has argued) then there can be no property rights antecedent to the tax structure, since taxes are needed to support the state institutions which define and protect property rights. But since there are many ways to define the property, contract, and market rules that produce and distribute income (as this chapter has also argued), pre-tax income is a product of legal convention and not a naturally occurring or presumptively just phenomenon. After all, if the state had defined property, contract, and market rules differently, the distribution of pre-tax income would have been different, making any claim to the 'naturalness' of pre-tax income nonsensical.<sup>195</sup> Taxation, therefore, should not be evaluated by looking at its impact on property, conceived as something that has an independent existence and

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although the authors do not go into any detail about what this means. The earlier sections of this chapter, therefore, can be understood as the theoretical groundwork for the following view of taxation.

<sup>194</sup> As the authors write, 'we have to evaluate the legitimacy of after-tax income by reference to the legitimacy of the political and economic system that generates it, including the taxes which are an essential part of that system.' Murphy and Nagel, above n 193, 33.

<sup>195</sup> As the authors claim elsewhere in the book, 'The money you earn under any system is yours because you have worked for it, but it is a mistake to think that what you have really earned is your pretax income....' Ibid 63.

validity. Rather, 'taxes must be evaluated as part of the overall system of property rights that they help to create.'<sup>196</sup>

Taxes, Murphy and Nagel explain, 'are not just a method of payment for government and public services. They are also the most important instrument by which the political system puts into practice a conception of economic or distributive justice.'<sup>197</sup> This is especially so when it is recognized that 'pre-tax' income has 'no independent moral significance.'<sup>198</sup> When putting a particular conception of justice into practice, however, those who formulate tax policies are faced with an enormous range of possibilities. Murphy and Nagel offer a brief review of a few of the main questions that have to be answered:

To what extent should education be financed out of tax revenues, or health care, or mass transportation, or the arts? Should taxation be used to redistribute resources from rich to poor, or at least to alleviate the condition of those who are unable to support themselves adequately because of disability or unemployment or low earning?

There are questions about the best form of taxation – whether it should be levied on individuals or business or on particular economic transactions, as by a sales tax or value-added tax. Should the base be wealth and property or the flow of resources over time – and in the latter case, should the measure be income or consumption? How should the tax system treat the transfer of resources within families and across generations, particularly at death?

There are issues about what should not be taxed – what level of minimum income, if any, should be exempt from taxation, for example, and what types of expenditures should be tax deductible or yield tax credits. There is [also] the perennial issue of proportional or 'flat' versus progressive taxes and of the appropriate degree of progressivity.<sup>199</sup>

Murphy's and Nagel's critical perspective on taxation calls for, or at least permits, a more central role for taxation in achieving socio-economic justice and environmental sustainability through the political process (as opposed to relying on the market alone to address such issues). It also means that we cannot sensibly address the question of how much tax revenue should be raised without also considering both the ways that revenue is spent and what we want tax policy to achieve in society. These are explicitly value-laden considerations. This understanding of the role of taxation, in itself, has no necessary policy implications. But the purpose of this chapter has not

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<sup>196</sup> Ibid 8.

<sup>197</sup> Ibid 3.

<sup>198</sup> Ibid 74.

<sup>199</sup> Ibid 5.

been to argue for particular policies, necessarily, but to show that a greater range of policies is on offer than what is commonly thought. By doing so, of course, the aim has been to open up the theoretical space needed for a post-growth jurisprudence of property to take root.

## 11. CONCLUSION: THE INESCAPABLE NORMATIVITY OF PROPERTY

Debates about how private property systems should be constructed or reconstructed in law are often surreptitiously constrained by the assumptions of libertarian reasoning. It is those assumptions which the analysis in this chapter has sought to bring into question. Such an exercise is important because those libertarian modes of thought obscure and disguise entrenched structures of wealth and power, insulating them from democratic reconsideration and making capitalism as we know it seem like the only alternative to state communism. Libertarian thought, which some have argued dominates popular thinking about property,<sup>200</sup> deflects attention away from the political choices benefiting some individuals, groups, and interests at the expense of others, and it unduly limits what reformative options appear democratically available. It can make the existing property regime seem ‘natural’ or ‘right’ or ‘just the way the world is,’ when, in fact, that regime is a contingent creation of our choosing, which we have made, and which can be democratically remade.

The aim of this chapter has obviously not been to resolve the analytical controversies surrounding what the concept of private property means; rather, the aim has been to articulate that concept in such way that does not unduly limit, as libertarianism does, the range of possible choices that can be made with respect to the institution of private property in advanced capitalist societies and beyond. The sub-text of the entire chapter has been that the problems facing capitalism are not problems of ‘private property’ or ‘the market,’ as such, but problems arising out of the dominant *forms* of those institutions which presently exist. Private property and the market are concepts that have taken many forms in the past and, even today, capitalist economies exhibit significant variation. What this chapter has tried to show is that even the variety of past and present forms of private property / market systems does not come close to exhausting the range of possibilities.<sup>201</sup> By formulating a post-growth jurisprudence of property, then, the objective of this thesis is not to offer a new *ontological* account of private property. Rather, on the basis of

<sup>200</sup> Murphy Nagel, above n 193, 31-3. See also, Meyer, above n 14.

<sup>201</sup> See Guth, ‘Law for an Ecological Age,’ above 4, 434 (‘Legal historians have shown that property rights have never been set in stone, and it can be surprising to realize just how malleable they have been over time. In fact, they have been continuously and sometimes dramatically modified through the centuries as our circumstances and social objectives have changed’).

the preceding discussion, the question which has opened up is *teleological*: What could (or should) private property become? A vast array of ecological and distributive options are available. There is no reason, therefore, why existing private property / market systems could not be radically reconfigured to serve the ecological and distributive aims of the degrowth movement, given the political will.





A person who is going to make a fruitful inquiry into the question of the best political [or legal] arrangement, must first set out clearly what the most choiceworthy life is. For if that is unclear, the best political [or legal] arrangement must also be unclear.

– Aristotle

### Chapter Three

## HOW MUCH PROPERTY IS ‘PROPER’? THOREAU’S ALTERNATIVE ECONOMICS

### 1. INTRODUCTION

The central theme in the last chapter was that property law, in particular, and the legal framework of the economy, in general, are inescapably normative constructions. What this means is that when lawmakers are creating and defining the property, contract, and market rules which structure and govern the economy, they cannot avoid making a vast multiplicity of value-laden decisions. ‘Law is politics,’ as the critical slogan goes,<sup>1</sup> which implies that the only way indeterminate legal concepts can be given concrete institutional content is by reference to policy considerations arising out of some normative framework.<sup>2</sup> Put otherwise, the last chapter argued that constructing and maintaining a private property / market system necessarily involves making value judgements about which goals a society should pursue and in what ways; how society should be organized; how competing interests should be ordered or prioritized; and which types of relationships should be structurally fostered and which should be structurally opposed. Joseph Singer neatly sums up this position with the phrase, ‘Property implies a vision of the social world,’<sup>3</sup> an insight which I argued applies not just to property law but to market construction and tax policy as well.<sup>4</sup>

Currently, as outlined in the Introduction, property and market relations in advanced capitalist societies (and increasingly elsewhere) are shaped by a vision of the social world in which sustained economic growth will eventually lead to a life of material abundance for all.<sup>5</sup> Any legal reforms which threaten to inhibit growth are

<sup>1</sup> See generally, David Kairys, *The Politics of Law: A Progressive Critique* (Revised ed, 1990).

<sup>2</sup> See Joseph Singer, ‘Normative Methods for Lawyers’ (2009) 56(4) *U.C.L.A. Law Rev.* 899.

<sup>3</sup> Joseph Singer, *Entitlement: The Paradoxes of Property* (2000) 142.

<sup>4</sup> Once again, the phrase ‘social vision’ is intended to include the vision of the proper relationships not only between people, but also between people and nature.

<sup>5</sup> See generally, Joseph Guth, ‘Law for the Ecological Age’ (2008) 9 *Vt. J. of Environ. L.* 431; Robert Collins, *More: The Politics of Economic Growth in Post-war America* (2000); Debal Deb, *Beyond*

rarely, if ever, given much of a hearing, since it is widely assumed that whatever social or ecological goals such reforms may be aiming to achieve, growth of the economic pie will be a more efficient path to their attainment.<sup>6</sup> Put simply, this pro-growth vision of abundance treats nature as a limitless resource for human consumption and it insidiously promotes a materialistic attitude to life by equating happiness and well-being with increased opportunities to consume.<sup>7</sup> Whatever basis of justification it may have had in the past, today there are compelling grounds for contesting this vision of abundance as well as the pro-growth conception of property it both shapes and is shaped by. Not only are the materialistic values underlying this vision proving to have undesirable effects on individual and social well-being,<sup>8</sup> but the process of globalizing Western-style consumption habits is placing an unsustainable burden on Earth's ecosystems and diminishing their capacity to support life in the future.<sup>9</sup>

One way to challenge the social vision of lawmakers and, by extension, the legal relations their particular social vision engenders, is to challenge the normative foundations upon which those legal relations rest. By logic of argument, that is the course this thesis must now take. It was argued in Chapter One that there are social, ecological, and economic reasons for affluent nations to reject growth economics, but those macro-economic arguments will not be repeated here. Instead, this chapter considers the normative question of what the most 'choiceworthy life' would be (to employ Aristotle's terminology)<sup>10</sup> if it were accepted that property relations in advanced capitalist societies should be reconfigured in accordance with a macro-economics beyond growth. For if that is unclear, as Aristotle would insist, a post-growth property system must also be unclear. In addressing this question, the chapter turns to the life and ideas of Henry David Thoreau, whose 'alternative economics' undermine the growth model of progress at the personal or ethical level. Since a degrowth transition to a steady state economy implies a reduction in overall consumption (in over-consuming societies, at least), it is my contention, for reasons

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*Developmentality: Constructing Inclusive Freedom and Sustainability* (2009); Clive Hamilton, *Growth Fetish* (2003).

<sup>6</sup> Wilfred Beckerman typifies this reasoning when he asserts, 'in the end the best – and probably the only – way to attain a decent environment in most countries is to become rich.' Wilfred Beckerman, 'Economic Growth and the Environment: Whose Growth? Whose Environment?' (1992) 20(4) *World Development* 481, 482. See also, Louis Kaplow and Steven Shavell, 'Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income' (1994) 23(2) *J. of Leg. Stud.* 667.

<sup>7</sup> See Clive Hamilton, above n 5; Clive Hamilton, *Requiem for a Species: Why We Resist the Truth about Climate Change* (2010).

<sup>8</sup> See Tim Kasser and Allen Kanner (eds), *Psychology and Consumer Culture: The Struggle for a Good Life in a Materialistic World* (2003); Tim Kasser, *The High Price of Materialism* (2002).

<sup>9</sup> See Chapter One, Sect. 3.

<sup>10</sup> Aristotle, *The Politics* (Rev. ed, 1981) 1323a 14-17.

explained below, that the post-growth jurisprudence of property being advanced in this thesis will make most sense to those who consider it in a Thoreauvian light.

### 1.1. *Law and Thoreau's Alternative Economics*

Before examining the details of Thoreau's alternative economics, it is important to explain more clearly what Thoreau is doing for this thesis and why his economic perspective has implications for law and legal analysis. Thoreau's economics are 'alternative' in the sense that they lie outside the macro-economic growth paradigm which dominates thinking about economic growth today.<sup>11</sup> According to growth economics, the overriding objective of governments is to grow the economy, one consequence of which is that property and market relations tend to be legally defined in such a way as to maximize growth as efficiently as possible.<sup>12</sup> Implicit to this growth paradigm – indeed, its foundation – is a conception of the 'legal subject' or the 'human being' more generally as a consumer who needs and desires ever-increasing consumption of goods and services to increase well-being.<sup>13</sup>

It is clear that from within the paradigm of growth economics a post-growth property system would seem misconceived, for the reason that such a system would not be designed to maximize exactly that which insatiable consumers value as the most direct means to well-being, namely, increased consumption of goods and services made possible by growth in per capita income.<sup>14</sup> But it is precisely the assumption that increased income/consumption always leads to increased well-being which Thoreau's alternative economics brings radically into question. In doing so, growth economics is brought radically into question, opening up normative space for an alternative economic perspective, and ultimately an alternative legal perspective, beyond growth.

This chapter will argue that Thoreau's critique of materialistic values and practices not only casts serious doubt on the idea that increased consumption of goods and services is always the best path to increased well-being; it also goes

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<sup>11</sup> See Stephen Purdey, *Economic Growth, the Environment and International Relations: The Growth Paradigm* (2010).

<sup>12</sup> See Introduction, Sect 2.

<sup>13</sup> For helpful review of the foundations of economic theories of consumption, see Neva Goodwin, Frank Ackerman and David Kiron (eds), *The Consumer Society* (1997) 149 (noting that 'standard economic theory... assumes that consumers come to the market with well-defined, insatiable desires for private goods and services').

<sup>14</sup> See Joel Magnuson, *Mindful Economics: How the U.S. Economy Works, Why it Matters, and How it Could be Different* (2008) 237 (arguing that the growth imperative of capitalism depends upon 'consumerism,' defined as 'a cultural norm that equates personal well-being with purchasing more and better material possessions').

significantly further, implying that in high-consumption societies like those in the developed world today, *reducing* consumption, in many cases, could actually *increase* well-being.<sup>15</sup> This directly contradicts the first premise of growth economics according to which more consumption is always better, and in doing so it raises the question of growth scepticism which is so central to this thesis. If a society is over-consuming, in the sense that reducing overall consumption could actually increase overall well-being, it is not at all clear why growth in per capita income should be a policy aim of lawmakers. Indeed, it is the argument of this thesis that the more a society is characterized by over-consumption, the less important growth in per capita income should be as a policy objective. More precisely, this thesis is arguing that the private property / market systems in highly developed regions of the world should not be legally structured with the goal of growing the economy; instead, more specific social and ecological objectives should be prioritized, even if doing so functions to inhibit growth.

Such an argument will be resisted, however, by all those who think that ‘the good life’ involves ever-increasing consumption of goods and services through growth in per capita income. For a post-growth jurisprudence of property to be attractive, then, it is absolutely critical that a sound case be made for why, in affluent societies, at least, increased consumption is no longer a ‘proper’ (or even a trustworthy) path to well-being. On that basis, this chapter uses Thoreau’s alternative economics to express an anti-consumerist ethics of consumption;<sup>16</sup> an ethics which, in some suitably recontextualized form (see Chapter Four), will need to inform the social vision of any society that is serious about reforming its private property / market system with the aim of transitioning, by way of degrowth, to a steady-state economy. Once again, this chapter’s extended excursion into questions of normative ethics and value is necessitated by the critical analysis in the last chapter, an analysis which showed that property and market concepts can only be given concrete legal content with reference to some normative framework or ‘social vision.’ That conclusion suggests that property theorists are not just entitled but *required* to engage questions of normative ethics and moral philosophy, and in this chapter (and the next) that challenge is explicitly accepted and taken up.

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<sup>15</sup> See, e.g., Cecile Andrews and Wanda Urbanska (eds), *Less is More: Embracing Simplicity for a Healthy Planet, a Caring Economy and Lasting Happiness* (2009). This point is explored further in the next chapter in the context of law and social movement scholarship.

<sup>16</sup> See David Crocker and Toby Linden (eds), *Ethics of Consumption: The Good Life, Justice, and Global Stewardship* (1998).

## 1.2. *The Various Interpretations (and Misinterpretations) of Thoreau*

To avoid a potential misunderstanding that may arise from the following discussion of Thoreau's life and ideas, one final preliminary point needs stating. Thoreau is probably most famous for the experiment in simple living that he undertook on the shores of Walden Pond during the years 1845-7, and that living experiment will in fact be the focal point of the following discussion, especially the account given of it in Thoreau's autobiographical manifesto, *Walden*.<sup>17</sup> It is in that text, supplemented by several essays, that Thoreau most powerfully conveys his economic philosophy, and those writings will be subjected to a close reading below. By focusing on Thoreau's living experiment, however, there is a risk that this chapter will be interpreted as a misguided recommendation for everyone to live exactly as Thoreau did – alone, in the woods, celebrating the agrarian ideal of a poet-naturalist. That is *not* the argument of this chapter, I wish to make clear. In interpreting this chapter, the following clarifications should be kept in mind.

One of the central criticisms this thesis makes of neoclassical economic analysis (including neoclassical analyses of law)<sup>18</sup> is how it accepts that there is an 'optimal' point of consumption or production beyond which economic actors should not surpass, *but then never addresses the exceedingly important question of where that optimal point might actually lie*.<sup>19</sup> The evidence presented in Chapter One, however, strongly suggests that determining where the optimal point of consumption and production is situated is not a question that economists (including Law & Economics scholars), or anyone, should just assume will be answered correctly. This is especially so when 'market failures' are as pervasive as they are.<sup>20</sup> This is not to say that economic actors, whether micro or macro, *cannot* answer the question correctly, only that it is wrong of neoclassical economists and legal economists to treat the question as easy when it is highly complex. Thoreau's greatest contribution to economic thought, I wish to suggest, and the reason why he is the focus of this chapter, arises out of the intellectual energy and attention that he dedicated to

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<sup>17</sup> Henry David Thoreau, 'Walden' in Carl Bode (ed), *The Portable Thoreau* (1982).

<sup>18</sup> For a discussion of law and neoclassicism, see James Hackney, 'Law and Neoclassical Economics: Science, Politics, and the Reconfiguration of American Tort Law Theory' (1997) 15(2) *Law and History Review* 275.

<sup>19</sup> It is hard to reference an 'absence' such as this, but it can be argued that the 'absence' follows logically from the assumptions of neoclassical economics. Specifically, neoclassicism assumes that 'rational' economic actors will intuitively know when costs start outweighing the benefits, as if the optimal point thoughtfully announces itself when it is reached. As one economist puts it, 'In any comparison of alternative bundles [of goods and services], the preferred bundle is the one that receives the highest utility number.' See Avinash Dixit, *Optimization in Economic Theory* (2nd ed, 1990) 1.

<sup>20</sup> See Herman Daly and Joshua Farley, *Ecological Economics: Principles and Applications* (2004) 157-220 (discussing the pervasiveness of market failures).

precisely that question of optimality which neoclassicism ignores – that is, the normative question of ‘how much is enough?’, or, as it is phrased in the title to this chapter, ‘how much property is “proper”?’<sup>21</sup> As a fervent individualist, Thoreau does not presume to answer the question for us, of course. But by taking the question seriously and dissecting it with great insight, Thoreauvian economics can help individuals and societies avoid the trap of assuming that ‘more is always better’ and then counter-productively shaping legal systems on that basis. My interest in Thoreau, therefore, has less to do with the particular form of life he practised during his time at the pond – which, admittedly, was somewhat artificial and idealized, though still highly instructive – and more to do with the alternative economic questions he asked while he was there. We will see, however, that Thoreau’s aim is not so much to get us reflecting on the world from the perspective we are currently looking at it; the purpose of his questions, rather – and his stylistic flamboyance – is to get us to look at the world in a new way and approach life with a new attitude.

## 2. THOREAU ON MATERIALISTIC CULTURE

‘Let us consider the way in which we spend our lives,’ Thoreau began one of his most provocative essays, noting that since time was short he would ‘leave out all the flattery, and retain all the criticism,’<sup>22</sup> as was his way. ‘What is it to be born free and not to live free?’<sup>23</sup> he asked his fellow citizens. ‘Is it a freedom to be slaves, or a freedom to be free, of which we boast?’<sup>24</sup> The United States of America may have been free from political tyrants, but it was painfully clear to Thoreau that it was ‘still the slave of an economical and moral tyrant.’<sup>25</sup> A tyrant called Mammon.

This world is a place of ‘incessant business,’ he was to lament, and there was ‘nothing, not even crime, more opposed to poetry, to philosophy, ay, to life itself, than this incessant business.’<sup>26</sup> He felt that it would be ‘glorious to see mankind at leisure for once,’ but there was ‘nothing but work, work, work.’<sup>27</sup> To be sure, Thoreau was not opposed to labour, industry, or enterprise, as such. His concern, rather, was that ‘those services which the community will most readily pay for, it is most disagreeable

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<sup>21</sup> On property and the proper, see Gregory Alexander, ‘Property as Propriety’ (1998) 77 *Nebraska L. R.* 667.

<sup>22</sup> Henry David Thoreau, ‘Life without Principle,’ in Carl Bode (ed), *The Portable Thoreau* (1982) 632.

<sup>23</sup> *Ibid* 650.

<sup>24</sup> *Ibid*.

<sup>25</sup> *Ibid*.

<sup>26</sup> *Ibid* 632.

<sup>27</sup> *Ibid*.

to render.<sup>28</sup> Thus, 'It is not enough to [say] that you worked hard to get your gold. So does the Devil work hard.'<sup>29</sup>

For these reasons Thoreau thought that to do anything merely for the sake of acquiring money or material superfluities was to be 'truly idle or worse.'<sup>30</sup> The following passage states his position directly:

If I should sell my forenoons and afternoons to society, as most appear to do, I am sure that for me there would be nothing left worth living for.... I wish to suggest that a man may be very industrious, and yet not spend his time well. There is no more fatal blunderer than he who consumes the greater part of his life getting his living.<sup>31</sup>

But Thoreau saw his townsfolk labouring under this very mistake. 'It is a fool's life,' he asserted bluntly, 'as they will find when they get to the end of it, if not before.'<sup>32</sup> He had travelled widely in Concord, and everywhere, in shops, offices, and fields, the inhabitants seemed to him to be leading lives of 'quiet desperation'<sup>33</sup> and doing penance in a thousand remarkable ways. 'The twelve labors of Hercules were trifling in comparison with those which my neighbors have undertaken; for they were only twelve, and had an end; but I could never see that these men slew or captured any monster or finished any labor.'<sup>34</sup> Thoreau likened people's materialistic cravings to the heads of a hydra, noting that 'as soon as one head is crushed, two spring up.'<sup>35</sup>

The ancient Chinese philosopher Lao Tzu once said, 'Those who know they have enough are rich.'<sup>36</sup> Thoreau was telling his contemporaries that they had 'enough' but that they did not know it, and so were poor. Always wanting more luxuries and comforts and never content with less, he accused them of not understanding the meaning of 'Economy,' of not understanding that the 'cost of a thing is the amount of... life which is required to be exchanged for it.'<sup>37</sup> 'Most men,' he wrote, 'even in this comparatively free country, through mere ignorance or mistake, are so occupied with factitious cares and superfluously course labors of life that its finer fruits cannot be

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<sup>28</sup> Ibid 634.

<sup>29</sup> Ibid 640.

<sup>30</sup> Ibid 634.

<sup>31</sup> Ibid 636.

<sup>32</sup> Thoreau, *Walden*, above n 17, 261.

<sup>33</sup> Ibid 263.

<sup>34</sup> Ibid 260.

<sup>35</sup> Ibid.

<sup>36</sup> See Goldian Vanenbroeck (ed), *Less is More: An Anthology of Ancient and Modern Voices Raised in Praise of Simplicity* (1991) 116.

<sup>37</sup> Thoreau, *Walden*, above n 17, 286.

plucked by them.<sup>38</sup> By a 'seeming fate,'<sup>39</sup> there was 'no time to be anything but a machine.'<sup>40</sup>

And for what? People's lives were being 'ploughed into the soil for compost'<sup>41</sup> just to obtain 'splendid houses' and 'finer and more abundant clothing... and the like,'<sup>42</sup> but as Thoreau was to insist, 'Superfluous wealth can buy superfluities only.'<sup>43</sup> Indeed, he claimed that 'Most of the luxuries, and many of the so-called comforts of life, are not only not indispensable, but positive hindrances to the elevation of mankind.'<sup>44</sup> More concerned about accumulating nice things or climbing the social ladder than they were about their own destinies, people astounded Thoreau by how 'frivolous'<sup>45</sup> they were with respect to their own lives – as if they could 'kill time without injuring eternity.'<sup>46</sup>

'Who made them serfs of the soil?'<sup>47</sup> he asked, again implying that his contemporaries were slaves to their uncontained material desires and yet oblivious to their self-imposed servitude. 'It is hard to have a Southern overseer; it is worse to have a Northern one; but worst of all when you are the slave-driver of yourself.'<sup>48</sup> At the height of his indignation Thoreau even turned on the abolitionists, and told them: 'Ye are all slaves.'<sup>49</sup> This was no mere rhetorical gesture. One of his poems even mocks the abolitionists' vehemence:

Make haste & set the captive free! –  
Are ye so free that cry?  
The lowest depths of slavery  
Leave freedom for a sigh.<sup>50</sup>

It was the English poet William Wordsworth who penned the lines, 'Getting and spending, we lay waste our powers,'<sup>51</sup> and we can imagine Thoreau being wholly sympathetic to this critical sentiment. And yet, such uncompromising condemnation

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<sup>38</sup> Ibid 261.

<sup>39</sup> Ibid.

<sup>40</sup> Ibid.

<sup>41</sup> Ibid.

<sup>42</sup> Ibid.

<sup>43</sup> Ibid 568.

<sup>44</sup> Ibid 269.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid 263.

<sup>47</sup> Ibid 260.

<sup>48</sup> Ibid 263.

<sup>49</sup> I am indebted to Carl Bode for this reference. See Carl Bode (ed), *The Portable Thoreau* (1982) 25.

<sup>50</sup> Ibid.

<sup>51</sup> William Wordsworth, 'The World is Too Much With Us; Late and Soon' in John Hayden (ed), *William Wordsworth: Selected Poems* (1994) 166.

of profit-seeking and acquisitiveness, of what Thoreau called ‘the commercial spirit,’ may give rise to the objection that Thoreau (and Wordsworth) were just disaffected romantics who failed to appreciate what were arguably the many *beneficial* aspects of industrial capitalism. Thoreau, however, had anticipated this retort: “What!” exclaim a million Irishman starting up from all the shanties in the land, “is not this railroad which we have built a good thing?” Yes, I answer, *comparatively* good, that is, you might have done worse; but I wish, as you are brothers of mine, that you could have spent your time better than digging in this dirt.<sup>52</sup> It is much the same for the United States Bank, Thoreau concluded. ‘It costs more than it comes to,<sup>53</sup> in terms of *life*, that is, a calculus to which we will return.

Thoreau was living in a time of great economic transformation and for him the railroad was the emblem of industrialization. He often spoke of the railroad metaphorically, as a representation of the emerging economic system that was fast changing the face of America and indeed the world. ‘We do not ride upon the railroad,’ he asserted, ‘it rides upon us.’<sup>54</sup> He developed this image in the following memorable passage:

Did you ever think what those sleepers are that underlie the railroad? Each one is a man, an Irishman, or a Yankee man. The rails are laid on them, and they are covered with sand, and the cars run smoothly over them. They are sound sleepers, I assure you. And every few years a new lot is laid down and run over; so that, if some have the pleasure of riding upon a rail, others have the misfortune to be ridden upon. And when they run over a man that is walking in his sleep... and wake him up, they suddenly stop the cars, and make a hue and cry about it, as if this were an exception. I am glad to know that it takes a gang of men for every five miles to keep the sleepers down and level in their beds as it is, for this is a sign that they may sometime get up again.<sup>55</sup>

Thoreau indeed hoped that those ‘sleepers’ who were being ‘ridden upon’ by industrialization would ‘sometime get up again,’ and he did what he could to ‘wake [his] neighbors up.’<sup>56</sup> But it appeared to Thoreau as if his sleeping neighbours had fallen into the common mode of living not because they preferred it to any other, but because they honestly thought there was no choice left. ‘So thoroughly and sincerely

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<sup>52</sup> Thoreau, *Walden*, above n 17, 308.

<sup>53</sup> *Ibid.*

<sup>54</sup> *Ibid* 345.

<sup>55</sup> *Ibid* 345-6.

<sup>56</sup> *Ibid* 337.

are we compelled to live, reverencing our life, and denying the possibility of change. This is the only way, we say.'<sup>57</sup>

But Thoreau was not convinced. He was of the view that 'there are as many ways as there can be drawn radii from one center.'<sup>58</sup> 'Here is life, an experiment to a great extent untried by me; but it does not avail me that they have tried it... [M]an's capacities have never been measured; nor are we to judge of what he can do by any precedents, so little has been tried.'<sup>59</sup> Even 'the life which men praise and regard as successful is but one kind,' and 'why should we exaggerate any one kind at the expense of the others?'<sup>60</sup> Forever the thoughtful non-conformist, Thoreau tended to believe that, 'What old people say you cannot do you try and find that you can,' and on that basis he boldly proposed that there should be, 'Old deeds for old people, and new deeds for new.'<sup>61</sup>

It was time for Thoreau to begin his living experiment at Walden Pond.

### 3. THE WALDEN EXPERIMENT

On Independence Day, 1845, a few days before his twenty-eighth birthday, Henry Thoreau left his town of Concord, Massachusetts, and went to live alone in the woods, on the shores of Walden Pond, a mile from any neighbour. There he built himself a modest cabin and for two years and two months earned a simple living mainly by the labour of his own hands. He also wrote, among other things, his masterpiece, *Walden* (subtitled, *Life in the Woods*), which gives an account of his two year stay.

In the second chapter of *Walden*, entitled 'Where I Lived, and What I Lived For,' Thoreau offers us an explanation for his exit from conventional society: 'I went the woods because I wished to live deliberately, to front only the essential facts of life and see if I could not learn what they had to teach, and not, when I came to die, discover that I had not lived.'<sup>62</sup> He 'did not wish to live what was not life,' he tells us, 'living is so dear;' nor did he wish to 'practice resignation, unless it was quite necessary.'<sup>63</sup>

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<sup>57</sup> Ibid 266.

<sup>58</sup> Ibid.

<sup>59</sup> Ibid 264-5.

<sup>60</sup> Ibid 274.

<sup>61</sup> Ibid 264.

<sup>62</sup> Ibid 343.

<sup>63</sup> Ibid.

I wanted to live deep and suck out all the marrow of life, to live so sturdily and Spartan-like as to put to rout all that was not life,... to drive life into a corner, and reduce it to its lowest terms, and, if it proved to be mean, why then to get the whole and genuine meanness out of it, and publish its meanness to the world; or if it was sublime, to know it by experience.<sup>64</sup>

Elsewhere he said that his purpose in going to Walden Pond was to ‘transact some private business with the fewest obstacles.’<sup>65</sup> In one sense, this ‘private business’ was simply to write in solitude, close to Nature and away from modern distractions. In another sense, though closely related to the first, his ‘private business’ was to solve, or at least better understand, the economic problem of how to live well in a world in which resources were scarce relative to the demands made upon them. Perhaps, Thoreau had decided, the best path was to reduce his material wants and live a simple life. He thought that ‘it would be some advantage to live a primitive and frontier life, though in the midst of an outward civilization, if only to learn what are the gross necessities of life and what methods have been taken to obtain them.’<sup>66</sup> Simplicity of life was to be his means to the elevation of purpose.

Thoreau had come to suspect that, ‘If your trade is with the Celestial Empire,’<sup>67</sup> by which he meant, ‘If your concerns are “higher” than merely getting and spending,’ – then very little is actually needed to live well and to be free, provided life is approached with the right attitude. ‘Simplify, simplify,’<sup>68</sup> was to be his refrain. A modest shelter from the elements should be fixture enough. Old clothes will do, will they not? ‘Instead of three meals a day, if it be necessary eat but one; instead of a hundred dishes, five; and reduce other things in proportion.’<sup>69</sup> Most importantly, ‘keep your accounts on your thumbnail.’<sup>70</sup>

This, in essence, was the ‘method’ Thoreau put to the test at Walden Pond, by living simply and rejecting the division of labour. As far as possible he secured his own food, by growing beans, peas, corn, turnips, and potatoes, and occasionally fishing in the pond. He cut down some local trees and built himself a house with but one small room, and made some basic furniture. It was not much, but it was enough. And just enough was plenty. He did not wish to be chained to the economy, so he practised self-reliance; he did not wish to be slave to artificial material desires, so he

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<sup>64</sup> Ibid 343-4.

<sup>65</sup> Ibid 275.

<sup>66</sup> Ibid 267.

<sup>67</sup> Ibid 275.

<sup>68</sup> Ibid 344.

<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

practised self-discipline; and he did not wish to live what was not life, so he practised self-culture. In short, he practised what I am calling 'alternative economics.'

#### 4. THOREAU'S ALTERNATIVE ECONOMICS

It is now time to take a closer look at how exactly Thoreau set about answering the most practical economic questions which confronted him; questions, I have suggested, which are unjustifiably neglected by mainstream economists, including legal economists. Those questions include: *How best to earn a living? How much time should one spend at it? How much does one need to live well and to be free?* Thoreau had discovered that there was an incompatibility between his self-culture and a profit-centred civilization, but instead of studying how to sell the product of his genius in the market, Thoreau studied how to avoid the necessity of selling it; at least, how to sell no more of it than was necessary to live well and to be free. This is the question of 'optimality' to which Thoreau dedicated so much attention (without using that terminology) and why his economic analysis is so important for this thesis. Once again, a post-growth jurisprudence of property will seem misconceived if the question of optimality is ignored and a society just assumes that 'more is always better.' But if more people were to reject the consumerist ethos that 'more is always better' and instead embrace a life reflecting the Thoreauvian ethos of simplicity and sufficiency, there is no reason to think that a private property / market system need always be designed to grow the economy. Indeed, in a world where global ecosystems are already trembling under the strain of over-consumption and in which so many have so little while a few have so much, there are compelling grounds for thinking that genuine progress today depends upon over-consuming societies initiating a degrowth process of planned economic contraction, and this means acquiring some concept of economic sufficiency, some concept of how much consumption is truly 'enough.'

The value and contemporary relevance of Thoreau lies mainly in his radical yet enticing suggestion that the process of voluntarily reducing consumption (as well as reducing the corresponding production) may actually improve quality of life.<sup>71</sup> His defining strategy of argumentation in this regard is to compare the value of commodities – whether clothing, housing, food, comforts, luxuries, etc. – with the value of the time needed to labour for them, and then to suggest to his readers that perhaps well-being could be increased by choosing fewer commodities and more

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<sup>71</sup> See discussion below.

time. If that argument is accepted – if it is accepted that increased consumption of goods and services is generally not what is needed to improve life in affluent societies – then the foundations of the growth model of progress collapse, opening up the normative space needed for a post-growth jurisprudence of property to take hold. In this way Thoreau's alternative economics challenge growth economics, complementing the arguments in Chapter One.

With the necessary groundwork complete, then, let us make haste to Thoreau's living experiment and explore his alternative economics in some detail.<sup>72</sup> The examination begins by considering Thoreau's analysis of the 'necessaries of life': what they are, how they are best understood, and what questions arise upon obtaining them. The examination then considers Thoreau's perspective on what lies beyond the necessaries of life, those material things which can be broadly categorized into comforts, luxuries, or tools. Throughout the following discussion I ask the reader to keep in mind that the dual purpose of the discussion is, first, to undermine the vision of abundance which is currently informing the private property / market systems of growth capitalism and, second, to provide some of the normative groundwork for a vision of sufficiency and simplicity which in forthcoming chapters will be developed, updated, and infused into a post-growth jurisprudence of property.

## 5. THE NECESSARIES OF LIFE

The first task set by alternative economics is to determine what are the gross necessaries of life, 'for not till we have secured these are we prepared to entertain the true problems of life with freedom and a prospect of success.'<sup>73</sup> The quoted passage is important, I believe, because with it Thoreau is seeking to avoid a misunderstanding that might arise, and sometimes does, from his celebration of material simplicity. Simplicity is not material destitution, he is saying. We all have basic bio-physical needs that have to be met (though they may be fewer than we commonly think). If those needs are not met then we would be consumed by anxiety over where our next meal might come from or whether we would be able to survive

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<sup>72</sup> I have been assisted in the following discussion by the following texts: Stanley Cavell, *The Senses of Walden* (An Expanded ed, 1981); Philip Cafaro, *Thoreau's Living Ethics: "Walden" and the Pursuit of Virtue* (2004); Leo Stoller, *After Walden* (1957); Leonard Neufeldt, *The Economist: Henry Thoreau and Enterprise* (1989); Harold Bloom (ed), *Henry David Thoreau's "Walden"* (1987); Christian Becker, 'Thoreau's Economic Philosophy' (2008) 15(2) *European Journal of the History of Economic Thought* 211; Thomas D. Birch and Fred Metting, 'The Economic Design of Walden' (1992) 65(4) *The New England Quarterly* 587; Richard Prud'Homme, 'Walden's Economy of Living' (2001) 20(3) *Raritan* 107.

<sup>73</sup> Thoreau, *Walden*, above n 17, 267-8.

the cold night. And that is obviously not a condition conducive to a life of freedom, a flourishing life. Accordingly, before dedicating any of our energies to marvelling at the wonders of the world, to developing our higher capacities, or to composing novel, personally meaningful answers to the questions posed by human existence, we will need to secure at least a certain minimum of material things to ensure our healthy, physical subsistence. Securing that minimum is therefore of immediate and primary importance.<sup>74</sup>

By the words, *necessary of life*, Thoreau meant ‘whatever... has been from the first, or from long use has become, so important to human life that few, if any... ever attempt to do without.’<sup>75</sup> Although most living creatures have only Food as a true necessary of life, and perhaps Shelter, also, Thoreau held that the necessities of life for a human being in his climate ‘may, accurately enough, be distributed under the several heads of Food, Shelter, Clothing, and Fuel.’<sup>76</sup> The following sections consider these necessities of life from the critical perspective of Thoreau’s alternative economics, following the order in which he discusses them in ‘Economy,’ the first chapter of *Walden*.<sup>77</sup>

### 5.1. Clothing

With respect to procuring clothing, Thoreau wondered whether we are more often led by the love of novelty and the opinions of others, than by a true utility. He reminds us that ‘the object of clothing is, first, to retain the vital heat, and secondly, in this state of society, to cover nakedness.’<sup>78</sup> On that basis he suggested – and this is his central point here – that any necessary or important work in life may be accomplished without adding to our wardrobes. ‘A man who has at length found something to do will not need to get a new suit to do it in.’<sup>79</sup> Beware, then, he wrote, ‘of all enterprises that require new clothes, and not rather the new wearer of clothes.’<sup>80</sup>

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<sup>74</sup> I should make clear that Thoreau is not suggesting that there is necessarily a conflict or trade-off here between such things as ‘developing higher capacities’ and ‘obtaining the necessities of life.’ As we have seen and will see again, his aim is to ensure that there is no conflict here; that is, he seeks to develop his higher capacities *as* he provides for himself. But, as a matter of basic instinct, Thoreau is pointing out that should a conflict actually arise, then securing necessities of life will always be prioritized over higher development. That is, when starving, one will look for food before reading Homer or admiring a sunset.

<sup>75</sup> Thoreau, *Walden*, above n 17, 267

<sup>76</sup> *Ibid* 267.

<sup>77</sup> I will, however, defer the discussion of Fuel, since it is largely metaphorical and is best addressed later.

<sup>78</sup> Thoreau, *Walden*, above n 17, 276.

<sup>79</sup> *Ibid* 278.

<sup>80</sup> *Ibid*.

Exemplifying his critical stance in relation to clothing, Thoreau stated: 'Only those who go to soirees and legislative halls must have new coats, coats to change as often as the man changes in them. But if my jacket and trousers, my hat and shoes, are fit to worship God in, they will do, will they not?'<sup>81</sup> It is an interesting question to consider, if not in relation to the worship of God, necessarily, then more generally in relation to the living of a meaningful, passionate life. Old clothes will do, will they not? Thoreau proposed that they will do just fine.

As we hand down our old, superfluous clothing to those poorer than ourselves, we find Thoreau telling us that, in terms of clothing, at least, the poor are actually richer than us for being able to do with less. But Thoreau must not be misunderstood here. He is not glorifying the poor or prescribing to us a dress code. He is attempting to get us reconsider cultural assumptions about the importance of material things (in this case clothing) to a well-lived life. As I interpret him, his argument is not that one cannot live a happy and meaningful life in fine clothing so much as fine clothing is not necessary for a happy and meaningful life. If that is so, reducing the consumption of fine clothing should not negatively affect overall well-being. In fact, since reducing consumption in clothing implies a correlative reduction in the labour needed to produce clothing, well-being is likely to increase since less time labouring means more leisure time – more freedom. Moreover, since consumption is correlated with environmental impact,<sup>82</sup> reducing consumption is one means of stepping more lightly on the planet. As will be seen, the defining characteristic of Thoreau's alternative economics is this insight that reducing consumption can often lead, not only to increased individual and social well-being, but also to reduced ecological impact.<sup>83</sup> The third 'dividend' that could come from reducing consumption – one which Thoreau paid less attention to but which is just as important as the first two – is that by taking less oneself, more is left for others who may be in greater need.

## 5.2. Shelter

As for Shelter, Thoreau does not deny that this is now a necessary of life, though he does make a point of noting that there are instances of human beings, no hardier

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<sup>81</sup> Ibid 278.

<sup>82</sup> See generally, Paul Ehrlich and Anne Ehrlich, *The Population Explosion* (1990) (discussing the 'I = PAT' identity, which holds that environmental impact (I) is a product of population (P), affluence (A), and technology (T)).

<sup>83</sup> See, e.g., Tim Jackson, 'Live Better by Consuming Less? Is There a Double Dividend in Sustainable Consumption?' (2005) 9(1-2) *Journal of Industrial Ecology* 19.

than ourselves, doing without shelter for long periods in colder countries.<sup>84</sup> Assuming, however, that 'Shelter' is indeed a necessary of life, Thoreau proposed that we 'Consider first how slight a shelter is absolutely necessary.'<sup>85</sup> He had seen Indians in his town living in tepees of thin cotton cloth, which in the first instance could be constructed in a day or two, at most, and taken down and put up in a few hours; and every family owned one.<sup>86</sup> He had even seen a large box by the railroad, six feet long by three feet wide, in which the labourers locked their tools up at night, and it suggested to him that anyone who was hard pushed might get such a one for a dollar, and, having bored a few holes in it, to admit the air at least, get into it when it rained at night, and hook down the lid, 'and so have freedom in his love, and in his soul be free.'<sup>87</sup> This will strike some as an absolutely ridiculous proposition, but Thoreau was 'far from jesting.'<sup>88</sup> An average house in his neighbourhood cost about eight hundred dollars (at the time) and Thoreau noted that to lay up this sum would take from ten to fifteen years of the labourer's life; add the farm and one would have to spend twenty, thirty, or forty years toiling – more than half of one's life is easily spent. Would the Indians have been wise to give up their tepees on these terms?

It is in this context where Thoreau made his alternative economics most explicit, exemplifying his defining strategy of argumentation. 'If it is asserted that civilization is a real advance in the condition of man – and I think it is, though only the wise improve their advantages – it must be shown that it has produced better dwellings without making them more costly; and the cost of a thing is the amount of life which is required to be exchanged for it, immediately or in the long run.'<sup>89</sup> Turning conventional economic analysis on its head, Thoreau suggested that 'when the farmer has got his house, he may not be the richer but the poorer for it, and it be the house that has got him.'<sup>90</sup>

Thoreau wanted to show at what sacrifice our more 'advanced' dwellings were obtained and to suggest that, by living more simply, we may secure all the advantage without suffering any of the disadvantage. With this in mind, he went to Walden Pond with an axe, cut down some trees, and built himself a modest but sturdy cabin. Again exemplifying his alternative mode of economic analysis, Thoreau declared that, 'I intend to build me a house which will surpass any on the main street in Concord in

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<sup>84</sup> Thoreau, *Walden*, above n 17, 282.

<sup>85</sup> *Ibid* 283.

<sup>86</sup> *Ibid* 283-285.

<sup>87</sup> *Ibid* 284.

<sup>88</sup> *Ibid*.

<sup>89</sup> *Ibid* 286.

<sup>90</sup> *Ibid* 288.

grandeur and luxury, as soon as it pleases me as much and will cost me no more [in terms of life] than the present one.<sup>91</sup>

It appears, then, that Thoreau was *perfectly content* with his shelter, modest though it was. Did this not make him richer than a king and queen who are dissatisfied with their palace? With a little more wit we could *all* be richer than kings and queens, Thoreau implied; but, unfortunately, 'Most men appear never to have considered what a house is, and are actually though needlessly poor all their lives because they think that they must have such a one as their neighbors have.'<sup>92</sup>

Thoreau's calculus here is essentially the same as it was regarding clothing. Perhaps it would be nice to live in a palace or a mansion or even the nicest house on the block, but it must not be forgotten that the more expensive one's housing is the more of one's life one will probably have to spend earning the money needed to buy or rent it (assuming we are not kings or queens). Furthermore, housing is necessarily made from resources taken from nature, so the environmental impacts of extravagant, resource-intensive housing should be considered when making judgements on what is 'proper' housing for what Thoreau called 'civilized' people. Why not keep housing modest and simple, Thoreau suggested? Since housing is typically the greatest overall expense in most people's lives,<sup>93</sup> this is an area where people should be particularly cognizant of the time / freedom cost of consumption. Perhaps by lowering 'standard of living' (measured by consumption in housing) people could actually increase 'quality of life' (measured by subjective well-being)? Indeed, Thoreau's suggestion is that by living in modest accommodation people can literally save years of labour and thereby become 'richer than the richest are now,'<sup>94</sup> not in terms of property, of course, but in terms of freedom and contentment – in terms of *life*. 'If I seem to boast more than is becoming,' he concluded, 'my excuse is that I brag for humanity rather than for myself.'<sup>95</sup>

### 5.3. Food

During his two-year stay at the pond, as noted earlier, Thoreau grew for himself the bulk of the food he ate – beans, especially, but also peas, corn, turnips, and potatoes. He drank water. From this experience he learned, among other things, that it 'cost

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<sup>91</sup> Ibid 304.

<sup>92</sup> Ibid 290.

<sup>93</sup> See Jerome Segal, *Graceful Simplicity: Toward a Philosophy and Politics of the Alternative American Dream* (1st ed, 1999) 46.

<sup>94</sup> Thoreau, *Walden*, above n 17, 295.

<sup>95</sup> Ibid 304.

incredibly little trouble to obtain one's necessary food'<sup>96</sup> and that 'a man may use as simple a diet as the animals, and yet retain health and strength.'<sup>97</sup> Reflecting on his first year of homesteading, Thoreau wrote that, 'All things considered, that is, considering the importance of a man's soul and of today, ... I believe that [I] was doing better than any farmer in Concord.'<sup>98</sup> As well as providing for his own dietary needs, he also cultivated approximately two and half acres of beans which he later sold to meet his occasional miscellaneous expenses.<sup>99</sup> As for his second year:

... I did better still, for I spaded up all the land which I required, about a third of an acre, and I learned from the experience of both years, ... that if one would live simply and eat only the crop which he raised, and raise no more than he ate, and not exchange it for an insufficient quantity of more luxurious and expensive things, he would need to cultivate only a few rods of ground, and that it would be cheaper to spade up that than to use oxen to plow it, and to select a fresh spot from time to time than to manure the old, and he could do all his necessary farm work as it were with his left hand at odd hours in the summer.<sup>100</sup>

By simplifying his life and practising self-reliance, Thoreau believed that he was more independent than any farmer he knew. 'I was not anchored to a house or farm, but could follow the bent of my genius, which is a very crooked one, every moment.'<sup>101</sup> This passage is significant because it shows that Thoreau's living experiment was meeting with some real success. He had gone into the woods, after all, to confront that 'vexed question'<sup>102</sup> of how to earn an honest living and still have freedom for his proper pursuits, and a life of simplicity and dedicated self-reliance was proving to be a promising response. Growing his own food, we see, was an important part of that response.

Growing his own food, however, came to be something much more than a matter of just physically sustaining himself. Thoreau admitted that, since he had little aid from horses, cattle, or hired labour, or from the latest farming implements, he was 'much slower'<sup>103</sup> in his work than other farmers. Nevertheless, he claimed that he became much more intimate with nature on this account and that his slower more

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<sup>96</sup> Ibid 315.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid 309-10.

<sup>99</sup> These expenses included seeds, rice, Indian meal and salt to make his own bread, oil for his lamp, etc. Thoreau therefore still relied on the market to an extent.

<sup>100</sup> Thoreau, *Walden*, above n 17, 310.

<sup>101</sup> Ibid.

<sup>102</sup> Ibid 284.

<sup>103</sup> Ibid 406.

personal approach yielded a 'constant and imperishable moral.'<sup>104</sup> This moral, he seemed to think, was that the fastest and most efficient way of farming, that is, the way that would yield the most profit in the market, was not necessarily the best way, all things considered. As Philip Cafaro has noted, Thoreau 'makes a point of doing most of the work himself, rather than contracting it out to more productive specialists with more elaborate tools. He does not, he tells us, bother with "imported" fertilizers. These moves would increase his productivity, but he refuses to allow that to dictate how he will farm.'<sup>105</sup> Furthermore, Thoreau could have hired himself out as a day labourer and for much less effort been able to buy his food at the grocer's, but he chose not to. Doing so would have left him relying on others first to hire him and second to produce and then sell him his necessities.

But Thoreau's reasons for living simply go deeper even than securing his independence and freedom. Allowing others to grow food for him, even if it was more 'efficient' or 'economic' to do so, would also have disconnected him from the land, from direct contact with Nature, that is, from the elemental source of both his material and spiritual nourishment.<sup>106</sup> And Thoreau would have no truck with that. He did not just want the beans to eat; he also wanted the *experience* of cultivating them. In a chapter of *Walden* entitled, 'The Bean Field,' we get an insight into the nature of his labours. Being outside, he tells us, working up a sweat under the morning sun and sky, hoeing his beans in the fresh country air, 'yielded an instant and immeasurable crop.'<sup>107</sup> At such times, he noted somewhat cryptically, it 'was no longer beans that I hoed,'<sup>108</sup> suggesting, we can suppose, that he was cultivating not so much the land as his own soul.

Thoreau delighted at being 'part and parcel of Nature.'<sup>109</sup> The chickadees became so familiar with him that at length one even perched upon an armful of wood which he was carrying, pecking at the sticks without fear. 'I once had a sparrow alight upon my shoulder for a moment while I was hoeing... and I felt that I was more distinguished by that circumstance than I should have been by an epaulet I could have worn. The squirrels also grew at last to be quite familiar, and occasionally stepped upon my shoe when that was the nearest way.'<sup>110</sup> Thoreau would listen to the brown thrashers as he worked his rows and would carefully observe the wildlife on the edge of his field. As he was not driven by an urge to maximize profits, and

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<sup>104</sup> Ibid 406.

<sup>105</sup> Cafaro, *Thoreau's Living Ethics*, above n 72, 98.

<sup>106</sup> On Thoreau's spiritual connection with nature, see Alan Hodder, *Thoreau's Ecstatic Witness* (2001).

<sup>107</sup> Thoreau, *Walden*, above n 17, 408.

<sup>108</sup> Ibid 408.

<sup>109</sup> Henry David Thoreau, 'Walking' in Carl Bode (ed), *The Portable Thoreau* (1982) 592.

<sup>110</sup> Thoreau, *Walden*, above n 17, 518.

was thus in no real hurry, he could rest on his hoe and watch the hen-hawks circling high in the sky, 'alternately soaring and descending, approaching and leaving one another, as if they were the embodiment of my own thoughts.'<sup>111</sup> Philip Cafaro again captures the significance of these and similar experiences exactly: 'To a poet-naturalist, opportunities for such encounters, even opportunities to feel changes in the weather and mark the natural course of the day, are strengthening and vivifying. Thoreau contrasts this work with factory and office work, suggesting again that the experience lost is not made up in increased pay or productivity.'<sup>112</sup>

This Thoreauvian calculus, it is suggested, deserves our most serious consideration, today more than ever before. But it will take some concerted imaginative effort on our part to broaden our view of things, since we entrenched urbanites, Thoreau would say, who are highly dependent on the grocer (or supermarket) and who live and work mostly indoors, can barely comprehend what it could even mean to be 'part and parcel with Nature.' And until we have some sense of its richness, some sense that there is another, simpler, more intimate way to provide for ourselves, we are likely to continue doing economics in the usual, narrow fashion and structuring our lives accordingly, not even knowing what we have lost, or, rather, what the market economy and its division of labour has taken from us. 'This is the only way, we say.'<sup>113</sup>

## 6. BEYOND THE NECESSARIES: HOW MUCH IS ENOUGH?

So there we have it, the essence of Thoreau's anti-consumerist views on Clothing, Shelter, and Food. We saw that he also listed Fuel as a necessary of life, a need which he met easily by collecting the dead and unsaleable wood behind his house and the driftwood from the pond.<sup>114</sup> What little else Thoreau said on the subject of Fuel was metaphorical, as noted above, and we will see that his use of metaphor in this context leads us nicely onto our next subject, which concerns the nature of what lies *beyond* the necessities of life. Is it the case that more is always better, as the growth model of progress assumes? Or might there come a time when basic material

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<sup>111</sup> Ibid 409.

<sup>112</sup> Cafaro, *Thoreau's Living Ethics*, above n 72, 99. Thoreau's point is not that factory and office work are not valuable. His suggestion is that the drive to maximize profits is disconnecting more and more people from the simple pleasures of contact with nature in their working lives. Thoreau is questioning whether the increased profits that arise from factory and office work is worth that disconnection from nature.

<sup>113</sup> Thoreau, *Walden*, above n 17, 266.

<sup>114</sup> Ibid 309.

needs are sufficiently met, rendering further increases in material wealth unnecessary, even counter-productive?

Consider the following passage: ‘By proper Shelter and Clothing we legitimately retain our own internal heat; but with an excess of these, or of Fuel, that is, with an external heat greater than our own internal, may not cookery properly be said to begin?’<sup>115</sup> Thoreau begins here by acknowledging, as he must, that a certain amount of the necessities of life is ‘legitimate’ or ‘proper,’ but he then goes on to suggest that they will eventually stop serving any legitimate purpose and indeed detract from life if consumed in ‘excess.’<sup>116</sup> A moment later his suggestion becomes a statement: ‘The luxuriously rich are not simply kept comfortably warm, but unnaturally hot; as I implied before, they are cooked, of course a la mode.’<sup>117</sup> Thoreau’s metaphor implies that fire, like material wealth, is far from being an unqualified good in our lives, but is instead good or bad depending on how much of it there is and how it is used.

It is within this metaphor that Thoreau crafted one of the central passages in *Walden*:

When a man is warmed by the several modes which I have described [i.e. Food, Shelter, Clothing, Fuel], what does he want next? Surely not more warmth of the same kind, as more and richer food, larger and more splendid houses, finer and more abundant clothing, more numerous, incessant, and hotter fires, and the like. When he has obtained those things which are necessary to life, there is another alternative than to obtain the superfluities; and that is, to adventure on life now, his vacation from humbler toil having commenced.<sup>118</sup>

It is worth taking some time to unpack Thoreau’s insight here. The unstated background point is that we must first secure the necessities of life, for without them we die. When we have secured the necessities of life, however, we are suddenly confronted by what Thoreau earlier called ‘the true problems of life with freedom and a prospect of success.’<sup>119</sup> That is, we are faced with the question of whether to keep on pursuing material things beyond what is necessary or *to do something else with our lives*. Thoreau was so critical of his contemporaries because to him they rarely seemed to face this question and instead thoughtlessly spent their lives accumulating material ‘superfluities’ – richer foods, splendid houses, finer clothing, hotter fires, etc.

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<sup>115</sup> Ibid 268.

<sup>116</sup> Ibid. This is the question of ‘optimality’ but in Thoreauvian terms.

<sup>117</sup> Ibid 269. Similarly, this is the question of ‘uneconomic’ consumption but in Thoreauvian terms.

<sup>118</sup> Ibid 270-1.

<sup>119</sup> Ibid 267-8.

– as if that were the only way to live. But there is an alternative, Thoreau insisted, and that is ‘to adventure on life now,’ our ‘vacation from humbler toil having commenced.’ Suddenly switching to a new metaphor, Thoreau proposed that, having rooted ourselves firmly in the earth and secured our material foundations, like the seeds of noble plants we should now rise confidently toward the heavens.<sup>120</sup>

Again, however, Thoreau must not be misunderstood. He is not proposing that we only ever work to obtain the gross necessities of life *and no more*. Put otherwise, he does not deny that there are times when obtaining more than is strictly necessary can genuinely improve our lives and help us achieve our goals, a point which is considered further in the next section. But Thoreau is warning us not to assume that material wealth will always contribute positively to our lives, for often, in insidious ways, it will not. It is not that there is anything inherently evil about money or material things; it is just that each moment we spend pursuing such things beyond what is necessary is a moment we could have spent on some free, non-materialistic good – such as sauntering through the woods, in Thoreau’s case – and we should always be cognisant of this type of trade-off. Sometimes trading our time for money and things will be a good trade, no doubt. But sometimes such a trade will ultimately cost more than it comes to in terms of *life*, making us not richer but poorer, and thus be a bad trade.

This calculus, as we have seen, is the heart of Thoreau’s alternative economics. The essential lesson can be expressed as follows: *once we have obtained those things necessary to life, we should thereafter carefully assess how much more we actually need to live well and to be free, by thinking about whether the pursuit of more material things would actually improve or detract from our lives, immediately or in the long run, and act on that basis.*<sup>121</sup> Applying this calculus to our lives may not be easy or clear cut, especially in a culture that celebrates material wealth as a good in itself. But if we neglect it – if we just assume that more material wealth is what is needed to improve our lives – then we are at risk of getting cooked, of course a la mode.<sup>122</sup> Those individuals and societies who do not want to be cooked must honestly confront the challenging questions posed by Thoreau’s alternative economics: ‘How much material wealth is *enough*?’ Any normative framework or ‘social vision’ must address this important human question.

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<sup>120</sup> Ibid 271.

<sup>121</sup> See Philip Cafaro, ‘Less is More’ in Samuel Alexander (ed), *Voluntary Simplicity: The Poetic Alternative to Consumer Culture* (2009) 127-134 (applying and discussing this calculus in the context of food consumption).

<sup>122</sup> Troublingly, global warming makes this point decreasingly metaphorical. See Chapter One, Sect. 3.1.

## 7. COMFORTS, LUXURIES, AND TOOLS

We are now in a position to consider what attitude Thoreau adopts in relation to material resources beyond the necessities of life. On this question his alternative economics entails – at times implicitly, at times explicitly – a categorization of material resources into ‘comforts,’ ‘luxuries,’ and ‘tools.’ Again, in discussing these issues Thoreau can be understood to be addressing the question of optimality – the question of ‘how much is enough?’ – which neoclassical economics, by simply taking ‘private preferences’ as given, refuses to engage.<sup>123</sup>

We all want the material resources needed to pursue our chief purpose in life, whatever that purpose might be. But might there be times when our pursuit of material resources does not support but actually interferes with our chief purpose? Everybody wants *enough*, but how much is *too much*? The answer to this question will be shaped by the answer given to, ‘Enough for *what*?’ and there is no single right answer to that question. We will see, however, that Thoreau’s alternative economics provides a framework for inquiry that each of us can apply to our own lives, despite the fact that we are likely to have unique life goals. Our answers to the questions posed will probably be different, since our life goals will probably be different; but alternative economics at least gets us struggling with the right questions, which is no minor accomplishment.

To begin with, consider a scenario in which a person is comfortably able to secure the necessities of life, but no more. Should this person spend their time despairing at how little they have? Or are the necessities alone enough to live well and to be free? Although Thoreau does not advocate that we only seek the necessities and no more, he does insist that if it so happens that our fate is to live a life founded upon the necessities only, this is no cause for despair, necessarily. In such circumstances, he argued, we are therefore simply ‘confined to the most significant and vital experiences; [we are] compelled to deal with the material which yields the most sugar... It is life near the bone where it is sweetest.’<sup>124</sup> His point is that once our basic material needs are met, ‘Money is not required to buy one necessary of the soul,’<sup>125</sup> which is but an inflection of the old adage that, ‘The best things in life are free.’<sup>126</sup> With the necessities of life secured, a strong-minded and cheerful simple liver can still fall in love, experience the joys of conversation and

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<sup>123</sup> See generally, N. Gregory Mankiw, *Principles of Economics* (5th ed, 2008).

<sup>124</sup> Thoreau, *Walden*, above n 17, 567.

<sup>125</sup> *Ibid* 568.

<sup>126</sup> This seems to be ratified by recent social science. See Chapter One, Sect 2.

friendship, saunter through Nature and delight in her 'inexhaustible entertainment,'<sup>127</sup> be part of a community or enjoy solitary contemplation, participate in political life, have aesthetic, sexual, or spiritual experiences, meditate, sing, laugh, etc. – none of which necessarily relies on money. As Thoreau put it, 'The setting sun is reflected from the windows of the almshouse as brightly as from the rich man's abode; the snow melts before its door as early in the spring. I do not see but a quiet mind may live as contentedly there, and have as cheering thoughts, as in a palace.'<sup>128</sup>

Thoreau, however, had possessions that went beyond the bare necessities of life, though a materially simple life he certainly lived. We know he built himself a small cabin with only one room, and ate a lot of beans. He tells us that his furniture, part of which he made himself, consisted of a bed, a table, a desk, three chairs, a looking-glass three inches in diameter, a pair of tongs and andirons, a kettle, a skillet, and a frying-pan, a dipper, a wash-bowl, two knives and forks, three plates, one cup, one spoon, a jug for oil, a jug for molasses, and a japanned lamp.<sup>129</sup> Though he did not wear rags, he happily wore patches on his old clothing, and since he spent so much time outdoors his clothing looked well-worn and weather-beaten. Beyond these things, he states that a few implements, such as 'a knife, an axe, a spade, a wheelbarrow, etc., and for the studious, lamplight, stationery, and access to a few books, rank next to necessities, and can all be obtained at a trifling cost.'<sup>130</sup> According to Thoreau, if our goals are 'higher' then we should recognize the limited need for money and possessions in our lives. As he was to say, 'my greatest skill has been to want but little.'<sup>131</sup>

Some material resources are simply indispensable to life – Food, Clothing, Shelter, and Fuel – and Thoreau classified these as 'necessaries.' As mentioned above, Thoreau also has three other categories of material resources, namely, 'comforts,' which serve to make our lives more pleasurable; 'luxuries,' which are superfluous, even harmful; and 'tools,' which serve to further our self-development and help us achieve our life goals. A few words will suffice to clarify the place these latter three categories have in Thoreau's alternative economics.

With respect to 'comforts,' let me begin by noting that Thoreau was far from being an ascetic or a puritan. He never denied himself material resources because he sought spiritual nourishment from deprivation. Nor did he disapprove of pleasure. Far from it, pleasure was very important to him. For this reason, he felt that there was a

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<sup>127</sup> Ibid 409.

<sup>128</sup> Ibid 566-7.

<sup>129</sup> Ibid 319.

<sup>130</sup> Ibid 269.

<sup>131</sup> Ibid 324.

proper place for ‘comforts’ in life, material things that were not necessary to life, but just made life better, happier, more pleasant. Nevertheless, Thoreau felt that we have to be careful. The risk with comforts is that they can be addictive. They can easily become the chief focus in our lives, consuming a lot of our time and energy, and Thoreau suggested that the purpose in life is not to be comfortable merely, but to live passionately. Furthermore, sometimes the time and money that we exchange for comforts can simply be a bad trade, in the sense that the comforts ultimately cost more in terms of ‘life’ than they come to. And so it is not that Thoreau is against the warmth of comforts, it is just that he thinks we are easily cooked. When answering the question, ‘How much is enough?’, alternative economics requires that we keep these considerations in mind.

If Thoreau was guarded with respect to ‘comforts,’ he was even more so with respect to ‘luxuries.’ Perhaps there are some people, he claimed, who could build more magnificently and live more lavishly than the richest do now, ‘without ever impoverishing themselves,’<sup>132</sup> but he had his doubts about whether any such people exist. Luxuries, he believed, were superfluous to a good life and, indeed, tended to cause more harm than good to those who were unlucky enough to be burdened by them. Referring to the superfluities of luxurious furniture and ornaments, he writes:

At present our houses are cluttered and defiled with it, and a good housewife would sweep out the greater part into the dust hole, and not leave her morning’s work undone. Morning work! By the blushes of Aurora and the music of Memnon, what should be man’s *morning work* in this world? I had three pieces of limestone on my desk, but I was terrified to find that they required to be dusted daily, when the furniture of my mind was all undusted still, and threw them out the window in disgust.<sup>133</sup>

Thoreau’s point here, as it has been so often before, is that we must not waste our limited time and attention on things that are irrelevant to our ‘morning work,’ that is, to our ‘proper pursuits.’ For it is not just that luxuries are superfluous to a good life – a criticism which sounds rather benign. More malignantly, they function to distract us from our proper pursuits, essentially wasting our time and thus our lives. In a famous phrase which we have already had occasion to consider, Thoreau claimed, ‘Most of the luxuries, and many of the so-called comforts of life, are not only not indispensable,

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<sup>132</sup> Ibid 271.

<sup>133</sup> Ibid 291.

but positive hindrances to the elevation of mankind.<sup>134</sup> And on this basis – again inverting mainstream economic perspectives – Thoreau provocatively stated: ‘a man is rich in proportion to the number of things he can afford to let alone.’<sup>135</sup>

This is not the end of it, however. Although Thoreau was critical of having and consuming luxuries, he was also critical of those people – Thoreau would call them ‘fools’ – who feel greatly deprived because they are without luxuries: ‘men have come to such a pass that they frequently starve, not for want of necessaries, but for want of luxuries.’<sup>136</sup> This point is important. If we read between the lines, Thoreau is suggesting that, once basic material needs have been met, whatever dissatisfaction people have with their material situations may well be the result of failing to look properly at their lives, rather than the result of any genuine lack. Let us not, he warned, be like the man who complained of ‘hard times because he could not afford to buy him[self] a crown!’<sup>137</sup> That type of complaint is symptomatic of what some social critics are today calling ‘affluenza,’ understood as an individual or collective psychological disorder that leaves people feeling deprived despite their plenty.<sup>138</sup>

Finally, there are ‘tools,’ those things which genuinely serve to further our self-development and help us achieve our life goals. If we look to Thoreau’s own life, in the category of ‘tools’ he would have included books, stationary, a lamp, his flute, hand lenses, wheel-barrow, etc. What we include in this category depends on what our life goals are, but we should always bear in mind that that tools may no longer help us, just as comforts may no longer bring pleasure, when used unwisely or excessively.<sup>139</sup> ‘Men have become the tools of their tools,’ Thoreau asserted.<sup>140</sup> ‘The best works of art are the expression of man’s struggle to free himself from this condition.’<sup>141</sup>

In summary, Thoreau’s views on consumption could be expressed as follows. Throughout much of human history it was a constant struggle to secure the necessities of life, and in such circumstances Thoreau perceived a certain wisdom and prudence in human decision-making, insofar as the guiding principle was to ‘satisfy the more pressing wants first.’<sup>142</sup> But in affluent societies, where most have

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<sup>134</sup> Ibid 269.

<sup>135</sup> Ibid 335.

<sup>136</sup> Ibid 316.

<sup>137</sup> Ibid 290.

<sup>138</sup> See Clive Hamilton and Richard Denniss, *Affluenza: When Too Much is Never Enough* (2005); John De Graaf et al, *Affluenza: The All-Consuming Epidemic* (2nd ed, 2005); Oliver James, *Affluenza: How to be Successful and Stay Sane* (2007).

<sup>139</sup> See Cafaro, *Thoreau’s Living Ethics*, above n 72, 84.

<sup>140</sup> Thoreau, *Walden*, above n 17, 292.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid 294.

more than enough to live well, Thoreau would ask: 'are the more pressing wants satisfied now?'<sup>143</sup> The suggestion is that, unlike the wise and prudent primitive societies, we are satisfying less pressing wants (for superfluous comforts, luxuries, and tools) and neglecting what for us might be more genuinely pressing wants, such as community, leisure, or a healthy natural environment. 'I am convinced,' Thoreau concluded, 'both by faith and experience, that to maintain one's self on this earth is not a hardship but a pastime, if we will live simply and wisely.'<sup>144</sup> This is perhaps the most important lesson that he learned while living in the woods, and it was a lesson that stayed with him for the rest of his life.

### 8. AFTER WALDEN

On 6 September, 1847, Thoreau left his cabin at Walden Pond and again took up residence in Concord, where he remained for the rest of his years, a 'sojourner in civilized life.'<sup>145</sup> Though he always lived a life of voluntary simplicity, he came to accept that industrial capitalism was an impersonally dictated politico-economic order within which he had to live, however much he despised it.<sup>146</sup> Since his material needs were so few, however, for a long time he found that he barely had to work one month each spring and fall to support himself.<sup>147</sup> His contemporary, Ralph Waldo Emerson, once made a fairly representative list some of Thoreau's various roles during these post-Walden years, a list which included 'building a boat or a fence, planting, grafting, surveying,' with 'short work' preferred to 'long engagements.'<sup>148</sup> These 'slight labors,' he reported, were 'commonly a pleasure' to him, and he was 'not often reminded they [were] a necessity.'<sup>149</sup> Though he was not highly paid, by keeping his material wants to a minimum he earned enough to generally work mornings only, leaving him with the afternoons and evenings absolutely free for his 'proper pursuits.' At the beginning of life, as at the end, Thoreau was very careful not to be seduced into exchanging his precious time and freedom, or converting nature into commodities, for an insufficient amount of comforts and luxuries. That is, he paid careful and dedicated attention to the question of optimality of consumption and production, and the preceding discussion was intended to introduce the idea that optimality may not mean material abundance.

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<sup>143</sup> Ibid.

<sup>144</sup> Ibid 325.

<sup>145</sup> Ibid 258.

<sup>146</sup> See Stoller, above n 72, 71.

<sup>147</sup> Ibid 52.

<sup>148</sup> Ibid 52-3.

<sup>149</sup> Thoreau, 'Life without Principle, above n 22, 636.

## 9. CONCLUSION: JUST ENOUGH IS PLENTY

So ends the examination of Thoreau's living experiment at Walden Pond and the alternative economics that he developed there. Or does this examination, by its very nature, have no end? After all, living a life of 'simplicity, independence, magnanimity, and trust,' involves 'solv[ing] some of the problems of life, not only theoretically, but practically also.'<sup>150</sup> And that is not so much a destination as it is an ongoing creative process. This chapter has left much unsaid, necessarily, and perhaps the discussion has raised more questions than it has answered. But perhaps that is how Thoreau would have wanted it. He was not interested in giving us detailed instructions on how to live a simpler life; nor did he want to save us the trouble of thinking for ourselves. Rather, he wanted to stoke the fire in our souls and inspire us with ideals. 'Don't spend your time in drilling soldiers,' he once wrote, 'who may turn out hirelings after all, but give to the undrilled peasantry a *country* to fight for.'<sup>151</sup>

Ever since he was a young man, Thoreau believed that the object of life was 'something else than acquiring property'<sup>152</sup> and that true success did not consist in 'much money, many houses' but in 'trying to better [our] condition in a higher sense than this.'<sup>153</sup> He had no desire to succeed in the desperate measure of getting rich or comfortable merely; he wanted to live well, to live deliberately, and he discovered that much less was needed for that task than might first have been thought. Thoreau's life is a reminder that dedicated individuals can establish a simpler, freer, way of life for themselves, simply by adopting a new attitude toward money and commodities and acting upon it with creativity and conviction.

This chapter began with the claim that property law, in particular, and the legal structure of the economy, in general, are inescapably normative constructions, in the sense that they imply a value-laden vision of the social world. The dual purpose of this chapter was, first, to undermine the vision of abundance which is currently giving shape to the private property / market systems of growth capitalism and, second, to provide some of the normative groundwork for a vision of sufficiency and simplicity which in the two forthcoming chapters will be developed and infused into a post-growth jurisprudence of property. The pro-growth vision of abundance is normatively grounded upon a conception of human beings as essentially consumers who need

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<sup>150</sup> Thoreau, *Walden*, above n 17, 270.

<sup>151</sup> As quoted in Stoller, above n 72, 123.

<sup>152</sup> *Ibid* 120.

<sup>153</sup> *Ibid*.

and desire ever-increasing consumption of goods and services to increase well-being. So far as that conception of humanity is accepted, it arguably follows that the legal structure of the economy should be shaped for the purpose of efficiently maximizing GDP per capita, since more income would mean that more consumer 'preferences' could be satisfied via market transactions. From that perspective, anything resembling a degrowth society would be decidedly unattractive, since by design a degrowth society would not function to maximize what consumers value as the most direct means to well-being, namely, increased consumption of goods and services.

We have seen, however, that Thoreau rejects the assumption that increased consumption always leads to increased well-being. He even encourages us to consider the perhaps counter-intuitive possibility that well-being could be increased by *reducing* consumption. In framing his alternative economic perspective, Thoreau began with the platitude that it is proper for individuals and societies to work to meet their basic material needs for food, clothing, shelter, etc., 'for not till we have secured these are we prepared to entertain the true problems of life with freedom and a prospect of success.'<sup>154</sup> But he then dedicated an unusual amount of attention to the question (ignored by mainstream economists and legal economists) of how much *more* material wealth is actually needed to live well and be free – the question of 'optimality.' Thoreau's radical conclusion, in essence, was that much less may be needed than is commonly thought. In the context of this thesis, Thoreau's conclusion brings into question whether affluent societies should still dedicate so much energy and attention to maximizing growth and, in particular, whether property and market relations as expressed in law should still be shaped for that purpose. Having secured the basic material conditions of life, Thoreau would argue, individuals in affluent societies are now faced with the question of whether to keep on pursuing material wealth *or to do something else with their lives*. Sometimes trading time for more money and commodities will be a good trade, no doubt; but sometimes such a trade will ultimately cost more than it comes to, in terms of *life*, making us not richer but poorer and thus be a bad (i.e. uneconomic) trade. Thoreau was so critical of his contemporaries because to him they rarely seemed to consider these questions and instead thoughtlessly spent their lives accumulating material 'superfluities' – richer foods, splendid houses, finer clothing, hotter fires, etc. – as if that were the only way to live. It is a critique that could be levelled at consumer cultures today. But there is an alternative, Thoreau insisted, and that is to stop the upward creep of material desire and voluntarily embrace a simpler life of reduced consumption and production.

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<sup>154</sup> Thoreau, *Walden*, above n 17, 267-8.

By doing so, Thoreau suggested, we could become 'richer than the richest are now.' Rejecting the consumerist ethos that 'more is always better,' Thoreau's central normative insight was that 'just enough is plenty,' and that simple insight, I contend, provides the most secure normative foundation upon which to construct a post-growth jurisprudence of property.





The law and legal disciplines are not created in a vacuum. Though they appear 'natural' and almost self-evident, the law and legal disciplines always tend, to a greater or narrower extent, to mirror the reality in which they are born and in which they grow. – **Mauro Zamboni**

#### Chapter Four

## THE SOCIAL CONSTRUCTION OF LAW: THE PROMISE OF THE VOLUNTARY SIMPLICITY MOVEMENT

### 1. INTRODUCTION

This chapter begins with a brief review of the argument so far. Chapter One presented a multi-dimensional critique of growth, arguing that growth in the advanced capitalist societies has become wasteful in terms of social well-being, ecologically unsustainable, and, on overall 'cost-benefit' analysis, uneconomic. On that basis it was proposed that those societies should stop pursuing growth and instead initiate a degrowth process of planned economic contraction, with the aim of moving toward and ultimately arriving at an ecologically sustainable and socially desirable steady-state economy. Since private property, as protected by law, is one of the central institutions of advanced capitalism – an institution widely celebrated as an engine for growth – it seemed fair to assume that any transition to a degrowth society would require, among other things, the legal reformation of current property structures, including the market and tax structures which help give property its institutional form. Accordingly, Chapter Two engaged critical property jurisprudence at length with the aim of determining whether, or to what extent, the private property / market systems of advanced capitalism could be legitimately reformed. By exposing the indeterminacy of property and market concepts in law and the implications of such, it was seen that that private property / market systems are malleable creatures of legal convention which can and do evolve as the 'social vision' which gives them institutional content evolves.<sup>1</sup> The logic of that conclusion implies that one way to induce legal reform of a private property / market system is to challenge the social

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<sup>1</sup> As explained in Chapter Two, the phrase 'social vision' can be understood to mean a normative commitment to a particular form of social life, which arises out of value judgements about how society should be organized, which goals should be pursued, and which types of relationships should be fostered. See Joseph Singer, 'The Reliance Interest in Property' (1988) 40(3) *Stanford L. R.* 611, 627-8.

vision upon which it rests, and that normative task was explicitly taken up in Chapter Three. Drawing on Thoreau's alternative economics, that chapter challenged today's pro-growth vision of material abundance by expressing an alternative vision based on the ideals of sufficiency and simplicity. It is that alternative vision which this thesis puts forward as the most secure normative foundation upon which to construct a post-growth jurisprudence of property.

It is not enough, however, simply to put forward an alternative social vision and hope for the best; which is to say, more is needed than the mere articulation of Thoreauvian ideals. Some explanation must also be offered as to how that alternative social vision could become infused into law, and that process of legal transformation is the issue which will be explored in this chapter. The background theoretical framework within which this chapter is situated is that of 'social constructionism,' a position, or variety of positions, which holds that the meaning of concepts, including legal concepts, is the product of evolving social practices and values rather than a reflection of an unchanging, objective reality.<sup>2</sup> While there are highly abstract philosophical issues surrounding social constructionism, the analysis of this chapter begins by questioning how and why, as a practical matter, socially constructed legal concepts acquire meaning, and how and why those meanings change. In examining these issues, the analysis looks to the emerging scholarship surrounding law and social movements.<sup>3</sup> In various ways this literature explores how social movements in any given society have impacted or could impact on the legal system to bring about structural change. Drawing on that literature and developing it in the context of this thesis, the preliminary argument of this chapter is that law can be understood, to a large extent, as a reflection of cultural values and assumptions, such that cultural evolution tends to induce legal evolution. In more theoretical terms, the basic argument is that if legal concepts are 'social constructs,' then social movements can be understood as a cultural mechanism through which legal concepts are socially

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<sup>2</sup> The claim that the meaning of concepts is the product of social practices and values implies that concepts acquire meaning from the ways in which they are *used* in language, which is another way of stating that the meaning of concepts is a contingent product of linguistic convention, not conceptual or semantic necessity. See Ludwig Wittgenstein, *Philosophical Investigations* (1953) 20 [43] ('The meaning of a word is its use in language.'). For a classic statement of social constructionism, see Peter Berger and Thomas Luckmann, *The Social Construction of Reality: A Treatise in the Sociology of Knowledge* (1966). One of most persuasive advocates of social constructionism in legal scholarship is Stanley Fish. See especially, Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989). See also, Larry Barnett, *Legal Construct, Social Concept: A Macrosociological Perspective on Law* (1993) (arguing that legal systems are social constructs, primarily shaped by social practices and values).

<sup>3</sup> See generally, Michael McCann (ed), *Law and Social Movements* (2006).

constructed and reconstructed.<sup>4</sup> This conclusion, so far as it is true, suggests that legal reformers, including property reformers, should carefully consider not only what cultural conditions would best facilitate the realization of their reform programs, but also what role social movements might have to play in producing those conditions.<sup>5</sup>

On that basis this chapter proceeds to define and discuss the Voluntary Simplicity Movement (the ‘Simplicity Movement’), a quietly emerging social movement which represents the most coherent manifestation, in contemporary Western society, at least, of the Thoreauvian ideals of sufficiency and simplicity.<sup>6</sup> It will be seen that the Simplicity Movement is comprised of a diverse range of people who are actively seeking to reduce or ‘downshift’ the level and impacts of their consumption (for various personal, social, and/or ecological reasons), while at the same time aiming to create for themselves an alternative, simpler conception of the good life in opposition to the Western-style consumerist ideal.<sup>7</sup> In the context of this thesis, the Simplicity Movement can be understood as a counter-culture that is rethinking personal relations to property – in particular, rethinking the question of how much property is ‘proper.’

The central argument of this chapter is that the Simplicity Movement or something like it will almost certainly need to expand, organize, and politicize, if anything resembling a post-growth property system (or a degrowth society more generally) is to emerge in law through democratic processes. In a sentence, that is the ‘grass-roots’ or ‘bottom up’ theory of legal transformation which will be expounded and defended in this chapter. In the next and final chapter we will be in a position to consider what a post-growth property system might actually look like as a program for legal reform.

## 2. LAW AND SOCIAL MOVEMENTS

‘This abstraction called Law,’ Justice Oliver Wendell Holmes, Jr., once observed, ‘is a magic mirror, [wherein] we see reflected, not only our own lives, but the lives of all

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<sup>4</sup> See Roberto Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (New ed, 2001) 556 (arguing that any transformative politics needs to be complemented by a cultural revolution in personal relations).

<sup>5</sup> See Jonnette Hamilton and Nigel Bankes, ‘Different Views of the Cathedral,’ in Aileen McHarg et al (eds), *Property and the Law in Energy and Natural Resources* (2010) 31 (describing private property as ‘socially constructed’).

<sup>6</sup> See generally, Mary Grigsby, *Buying Time and Getting By: The Voluntary Simplicity Movement* (2004).

<sup>7</sup> See generally, Samuel Alexander (ed), *Voluntary Simplicity: The Poetic Alternative to Consumer Culture* (2009).

men that have been!<sup>8</sup> Building upon this insight, celebrated legal historian, Kermit Hall, developed a conception of law as a ‘magic mirror,’ that is, as a reflection of culture which offers historians an opportunity to explore the social choices and moral imperatives of previous generations.<sup>9</sup> Consistent with social constructionist theory (though without being framed in such terms), Hall argued that law ‘is indeed a cultural artefact, a moral deposit of society. Because its life stretches beyond that of a single individual, its meaning reaches the values of society.’<sup>10</sup> Although Hall correctly acknowledged that law both affects and is affected by the social order – indeed, that law can both change and reinforce the social order – his theory of law is characterized predominately by how it describes ‘the rapidity with which changes in the general culture penetrated the legal system.’<sup>11</sup> Meticulously researched and robustly argued, Hall’s primary conclusion is that a legal system ‘is more like a river than a rock, more the product of social and cultural change than the molder of social development.’<sup>12</sup> This chapter builds upon Hall’s thesis that law is more the product of social and cultural change than the reverse.<sup>13</sup>

My interest in Hall’s conception of legal history lies not so much in its historical component but in what it implies about law today and in the future. If Hall is correct that the substance and structure of legal systems have changed over time ‘reflecting the values and assumptions of past generations,’<sup>14</sup> it would seem to follow that the future of law, including property law, depends upon the values and assumptions of present and future generations.<sup>15</sup> Within this framework, today’s pro-growth conception of property can be understood as a reflection of the dominant values and assumptions of today’s consumerist culture.<sup>16</sup> That is, if most individuals in advanced capitalist societies want ‘more’ then, naturally, those legal systems will tend to be structured to ‘grow.’ Hall’s theory implies, however, that if those cultural values and

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<sup>8</sup> Oliver Wendell Holmes Jr., *The Speeches of Oliver Wendell Holmes, Jr.* (1891) 17.

<sup>9</sup> Kermit Hall and Peter Karsten, *The Magic Mirror: Law in American History* (2nd ed, 2009) 1.

<sup>10</sup> *Ibid* 2.

<sup>11</sup> *Ibid* 341.

<sup>12</sup> *Ibid* 383.

<sup>13</sup> It should be acknowledged from the outset that ‘law reflects culture’ is a contestable and, in many ways, overly simplistic proposition, especially when stated so bluntly. Law, rather than being shaped by culture in a unidirectional way, sometimes takes the *lead* in social development and is influenced by forces *other* than cultural values. Nevertheless, for reasons to be explained, lawmakers (whether judges or politicians) have little option but to respond to significant changes in cultural values, and on that basis it will be argued that cultural forces (including social movements), while not the exclusive source of law, are indeed one of its primary sources. See Lawrence Rosen, *Law as Culture: An Invitation* (2006).

<sup>14</sup> Hall and Karsten, above n 9, 379.

<sup>15</sup> See Kathy Laster, *Law as Culture* (2nd ed, 2001) (highlighting the ways in which law reflects social values and priorities).

<sup>16</sup> See Neva Goodwin, Frank Ackerman and David Kiron (eds), *The Consumer Society* (1997).

assumptions were to change, this would likely induce changes to law.<sup>17</sup> Put otherwise, the idea is that changes in cultural values will tend to precipitate the emergence of new laws and the application of existing laws in new ways to new contexts. Indeed, it is my contention that the Simplicity Movement will need to enter the cultural mainstream to some significant extent if there is any hope of a post-growth property system being realized (or reflected) in law. The basic reasoning here is that the legal structure of a property system will not reflect an ethics of simplicity and sufficiency until such an ethics is embraced at the socio-cultural level. On that basis, I put forward the Simplicity Movement as a social movement of legal significance – potentially significant, at least – and thus a proper subject of legal analysis. For reasons to be canvassed below, however, the Simplicity Movement does not fit neatly into the existing literature on law and social movements and, therefore, in many ways it needs to be considered in its own light.

Although there is an emerging body of literature addressing questions relating to law and social movements, not so long ago it was noted that ‘legal scholars seem largely oblivious to the extensive social science literature on social movements.’<sup>18</sup> Indeed, in recent years, Michael McCann, one of the most prominent socio-legal theorists in this field, was still able to write that ‘[r]igorous study of law and social movements has been a surprisingly limited and marginal intellectual endeavour in the legal academy.’<sup>19</sup> McCann also observed that social movement specialists ‘have rarely directly analysed whether, or to what extent, law does or does not matter for the struggles at stake.’<sup>20</sup> This lack of correspondence and integration is unfortunate, another theorist laments, since ‘legal scholars have much to gain from broadening their perspective and making contact with the social movement literature.’<sup>21</sup> In particular, legal scholars could ‘acquire a new approach for understanding the origin and meaning of basic legal concepts,’<sup>22</sup> including, perhaps, property and market concepts. This chapter seeks to contribute to this underdeveloped but promising relationship between social movement literature and legal scholarship.

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<sup>17</sup> See also, Gerald Torres, ‘Social Movements and the Ethical Construction of Law’ (2009) 37 *Cap. U. L. R.* 535 (arguing that social movements are part of what creates social meaning and that meaning is reflected in the technical application of law’s command).

<sup>18</sup> Edward Rubin, ‘Passing Through the Door: Social Movement Literature and Legal Scholarship’ (2001) 150 *U. Pa. L. R.* 1, 2.

<sup>19</sup> Michael McCann, ‘Law and Social Movements: Contemporary Perspectives’ (2006) 2 *Annu. Rev. Law. Soc. Sci.* 17.

<sup>20</sup> Michael McCann (ed), *Law and Social Movements* (2006) xi.

<sup>21</sup> Rubin, above n 18, 3.

<sup>22</sup> *Ibid.*

### 2.1. *What is a Social Movement? Sketching the Boundaries of an Idea*

Before going any further it is worth clarifying the term ‘social movement,’ which scholars have defined in various, often overlapping, ways. An exact definition is not necessary for present purposes, but some clarification is needed for the discussion to proceed. Sidney Tarrow’s often cited definition holds that social movements are ‘groups possessing a purposive organization, whose leaders identify their goals with the preferences of an unmobilized constituency which they attempt to mobilize in direct action in relation to a target of influence in the political system.’<sup>23</sup> Charles Tilly, a political scientist, adds to this understanding. He proposes that a social movement is a sustained series of interactions between power-holders and persons speaking on behalf of a constituency lacking formal representation, ‘in the course of which those persons make publicly visible demands for changes in the distribution or exercise of power, and back those demands with public demonstrations of support.’<sup>24</sup> More recently, another helpful definition has been provided by socio-legal theorist, Cary Coglianese, who writes:

A social movement is a broad set of sustained organizational efforts to change the structure of society or the distribution of society’s resources. Within social movements, law reformers typically view law as a resource or strategy to achieve desired social change. Since social change is the purpose of a social movement, law reform generally is taken to provide a means of realizing that goal.<sup>25</sup>

Finally, for present purposes, there is the further clarification provided by McCann, who states that ‘social movements aim for a broader scope of social and political transformation than do more conventional political activities. While social movements may press for tangible, short-term goals within the existing structure of relations, they are animated by more radical aspirational visions of a different, better society.’<sup>26</sup> McCann also claims that social movements tend to develop through four broad phases, namely: (1) initial group identity formation, consciousness raising, and movement organizing; (2) early battles to win recognition by dominant groups or to get on the public agenda; (3) struggles of policy development and implementation; (4)

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<sup>23</sup> Sidney Tarrow, *Struggling to Reform: Social Movements and Policy Change During Cycles of Protest* (1983) 7.

<sup>24</sup> Charles Tilly, ‘Social Movements and National Politics’ in Charles Bright and Susan Harding (eds), *Statemaking and Social Movements* (1984) 306.

<sup>25</sup> Cary Coglianese, ‘Social Movements, Law, and Society: The Institutionalization of the Environmental Movement’ (2002) 150 *U. Pa. L. R.* 85.

<sup>26</sup> Michael McCann (ed), *Law and Social Movements* (2006) xiv.

eventual movement decline, transformation, 'hibernation,' or rebirth.<sup>27</sup> In anticipation of later discussions, it is suggested that the development of the Simplicity Movement is at most in transition between phases (1) and (2).<sup>28</sup>

## 2.2. *Social Movements and the Mobilization of Law*

Social movements often employ a wide range of tactics to advance their causes, including public education, media campaigns, and social networking, as well as disruptive 'symbolic' tactics which are intended to halt or upset social practices, such as protests, marches, strikes, and the like.<sup>29</sup> As the definitions above outlined, however, more developed social movements generally seek to make an impact not only in the social sphere but also a structural impact in the political and legal spheres, and such structural impact depends in a large part on being able to mobilize law for the movement's causes.<sup>30</sup> As McCann notes, 'law provides resources by which social groups and individuals initiate and sustain conflict over basic social values, arrangements and relationships,'<sup>31</sup> such that 'legal mobilization politics typically involves reconstructing legal dimensions of inherited social relations.'<sup>32</sup> This is not always (or ever) a unidirectional process, however, but a dialectical one, in the sense that social movements affect law while law can also affect social movements. On this point Susan Coutin has argued that social movements 'shape (or attempt to shape) the path of law, even as such pathmaking can redefine social reality in ways that, in turn, redefine causes and reshape activism.'<sup>33</sup>

It is also important to recognize that law and legal institutions can cut both ways, serving as resources both to challenge the existing order and to fortify the status quo against challenges.<sup>34</sup> Law has long been recognized as having a legitimizing or mystifying effect on the existing order,<sup>35</sup> colouring it at times with what Roberto Unger

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<sup>27</sup> Michael McCann, 'How Does Law Matter for Social Movements?' in Bryant Garth and Austin Sarat (eds), *How Does Law Matter?* (1998) 76, 79. See also, Doug McAdam and David Snow, *Social Movements: Readings on their Emergence, Mobilization, and Dynamics* (1997).

<sup>28</sup> On the underdeveloped political consciousness of the Simplicity Movement (discussed later in the chapter), see Grisby, *Buying Time and Getting By: The Voluntary Simplicity Movement*, above n 6, 12.

<sup>29</sup> Michael McCann (ed), *Law and Social Movements* (2006) xiv.

<sup>30</sup> See generally, Michael McCann, 'Legal Mobilization and Social Reform Movements: Notes on Theory and its Application' (1991) 11 *Studies in Law, Politics and Society* 225.

<sup>31</sup> Michael McCann (ed), *Law and Social Movements* (2006) xix.

<sup>32</sup> Michael McCann, 'Law and Social Movements' in Austin Sarat (ed), *The Blackwell Companion to Law and Society* (2004) 506, 510.

<sup>33</sup> Austin Sarat and Stuart Scheingold, *Cause Lawyers and Social Movements* (2006) 101.

<sup>34</sup> Michael McCann (ed), *Law and Social Movements* (2006) xx.

<sup>35</sup> On this point, see Jack Balkin, 'Critical Legal Theory Today' in Francis Mootz (ed), *On Philosophy in American Law* (2008) 64.

aptly terms ‘false necessity.’<sup>36</sup> Just as clearly, though, legal history is replete with examples of social movements having successfully used law as a tool to generate genuinely revolutionary reform – even, at times, over a relatively short timeframe. Joel Handler, in his pioneering text, *Social Movements and the Legal System: A Theory of Law Reform and Social Change*,<sup>37</sup> discusses the social movements associated with environmentalism, consumer protection, civil rights, and social welfare. All these areas featured social movements that included, as a central aspect of their program, the creation of new laws or the reform of existing ones.<sup>38</sup> The U.S. Civil Rights movement, in particular, provides one of the clearest and most striking case studies on this subject, since it had both judicial effects (e.g. *Brown v Board of Education*)<sup>39</sup> and legislative effects (e.g. Civil Rights Act 1964)<sup>40</sup> of arguably unprecedented proportions. It is all the more striking since the massive legal restructuring generated by this particular social movement was ignited by seemingly inconsequential acts in the social sphere, such as when Rosa Parks refused to give up her seat on the bus.<sup>41</sup>

Participants in social movements are correct to perceive the judicial process as one of the main mechanisms for legal reform. As Justice Sackville of the Australian Federal Court puts it, ‘Courts, like all institutions of government, have no option but to respond to social change.... Changes in community values... quickly permeate legal doctrine.’<sup>42</sup> Indirectly, social movements can affect how judges decide cases simply through the fact that social movements are a part of what constitutes and shapes culture, and judges themselves are inevitably shaped and influenced by the culture in which they adjudicate.<sup>43</sup> Put otherwise, even if law is not directly mobilized by a

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<sup>36</sup> See Unger, *False Necessity*, above n 4.

<sup>37</sup> Joel Handler, *Social Movements and the Legal System: A Theory of Law Reform and Social Change* (1978).

<sup>38</sup> See also, Drew Hutton and Libby Connors, *A History of the Australian Environment Movement* (1999); Paul Byrne, *Social Movements in Britain* (1997).

<sup>39</sup> *Brown v Board of Education* (1954) 347 U.S. 483.

<sup>40</sup> *Civil Rights Act* (1964) U.S.

<sup>41</sup> Of course, one must be wary of exaggerating the significance of the role Rosa Parks, as an individual, played in the Civil Rights Movement; but the point remains that it was an act of opposition in the social sphere – an example of innumerable acts, really – that helped spark the Civil Rights revolution in legal relations. It is also worth acknowledging the role that cases such as *Brown* played as a catalyst for social changes which, in turn, led to further legal changes. See generally, Joseph Luders, *The Civil Rights Movement and the Logic of Social Change* (2010). See also, Richard Dello Buono, Angela Stout and William Chambliss, *Social Problems, Law, and Society* (2004).

<sup>42</sup> Justice Ronald Sackville, ‘Courts and Social Change’ (2005) 33(3) *Federal Law Review* 373, 375.

<sup>43</sup> See Philip Bobbitt, *Constitutional Fate: Theory of the Constitution* (1982) 93-4 (arguing that courts often decide cases based on shared social values and that changes in legal meaning can often be connected to moment’s of change in the ‘ethos’ of a polity). With particular reference to property law, see Terry Frazier, ‘Protecting Ecological Integrity within the Balancing Function of Property Law’ (1998) 28(1) *Environmental Law* 53 (arguing that judges are inevitably influenced by culture when they create, interpret, or apply property rules).

social movement, arguments that may have been persuasive in court in the past (e.g. arguments based on race, gender, or sexual orientation, etc.) may not be so persuasive today as a result of social movements impacting on culture, including legal culture.<sup>44</sup> In this way, as Edwin Rubin argues, ‘the social sphere is... an important source of law.’<sup>45</sup>

In a more direct fashion, however, social movements can influence law and the judicial process by proactively initiating legal proceedings themselves and forcing the judiciary to reconsider or take a stand on issues that may otherwise have been left sleeping.<sup>46</sup> This more direct mode of influence has been the primary interest of current literature on law and social movements, which has focused on the role activist attorneys or ‘cause lawyers’ play in furthering the interests of social movements.<sup>47</sup> Since law is notoriously comprised of indeterminate concepts and sometimes contradictory principles,<sup>48</sup> cause lawyers acting in the name of social movements can initiate judicial proceedings to challenge existing interpretations of legal principles or concepts in order to redefine entitlements and formulate new aspirations for collective living. As McCann states, ‘inherited legal symbols and discourses provide relatively malleable resources that are routinely reconstructed as citizens consciously seek to advance their interests in everyday life.’<sup>49</sup> At the same time, McCann acknowledges that ‘this indeterminacy or plasticity of legal conventions is limited.’<sup>50</sup> Another social movement scholar agrees, arguing that legal cultures ‘provide symbols which can be manipulated by their members for strategic goals, but they also establish constraints on that manipulation.’<sup>51</sup> Despite the very real limitations and constraints, however, it is a matter of historical fact that ‘law can serve as a useful site for articulating and advancing alternative visions of the good’<sup>52</sup> – a point upon which this chapter seeks to build.

As well as mobilizing the judicial process, social movements can also seek to mobilize the legislative process to advance their alternative visions of the good.<sup>53</sup> The

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<sup>44</sup> See Torres, ‘Social Movements and the Ethical Construction of Law, above n 17, 547 (arguing that concerted social action can change what is considered the legitimate interpretation of law).

<sup>45</sup> Rubin, above n 18, 11.

<sup>46</sup> See Justice Ronald Sackville, ‘Courts and Social Change’ (2005) 33(3) *Federal Law Review* 373, 375 (noting that ‘social change generates new legal issues requiring resolution by the courts’).

<sup>47</sup> See Austin Sarat and Stuart Scheingold, *Cause Lawyers and Social Movements* (2006).

<sup>48</sup> See generally, Joseph Singer, ‘Legal Realism Now’ (1988) 76(2) *Calif. L. R.* 467.

<sup>49</sup> Michael McCann (ed), *Law and Social Movements* (2006) 6.

<sup>50</sup> *Ibid* xviii.

<sup>51</sup> Sally Merry, ‘Concepts of Law and Justice among Working-Class Americans: Ideology as Culture’ (1985) 9(1) *Legal Stud. F.* 59, 60.

<sup>52</sup> Austin Sarat and Stuart Scheingold, *Cause Lawyers and Social Movements* (2006) 9.

<sup>53</sup> See, e.g. Drew Hutton and Libby Connors, *A History of the Australian Environment Movement* (1999); Russell Dalton, *The Green Rainbow: Environmental Groups in Western Europe* (1994)

reasoning here, as outlined by Kristian Ekeli, is quite simple: ‘Political parties will in many cases have a strong incentive not to take a position that deviates too much from the preferences of their voters, in order not to be punished during the elections.’<sup>54</sup> It follows that if those social preferences change and/or their advocates become more vocal and influential, the prospect of mobilizing the legislature increases, since politicians will have an incentive to reconsider the priorities of their constituencies and act accordingly, or else risk losing office. In this way, as other scholars have correctly noted, ‘The law’s power depends on the values, beliefs, and behaviour of individuals.’<sup>55</sup> Since social movements are made up of innumerable, seemingly insignificant acts of individuals, those individual acts can be understood to socially construct law on account of their cumulative politico-juridical influence. ‘[B]y enacting legality in daily life, ordinary people give flesh and meaning to what is otherwise an “abstract but binding form.” Those everyday enactments, in turn, create the possibility for change – in law, in institutions, in social life.’<sup>56</sup> What all this suggests is that social movements and other cultural forces play a larger role in the construction of law than is acknowledged by those who conceive of law merely as a politico-juridical construction promulgated from ‘the top down.’<sup>57</sup> To understand the process of law reform, therefore – and to be able to develop effective strategies for law reform – attention must be paid to the influential (but often unnoticed) forces that shape law from the ‘bottom up.’

Consistent with Hall’s thesis that legal history is a ‘magic mirror’ which reflects cultural history, Edward Rubin has argued that much of legal history ‘can be described as the product of social movements, and this perspective might provide new insights into otherwise familiar events.’<sup>58</sup> While no socio-legal theorists suggest that social movements are the *only* forces that shape law, Rubin and others are surely correct to insist that their powerful influence and impact cannot be denied. It should be noted, however, that this perspective is not new. As far back as 1926, John Franklin Jameson published *The American Revolution as a Social Movement*,<sup>59</sup> in which he depicted the Revolution (and its legal ramifications) first and foremost as

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(exploring the effects that environmental interest groups have on the political process through the groups’ creation of a force for changing society’s policy interests).

<sup>54</sup> Kristian Ekeli, ‘Giving a Voice to Posterity: Deliberative Democracy and Representation of Future People’ (2005) 18 *Journal of Agricultural and Environmental Ethics* 429, 431.

<sup>55</sup> Anna-Maria Marshall and Scott Barclay, ‘In Their Own Words: How Ordinary People Construct the Legal World’ (2003) 28(3) *Law & Social Inquiry* 617, 622.

<sup>56</sup> *Ibid* 618 (footnotes omitted).

<sup>57</sup> See Torres, ‘Social Movements and the Ethical Construction of Law,’ above n 17 (discussing the role popular understanding plays in how law is created and how this expands conventional ideas about where the authoritative commands that we call law originate).

<sup>58</sup> Rubin, above n 18, 64.

<sup>59</sup> John Franklin Jameson, *The American Revolution as a Social Movement* (1926).

a *social* uprising.<sup>60</sup> What Jameson, Rubin, Hall, and other theorists suggest is that ‘changes in society’s values and public opinion can feed back into the legal system and affect the prospects for law reform and enhance the effective implementation of legislation.’<sup>61</sup> Not only that, ‘law reform efforts themselves may have an impact on public opinion, with action by courts and other legal institutions sometimes lending legitimacy to the claims advanced by social movements.’<sup>62</sup> The legal system, therefore, can be used both to enlarge opportunities for grass-roots collective action and to consolidate any achievements. In these ways law reform efforts by social movements can function both as a club and a catalyst for a transformative politics.

### 2.3. *The Uniqueness of the Voluntary Simplicity Movement and its Implications for Legal Reform*

It was noted earlier that the Simplicity Movement does not fit neatly into the conceptual frameworks commonly used for thinking about law and social movements. One reason for this is that social movements tend to be conceptualized (often with every justification) as subordinate or excluded groups in society seeking increased empowerment, recognition, and respect through social struggle. Obvious examples, particularly in the U.S., are the Civil Rights, Women’s Rights, and Gay Rights movements. The Simplicity Movement, however, cannot be placed coherently into this category, since the very act of voluntarily reducing consumption and production generally implies a certain position of privilege and material security in society, which subordinate or excluded groups typically (though not necessarily) lack.<sup>63</sup> It remains to be seen, however, exactly what implications this may have for any law reform efforts arising out of the Simplicity Movement. One negative implication might be a relatively diminished sense of social solidarity or ‘group consciousness’ within the Simplicity Movement, at least in the sense that participants may not be driven together by a deep and immediate sense of personal or social injustice which historically gave intense motivational fire to other movements (such as Civil Rights, Women’s Rights, and Gay Rights).<sup>64</sup> Indeed, it will be seen below that one criticism levelled at the

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<sup>60</sup> See also, Drew Hutton and Libby Connors, *A History of the Australian Environment Movement* (1999); Paul Byrne, *Social Movements in Britain* (1997).

<sup>61</sup> Coglianese, above n 25, 86.

<sup>62</sup> *Ibid.*

<sup>63</sup> As David Shi remarks, ‘By its very nature... voluntary simplicity has been and remains an ethic professed and practiced by those free to choose their standard of living.’ See David Shi, *The Simple Life: Plain Living and High Thinking in American Culture* (2nd ed, 2007) 7.

<sup>64</sup> See generally, Loretta Capeheart and Dragan Milovanovic, *Social Justice: Theories, Issues, and Movements* (2007).

Simplicity Movement has been its tendency to be apolitical. Perhaps a lack of passionate solidarity among participants explains this. It would be wrong to jump to conclusions here, however. After all, the Environmental Movement does not fit obviously into the category of subordinate/excluded groups – many of its participants are well-educated and middle-class (even if the environmental ‘cause’ itself remains subordinate)<sup>65</sup> – and yet environmental activists are notoriously as passionate, driven, and committed as any.<sup>66</sup> In fact, the environmentalist sensibility within the Simplicity Movement (discussed below) may provide it with all the motivational intensity it needs, since the ecological threat is arguably the greatest challenge humanity has ever faced. Looking at the uniqueness of the Simplicity Movement from a very different and more positive perspective, however, the fact that the movement arises out of relatively privileged socio-economic circumstances may actually prove to be to its advantage, in that there may be fewer hurdles to overcome should it seek to access or influence legal and political processes for the purposes of structural reform.

These points suggest that the social movement which most closely resembles the Simplicity Movement, and which might shed some light on it, is the Environmental Movement.<sup>67</sup> The Environmental Movement has contributed to considerable changes in law and social values over the last few decades, as Coglianese writes: ‘Legal reform, if it is to have an enduring impact, needs to be accompanied by a genuine change in public values. Broad public support for the environment has helped to sustain the nation’s basic institutional commitment to the environment as reflected in contemporary law.’<sup>68</sup> Furthermore, he adds, ‘[j]ust as the legal system helps sustain environmentalism during periods of public inattention, the system of environmental law is itself sustained by a broad social consensus in favour of environmental protection and by a latent environmentalism that stands ready to be activated by environmental groups.’<sup>69</sup> Coglianese sums up his central conclusion neatly in the following passage:

[L]aw reform is not simply a tool for changing society; rather, law reform is itself affected by society and its nonlegal norms and values. To be successful, social movement reformers need not only seek changes in the law but changes in public

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<sup>65</sup> The Environmental Movement, however, far from being as monolithic as this suggests, is increasingly diverse. For a discussion, see Timothy Doyle, *Environmental Movements in Minority and Majority Worlds* (2005).

<sup>66</sup> See, e.g., Christopher Manes, *Green Rage: Radical Environmentalism and the Unmaking of Civilization* (1st ed, 1990).

<sup>67</sup> See generally, John McCormick, *Reclaiming Paradise: The Global Environmental Movement* (1989).

<sup>68</sup> Coglianese, above n 25, 109.

<sup>69</sup> *Ibid* 116.

values too. In the absence of direct changes to society's values, law reform efforts could prove at worst vacuous or at best vulnerable to counterattack or atrophy over time.<sup>70</sup>

In the context of this thesis, the significance of this conclusion lies in how it exposes the need for law reformers to pay attention to social values as a necessary part of law reform efforts.<sup>71</sup> Social movements clearly need law reform to help achieve their goals of social change, but 'law reform itself needs a supportive social and political climate if it is to maintain its viability and effectiveness over time.'<sup>72</sup> This point draws attention to the 'reactive' rather than 'proactive' nature of liberal democracies, as another scholar explains (also in the context of the Environmental Movement): 'Political parties are just a reflection of their society... Political parties will only behave in a more environmental fashion from the moment that the average citizen will do so and not in the reverse order.'<sup>73</sup> This is no doubt the kind of reasoning which led Robyn Ekersley to assert that 'the environmental problematic is a crisis of culture and character.'<sup>74</sup> More generally, the problems of growth outlined in Chapter One could be characterized in much the same way, suggesting that the cause of and the solution to those problems may lie primarily – at least, initially – in the social sphere.<sup>75</sup>

A second factor that distinguishes the Simplicity Movement from most literature on law and social movements is that it does not imply – at least, not obviously – a political agenda. It may be obvious that it *needs* a political agenda, but even if that is so it is much less obvious what such an agenda would look like. Contrast this with other movements. The politics of the early Women's Rights movement, for example, obviously called for such structural changes as the right to vote; the Civil Rights movement obviously called for desegregation, among other things; the Gay Rights

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<sup>70</sup> Ibid.

<sup>71</sup> There is a large socio-legal studies movement which, in various ways, ratifies this claim. Though the vast literature cannot be comprehensively reviewed here, some of the important contributions (beyond the literature already cited) include: Lawrence Friedman, 'The Law and Society Movement' (1986) 38 *Stan. L. R.* 763; Alan Hunt, *Explorations in Law and Society: Towards a Constitutive Theory of Law* (1993); Roger Cotterrell, *Sociological Perspectives on Law* (2001).

<sup>72</sup> Coglianesse, above n 25, 116.

<sup>73</sup> See Marius De Geus, *The End of Over-Consumption: Towards a Lifestyle of Moderation and Self-Restraint* (2003) 25 (quoting Dick Tommel, a Dutch Member of Parliament).

<sup>74</sup> Robyn Ekersley, *Environmentalism and Political Theory: Toward an Ecocentric Approach* (1992) 17. See also, Christer Berglund and Simon Matti, 'Citizen and Consumer: The Dual Role of Individuals in Environmental Policy' (2006) 15(4) *Environmental Politics* 550.

<sup>75</sup> To clarify, this is not to deny, of course, the necessary role law will need to play in any transformative politics; it is only to propose that progressive reform in the legal and political spheres will depend, ultimately, on a social sphere that deems such reform necessary and legitimate.

movement obviously called for the decriminalization of homosexuality, etc.<sup>76</sup> Although it can be argued that deeper and less apparent structural biases did and still do discriminate unjustly against these groups,<sup>77</sup> the present point is that as those groups were forming into social movements there were at least some political changes to focus on that were quite clearly implied from the outset by the nature of the movements themselves.

As noted above, however, it is not immediately obvious what transformative politics is implied by the Simplicity Movement. I would suggest that this is primarily due to the highly problematic nature of one of the Simplicity Movement's defining concerns, namely, reducing and changing consumption habits in affluent societies.<sup>78</sup> According to liberal theory and neoclassical economics, consumption is generally conceived of as a matter of 'private preference,' an area of life in which individuals make their own decisions in the marketplace free from politico-juridical mandates.<sup>79</sup> From that liberal / economic perspective, reducing or changing consumption habits may or may not be a requirement of morality or ethics, but it is certainly not an area that should be governed by law. In other words, the liberal / economic position is that lawmakers should not seek to shape or govern private preferences as expressed in the market; rather, lawmakers should be neutral in regard to consumption by taking private preferences as 'given.' That conception of market consumption may well need to be rethought, to some extent, at least, if there is ever to be a politics of voluntary simplicity, a politics of consumption.<sup>80</sup>

Fortunately, some of the background analysis on this point was canvassed in Chapter Two, where it was argued at length that law (including property and market structures) cannot be neutral, as such. On that basis I would argue that the prospect of a politics of voluntary simplicity should not be dismissed in advance simply on the grounds that it would be non-neutral with respect to its effects on consumption habits

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<sup>76</sup> See generally, Peter Rodrigues and Titia Loenen, *Non-Discrimination Law: Comparative Perspectives* (1999).

<sup>77</sup> *Ibid.*

<sup>78</sup> See Albert Lin, 'Virtual Consumption: A Second Life for Earth' (2008) 2008 *BYU L. R.* 476 ('Tackling the problems posed by consumption quickly entangles one in questions of lifestyle choices and equity').

<sup>79</sup> The theoretical foundations of this position were outlined in the Introduction, Sect. 2. See also, Tim Jackson, 'Policies for Sustainable Consumption' (2003) 64 <[http://www.sd-commission.org.uk/file\\_download.php?target=/publications/downloads/030917%20Policies%20for%20sustainable%20consumption%20\\_SDC%20report\\_.pdf](http://www.sd-commission.org.uk/file_download.php?target=/publications/downloads/030917%20Policies%20for%20sustainable%20consumption%20_SDC%20report_.pdf)> at 15 December 2010 (noting that 'There has been a tendency in conventional policy to assume that government should play as little role as possible in regulating or intervening in consumer choice. The doctrine of consumer sovereignty has dominated both economics and politics for several decades').

<sup>80</sup> See Lin, above n 78, 1 ('Consumption is at the root of many of the world's greatest environmental challenges, yet laws or policies that directly address consumption are rare'). See also, James Salzman, 'Sustainable Consumption and the Law' (1997) 27 *Environmental Law* 1243.

(since every legal regime is non-neutral).<sup>81</sup> But even if that preliminary point is accepted, that does not say anything about what concrete politics of consumption is actually implied by the Simplicity Movement. Once again, this lack of clarity distinguishes the Simplicity Movement from those other social movements which seemed to have at least a preliminary political agenda implicit in their very natures. For these reasons I contend that the Simplicity Movement must dedicate much more attention to formulating a coherent political agenda, partly as a means of fostering group-consciousness and partly as a means of amplifying the movement's political sensibility.<sup>82</sup> That task of formulating a politics of voluntary simplicity is explicitly taken up in the final chapter, which focuses on the legal reformation of private property / market systems in advanced capitalist societies. The remainder of this chapter, however, is dedicated to providing a more detailed account of the Simplicity Movement itself, for the central argument being advanced in this chapter is that the Simplicity Movement will need to expand and organize at the social level if a politics of voluntary simplicity is ever to reconstruct law.

### 3. THE VOLUNTARY SIMPLICITY MOVEMENT

Since legal theorists have paid almost no attention to the Simplicity Movement,<sup>83</sup> this part of the chapter will begin by contextualizing the contemporary movement and offering an expanded definition of the underlying idea. In the interests of clarity some common misconceptions about voluntary simplicity will also be addressed. Later sections will (i) consider the various justifications that have been offered in support of voluntary simplicity; (ii) provide an overview of how the idea is variously practiced by participants in the movement today; and (iii) respond to objections that are sometimes levelled at the Simplicity Movement. The concluding section will return to consider the movement's potential legal and political significance in anticipation of the concrete reforms proposed in the final chapter.

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<sup>81</sup> See also, Cass Sunstein, 'Legal Interference with Private Preferences' (1986) 53(4) *U. of Chi. L. R.* 1129 (outlining the myriad ways in which law already 'interferes' with private preferences).

<sup>82</sup> For the only sustained inquiry dedicated solely to the politics of voluntary simplicity, see Charles Siegel, *The Politics of Simple Living* (2008).

<sup>83</sup> Aside from occasional passing comments here and there, it appears that the only legal scholarship, other than my own, which addresses the relationship between law and voluntary simplicity is the piece Eric Freyfogle wrote for my edited anthology on simplicity. See Eric Freyfogle, 'Simplicity, Community, and Private Land,' in Alexander (ed), above n 7, 245-253.

### 3.1. Contextualizing the Movement in an Age of Commodity Fetishism

In the developed regions of the world, such as North America, Western Europe, Japan, Australia, New Zealand, etc., decades of unprecedented economic growth have all but solved the economic problem of how to secure the necessities of life and, indeed, have resulted in most people living lives of relative luxury and comfort.<sup>84</sup> Though a small residue of poverty remains in these regions, on the whole ordinary people are fabulously wealthy when considered in the context of all known history or when compared with the 2.5 billion people who today struggle for a bare subsistence.<sup>85</sup> As Clive Hamilton puts it, 'Most Westerners today are prosperous beyond the dreams of their grandparents.'<sup>86</sup> The houses of typical families are bigger than ever,<sup>87</sup> and they are each filled with untold numbers of consumer products, such as multiple TVs, stereos, computers, mobile phones, racks of unused clothes, washing machines, fridges, dishwashers, dryers, vacuum cleaners, kitchen gadgets, etc. – products that often overflow into garages or hired storage rooms to create spaces full of accumulated 'stuff.'<sup>88</sup> Houses are often centrally heated and air-conditioned, with spare rooms and two or more cars parked outside.<sup>89</sup> Average wages are well above subsistence levels,<sup>90</sup> meaning that almost everyone has spare income to spend on comforts and luxuries such as alcohol, take-away food, going to the movies, fashionable clothes or furniture, books, taking holidays, etc. People generally have access to a variety of public services, including free primary and secondary education. On top of all this, democratic political systems are firmly established, the water is clean, and almost nobody goes hungry.<sup>91</sup>

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<sup>84</sup> See generally, Avner Offer, *The Challenge of Affluence: Self-Control and Well-Being in the United States and Britain since 1950* (2006); Robert Frank, *Luxury Fever: Why Money Fails to Satisfy in an Era of Excess* (1999); Richard Easterlin, *Growth Triumphant: The Twenty-First Century in Historical Perspective* (1996).

<sup>85</sup> See World Bank, 'World Development Indicators: Poverty Data,' (2008) 11 <<http://siteresources.worldbank.org/DATASTATISTICS/Resources/WDI08supplement1216.pdf>> at 5 September 2010.

<sup>86</sup> Clive Hamilton, *Growth Fetish* (2003) xi.

<sup>87</sup> See, e.g., Alex Wilson and Jessica Boehland, 'Small is Beautiful: U.S. House Size, Resource Use, and the Environment' (2005) 9(1/2) *Journal of Industrial Ecology* 277 (reporting that average living area per person in new houses in the U.S. increased by a factor of three since 1950s).

<sup>88</sup> In the United States, for example, the storage industry has increased 40-fold since the 1960s, from virtually nothing to \$12 billion annually, making it now larger than the US music industry. See John De Graaf et al, *Affluenza: The All-Consuming Epidemic* (2nd ed, 2005) 32.

<sup>89</sup> Hamilton, above n 86, xi.

<sup>90</sup> In February 2010, for example, the Australian Bureau of Statistics reported that the average, full-time salary in Australia was over \$67,000. See <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/mf/6302.0>> at 10 August 2010).

<sup>91</sup> Again, this is not to deny that residual poverty remains an extremely important issue even in advanced capitalist societies; rather, the claim is that affluence, not poverty, is now the dominant

All this is indicative of unprecedented material wealth, which it will not be suggested is a bad thing, necessarily. But it is a prosperity which has proven extremely easy to take for granted, leaving many in the global middle-class still feeling deprived despite their plenty.<sup>92</sup> Material wealth has reached unprecedented levels and yet there is growing body of social research which indicates that many people in affluent societies today are no more satisfied with their lives than people were in the 1950s and '60s.<sup>93</sup> In other words, it seems that huge increases in material wealth have stopped contributing meaningfully to individual and social well-being affluent societies.<sup>94</sup> It is troubling, therefore, to see that even the richest nations are still focused primarily on maximizing wealth, maximizing GDP per capita.<sup>95</sup> As Thoreau would say, '[We] labor under a mistake.'<sup>96</sup>

Is it possible that the majority of people living in affluent societies today have reached a stage in their economic development where the process of getting richer is now causing the very problems that they seem to think getting richer will solve? Building upon and updating Thoreau's alternative economics, I wish to argue that this is indeed the case. Consumer culture, which every day is being globalized further,<sup>97</sup> is failing to fulfil its promise of a better life.<sup>98</sup> It has even begun taking away many of the things upon which well-being depends, such as community life,<sup>99</sup> a work/life balance,<sup>100</sup> spiritual and aesthetic experience,<sup>101</sup> and a healthy natural environment.<sup>102</sup> All this makes it hard to avoid the confronting questions: Is more

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societal characteristic. See Hamilton, above, n 85, xiii-xvii (critiquing the 'deprivation model' of politics which shapes policies as if society were generally deprived, despite actual affluence).

<sup>92</sup> Despite living in one of the richest nations in the world, when Australians were asked in a nationwide survey about whether they thought they could 'afford to buy everything they really needed,' nearly two-thirds said 'no.' See Clive Hamilton and Richard Denniss, *Affluenza: When Too Much is Never Enough* (2005) 4.

<sup>93</sup> See Chapter One, Sect. 2.

<sup>94</sup> As discussed in Chapter One, Sect. 2, the best explanation for this phenomenon seems to be that beyond the satisfaction of 'basic needs' (a concept that is admittedly problematic, but still useful), further increases in income are a poor substitute for non-materialist 'goods,' such as friendship, community engagement, meaningful employment, leisure, creative activity, etc. See generally, Rafael Di Tella and Robert MacCulloch, 'Happiness Adaptation to Income Beyond "Basic Needs"' in Ed Diener, Daniel Kahneman and John Helliwell (eds), *International Differences in Well-Being* (2010) 217.

<sup>95</sup> See generally, Stephen Purdey, *Economic Growth, the Environment and International Relations: The Growth Paradigm* (2010); Joseph Stiglitz, Amartya Sen and Jean-Paul Fitoussi, *Mis-Measuring Our Lives: Why GDP Doesn't Add Up* (2010).

<sup>96</sup> Henry David Thoreau, 'Walden' in Carl Bode (ed), *The Portable Thoreau* (1982) 261.

<sup>97</sup> See Hellmuth Lange and Lars Meier, *The New Middle Classes: Globalizing Lifestyles, Consumerism and Environmental Concern* (2009).

<sup>98</sup> See Tim Kasser and Allen Kanner (eds), *Psychology and Consumer Culture: The Struggle for a Good Life in a Materialistic World* (2003).

<sup>99</sup> See Robert Putnam, *Bowling Alone: The Collapse and Revival of American Community* (2000).

<sup>100</sup> John De Graaf (ed), *Take Back Your Time: Fighting Overwork and Time Poverty in America* (2003).

<sup>101</sup> David Myers, *The American Paradox: Spiritual Hunger in an Age of Plenty* (2000).

<sup>102</sup> See Chapter One, Sect. 3.1.

consumption and production really the solution to these problems? Or is there, as Ted Trainer puts it, a 'Simpler Way'?<sup>103</sup>

The following sections look more deeply into the way of life practised by participants in the Simplicity Movement.

### 3.2. *Defining Voluntary Simplicity*

Voluntary simplicity is an oppositional living strategy that rejects the high-consumption, materialistic lifestyles of consumer cultures and affirms what is often just called 'the simple life' or 'downshifting.'<sup>104</sup> Sometimes called 'the quiet revolution',<sup>105</sup> this approach to life involves providing for material needs as simply and directly as possible, minimizing expenditure on consumer goods and services, and directing progressively more time and energy towards pursuing non-materialistic sources of satisfaction and meaning.<sup>106</sup> This generally means accepting a lower income and a lower level of consumption, in exchange for more time and freedom to pursue other life goals, such as community or social engagements, more time with family, artistic or intellectual projects, more fulfilling employment, political participation, sustainable living, spiritual exploration, reading, contemplation, relaxation, pleasure-seeking, love, and so on – none of which need to rely on money, or much money.<sup>107</sup> Various defended by its advocates on personal, social, humanitarian, and ecological grounds (discussed below), voluntary simplicity is predicated on the assumption that human beings can live meaningful, free, happy, and infinitely diverse lives, while consuming no more than a sustainable and equitable share of nature.<sup>108</sup> That, at least, is the challenging ideal which seems to motivate and guide many of its advocates and practitioners.<sup>109</sup>

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<sup>103</sup> See Ted Trainer, 'The Simpler Way,' <<http://ssis.arts.unsw.edu.au/tsw/>> at 10 October 2010.

<sup>104</sup> See, e.g., Charles Wagner, *The Simple Life* (1901); Juliet Schor, *The Overspent American: Upscaling, Downshifting, and the New Consumer* (1st ed, 1998). The term voluntary simplicity was coined by Richard Gregg, an American lawyer and committed follower of Gandhi. See Richard Gregg, 'The Value of Voluntary Simplicity,' in Alexander (ed), above n 7, 111-126.

<sup>105</sup> Duane Elgin, *Promise Ahead: A Vision of Hope and Action for Humanity's Future* (1st ed, 2000) Ch. 4.

<sup>106</sup> See Amitai Etzioni, 'Voluntary Simplicity: A New Social Movement?' in William Halal and Kenneth Taylor, *Twenty-First Century Economics: Perspectives of Socioeconomics for a Changing World* (1999).

<sup>107</sup> See Clive Hamilton and Richard Denniss, 'The Downshifters,' in Alexander (ed), above n 7, 219-234.

<sup>108</sup> See Joshua Gambrel and Philip Cafaro, 'The Virtue of Simplicity' (2009) 23(1) *Journal of Agricultural and Environmental Ethics* 85.

<sup>109</sup> See generally, Cecile Andrews and Wanda Urbanska (eds), *Less is More: Embracing Simplicity for a Healthy Planet, a Caring Economy and Lasting Happiness* (2009).

According to this philosophy of living, personal and social progress is measured not by the conspicuous display of wealth or status, but by increases in the qualitative richness of daily living, the cultivation of relationships, and the development of social, intellectual, aesthetic, and/or spiritual potentials.<sup>110</sup> As Duane Elgin has famously defined it, voluntary simplicity is ‘a manner of living that is outwardly simple and inwardly rich, ... a deliberate choice to live with less in the belief that more life will be returned to us in the process.’<sup>111</sup> According to the most prominent historian of the Simplicity Movement, David Shi, the primary attributes of the simple life include: thoughtful frugality; a suspicion of luxuries; a reverence and respect for nature; a desire for self-sufficiency; a commitment to conscientious rather than conspicuous consumption; a privileging of creativity and contemplation over possessions; an aesthetic preference for minimalism and functionality; and a sense of responsibility for the just uses of the world’s resources.<sup>112</sup> More concisely, Shi defines voluntary simplicity as ‘enlightened material restraint.’<sup>113</sup>

It should be noted that voluntary simplicity does not, however, mean living in poverty, becoming an ascetic monk, or indiscriminately renouncing all the advantages of science and technology. It does not involve regressing to a primitive state or becoming a self-righteous puritan. And it is not some escapist fad reserved for saints, hippies, or eccentric outsiders. Rather, advocates of simplicity suggest that by examining afresh our relationships with money, material possessions, the planet, ourselves and each other, ‘the simple life’ of voluntary simplicity is about discovering the freedom and contentment that comes with knowing how much consumption is truly ‘enough.’<sup>114</sup> Arguably, this is a theme that has something to say to everyone, especially those in consumer cultures today who are every day bombarded with thousands of cultural and institutional messages insisting that ‘more is always better.’ Voluntary simplicity is a philosophy of living that advocates a counter-cultural position based on notions of sufficiency and simplicity.<sup>115</sup>

The notion of living simply, of course, is not new.<sup>116</sup> The virtues of moderation and enlightened material restraint have been integral to almost all ancient wisdom

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<sup>110</sup> See Jerome Segal, *Graceful Simplicity: Toward a Philosophy and Politics of the Alternative American Dream* (1st ed, 1999).

<sup>111</sup> Duane Elgin, *Voluntary Simplicity: Toward a Way of Life that is Outwardly Simple, Inwardly Rich* (Rev. ed, 1993).

<sup>112</sup> Shi, above n 63, 3.

<sup>113</sup> *Ibid* 131.

<sup>114</sup> See Alan Durning, *How Much is Enough?: The Consumer Society and the Future of the Earth* (1992).

<sup>115</sup> See Thomas Princen, *The Logic of Sufficiency* (2005); Gambrel and Cafaro, above n 108.

<sup>116</sup> See generally, Goldian Vanenbroeck (ed), *Less is More: An Anthology of Ancient and Modern Voices Raised in Praise of Simplicity* (1991).

and spiritual traditions throughout history, with prominent advocates including Lao Tzu, Confucius, Buddha, Diogenes, the Stoics, Jesus, Mohammad, St Francis, the Quakers, John Ruskin, William Morris, the New England Transcendentalists (especially Henry Thoreau), the European Bohemians, Tolstoy, Gandhi, Lenin, Richard Gregg, Helen and Scott Nearing, and many of the Indigenous peoples around the world.<sup>117</sup> But in postmodernity, where consumption seems to be glorified and luxury admired as never before, voluntary simplicity arguably acquires a special significance.

#### 4. MISCONCEPTIONS ABOUT VOLUNTARY SIMPLICITY

So as not to be misunderstood, it may be worthwhile spending a few moments clarifying a few points made in preceding sections by distinguishing voluntary simplicity from what it is not.

##### 4.1. *A Glorification of Poverty?*

Voluntary simplicity can be misinterpreted sometimes as glorifying or romanticizing poverty, a myth encouraged perhaps by the fact that some of the more extreme proponents of simplicity – e.g. Diogenes, St Francis, Gandhi, etc. – did indeed live lives of staggering material renunciation. Such extremism can be alienating if it is considered to be a defining or necessary feature of the simple life, which it is not.<sup>118</sup> There is also a risk that advocates of simplicity will be understood to be downplaying the plight of those in the world who genuinely live lives oppressed by material deprivation. It is of the utmost importance, then, to be perfectly clear on this point: voluntary simplicity does not mean poverty. Poverty, in its various dimensions, is debilitating and humiliating.<sup>119</sup> Voluntary simplicity, on the other hand, can be understood as an empowering expression of freedom; a choice to live with fewer market commodities in the belief that a better life, and a better world, will result. It is about the importance of understanding and attaining material *sufficiency*,<sup>120</sup> while, at the same time, creating a life rich in its non-material dimensions.<sup>121</sup>

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<sup>117</sup> For a sampling of the historical literature, see Vanenbroeck (ed), above n 116.

<sup>118</sup> See Segal, above n 110, 20.

<sup>119</sup> On the difficulty of defining poverty, see Segal, above n 110, 21.

<sup>120</sup> See Thomas Princen, *The Logic of Sufficiency* (2005).

<sup>121</sup> See Segal, above n 110, 22.

#### 4.2. *Necessarily Agrarian? Just for Hippies?*

Living simply does not necessarily imply leaving the city to live in the country; nor does it mean becoming a hippie or joining a commune. Although some may find that an agrarian existence is a very good and natural way to live, it will not be attractive (or available) to everyone; nor will living in a hippie commune. Indeed, learning how to live more simply and sustainably in an increasingly urbanized world is surely one of the greatest challenges of our age, especially since legal and political institutions and social infrastructure make urban simple living, especially, much more difficult than it needs to be. For now, suffice it to note that voluntary simplicity is not synonymous with the 'back-to-the-land' movement or the counter-cultures that arose in the 1960s and 70s. It should be added, however, that those movements do share some common ideals with voluntary simplicity, such as anti-consumerism, self-sufficiency, the celebration of life, a deep respect for nature, and non-violent resistance to unjust features of society.<sup>122</sup>

#### 4.3. *Primitive, Regressive, Anti-Technology?*

Voluntary simplicity, furthermore, does not mean indiscriminately renouncing all the advantages of science and technology. It does not mean living in a cave, giving up all the benefits of electricity, or rejecting modern medicine. But it does question the assumption that science and technology are always the most reliable paths to health, happiness, and sustainability. It is certainly better to accept rather than reject the advantages, though so dearly bought, which the invention and industry of humankind offer – provided, of course, that they are genuine advantages. But often with such 'modern improvements,' as Thoreau warned, there is 'an illusion about them; there is not always a positive advance.'<sup>123</sup> Voluntary simplicity, then, involves taking a thoughtfully sceptical stance in relation to technology and science, rejecting those aspects which, all things considered, seem to cost more than they come to. Clearly, this is far from being primitive or regressive. Just perhaps our modern technocratic societies will one day come to see that there is a sophistication and elegance to the clothesline, the bicycle, and the water tank that the dryer, the automobile, and the desalination plant, decidedly lack. On a similar note, perhaps it will one day be widely accepted that there is a certain primitiveness to technological gimmicks or that a

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<sup>122</sup> See H el ene Cherrier, 'Anti-Consumption Discourses and Consumer-Resistant Identities' (2009) 62(2) *Journal of Business Research* 181.

<sup>123</sup> Thoreau, above n 96, 306.

blind faith in science can itself be ‘anti-progress.’ In the words of the great Leonardo da Vinci: ‘Simplicity is the ultimate sophistication.’<sup>124</sup>

## 5. JUSTIFYING VOLUNTARY SIMPLICITY

With the definitional overview complete, it is now time to consider what reasons or incentives there might be for choosing a life of voluntary simplicity. The following discussion is divided into four (somewhat overlapping) sections – personal, social / communitarian, humanitarian, and ecological.

### 5.1. *Personal*

Money provides power in the market – power to purchase and consume desired commodities, whether goods or services. Consumption, by satisfying market preferences, is supposed to lead to well-being. In essence, this is the economic foundation of consumer culture.<sup>125</sup> Its fundamental prescription is that people should seek well-being in higher incomes and more consumption.<sup>126</sup> The problem, however, as Juliet Schor and others have argued, is that the pursuit of income and consumption can easily distract people from what is best in their lives, functioning to lock people into a ‘work-and-spend’ cycle that has no end and attains no lasting satisfaction.<sup>127</sup> Many simplicity theorists argue that if people in affluent societies are prepared to rethink their relationships with money and possessions, they just might be able to free up more time and energy for the pursuit of what truly inspires them and makes them happy, whatever that may be. As Richard Gregg put it, living simply means ‘an ordering and guiding of our energy and desires, a partial restraint in some directions in order to secure a greater abundance of life in other directions.’<sup>128</sup> In this way voluntary simplicity can be seen to offer enhanced meaning and satisfaction in people’s lives. The message, in more technical terms, is that lowering ‘standard of living’ (measured by income/consumption) can actually lead to increased ‘quality of

<sup>124</sup> See Steve Deger and Leslie Gibson (eds), *The Book of Positive Quotations* (2nd ed, 2007) 262.

<sup>125</sup> For a critical discussion of the economic theory underpinning consumer culture, see Neva Goodwin, Frank Ackerman and David Kiron (eds), *The Consumer Society* (1997) 149-228.

<sup>126</sup> The prophet of consumerism, Victor Lebow, once stated: ‘Our enormously productive economy demands that we make consumption a way of life, that we convert the buying and use of goods into rituals, that we seek our spiritual satisfaction and our ego satisfaction in consumption. We need things consumed, burned up, worn out, replaced and discarded at an ever-increasing rate,’ quoted in Vance Packard, *The Waste Makers* (1963) 11.

<sup>127</sup> See Juliet Schor, *The Overworked American: The Unexpected Decline of Leisure* (Rev. ed, 1993). See also, Tim Kasser and Allen Kanner (eds), *Psychology and Consumer Culture: The Struggle for a Good Life in a Materialistic World* (2003).

<sup>128</sup> Gregg, above n 104, 112.

life' (measured by subjective well-being).<sup>129</sup> It is important to emphasize, however, that this is not just about living a happier or more pleasurable life; it can also be about living more deeply and meaningfully in some existentialist, even spiritual, sense.<sup>130</sup>

I begin with the personal incentives for living simply not because they are the most important, necessarily, but because I believe that if the Simplicity Movement is to expand, it must be shown that living simply does not tend to generate any sense of deprivation, but actually frees people from an insidiously addictive consumerism and an unhealthy relation with money and possessions.<sup>131</sup> Rather than dedicating one's life to the pursuit of ever-higher levels of income and consumption, simple lives are more likely to have a balanced working life or even work part-time,<sup>132</sup> and they are more likely to seek fulfilling employment and accept a modest income, rather than get too hung about securing the highest income possible.<sup>133</sup> With less time devoted to acquiring expensive commodities, simple lives tend to have more time to spend with friends and family, and more time to spend pursuing their private passions.<sup>134</sup> The point here is that disciplined and enlightened moderation with respect to one's material life does not tend to give rise to any sense of deprivation or sacrifice, but ultimately gives rise to a happiness, a contentment, and even a freedom significantly greater than that which is ordinarily known in the 'work-and-spend' cycle of consumer culture.<sup>135</sup> In short, many people are drawn to voluntary simplicity because they want to escape the vapidness of the rat race and live more with less.<sup>136</sup>

## 5.2. Social / Communitarian

There are also social or communitarian incentives for embracing a life of voluntary simplicity.<sup>137</sup> For example, when an individual embraces voluntary simplicity by working less, this may well benefit the individual (e.g. by creating more leisure and reducing stress). But those individual benefits will often have flow on effects that

<sup>129</sup> See Philip Cafaro, 'Less is More' (2001) 14(1) *Global Bioethics* 45.

<sup>130</sup> On the spiritual significance of simplicity, see Erich Fromm, *To Have or to Be?* (1st ed, 1976).

<sup>131</sup> Etzioni, above n 106.

<sup>132</sup> Hamilton and Denniss, above n 92, 156 (reporting that 29 per cent of downshifters surveyed practise voluntary simplicity by reducing their working hours).

<sup>133</sup> Ibid (reporting that 19 percent of downshifters practise voluntary simplicity by changing careers).

<sup>134</sup> Ibid 153 (reporting that 35 percent of downshifters do so because they want to spend more time with family).

<sup>135</sup> Ibid (reporting that 90 per cent of downshifters are happier with their changed lifestyle, despite having reduced income).

<sup>136</sup> See Hélène Cherrier, 'Drifting away from Excessive Consumption: A New Social Movement based on Identity Construction' (2002) 29 *Advances in Consumer Research* 245.

<sup>137</sup> See, e.g., Suzanne Miller and Jennifer Paxton, 'Community and Connectivity: Examining the Motives Underlying the Adoption of a Lifestyle of Voluntary simplicity' (2006) 33 *Advances in Consumer Research* 289.

benefit others too, such as creating more time and energy for family and friends, or more time and energy to enjoy one's civic or neighbourly responsibilities.<sup>138</sup> As Cafaro and Gambrel suggest, 'simplicity can help us develop social unions that enrich our lives. By fostering contentment with our status and possessions and reducing levels of dissatisfaction, simplicity can help minimize social tension and build up social capital.'<sup>139</sup>

Social critics argue that community engagement is often pushed to the side by the demands of a high-consumption life.<sup>140</sup> David Myers coined the term 'social recession' to describe essentially this phenomenon.<sup>141</sup> A society might be booming economically, but dedicating too much attention to consumption and the acquisition of wealth, to the detriment of family and community life, can lead to an individualistic society of frantic, agitated, and alienated egos.<sup>142</sup> Mark Burch sums up this point exactly: 'The brutally "simple" fact is that if the quality of our family and community relationships has suffered, it's because we've chosen to do something else with our time.'<sup>143</sup> What Burch, Myers, Putnam, Cafaro, Gambrel, and many others propose is that affluent societies would be better off if they spent less time accumulating and consuming, and more time cultivating family and community relationships and increasing their civic engagements.<sup>144</sup> The simple act of sharing something with neighbours rather than each having their own is a good example. Which community is richer: The one where each has their own? Or the community that has less but shares?

### 5.3. *Humanitarian*

Although there are indeed many personal and communitarian incentives for adopting voluntary simplicity, it would be an impoverished ethics that sought to justify itself solely in relation to personal or community self-interest. For that reason, it is

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<sup>138</sup> See, e.g., Cahit Guven, 'Are Happier People Better Citizens?' (2009) available at <[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1422493](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1422493)> at 10 October 2010 (providing evidence that happier people tend to create more social capital, are more likely to vote, volunteer, and participate in public activities).

<sup>139</sup> Gambrel and Cafaro, above n 108, 11.

<sup>140</sup> De Graaf et al, above n 88, 63-71.

<sup>141</sup> See Myers, above n 101.

<sup>142</sup> See Putnam, above n 99; Robert Lane, *The Loss of Happiness in Market Democracies* (2000). See also, Yiannis Gabriel and Tim Land, *The Unmanageable Consumer* (2<sup>nd</sup> ed, 2006) 10 (describing the "Fordist Deal" – the trade-off in which workers obtain greater material enjoyment in exchange for alienation and loss of autonomy in the workplace).

<sup>143</sup> Mark Burch, *Stepping Lightly: Simplicity for People and the Planet* (2000) 65 (emphasis omitted).

<sup>144</sup> See Michelle Nelson, Mark Rademacher and Hye-Jin Paek, 'Downshifting Consumer = Upshifting Citizen?' (2007) 611 *Annals of the American Academy of Political and Social Science* 141.

important to recognize that there are also broader *humanitarian* reasons for adopting voluntary simplicity.<sup>145</sup> In a world where extreme poverty exists amidst such plenty, living simply can be understood as a lifestyle response to the highly skewed distributions of wealth in the world, a response that seeks as far as possible not to be implicated in a system of distribution perceived by many to be grossly unjust.<sup>146</sup> In a similar vein, living simply can also be understood to be an act of sharing, an act of human solidarity, by trying to resist high levels of consumption that cannot be shared by all.

We live in a world of scarce resources. There is only so much stuff to go around, and with the global population expected to exceed nine billion around the middle of this century, competition over resources can be expected to intensify greatly. One obvious way to share with others, then, is simply to take less, to try to take only what one needs to live a dignified life, and no more.<sup>147</sup> Taking less may not be easy, of course, especially in cultures that celebrate extravagance. But it is hard to imagine how the problems of poverty will ever be solved if the materially rich and materially comfortable continue seeking ever-higher levels of consumption.<sup>148</sup> Furthermore, we saw in Chapter One that growth and the so-called 'trickle down effect' is not a solution upon which we should rely for humanitarian relief.<sup>149</sup> Challenging though it may be to admit, a necessary part of the solution to poverty involves those in the global consumer class showing some enlightened, compassionate restraint in relation to their material lives. As Gandhi once said, 'Live simply so that others may simply live.'<sup>150</sup>

#### 5.4. *Ecological*

As well as personal, communitarian, and humanitarian reasons for living simply, there are, of course, also *environmental* reasons. It has long been recognized that

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<sup>145</sup> See Deirdre Shaw and Terry Newholm, 'Voluntary Simplicity and the Ethics of Consumption' (2002) 19(2) *Psychology and Marketing* 167.

<sup>146</sup> See Daniel Fireside (ed), *The Wealth Inequality Reader* (3<sup>rd</sup> ed, 2009).

<sup>147</sup> See Jim Merkel, *Radical Simplicity* (2003) Chaps. 1 and 3.

<sup>148</sup> See Hamilton and Denniss, above n 92, 192 (arguing that 'To solve the problem of poverty, real deprivation, we must first solve the problem of affluence, imagined deprivation').

<sup>149</sup> See David Woodward and Andrew Simms, 'Growth Isn't Working: The Unbalanced Distribution of Benefits and Costs from Economic Growth' (2006) <<http://www.neweconomics.org/>> at 15 October 2010.

<sup>150</sup> On Gandhi's conception of simplicity, see Mahatma Gandhi, 'The Quest for Simplicity: My Idea of Swaraj,' in Majid Rahnema and Victoria Bawtree (eds), *The Post-Development Reader* (1997) 306-7.

consumption and ecological impact are correlated,<sup>151</sup> and from this correlation it follows that reducing consumption can be an effective means for reducing ecological impact. Indeed, it is becoming increasingly clear that simpler living, in the sense of reduced and more efficient consumption, is needed to save our planet from grave ecological harm.<sup>152</sup> This is especially so in the affluent societies, where lifestyles of reduced consumption will be a necessary part of any transition to a sustainable future.<sup>153</sup> This has been acknowledged in several of the leading international policy documents on the environment which have emerged in recent decades. Agenda 21, for example – the main policy document to emerge from the Rio Earth Summit in 1992 – argued that ‘the major cause of the continued deterioration of the global environment is the unsustainable pattern of consumption and production, particularly in the industrialized countries.’<sup>154</sup> This document called for the following actions:

- a. To promote patterns of consumption and production that reduce environmental stress and will meet the basic needs of humanity.
- b. To develop a better understanding of the role of consumption and how to bring about more sustainable consumption patterns.<sup>155</sup>

In more recent years, this message has been widely affirmed. When the World Summit convened in Johannesburg in 2002, ‘changing consumption and production patterns’<sup>156</sup> was identified as one of three ‘overarching objectives’ for sustainable development. What these and other reports imply is that fundamental lifestyle changes with respect to private consumption are one of the main preconditions to ecological sustainability.<sup>157</sup>

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<sup>151</sup> See generally, Paul Ehrlich and Anne Ehrlich, *The Population Explosion* (1990) (discussing the ‘I = PAT’ identity, which holds that environmental impact (I) is a product of population (P), affluence (A), and technology (T)).

<sup>152</sup> See Chapter One, Sect. 3. To clarify, what is needed in terms of consumption is not just ‘less of the same,’ but ‘less, more efficient, and different.’

<sup>153</sup> But see, Hana Librova, ‘The Environmentally Friendly Lifestyle: Simple or Complicated?’ (2008) 44(6) *Czech Sociological Review* 1111 (arguing that there is nothing very ‘simple,’ in the sense of ‘easy,’ about living sustainably in consumer cultures).

<sup>154</sup> See United Nations Department of Economic and Social Affairs, ‘Agenda 21,’ Sect. 4.3, <<http://www.un.org/esa/dsd/agenda21/>> at 10 October 2010.

<sup>155</sup> *Ibid.*, Sect. 4.7.

<sup>156</sup> United Nations, ‘World Summit on Sustainable Development’ (2002) <<http://www.un-documents.net/jburgdec.htm>> at 10 November 2010.

<sup>157</sup> There is also a growing recognition that ecological and humanitarian issues are closely linked. See Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being* (2005) 2 (acknowledging that ‘the degradation of ecosystems services is already a significant barrier to achieving the Millennium Development Goals’).

## 6. PRACTISING VOLUNTARY SIMPLICITY

It is all very well to theorize about the simple life – to debate definitions and evaluate justifications – but theory is empty if it is not grounded upon practice. Accordingly, the following sections seek to enrich the preceding theoretical discussions by providing an exposition of how the idea of voluntary simplicity is actually *lived* by participants in the movement.<sup>158</sup>

### 6.1. *A Non-Universalist Disclaimer*

Any discussion of the practice of simplicity ought to begin by acknowledging that there is not one way to live simply. There is no Doctrine or Code of Simplicity to follow, as such; there is no Method or Equation of Simplicity into which we can plug the facts of our lives and be told how to live. That is precisely what the idea cannot do. Voluntary simplicity, it could be said, is more about questions than answers, in the sense that practising simplicity calls for creative interpretation and personalized application. It is not for ‘experts,’ therefore, or for anyone, to prescribe universal rules on how to live simply. We each live unique lives and we each find ourselves in different situations, with different capabilities, and different responsibilities. Accordingly, the practice of simplicity by one person, in one situation, may very well involve different things to a different person, in a different situation. Furthermore, simple living is not so much a destination as it is an ongoing creative process. But, as I have implied, I do not think that this practical indeterminacy is an objection to the idea.

With that non-universalist disclaimer noted, a few general remarks will now be made on what a simple life might look like in practice and how one might begin to live it.

### 6.2. *Money*

Although practising simplicity is much more than just being frugal with money and consuming less – it is also a state of mind – in a market economy spending wisely

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<sup>158</sup> This discussion of the practice of simplicity is based, in part, upon my personal explorations of the simple life in recent years, which I have described in more detail in Samuel Alexander, ‘Deconstructing the Shed: Where I Live and What I Live For,’ *Concord Saunterer* (2011, forthcoming).

plays a central role.<sup>159</sup> In *Your Money or Your Life*, Dominguez and Robin provide elaborate financial exercises for readers to undertake which seek to provoke reflection on the real value of money and the real cost of things.<sup>160</sup> Such exercises may sound mundane and a bit pointless – everybody assumes they are careful, rational spenders – but if it is carried out with precision the results may well surprise, and perhaps even shock. One might find that seemingly little purchases add up to an inordinate amount over a whole year, which may raise new and important questions about whether the money might have been better spent elsewhere, not at all, or exchanged for more time by working less. Then consider how much would be spent in each category over ten years. The aim of this exercise is not to create tightwads, as such, but smart consumers who are conscious of the time/life/ecological cost of their purchases. After all, as Thoreau would insist, ‘The cost of a thing is the amount of... life which is required to be exchanged for it.’<sup>161</sup> When exploring voluntary simplicity in this light, one might well find that some reductions and changes to spending habits, rather than inducing any sense of deprivation, will instead be life-affirming.

When it comes to spending money in accordance with the ethos of voluntary simplicity, it is also important to bear in mind Vicki Robin’s profound democratic insight: That how we spend our money is how we vote on what exists in the world.<sup>162</sup> Purchasing something sends a message, consciously or unconsciously, to the marketplace, affirming the product, its ecological impact, its process of manufacture, etc. Simple living, therefore, involves shopping as conscientiously as possible, directing one’s monetary ‘votes’ into socially and ecologically responsible avenues and boycotting irresponsible avenues.<sup>163</sup> A tension can arise here, of course, because shopping conscientiously or ‘ethically’ tends to be (but is not always) more expensive.<sup>164</sup> If it is true, however, that market expenditure is a vote on what exists in the world then it would seem that the global consumer-class has the potential to

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<sup>159</sup> This depends on consumers being ‘informed,’ which depends, in part, upon good labelling of commodities. See James Salzman, ‘Sustainable Consumption and the Law’ (1997) 27 *Environmental Law* 1243.

<sup>160</sup> Joseph Dominguez and Vicki Robin, *Your Money or Your Life: Transforming your Relationship with Money and Achieving Financial Independence* (New ed, 1999).

<sup>161</sup> Thoreau, above n 96, 286.

<sup>162</sup> The idea of ‘voting with your money,’ however, would be more accurately attributed to John Ruskin. See Vanenbroeck (ed), above n 116, 63.

<sup>163</sup> This is not meant to suggest that ‘market mechanisms,’ in themselves, will be an adequate path to ecological protection or social justice. Nor is this an argument for what might be called ‘green consumerism’ (i.e. consumerism by another name). The point is that in a market society, expenditure is one way, among others, for individuals to ‘vote on what exists in the world.’ See generally, Daniel Finn, *The Moral Ecology of Markets: Assessing Claims about Markets and Justice* (2006).

<sup>164</sup> See David Bosshart, *Cheap? The Real Cost of Living in a Low Price, Low Wage World* (2006).

become a non-violent revolutionary class and change the world, simply by changing its spending habits.<sup>165</sup> *Simplicity is the new spectre haunting capitalism*. Never before have so many people had the option of casting off the chains of consumer culture, stepping out of the rat race, and living (and spending) in opposition to the existing order of things. Money is power, and with this power comes responsibility.<sup>166</sup>

### 6.3. *Housing*

Housing (whether purchasing, building, or renting) is typically life's greatest single expense, so simple lovers must think especially carefully about where they live and why, and how much of their lives they are prepared to spend seeking a 'nicer' place to live. Exactly what kind of shelter does one need to live well and to be free? Obviously, we must answer this question for ourselves – at least, within the constraints of our own socio-economic context – but again the words of Thoreau might give us a moment's pause: 'Most people appear never to have considered what a house is, and are actually though needlessly poor all their lives because they think that they must have such a one as their neighbours have.'<sup>167</sup> The 'McMansions' which are so prevalent in the suburbs of North America and increasingly elsewhere are extremely resource-intensive and very expensive.<sup>168</sup> In opposition to that trend, participants in the Simplicity Movement are exploring alternative ways to accommodate themselves and their families, by embracing smaller, much more modest and energy-efficient homes. In particular, some are exploring co-housing arrangements, 'green design,' and other forms of low-impact development, including eco-villages and 'transition initiatives.'<sup>169</sup> More radical participants are building their own straw-bale houses, making shacks out of abandoned or second-hand materials, or converting shipping containers into homes.<sup>170</sup>

### 6.4. *Clothing*

The historic purpose of clothing, as Thoreau pointed out, was to keep us warm and, in time, for reasons of modesty. Today its dominant purpose seems to be fashion and

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<sup>165</sup> Michele Micheletti, *Political Virtue and Shopping: Individuals, Consumerism, and Collective Action* (2010) (providing a theoretically sophisticated, empirically rich examination of the increasingly important phenomenon of politically and ethically motivated market expenditure).

<sup>166</sup> See Clive Barnett et al, 'The Political Ethics of Consumerism' (2005) 15(2) *Consumer Policy Review* 45.

<sup>167</sup> Thoreau, above n 96, 290.

<sup>168</sup> See Wilson and Boehland, above n 87.

<sup>169</sup> Rob Hopkins, *The Transition Handbook: From Oil Dependency to Local Resilience* (2008).

<sup>170</sup> *Ibid.*

the conspicuous display of wealth and status. People can, of course, spend thousands and thousands of dollars on clothing, if they wish. But simple livers tend to 'dress down,' wearing functional, often second-hand clothing.<sup>171</sup> Such clothing can be generally obtained at a minimal expense. Dressing down, it should be noted, does not necessarily imply giving up 'style' or puritanically denying self-expression through what one wears. But it does seem to imply rejecting high fashion (and all its stands for) in favour of some 'alternative' aesthetic.<sup>172</sup> In this way, dressing down can be understood to be an outward statement of simplicity; an effort, however small, to express aesthetically one's opposition to consumer culture. Hundreds of billions of dollars are spent each and every year in the fashion industry.<sup>173</sup> Just imagine if even half of that money was redirected toward green energy or humanitarian initiatives. We would lose so little and gain so much. Again, how we spend our money is how we vote on what exists in the world.

#### 6.5. *Food*

Eating locally, eating organically, eating out in moderation, eating less or no meat, eating simply, lightly, and creatively, and, as far as possible, growing one's own fruit and vegetables – these are some of the key characteristics to food production and consumption in the lives of many simple livers.<sup>174</sup> Given some thought and a little discipline, a nutritious, environmentally sensitive diet can be obtained at a surprisingly low cost.<sup>175</sup>

#### 6.6. *Work*

Rethinking attitudes to work is central to the way many participants in the Simplicity Movement approach simple living.<sup>176</sup> Charles Siegel poses the critical question:

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<sup>171</sup> See Hamilton and Denniss, above n 92, 166.

<sup>172</sup> See, e.g., Kate Soper, 'Alternative Hedonism, Cultural Theory and the Role of Aesthetic Revisioning' (2008) 22(5) *Cultural Studies* 567.

<sup>173</sup> See OECD, 'A New World Map in Textiles and Clothing' (2002) available at <<http://www.oecd.org>> at 15 October 2010 (reporting that in 2002 the global textile and clothing industries amounted to \$350 billion).

<sup>174</sup> Motivations for 'eating simply and locally' are diverse, and the reasoning, at times, complex. Two important considerations are reducing 'food miles' and increasing 'food security.' See generally, Alison Blay-Palmer, *Food Fears: From Industrial to Sustainable Food Systems* (2008).

<sup>175</sup> See Elise McDonough, *Sustainable Food: How to Buy Right and Spend Less* (2009). See also, [www.slowfood.com](http://www.slowfood.com). Slow Food is a global, grassroots organization with over 100,000 supporters in 150 countries who are linking the pleasure of good food with a commitment to their community and the environment.

<sup>176</sup> See Hamilton and Denniss, above n 92, Chap. 10.

‘Should we take advantage of our increasing productivity to consume more or to have more free time?’<sup>177</sup> If people keep raising their material standard of living every time they come into more money – through a pay rise, for example, or through some new technology which increases productivity per hour – working hours will never decrease and may even rise. Indeed, many Westerners, especially North Americans, Britons, and Australians, are working longer hours today than they were in the 1970s, despite being considerably more productive.<sup>178</sup> Generally speaking, they have directed all their wealth and productivity gains into consuming more and have not taken any of those gains in terms of increased free time. But why, one might ask, should people always be working for more consumer products and services and not sometimes be content with less? Why should people not accept a lower material standard of living (e.g. old clothes, smaller house, no car, no luxury travel, etc.) and work half as much? Who can say what wonders such a cultural style might not bring! Thoreau’s opinion on working hours seems to exemplify the perspective widely held among participants in the Simplicity Movement:

Those slight labors which afford me a livelihood, and by which it is allowed that I am to some extent serviceable to my contemporaries, are as yet commonly a pleasure to me, and I am not often reminded that they are a necessity. So far I am successful. But I foresee that if my wants should be much increased, the labor required to supply them would become a drudgery. ... I wish to suggest that a man may be very industrious, and yet not spend his time well.<sup>179</sup>

The basic idea here is that if people can embrace simple living and stop the upward creep of material desire, they can take some or all of their pay rises or productivity gains, not in terms of more consumption, but in terms of more free time. And this raises the questions: Are we forced by the ‘curse of labour’ to work so much? Or are we freer than we think we are? The Simplicity Movement is an example of a social movement where people are enjoying the benefits of exchanging money and consumption for more free time.<sup>180</sup>

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<sup>177</sup> Siegel, above n 82.

<sup>178</sup> See generally, John De Graaf (ed), *Take Back Your Time: Fighting Overwork and Time Poverty in America* (2003); Hamilton and Dennis, above n 92, Chap. 6.

<sup>179</sup> Henry David Thoreau, ‘Life without Principle,’ in Carl Bode (ed), *The Portable Thoreau* (1982) 636.

<sup>180</sup> Some of the structural difficulties people can face in this exchange will be discussed in the next chapter.

## 7. CRITICISMS OF VOLUNTARY SIMPLICITY

The Simplicity Movement has not been free from criticism. Three of the more prominent criticisms will now be considered.

### 7.1. *A Leisure Expansion Movement*

The Simplicity Movement is sometimes described, occasionally even by its advocates, as a leisure expansion movement.<sup>181</sup> The criticism sometimes implicit in this description is that voluntary simplicity is a self-centred, narrowly hedonistic philosophy of life available only to a privileged few. While voluntary simplicity by its very nature is indeed 'an ethic professed and practiced primarily by those free to choose their standard of living,'<sup>182</sup> the broad-based affluence in the developed world today means that the choice of voluntary simplicity is available *to some degree* to the vast majority of people. Put otherwise, down-shifting does not just mean selling the Porsche and buying a Prius, or retiring at 40 and living off the income of investment properties. It can be practiced by all those who have a degree of discretionary income.<sup>183</sup> Furthermore, the simple life is not just about improving one's own life through leisure expansion. The Simplicity Movement may indeed be a leisure expansion movement *for some*, which in itself is no grounds for criticism; in fact, trading income/consumption for more free time is one of the most important cultural shifts needed in the developed world today.<sup>184</sup> But to characterize the Simplicity Movement *merely* as a leisure expansion movement is to betray an ignorance of the diverse motivations people actually have for adopting voluntary simplicity, which often include environmentalism and social justice.<sup>185</sup> Bearing those ethically-based motivations in mind, the fact that simple living can also be described as a form of 'alternative hedonism'<sup>186</sup> seems to provide, not grounds for criticism, but further support for the Simplicity Movement.

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<sup>181</sup> Segal, above n 110, 13.

<sup>182</sup> Shi, above n 63, 7.

<sup>183</sup> See Michael Maniates, 'In Search of Consumptive Resistance: The Voluntary Simplicity Movement,' in Thomas Princen et al (eds), *Confronting Consumption* (2002) 221 (arguing that simplicity is 'not the domain of the rich').

<sup>184</sup> New Economics Foundation, *21 Hours: Why a 21-Hour Work Week can Help Us All Flourish in the 21<sup>st</sup> Century* (2010) <[www.neweconomics.org](http://www.neweconomics.org)> at 10 November 2010.

<sup>185</sup> See Denniss and Hamilton, above n 92, 157 (discussing their Australian survey which reports on the diversity of motivations downshifter have for adopting voluntary simplicity lifestyles).

<sup>186</sup> Soper, above n 172.

## 7.2. Consumption as Meaning and Identity

A more sophisticated critique of voluntary simplicity arises out of theories of consumption which recognize that commodities have come to play a role in our lives that go well beyond their material functionality. These theories hold that commodities also function symbolically as social artefacts through which people express and create their identities and in which people seek not just satisfaction but meaning and social acceptance.<sup>187</sup> 'Stuff is not just stuff,'<sup>188</sup> as Tim Jackson puts it, implying that what we own (especially in modern consumer societies) can be understood as part of the 'extended self.'<sup>189</sup> This understanding of consumption raises important questions about voluntary simplicity, because if consumption is needed not just for material provision but also for social acceptance, the social expression of one's identity, and the creation of meaning in life, then what exactly are advocates of voluntary simplicity asking people to give up? What would reducing consumption actually mean if, as Mary Douglas put it, 'An individual's main objective in consumption is to help create the social universe and to find in it a creditable place.'<sup>190</sup> The symbolic function of consumption does seem to present a challenge to the idea of voluntary simplicity, but the challenge is not as forceful as it may first appear. Psychologist Philip Cushman has argued that the 'extended self' created through consumption is actually an 'empty self,' one that is constantly in need of being 'filled up' with consumer artefacts.<sup>191</sup> Although consumption may indeed be a medium through which individuals in modern societies increasingly seek to find meaning, there is great deal of evidence (supplemented by strong intuitions, perhaps) which suggests that seeking meaning in consumption is not fulfilling its promise of a happy and meaningful life.<sup>192</sup> Furthermore, anti-consumerist movements in their various forms have never advocated *renouncing* meaning but, on the contrary, they have always sought to *create* and *enhance* meaning through opposition to mainstream consumption habits.<sup>193</sup> As Jackson contends, 'the insight that a certain amount of consumer behaviour is dedicated to an (ultimately flawed) pursuit of meaning opens

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<sup>187</sup> See Helga Dittmar, *The Social Psychology of Material Possessions: To Have is To Be* (1992).

<sup>188</sup> Tim Jackson, *Prosperity without Growth: Economics for a Finite Planet* (2009) 63.

<sup>189</sup> *Ibid.*

<sup>190</sup> Mary Douglas, 'Relative Poverty, Relative Communication' [1976], in Jackson (ed), *Sustainable Consumption* (2005) 243.

<sup>191</sup> Philip Cushman, 'Why the Self is Empty,' 45(5) *American Psychologist* 599.

<sup>192</sup> See Tim Kasser, *The High Price of Materialism* (2002); Tim Kasser and Allen Kanner (eds), *Psychology and Consumer Culture: The Struggle for a Good Life in a Materialistic World* (2003).

<sup>193</sup> See Hélène Cherrier, 'Anti-Consumption Discourses and Consumer-Resistant Identities' (2009) 62(2) *Journal of Business Research* 181; Rajesh Iyer and James Muncy, 'Purpose and Object of Anti-Consumption' (2009) 62(2) *Journal of Business Research* 160.

up the tantalizing possibility of devising some other, more successful, less ecologically damaging strategy for creating and maintaining personal and cultural meaning.’<sup>194</sup> In the Simplicity Movement, it could be argued, that ‘tantalizing possibility’ is becoming a reality.

### 7.3. *Escapist / Apolitical*

Finally, the Simplicity Movement has been criticized for being ‘escapist’ or ‘apolitical,’ a criticism which, it cannot be denied, has some weight.<sup>195</sup> Leading sociologist on voluntary simplicity, Mary Grigsby, notes that participants in the Simplicity Movement ‘don’t generally talk about policy initiatives, instead focusing on the individual as the primary mechanism for change.’<sup>196</sup> While the individual may well be the primary mechanism for change, many in the Simplicity Movement do not seem to recognize that, if change is what is truly sought, much more attention must be dedicated to political engagement. That is to say, reformative efforts must not be limited to personal transformation, but must also employ ‘grass-roots’ or ‘bottom up’ forces to reshape ‘top-down’ politics. This is especially so, given the many difficulties and forms of resistance people face when seeking to practise simplicity within political, legal, and economic structures that seem to be inherently opposed to reducing the levels and impacts of market consumption.<sup>197</sup> It would be wrong to suggest that voluntary simplicity is an impossible living strategy, but the pro-growth structures of advanced capitalist societies certainly make living simply much more difficult than it needs to be, and this is inhibiting the expansion and impact of the movement.<sup>198</sup> Accordingly, to the extent that the Simplicity Movement currently seeks to escape that structure rather than transform it, it properly deserves criticism. It should be noted, however, that this is not a criticism that touches on anything necessary or intrinsic to the Simplicity Movement. It just makes the point that historically the movement has been lacking in political consciousness. Fortunately, there are emerging signs of the movement’s politicization, although much more action is needed.<sup>199</sup>

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<sup>194</sup> Tim Jackson (ed), *Sustainable Consumption* (2005) 20.

<sup>195</sup> See Maniates, above n 183, 199.

<sup>196</sup> Grigsby, above n 6, 12.

<sup>197</sup> As Michael Jacobson puts it, ‘Our country is set up to oppose voluntary simplicity.’ See Michael Jacobson, *Marketing Madness* (1995), as quoted in de Graaf et al, *Affluenza*, above n 87, 221.

<sup>198</sup> See Christer Sanne, ‘Willing Consumers—Or Locked-In? Policies for a Sustainable Consumption’ (2002) 2002(42) *Ecological Economics* 273.

<sup>199</sup> See The Simplicity Forum, <[www.thesimplicityforum.org](http://www.thesimplicityforum.org)> at 10 October 2010 (a forum of leaders in the Simplicity Movement dedicated to organizing the ‘invisible constituency’ of simple livers and

In order to socially reconstruct law, the movement will need to expand and organize at the social level, and this will require, to begin with, more individuals making personal commitments to live in opposition to the Western-style consumerist ideal and create for themselves, as far as possible, an alternative conception of the good life. Having increasing numbers of individuals confronting the dominant culture by re-imagining the good life is necessary for creating fertile conditions for a politics of simplicity, but, as outlined earlier, it will not be sufficient to bring about significant structural change in the absence of collective action. Politicizing the movement will need to involve ‘simple livers’ or ‘downshifTERS’ networking with others who are doing the same, so that when opportunities arise the Simplicity Movement can be quickly and efficiently mobilized to support or introduce policy initiatives that advance the movement’s aims.<sup>200</sup> This may, at times, need to involve linking up with other movements (e.g. Environmental Movement) when objectives coincide. But a large part of the problem at present is that the movement’s policy agenda is underdeveloped. As Grigsby notes, ‘the ideas of voluntary simplicity need to be developed to link their complaints and demands to clearly articulated and plausible policies that can be carried into existing political structures to bring about institutional change.’<sup>201</sup> In the next chapter an attempt is made to address this lack, by articulating a program for the legal reform of private property / market systems based on the social vision being advanced by the Simplicity Movement.

## 8. CONCLUSION: THE SOCIAL RECONSTRUCTION OF PROPERTY RELATIONS

This chapter began by outlining a social constructionist theory of legal transformation which drew on law and social movement literature to argue that cultural evolution tends to induce legal evolution. That foundational argument raised the question of what cultural conditions would best facilitate the manifestation in law of a post-growth property system, and this chapter answered that question by looking to the contemporary Simplicity Movement. The basic reasoning here is that the legal

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actively working towards ‘changing both the culture *and the policies* that drive overwork and overconsumption’) (emphasis added). See also Mary Grigsby, ‘Extending the Movement,’ in Samuel Alexander (ed), *Voluntary Simplicity: The Poetic Alternative to Consumer Culture*, above n 7, at 283 (outlining ways that the Simplicity Movement could extend into the mainstream and become a more significant oppositional force).

<sup>200</sup> Online networking provides a cheap and accessible tool for organizing collective action. See Hannah Lownsbrough, ‘The Progressive Potential of Online Organizing’ *Renewal* (2010) 18(3/4) 74.

<sup>201</sup> Grigsby, above n 6, 186.

structure of a property system will not reflect an ethics of sufficiency and simplicity until such an ethics is embraced at the cultural level.<sup>202</sup>

The argument that property reform is dependent on cultural circumstances has been made (in a different context) by Margaret Radin, who expressed the point as follows:

[W]hen we think the government has bad reasons for doing something in specific circumstances, we are also going to think that its interest is weak or non-existent in those circumstances, and we are most likely to call its action a 'taking.' Conversely, when we think the government has good reasons for doing some in specific circumstances, we are also going to think that its interest is strong or even 'compelling' in those circumstances, and we are less likely to call its action a 'taking.' ... [O]ur very recognition of the existence of property rights is inter-twined with our perceptions of their justice. There is no sharp demarcation between empirical and normative questions, and cultural commitments are reflected in the way we view either kind of question.<sup>203</sup>

Radin's position is that property law depends, in large part, upon the surrounding cultural circumstances, such that an owner's 'bundle of rights' will tend to fluctuate and, indeed, entire property systems will tend to evolve, when the cultural circumstances within which law is constructed change. Court decisions, Radin claims, are 'not separate from the culture that produced them,'<sup>204</sup> a claim which it was argued earlier applies equally well to legislative enactments. This view also finds support in the work of Eric Freyfogle, who writes:

Property is at root a legal institution, yet property laws themselves stem from the lawmaking community – that is, from a source that lies above and behind the law. To study property law is to gain insights into society as a whole: where it has been, what it values, and where it wants to go.<sup>205</sup>

The underlying argument of this chapter has been that if anything resembling a post-growth property system is to emerge democratically, the Simplicity Movement (or something like it) will almost certainly need to expand into the cultural mainstream and demand some political recognition. If this were to happen – and there are some,

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<sup>202</sup> See Hamilton and Bankes, above n 5, 31 (describing private property as 'socially constructed').

<sup>203</sup> Margaret Radin, *Reinterpreting Property* (1993) 167, 169.

<sup>204</sup> *Ibid* 170.

<sup>205</sup> Eric Freyfogle, *The Land we Share: Private Property and the Common Good* (2003) 36.

admittedly tentative, signs that such a cultural shift is underway<sup>206</sup> – we could expect the forces of this alternative social imaginary to radically reshape the growth economies of today and the legal institutions which support them, ushering in an age of degrowth. It could be said, then, that degrowth does not just refer to a contracting economy; it also designates a corresponding mode of being, namely, voluntary simplicity.

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<sup>206</sup> See Maniates, above n 183, 202 (arguing that ‘Simplicity is teething between a self-absorbed subculture... and a nascent social movement capable of fostering lasting change in how work, play, and consumption are organized in industrial society’). See also, Ronald Inglehart, ‘Changing Values Among Western Publics from 1970 to 2006’ (2008) 31(1/2) *Western European Politics* 130-46 (reporting on the gradual rise of ‘post-material’ values in Western publics since 1970).



It's all a question of story. We are in trouble just now because we are in-between stories. The Old Story – the account of how the world came to be and how we fit into it – sustained us for a long time. It shaped our emotional attitudes, provided us with life purpose, energized action, consecrated suffering, integrated knowledge, and guided education. We awoke in the morning and knew where we were. We could answer the questions of our children. But now it is no longer functioning properly, and we have not yet learned the New Story.

— Thomas Berry, 'The New Story,' in *The Dream of the Earth*

## Chapter Five

# POLITICAL DOWNSHIFTING ON THE PATH TO ENTROPIA

*Thomas Berry was a visionary. He told new stories about the Universe and our place in it, stories not only about where we have been and where we seem to be going, but also stories about where we could go, if only we exercised our freedom in different ways.<sup>1</sup> Indeed, story, myth, and narrative played a central role in Berry's thinking, as the epigraph to this chapter indicates.*

*Every individual life and every society is an enactment of a story people tell themselves about the nature and purpose of their existence and of the world they live in. These stories shape our experiences and guide our thoughts and actions – for better or for worse, consciously or unconsciously. Berry was deeply troubled by the dominant story of our times. Put simply, he felt it was a story of Earth as a limitless resource to be exploited for human gratification, a story which not only degraded the integrity of our living planet but also promoted a materialistic attitude to life by equating happiness and well-being with increased opportunities to accumulate and consume. Berry tried to provoke us into reconsidering this story. He tried to unsettle and inspire us, by telling new stories. As one of its defining features, Berry's Earth scholarship is a reminder of the significance of story.<sup>2</sup>*

*In this final chapter I have chosen to experiment with story, inspired by Berry's writings. Due to the unconventional nature of my undertaking, however, I have avoided direct reference to Berry's writings, but the influence of those writings should be clear, everywhere lying just beneath the surface. In an attempt to contribute in some modest way to what Berry called the Great Work – that is, the work of creating*

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<sup>1</sup> Thomas Berry, *The Great Work: Our Way into the Future* (1st ed, 1999); Brian Swimme and Thomas Berry, *The Universe Story: From the Primordial Flaring Forth to the Ecozoic Era* (1992).

<sup>2</sup> See also, Robin West, 'Jurisprudence as Narrative: An Aesthetic Analysis of Modern Legal Theory' (1985) 60 *N.Y.U. L. R.* 145, 146, where she writes: 'when we [lawyers] discuss what is possible, what we desire and what we dread, we quite naturally turn to stories about hypothetical communities and the legal actors and forms within those communities.'

an Ecozoic era<sup>3</sup> – I will tell a story of the future, a possible future that was conceived of in between the poles of pessimism and optimism but which is ultimately based upon a faith in the human spirit to meet the challenges which presently confront it. Though I cannot be sure Berry would have agreed with all the conclusions drawn or speculations made, I believe he would have been sympathetic to my general undertaking.<sup>4</sup>

What follows is an attempt to look back on the 21<sup>st</sup> century from the vantage point of the year 2099. It takes the form of an essay, written for the journal *Possibility* by Lennox Kingston, a 90-year-old historian of *Law and Society*.<sup>5</sup> The essay reviews how the gradual politicization of the Simplicity Movement affected, through legal reform, the structure of late capitalism, with a particular focus on the evolution of property relations. The purpose of this experimental essay is to bring together the central themes of the preceding chapters and provide some insight into what a post-growth property system might look like as a legal reality.<sup>6</sup>

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<sup>3</sup> See Thomas Berry, 'The Ecozoic Era,' in Hildegard Hannum, *People, Land, and Community: Collected E.F. Schumacher Society Lectures* (1997) 191. See also, n 1 above.

<sup>4</sup> For other examples of lawyers using story in legal scholarship, see Lon Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harv. L. R.* 616 (writing several judgments on a fictional murder case); John Harris, 'Inheritance and the Justice Tribunal,' in Stephen Munzer (ed), *New Essays in the Legal and Political Theory of Property* (2001) 106 (discussing 'The Justice Tribunal' which sits in an imaginary country that resembles contemporary Western societies, except that there is no law of testation or of intestate succession); and Eric Freyfogle, 'Private Property: A Fable Retold,' in *On Private Property: Finding Common Ground on the Ownership of Land* (2007) 157-179 (retelling the story of property law's evolution as if it had been guided by different values). More theoretically, see Richard Delgado, 'Storytelling for Oppositionists and Others: A Plea for Narrative' (1989) 87(8) *Mich. L. R.* 2411; Sanford Levinson, 'Law as Literature' (1981) 60 *Tex. L. R.* 373.

<sup>5</sup> I borrow the term 'Entropia' from the French journal *Entropia: A Review of Theoretical and Political Study about Degrowth*, available online at <http://www.entropia-la-revue.org/spip.php?rubrique24>.

<sup>6</sup> Since there has been no prior description of a specifically post-growth property system in legal scholarship (or anywhere), the law reform proposals outlined below are intended to provoke thought and debate rather than 'convince,' as such. This is an acknowledgement that a much more detailed and comprehensive defence of the proposals will need to be forthcoming in the future, if a post-growth property system is to be deemed justifiable. Nevertheless, due to the necessary limitations of space in this final, exploratory chapter, I felt it was better to provide an overview of various post-growth property reforms, and thereby provide some sense of the bigger picture, than focus narrowly on one or two aspects of reform.

# LOOKING BACKWARD FROM THE YEAR 2099: ECOZOIC REFLECTIONS

Lennox Kingston

*Possibility* 81(4) (2099)

## 1. THE QUIET REVOLUTION

So long as most people felt that a higher material 'standard of living' was needed to increase 'quality of life,' growth capitalism was politically safe.<sup>7</sup> But that which is kept alive by the citizenry can also, through a change in consciousness, be transformed by it. This subversive thesis was famously advanced during the counter-cultural movements of the 1960s and 1970s, and was neatly captured in their slogan 'revolution by consciousness.'<sup>8</sup> But it was not until the so-called 'New Generation' counter-cultural movements of the late 2010s and early-to-mid-2020s did a revolution by consciousness genuinely threaten to become a concrete reality. Of those movements, the one which did most to recompose the social imaginary marched under the banner of Simplicity. This 'quiet revolution,'<sup>9</sup> as it came to be known, was not like revolutions of the past, however. It originated with the individual and with culture. It did not need violence to succeed and it could not have been successfully resisted by violence. And it changed the politico-legal structure only as its final act.<sup>10</sup>

By the end of the 2020s, the Simplicity Movement had become a significant oppositional force, and it would continue to strengthen and expand every year. Although the movement had not, at this stage, achieved the cultural paradigm shift to which it aspired, and although its political impact had so far been quite modest, the line between counter-culture and mainstream had certainly blurred, which is always a sign of great social transition.<sup>11</sup> Most significantly, attitudes to consumption were in unprecedented flux. Luxurious and extravagant lifestyles, once almost universally admired and envied, had come to be seen by many as morally problematic, improper in an age of ecological crisis and great human need, and certainly not the most

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<sup>7</sup> See Robert Reich, *Supercapitalism: The Transformation of Business, Democracy, and Everyday Life* (2007) (shifting the blame for corporate dominance away from the trans-nationals and toward ordinary consumers who want the cheapest deal and investors who want the highest returns).

<sup>8</sup> Charles Reich, *The Greening of America* (1970) 322.

<sup>9</sup> Duane Elgin, *Promise Ahead: A Vision of Hope and Action for Humanity's Future* (1st ed, 2000), Ch. IV.

<sup>10</sup> See Reich, *The Greening of America*, above n 8, 2.

<sup>11</sup> Theodore Roszak, *The Making of a Counter Culture: Reflections on the Technocratic Society and its Youthful Opposition* (1st ed, 1995).

reliable path to personal flourishing.<sup>12</sup> Furthermore, simple living had become a socially accepted alternative lifestyle, which made stepping out of materialistic lifestyles much less isolating, thus hastening the demise of consumer culture. These changes resulted in discernable social and ecological benefits.<sup>13</sup>

Nevertheless, despite significant cultural transformation in attitudes to consumption, around this time many within the Simplicity Movement came to a troubling realization. It was becoming apparent that even those who genuinely wished to embrace voluntary simplicity as an oppositional living strategy were finding the *practice* of simplicity extremely challenging, especially in urban centres.<sup>14</sup> Put otherwise, it seemed that legal, political and economic institutions, and social infrastructure, were functioning to lock many people into high-impact consumerist lifestyles, despite their desire for a simpler way of life.<sup>15</sup> There had, of course, always been an undercurrent within the Simplicity Movement which insisted that personal action alone was never going to be enough to achieve ecological sustainability and social justice – that political engagement was necessary.<sup>16</sup> But few had appreciated quite how hard it would be to create a simpler form of life from within an institutional framework based on materialistic, pro-growth values. By the late 2020s, however, it had become obvious to all that the socio-cultural movement away from consumerism needed to be supplemented and facilitated by a politico-legal movement away from growth economics, and that latter transition, focusing on the legal evolution of property relations, is the subject of this essay.

## 2. PROPERTY BEYOND GROWTH: TOWARD A POLITICS OF VOLUNTARY SIMPLICITY

What follows is a review of the matrix of ‘revolutionary reforms’ which resulted from the gradual politicization of the Simplicity Movement in Western societies over the course of the 21<sup>st</sup> century.<sup>17</sup> Obviously, different nations evolved in different ways, at

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<sup>12</sup> See generally, Marius De Geus, *The End of Over-Consumption: Towards a Lifestyle of Moderation and Self-Restraint* (2003).

<sup>13</sup> See generally, Thomas Princen, *The Logic of Sufficiency* (2005) (outlining the various benefits of simple living).

<sup>14</sup> See Eric Freyfogle, ‘Simplicity, Community, and Private Land,’ in Samuel Alexander (ed), *Voluntary Simplicity: The Poetic Alternative to Consumer Culture* (2009) 250-2 (noting that ‘In its current political, legal, and economic forms, the modern world makes simple living a difficult option,’ noting also that ‘A study of [private property] should be high on the list of tasks for social reformers out to promote more simple ways of life.’).

<sup>15</sup> See, e.g., Christer Sanne, ‘Willing Consumers—Or Locked-In? Policies for a Sustainable Consumption’ (2002) 2002(42) *Ecological Economics* 273.

<sup>16</sup> See, e.g., Charles Siegel, *The Politics of Simple Living* (2008).

<sup>17</sup> The Western societies are presently the primary focus of attention because it was therein that growth economics were born and were most deeply entrenched, and where the most radical shifts away from growth economics occurred. Being the economically and politically dominant societies, this Western

different times, and these differences were sometimes considerable. Indeed, throughout the Great Transition an openness to plurality was, and still is, considered a virtue.<sup>18</sup> Nevertheless, if we look at the world at the beginning of this century and compare it with how it is at the end, it cannot be denied that there has been a recognizable and coherent paradigm shift in law, politics, and economics, especially with respect to Western-style systems of property. In what follows an attempt is made to outline, with a broad brush, the most significant features of the new paradigm, beginning with the new indicators of progress which were so instrumental in disposing of growth economics and which opened up the political space needed for a post-growth jurisprudence of property to take root. Deferring to convention, this new paradigm will be referred to as ‘Entropia,’ which is not a place, as such, so much as the idealized social, economic, and political order which guided and motivated many of the radical law reform movements during this century.

### 2.1. *Beyond GDP: Alternative Indicators of Progress*

During the era of growth capitalism (1945-2030), increasing GDP was the overriding objective of governments.<sup>19</sup> It was an era when economists, policymakers, judges, lawyers, reporters, and the wider public, generally relied on GDP as a shorthand indicator of a nation’s progress (‘the growth model of progress’). But GDP is merely a sum of national spending which makes no distinctions between market transactions that add to well-being and those that diminish it; it does not take any account of ecological damage or wealth distribution; and anything that is not recorded as a market transaction is excluded from its accounts, such as domestic work, volunteering, and leisure.<sup>20</sup> For these reasons, among others, GDP is a highly defective measure of how well-off a society is and a poor indicator of policy and institutional success. As this came to be recognized and exposed, scholars and

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transition obviously had significant impacts on the global economic and political order, and this could give rise to the objection that the limited ‘Western’ focus of the present analysis is somewhat artificial, in the sense that transnational flows of capital mean that the late capitalist economies were, by nature, global creatures. See, e.g., Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd ed, 2002); Michael Hardt and Antonio Negri, *Empire* (2000). While the global nature of late capitalist economies can hardly be denied, it is suggested that there is nevertheless a value in examining the paradigm shift which occurred *within* those economies, given their dominance. The broader issues of how those intra-national developments affected, or were affected, by the global order must be the focus of another study. But see, Debal Deb, *Beyond Developmentality: Constructing Inclusive Freedom and Sustainability* (2009).

<sup>18</sup> Stephen Spratt et al, *The Great Transition: A Tale of How it Turned Out Right* (2009).

<sup>19</sup> See, e.g., Clive Hamilton, *Growth Fetish* (2003); Stephen Purdey, *Economic Growth, the Environment and International Relations: The Growth Paradigm* (2010).

<sup>20</sup> See generally, Joseph Stiglitz, Amartya Sen and Jean-Paul Fitoussi, *Mis-Measuring Our Lives: Why GDP Doesn't Add Up* (2010).

policymakers began developing alternative, much more nuanced, measures of societal progress.<sup>21</sup> One such measure, which has gradually received official recognition and respect, is known as the Genuine Progress Indicator (GPI).<sup>22</sup> Arguably, this development symbolizes better than any other the transition from growth capitalism to Entropia.

Although the GPI remains an imperfect tool, and so must be employed cautiously and tentatively, the significance of it replacing GDP as the dominant measure of progress can hardly be overstated. In essence, public recognition of and support for the GPI means that political parties can campaign for policy and institutional reforms – including property law reforms – that are likely to genuinely improve human well-being and ecological conditions, even if those reforms would slow or even reduce growth. Once upon a time, of course, when growth in GDP was assumed to be unquestionably a good thing, implementing reforms that would negatively affect growth rates or even lead to degrowth was tantamount to committing political suicide. But by distinguishing genuine progress from growth, that changed. In particular, new space opened up within the political arena for the following legal reforms in property relations.

## 2.2. Basic Income as a New Property Right

One of the deepest and most enduring criticisms levelled at capitalist economies was that, no matter how rich they became, there always remained an underclass of people who were unemployed and poverty-stricken.<sup>23</sup> To permit members of an affluent society to live without any secure livelihood seems intolerable to us, but majority opinion among earlier generations took it to be regrettable but permissible, perhaps even necessary.<sup>24</sup> Even strong varieties of the 'welfare state' under capitalism were unable to provide all with the economic security which we regard as necessary to live a fully human life of freedom and dignity, since welfare payments

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<sup>21</sup> See Herman Daly, John Cobb and Clifford Cobb, *For the Common Good: Redirecting the Economy toward Community, the Environment, and a Sustainable Future* (2nd ed, 1994). See also, Philip Lawn, 'A Theoretical Foundation to Support the Index of Sustainable Economic Welfare (ISEW), Genuine Progress Indicator (GPI), and Other Related Indexes' (2003) 44(1) *Ecological Economics* 105.

<sup>22</sup> See, e.g., Philip Lawn and Matthew Clarke, *Sustainable Welfare in the Asia-Pacific: Studies Using the Genuine Progress Indicator* (2008).

<sup>23</sup> Of course, capitalist economies societies were also the richest economies, where poverty levels were generally lower than in non-capitalist economies. But given the affluence of advanced capitalist economies, it is unclear why a residue of poverty was permitted to remain amidst such plenty. See, e.g., John Iceland, *Poverty in America: A Handbook* (2nd ed, 2006).

<sup>24</sup> For a critical discussion of traditional views of poverty, see Thomas Ross, 'The Rhetoric of Poverty: Their Immorality, Our Helplessness' (1990) 79 *Geo. L. J.* 1499.

could be denied, delayed, qualified, or revoked, for any number of reasons.<sup>25</sup> The politics of Entropia boldly confronted this serious problem with remarkable directness, by gradually introducing varieties of what is generally called a 'Basic Income,' otherwise known as a 'Simplicity Entitlement.'<sup>26</sup>

Although there is considerable variety in forms of Basic Income, the core idea is relatively straightforward.<sup>27</sup> In its idealized and most radical form, every permanent resident would receive a periodic (e.g. fortnightly) stipend sufficient to live at a minimal standard of economic security, generally at a level around 125% of the culturally specific 'poverty line;' that is, enough to live simply, securely, and with dignity, though, as one commentator put it, 'extremely modestly.'<sup>28</sup> The Basic Income is guaranteed by the state, is unconditional on the performance of any labour, and is universal (excepting only those incarcerated). Parents are the custodians of children's grants (which are typically somewhat lower than adult grants). Within a fully developed Basic Income System most other state transfers can be abolished – such as unemployment benefits, family allowances, pensions, etc. – since the Basic Income grant is sufficient to provide everyone with a decent, though minimal, subsistence.<sup>29</sup> Economic insecurity, whether from incapacity or unemployment, is therefore essentially eliminated.<sup>30</sup> Even minimum wage laws can be somewhat relaxed, since all earning above the Basic Income is discretionary. Other kinds of programs remain, such as support for people with special needs, as do universalistic

<sup>25</sup> See Philippe Van Parijs, 'Basic Income Capitalism' (1992) 102(3) *Ethics* 465, 465-6 (discussing the limitations of the conventional welfare state as a means of providing economic security).

<sup>26</sup> On the idea of a Basic Income, see, e.g., Philippe van Parijs, *Real Freedom For All: What (If Anything) Can Justify Capitalism?* (1995); Erik Olin Wright, 'Reducing Income and Wealth Inequality: Real Utopian Proposals' (2000) 29(1) *Contemporary Sociology* 143; Michael Hardt and Antonio Negri, *Empire* (2000) 401-3. Interestingly, economists as diverse as John Kenneth Galbraith and Milton Friedman supported the introduction of some form of Basic Income. See John Galbraith, *The Affluent Society* (1958); Milton Friedman, *Capitalism and Freedom* (1962). The Basic Income has come to be known as a 'Simplicity Entitlement' because the normative framework of voluntary simplicity which was instrumental in realizing this policy initiative was not just about resisting over-consumption, it was also about ensuring that everyone had 'enough.' See Thomas Princen, *The Logic of Sufficiency* (2005).

<sup>27</sup> For a discussion of the history of this idea, see Steven Pressman, Michael Anthony Lewis and Karl Widerquist, *The Ethics and Economics of the Basic Income Guarantee* (2005), Part I.

<sup>28</sup> Ibid 282.

<sup>29</sup> The fact that Basic Income Systems reduce or eliminate the need for unemployment benefits, family allowances, pensions, etc., as well as the bureaucracy needed to administer such transfers, is the main reason Basic Income Systems receive support from the political Right. See, e.g., Milton Friedman, *Capitalism and Freedom* (1962).

<sup>30</sup> For some time social researchers have been arguing that there is a direct and positive correlation between income and well-being at low levels of income, but that increases in income beyond some 'basic needs' threshold have a fast diminishing marginal utility. See generally, Richard Layard, Guy Mayraz and Stephen Nickell, 'The Marginal Utility of Income' (2008) 92 *J. of Pub. Econ.* 1846; Rafael Di Tella and Robert MaCulloch, 'Happiness Adaptation to Income Beyond "Basic Needs"' in Ed Diener, Daniel Kahneman and John Helliwell (eds), *International Differences in Well-Being* (2010) 217. Supporting the institution of Basic Income Systems, this research scientifically confirms the intuitively sound proposition that eliminating poverty is an extremely important step in increasing individual and social well-being.

programs, such as public education and health care.<sup>31</sup> In many jurisdictions, the Basic Income entitlement is increasingly being described as a ‘new’ property right, although the terminology used to describe this entitlement is obviously less important than the entitlement itself.<sup>32</sup>

The feasibility of a Basic Income System was historically doubted for two main reasons.<sup>33</sup> The first objection was that making the Basic Income unconditional on the performance of any labour would give rise to a society of ‘free-riders’ and ultimately lead to economic collapse. This pessimistic outlook, however, has been proven unjustified.<sup>34</sup> Few would be surprised to hear that the ‘free-rider’ problem does exist to a certain extent today – that is, there are indeed some who live off the Basic Income but who choose not to contribute to society in any discernable way. However, it turns out that human beings, by and large, are social creatures, who find being engaged in their community’s work more meaningful and fulfilling than being isolated, idle, and parasitic on the community.<sup>35</sup> Furthermore, the very small minority that choose not to contribute in any way prove to be a tolerable burden – certainly more tolerable than the levels of poverty which persisted within the property systems of late capitalism.<sup>36</sup> A large majority of citizens remain in some form of paid employment, and the percentage that do not are typically engaged in other forms of socially necessary and beneficial work, such as raising children, working in community gardens or local energy centres, volunteering in areas of interest or concern, or exchanging labour for housing through the Organization for Affordable and Sustainable Housing.<sup>37</sup>

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<sup>31</sup> Erik Wright, ‘Reducing Income and Wealth Inequality’ above n 26, 149.

<sup>32</sup> See Charles Reich, ‘The New Property’ (1964) 73(5) *Yale L. J.* 733 (arguing that as contexts change new forms of property rights may need to be created to ensure that ‘private property’ systems still advance the ethical purposes that justified their original institution). Although the notion of ‘new’ property rights was and, to some extent, remains controversial, over recent decades the notion that private property systems are justified only to the extent that they guarantee economic security for all has attained widespread support. Conceiving of Basic Income as ‘new property’ also finds support in the Hegelian justification for private property, which essentially holds that if private property is necessary for human development, then it is of the utmost importance that all have access to sufficient private property to develop. See Georg Hegel, *Philosophy of Right* (1952). For an incisive discussion and defence of this Hegelian view, see Jeremy Waldron, *The Right to Private Property* (1988) Ch. 10.

<sup>33</sup> See Tony Fitzpatrick, *Freedom and Security: An Introduction to the Basic Income Debate* (1999) 4.

<sup>34</sup> This confirms the results of the extensive social experiments undertaken in the United States between 1968-1980 which concluded that providing guaranteed income to individuals and households had only small and affordable reductions in labour-supply due to incentive effects. For a thorough discussion of those experiments, see Pressman et al, above n 27, Chap. 5.

<sup>35</sup> See, e.g., Liliana Winkelmann and Rainer Winkelmann, ‘Why Are the Unemployed so Unhappy? Evidence from the Panel Data’ (1998) 65 *Economica* 1; Andrew Clark and Andrew Oswald, ‘Unhappiness and Unemployment’ (1994) 104 *Economic Journal* 648.

<sup>36</sup> See, e.g., John Iceland, *Poverty in America: A Handbook* (2nd ed, 2006); Peter Krause, Gerhard Bäcker and Walter Hanesch, *Combating Poverty in Europe* (2003).

<sup>37</sup> To guard against the ‘free-rider’ problem – at least as a cautionary, transitional step – some jurisdictions have established a variation of the Basic Income known as a Participation Income, which

The second objection levelled at the Basic Income concerned the feasibility of financing it, an issue which is obviously of great importance, although it was and remains a matter of political commitment more than a financing issue. Basic Income entitlements did create a new and significant financial burden on the public purse, however changes to public spending as well as significant tax reforms (discussed below) have been sufficient, in many of the wealthier jurisdictions, at least, to gradually raise the Basic Income to a minimal level of dignified subsistence. Those jurisdictions around the globe which are still transitioning toward a subsistence-level Basic Income System are often called Guaranteed Income Systems (i.e. systems which guarantee a certain level of income, but below subsistence levels, meaning that some supplementary income is still necessary through earnings).<sup>38</sup> Another method several nations have used to progress toward a Basic Income System is to establish a Negative Income Tax System, which differs from a Basic Income in that it provides a tax-credit (typically beginning at low levels and increasing over time) to those with low incomes, providing such low-earners with a minimum income but by an alternative route.<sup>39</sup> These approaches of incrementally raising the level of Guaranteed Income or Negative Income Tax to establish a fully developed system of Basic Income were key both to the financial viability and to the political attractiveness of the Basic Income policy objective.<sup>40</sup>

It is worth noting that a Basic Income System or one of their varieties does tend to slow growth in the economies in which they operate, for the reason that such systems – consonant with the predictions of orthodox economic theory – inevitably provide fewer incentives for citizens to dedicate so much of their energy to conventional productive activity.<sup>41</sup> But since the wealthiest nations today are no longer anxious to grow, and many are even voluntarily transitioning by way of degrowth to a steady-state economy, the traditional imperative to maximize

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does mandate some form of social contribution, but not necessarily ‘productive’ work as traditionally understood. A ‘social contribution,’ in this sense, could include care-giving, studying, volunteer work, and looking for work; or being excused due to illness, disability, or reaching retirement age. For pioneering scholarship on the Participation Income, see Anthony Atkinson, *Public Economics in Action: The Basic Income / Flat Tax Proposal* (1995). The Participation Income also receives support from those who argue that there is no moral right to income without a related duty to work. Pressman et al, above n 27, 258.

<sup>38</sup> See Pressman et al, above n 27, 282.

<sup>39</sup> For a discussion, see Fitzpatrick, above n 33, 88-99.

<sup>40</sup> For a defence of the incremental approach, see Pressman et al, above 27, 308. In 1976, the American State of Alaska was the first political unit to establish a form of Guaranteed Income System (known as the ‘Alaska Permanent Fund’) which began distributing 50 per cent of all royalties flowing from Alaskan oil sales. In terms of wealth distribution, this quickly made Alaska the most equal of all the U.S. states, with less poverty. See Pressman et al, at 252-3. In 2004, Brazil became the first nation to establish a Guaranteed Income System. See Pressman et al, at 250.

<sup>41</sup> Ibid 98.

incentives to produce is much less pressing.<sup>42</sup> Indeed, the level at which governments set a Basic or Guaranteed income can be a device to control, to a certain extent, the level of growth or degrowth in an economy.<sup>43</sup>

The social benefits of Basic Income Systems have been profound and far-reaching. Beyond eliminating poverty and economic insecurity – which were the primary functions of a Basic Income System – its gradual institution also strengthened the bargaining position of workers, since it gave them a property right that was independent of their paid employment, and thus more power to demand decent working conditions. It also meant that people did not have to accept alienating, exploitative, or degrading jobs just to survive; nor was there any real pressure to sacrifice social and political autonomy in order to achieve economic security.<sup>44</sup> Furthermore, introducing the Basic Income was effectively an acknowledgement of the worth of unpaid caring work and other forms of social contribution, thereby extending economic citizenship beyond participants in the traditional labour market.<sup>45</sup> For these reasons, among others, the legal restructuring of property relations based upon the notion of Basic Income has done much to create more democratic and egalitarian societies.<sup>46</sup> By structurally promoting degrowth economics and low-consumption or ‘simpler’ living, the Basic Income has also led to considerable ecological benefits.<sup>47</sup>

### 2.3. *Progressive Taxation and the Maximum Wage*

In general, the property systems of Entropia are shaped by highly progressive income or consumption taxes which fund a considerable portion of state policies, including the Basic Income entitlement.<sup>48</sup> Progressive forms of taxation were in place

<sup>42</sup> See Herman Daly, *Steady-State Economics* (2nd ed, 1991) 56.

<sup>43</sup> Baptiste Molondo, ‘The Basic Income: A Factor of Degrowth’ (2008) 174 <[www.degrowth.net](http://www.degrowth.net)> at 10 December 2010.

<sup>44</sup> Ingrid Robeyns, ‘An Income of One’s Own: A Radical Vision of Welfare Policies in Europe and Beyond’ (2001) 9(1) *Gender and Development* 82, 84.

<sup>45</sup> Ibid 85. See also, Ailsa McKay, *The Future of Social Security Policy: Women, Work and a Citizens’ Basic Income* (2005).

<sup>46</sup> See generally, Bruce Ackerman et al, *Redesigning Distribution: Basic Income and Stakeholder Grants as Alternative Cornerstones for a More Egalitarian Capitalism* (2006).

<sup>47</sup> Defending Basic Income from an ecological perspective, see Jan Otto Andersson, ‘The Green Case for Basic Income’ (2009) 4(2) *Basic Income Studies* Art. 4. See also, Michael Kenny and James Meadowcroft (eds), *Planning Sustainability* (1999) Ch 6; Fitzpatrick, above n 33, 176-201.

<sup>48</sup> During the second half of this century there has been a slow movement away from income taxes toward consumption taxes, but at present the former are still the dominant structure and so will be the focus of this section. Consumption taxes find some of their most ardent supporters among ecological economists, who argue that governments should tax environmental ‘bads,’ such as consumption, not social ‘goods,’ such as income. See, e.g., Herman Daly, *Ecological Economics and Sustainable Development: Selected Essays of Herman Daly* (2007) 111. On progressive consumption taxes, see

even within the paradigm of growth capitalism, so there is little need to address the matter of justification in any detail. Put simply, progressive taxation is considered by many to be justifiable on the somewhat overlapping grounds of equity and efficiency;<sup>49</sup> that is, because it is equitable, in this view, for the richest to pay more than the poorest to fund the state's policies;<sup>50</sup> and, secondly, because the diminishing marginal utility of money means that the more money one has, the less utility or happiness one can buy with each further dollar (i.e. one dollar is more valuable to a poor person than to a rich person), arguably making some redistribution an efficient use of resources.<sup>51</sup> What distinguished the politics of Entropia from growth capitalism was how progressive taxation was used to effectively create a 'maximum wage' or 'income cap.'<sup>52</sup> Let us consider this central development.

Just as most at the beginning of the twentieth century had trouble imagining how their ancestors could have stomached slavery, so we at the end of the twenty-first century are dismayed by the incredibly excessive incomes that some executives, managers, shareholders, traders, sports stars, doctors, lawyers, etc. received not so long ago.<sup>53</sup> We cannot understand why it was ever permitted for some incomes to reach into the millions or tens of millions of dollars when many – often those working in the very same enterprise – received little more than an (insecure) subsistence wage.<sup>54</sup> We consider such disparities plainly objectionable on many grounds – in particular, they undermine democracy by creating huge imbalances of power; they are socially corrosive; they encourage grossly extravagant lifestyles; and they simply cannot be justified by any appeal to proportional merit or social contribution.<sup>55</sup> Indeed,

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Robert Frank, 'Should Public Policy Respond to Positional Externalities?' (2008) 92 *J. of Pub. Econ.* 1777.

<sup>49</sup> For a discussion equity and efficiency issues in taxation, see William Baumol and Alan Blinder, *Microeconomics: Principles and Policy* (11th ed, 2009) 384-87.

<sup>50</sup> This is sometimes described as the 'ability-to-pay principle,' which states that 'those most able to pay should pay the highest taxes'. Ibid 384-5.

<sup>51</sup> See Richard Layard, Guy Mayraz and Stephen Nickell, 'The Marginal Utility of Income' (2008) 92 *J. of Pub. Econ.* 1846. Redistribution by way of progressive taxation is an especially efficient use of resources when – as is the case in affluent societies – 'relative income' becomes more important to most people than 'absolute income.' For an early discussion of this view, see Michael Boskin and Eytan Sheshinski, 'Optimal Redistributive Taxation When Individual Welfare Depends Upon Relative Income' (1978) 92(4) *Quart. J. of Econ.* 589; see also, Frank, above n 48.

<sup>52</sup> See generally, Sam Pizzigati, *The Maximum Wage: A Common-Sense Prescription for Revitalizing America by Taxing the Very Rich* (1992); Sam Pizzigati, *Greed and Good: Understanding and Overcoming the Inequality that Limits our Lives* (2004).

<sup>53</sup> See generally, Giovanni Cornia (ed), *Inequality, Growth, and Poverty in an Era of Liberalization and Globalization* (2004).

<sup>54</sup> At the beginning of this century, for example, top corporate executives in the United States earned over 400 times the income of average production workers. See Pizzigati, *Greed and Good*, above n 52, 479.

<sup>55</sup> On the negative impacts of inequality, see Kate Pickett and Richard Wilkinson, *The Spirit Level: Why Greater Equality Makes Societies Stronger* (2009); James Lardner and David Smith, *Inequality Matters: The Growing Economic Divide in America and its Poisonous Consequences* (2005).

limitless wealth is highly contestable even in terms of John Locke's political philosophy of property, which was often held up as the foundation of capitalism.<sup>56</sup> The politics of Entropia, of course, never advocated anything like strict equality in incomes. Degrees of inequality remain. However, it is taken for granted today that in a world of scarce resources *some* limits must be placed on individual incomes, and a simple but bold restructure of progressive income tax policy provided an effective method for doing so.<sup>57</sup>

An income tax is 'progressive' when the tax rate increases as the taxable income increases.<sup>58</sup> In theory, at least, all income over a certain amount could be taxed completely, thereby creating a 'maximum wage' or 'income cap.' Although only New Zealand's *Remuneration Justice Act 2038* has actually gone this far – placing a 100 percent tax on annual incomes over \$300,000 – many other economies have gradually established a top income bracket which is taxed more than ninety percent (which, strictly speaking, does not place any 'cap' as such on incomes, but functions in a similar way).<sup>59</sup> The income level of the top tax bracket also varies between nations, often starting high, for political reasons, and then decreasing. But today it generally sits quite stably around ten to fifteen times the level of the Basic Income.<sup>60</sup>

One may have thought that the introduction of such policies would have been politically controversial in the extreme, given the entrenched presumption of limitless income potential in capitalist economies. It turned out, however, that this was not the

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<sup>56</sup> See Mark Rankin, 'The Immorality of Unlimited Wealth: The Lockean Limits to the Acquisition and Accumulation of Private Property' (2000) 4(1) *Flinders Journal of Law Reform* 39.

<sup>57</sup> The 'maximum wage' finds further justification in the sociological research which shows that once the basic comforts and refinements of life have been provided for, further increases in income have a fast diminishing marginal utility. See, e.g., Layard et al, above n 51. See also, Ed Diener, Jeff Horwitz and Robert Emmons, 'Happiness of the Very Rich' (1985) 16 *Social Indicators Research* 263 (providing evidence that the very rich are only marginally happier than a random cross-section of the population). What this research suggests is that high incomes are essentially wasted as far as personal well-being is concerned, making a 'maximum wage' an extremely important means of avoiding wasteful consumption.

<sup>58</sup> See Baumol and Blinder, above n 49, 379.

<sup>59</sup> We must not forget that as late as 1961 in the United States, the top tax bracket was 91 per cent; and in the post-war era the Danes had a top tax bracket in excess of 97 per cent. See Pizzigati, *The Maximum Wage*, above n 52, 62; Pizzigati, *Greed and Good*, above n 52, 527. So the policy of effectively establishing a 'maximum wage' by such means was not as radical or unprecedented as some made it out to be. As well as lessening inequalities, by providing disincentives to keep on earning beyond the highest tax bracket, such progressive tax policies function to promote non-materialist pursuits, which sits consistently with Entropia's underlying social vision of voluntary simplicity.

<sup>60</sup> Setting the Maximum Wage as a ratio of the Basic Income gives the wealthiest members of society an incentive to seek a raise in the Basic Income. This is consistent with the 'maximin' principle, often associated with John Rawls. Put simply, the maximin principle holds that society should be structured so as to maximize the well-being of the worst off. See John Rawls, *A Theory of Justice* (1971) Chap. III, Sect. 26. See also, Pizzigati, *The Maximum Wage and Greed is Good*, above n 52 (discussing the differential between the highest and lowest incomes in a society and arguing for a 'Ten Times Rule').

case. There were, of course, the usual objections from advocates of ‘free markets’<sup>61</sup> – and the progressive tax laws certainly underwent vigorous and often heated debate in the various legislatures – but many referenda were held which unambiguously demonstrated that the laws had overwhelming public support, doubtless owing to the fact that the maximum wage would only limit the incomes of a very small minority of people. Political representatives, accordingly, had little choice but to follow the will of the people.<sup>62</sup>

#### 2.4. Worker Cooperatives

Capitalist economic relations paradigmatically involved workers selling their labour to the owners of productive assets and those owners then selling the commodities produced for more than the cost of the labour that went into making them, thereby making a ‘profit.’ We attribute to Karl Marx, more than any other, the thesis that this capitalist mode of production and exchange exploits workers.<sup>63</sup> It is exploitative, Marx argued, because workers are paid less for their labour than the value of the commodities they produce, creating a ‘surplus value’ which is improperly retained by the capitalist even though it is the product of the workers’ labour.<sup>64</sup> The solution Marx proposed was to abolish all private property in productive assets and establish a property system based on state ownership; that is, his solution was to replace capitalism with communism.<sup>65</sup>

Many involved in the politics of Entropia were sympathetic (without wholly subscribing) to the view that workers, to varying extents, were exploited under the capitalist mode of production and its legal superstructure;<sup>66</sup> yet, for various reasons, most did not see state ownership of productive assets as the solution. Rather than state communism, what emerged instead have been various forms of ‘market-socialist’ property systems, in which worker cooperatives are increasingly the

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<sup>61</sup> See, e.g., Friedman, above n 26 (arguing that a maximum wage would reduce the incentive to innovate).

<sup>62</sup> It could be argued that the Global Financial Crisis of 2007-8 was the catalyst which gave impetus to the ‘maximum wage’ law reform movements this century. See Helmut Dietl et al, ‘Executive Salary Caps: What Politicians, Regulators and Managers Can Learn from Major Sports Leagues’ (2010) *Institute for Strategy and Business Economics, University of Zurich, Working Paper, No.129*, 2 (noting that ‘One of the most prominent proposals [for avoiding financial crises in the future] is the introduction of salary caps for corporate executives’).

<sup>63</sup> See generally, Karl Marx, *Capital: A Critique of Political Economy* (1977).

<sup>64</sup> *Ibid.*

<sup>65</sup> *Ibid.* See also, Karl Marx and Friedrich Engels, *The Communist Manifesto* (1848).

<sup>66</sup> See, e.g., Serge Latouche, *Farewell to Growth* (2009) 89.

dominant economic form.<sup>67</sup> In general, these enterprises are owned by their workers and democratically operated on a 'one person, one vote' basis, thereby avoiding the exploitative and alienating relationships which Marx and others criticised so vehemently.<sup>68</sup> The cooperatives still fall within the private property paradigm, however, since workers still have individual ownership interests in them, and the state does not determine what the cooperatives produce.<sup>69</sup> Furthermore, the economy is still based on market exchanges, since cooperatives gain income by selling their goods and services to customers. In doing this, they compete with other cooperatives (and other small businesses of the allowable types), which secures the efficiency rewards that were once considered peculiar to capitalist structures. The primary difference with growth capitalism is that large corporate entities employing non-shareholders have largely disappeared.<sup>70</sup>

The transition to this type of 'stakeholder society' was facilitated both by public policy and cultural changes, with each mode of transition promoting and supporting the other. When governments decided that broadening the ownership base of the economy was to be a policy priority, the first step in that direction was often to make the tax rates for worker cooperatives extremely attractive compared to the tax rates for the traditional 'owner-shareholder' corporate entities. Governments also began explicitly preferring worker cooperatives when contracting with the private sector, and whenever possible government spending was directed toward worker cooperatives. Various types of development banks were also created through which governments began funding new businesses which were required to establish themselves as worker cooperatives.<sup>71</sup> Collectively, these strategies, and many others, were able to create fertile conditions in which worker cooperatives could take root, multiply, and flourish. It was arguably a shift in consumer attitudes, however, that was the deepest driver of change. When private individuals began choosing to direct their expenditure toward cooperative enterprises, the old corporate structures gradually withered away

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<sup>67</sup> For a discussion of the most influential cooperative test case – that of the Mondragon Cooperative Corporation – see William Whyte and Kathleen Whyte, *Making Mondragon: The Growth and Dynamics of the Worker Cooperative Complex* (2nd ed, 1991). See also, J. K. Gibson-Graham, *A Postcapitalist Politics* (2006) Ch 5; Picket and Wilkinson, above n 55.

<sup>68</sup> Although Marx never addressed the question of whether the mode of production and exchange in a society of worker cooperatives would have been exploitative and alienating, it could be argued that property systems dominated by cooperatives effectively resolve whatever 'contradictions' were arguably present within capitalist property structures of production and exchange. See Bertell Ollman and David Schweickart, *Market Socialism: The Debate Among Socialists* (1998).

<sup>69</sup> See Michael Robertson, 'Reconceiving Private Property' (1997) 24(4) *J. of Law and Society* 465 (providing an elaborate and convincing case for why these types of worker cooperatives fall coherently within the paradigm of private property).

<sup>70</sup> *Ibid* 478.

<sup>71</sup> See Jeffrey Gates, *The Ownership Solution: Toward a Shared Capitalism for the Twenty-First Century* (1998) (exploring these and others means of broadening the ownership base of corporations).

as a natural consequence of market forces. This is a powerful reminder that how we spend our money is how we vote on what exists in the world.<sup>72</sup>

The emergence of worker cooperatives has been one of the most significant developments on the path to Entropia. It has expanded democratic decision-making beyond representative politics to include the everyday realm of economics, giving people much more control over their lives. Although democratizing the internal workings of business enterprises has created new inefficiencies – for example, decision-making can be slower – the fact that workers now have a real stake in the businesses within which they work has also created new forms of efficiency and fostered a new ethics of productivity and collective responsibility.<sup>73</sup> The material rewards of production are also distributed more evenly, though strict equality is rarely practised (or expected).<sup>74</sup> Beyond these appealing features, worker cooperatives have also generally functioned to be more ecologically sensitive than the old corporate forms, since businesses owned and managed by local citizens tend to take more care than ‘absentee owners’ to ensure business practices do not harm the environment.<sup>75</sup> Finally, cooperatives also seem to have engendered a greater sense of social solidarity and community, as workers belong to and participate in relatively stable associations of people with common interests and a shared economic identity.<sup>76</sup>

## 2.5. *Land Law, Harm, and the Tort of Ecological Degradation*

Although all of the reforms described above have had beneficial ecological implications, more direct and focused legal and political action was needed to adequately confront the ecological crisis and ensure that national economies, and the

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<sup>72</sup> See generally, Michele Micheletti, *Political Virtue and Shopping: Individuals, Consumerism, and Collective Action* (2010).

<sup>73</sup> See Wanjiru Njoya, 'Employee Ownership and Efficiency: An Evolutionary Perspective' (2004) 33(3) *Industrial L. J.* 221.

<sup>74</sup> Since workers generally vote for the firm director(s), this provides a structural means of ensuring that pay differentials are equitable.

<sup>75</sup> See Neil Carter, 'Worker Cooperatives and Green Political Theory,' in Brian Doherty and Marius de Geus, *Democracy and Green Political Thought: Sustainability, Rights, and Citizenship* (1996) 55 (noting that 'Most varieties of green political thought... display a fondness for the worker cooperative'). Carter's analysis is particularly useful in that he takes a sceptical stance in relation to the environmental credentials of worker cooperatives and concludes, after rigorous theoretical and empirical examination, that the claim that worker cooperatives are ecologically sensitive is 'valid only under certain circumstances,' at 55. While acknowledging ecological sustainability is not guaranteed under a system of cooperatives, Carter cites the more democratic structure of cooperatives and the heightened potential for close ties with the local community as the main reasons cooperatives will tend to be more ecologically sensitive than traditional corporate structures.

<sup>76</sup> See Thomas Weisskopf, 'A Democratic Enterprise-Based Market Socialism,' in Pranab Bardhan and John Roemer, *Market Socialism: The Current Debate* (1993) 121.

global economy, were kept within the sustainable carrying capacity of the planet. For a long time, however, state action on this critical matter was sluggish and uncommitted. It was estimated that the global economy first overshoot the absorptive and regenerative capacities of the biosphere in the late 1970s,<sup>77</sup> and by the first decade of this century estimates of this ecological overshoot were at 50 percent.<sup>78</sup> And yet, despite this predicament, every economy on the planet at this time was still aiming to maximize growth, making a dangerous ecological situation truly perilous.<sup>79</sup>

Over the first two decades of this century it became increasingly clear that the pro-growth structure of modern property law had no mechanism for keeping the macro-economic scale of an economy within ecologically sustainable limits. Property law under growth capitalism was predicated on a 'cost-benefit' assumption that economic activity provided a net benefit to society even if it caused some environmental damage.<sup>80</sup> This governing assumption was formed at a time when the world was viewed as an 'empty world,' that is, as a world with low population in which limitless economic expansion could be accommodated by seemingly boundless natural resources and absorptive sinks.<sup>81</sup> By the turn of this century, however, the world was no longer 'empty' but 'full.'<sup>82</sup> Populations reached extremely demanding levels, peaking as predicted in excess of nine billion,<sup>83</sup> and global ecosystems trembled under the weight of over-consumption.<sup>84</sup> And yet, for many years, property systems even within the richest nations remained growth-focused, driven by the 'empty-world' assumptions of a bygone era.

Put simply, the pro-growth structure of property law was simply not designed to deal with the cumulative environmental impacts of economic activity. In the words of Joseph Guth:

Each incremental impact, if taken alone in an empty world, might have caused cost-benefit justifiable harm or even, in many cases (such as carbon emissions), no harm

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<sup>77</sup> WWF, 'Living Planet Report' (2010) 7 <<http://www.footprintnetwork.org/press/LPR2010.pdf>> at 10 November 2010.

<sup>78</sup> Ibid 8.

<sup>79</sup> See generally, Donella Meadows, Jorgen Randers and Dennis Meadows, *Limits to Growth: The 30-year Update* (2004).

<sup>80</sup> See Joseph Guth, 'Cumulative Impacts: Death-Knell for Cost-Benefit Analysis in Environmental Decisions' (2008) 11 *Barry L. R.* 23. The presumption could be rebutted, but, significantly, the burden of proof lay upon those challenging industry.

<sup>81</sup> See Herman Daly and Joshua Farley, *Ecological Economics: Principles and Applications* (2004) Chap. 7.

<sup>82</sup> Ibid.

<sup>83</sup> See United Nations Department of Social and Economic Affairs, 'World Population Prospects: The 2008 Revision' (2008) <[http://esa.un.org/unpd/wpp2008/pdf/WPP2008\\_Highlights.pdf](http://esa.un.org/unpd/wpp2008/pdf/WPP2008_Highlights.pdf)> at 10 November 2010.

<sup>84</sup> See Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being* (2005).

at all. But under conditions of ecological overshoot each incremental impact contributes to a total loss that is immeasurable. Indeed, the permanent loss of the ecological integrity of the Earth, since we need it to survive and prosper, might fairly be considered an infinite loss.<sup>85</sup>

Elsewhere Guth evocatively likened the problem of cumulative ecological impacts to the parable of the straw which broke the camel's back: 'Just as it would miss the larger picture to assume that since one or a few straws do not hurt the camel, straw after straw can be piled on without concern, so the "trust in economic growth" decision rule misses the larger picture by assuming that cost-benefit-justified environmental damage can grow forever.'<sup>86</sup> What was urgently needed was a means of constraining – at least, helping to constrain – the total scale of an economy's environmental damage.

That means eventually arrived in the form of a Tort of Ecological Degradation, which has developed in most of the common law jurisdictions (and is reflected in legislation in both common law and civil law jurisdictions). Although this new body of law is being shaped in jurisdictionally specific forms, it is clear they are all indebted to Guth's pioneering work on the subject.<sup>87</sup> Guth originally formulated the new tort in the following terms:

**Sec. 1.** A person is subject to liability for ecological degradation if his or her conduct is a legal cause of an unreasonable ecological threat.

**Sec. 2.** An ecological threat is any effect on the natural world that may contribute to ecological degradation.

**Sec. 3.** An ecological threat is unreasonable unless the person whose conduct is a legal cause of the threat demonstrates by a preponderance of evidence that the threat does not contribute to ecological degradation.

**Sec. 4.** A person whose conduct is a legal cause of an unreasonable ecological threat may be relieved of some or all liability for ecological degradation if the person demonstrates by a preponderance of the evidence that:

- (a) The person has no feasible alternative to the conduct that is likely to contribute less to ecological degradation; and
- (b) The person is conducting a vigorous program to develop such a feasible alternative.

**Sec. 5.** Any member of a community that may be affected by an ecological threat may bring an action for ecological degradation.<sup>88</sup>

<sup>85</sup> Guth, 'Death Knell,' above n 80, 29.

<sup>86</sup> Joseph Guth, 'Two Rules for Decisions: Trust in Economic Growth vs. Precaution' (2007) *Science & Environmental Health Network* 4 <[www.sehn.org](http://www.sehn.org)> at 10 November 2010.

<sup>87</sup> Joseph Guth, 'Law for the Ecological Age' (2008) 9 *Vt. J. of Environ. L.* 431.

<sup>88</sup> *Ibid* 495.

Understandably, many complex legal issues were raised by the imposition of liability for contributing to ecological degradation, including the precise definition of key terms (e.g. 'ecological degradation,' 'contribute,' 'legal cause,' 'feasible alternative,' 'vigorous program'); the standard of proof that the defendants must carry ('preponderance of the evidence,' 'clear and convincing evidence,' or some other standard); among other issues about the affirmative defence (Sec 4.), standing (Sec 5.), and remedies.<sup>89</sup> But judges had been tasked with developing entirely new bodies of law in the past, and they proved quite capable of creating workable and sufficiently predictable rules in this case too.<sup>90</sup> Common law judges were not quick to confront the ecological crisis, it must be said, but when they rose to the challenge their contribution proved to be vital.<sup>91</sup>

It would not be improper to say that the Tort of Ecological Degradation revolutionized the property systems of growth capitalism. More than any other single legal development, this tort undermined the assumptions of growth economics upon which property law had been based. It helped replace that economic model with the foundational premise of Earth Jurisprudence, which broadly holds that law – including the laws of property – should be designed, at base, to preserve and protect the health and integrity of the biosphere.<sup>92</sup> The tort's crowning achievement is arguably the part it played in the planned economic contraction, or degrowth, of the world's largest economies, eventually reducing their ecological footprints to accord with Earth's sustainable carrying capacity.<sup>93</sup> This was significant not just as a matter of ecological justice, but also as a matter of social justice, since it provided room for the poorest nations to grow.<sup>94</sup>

Complementing this judicial development were legislative efforts to achieve that same goal of limiting the total macro-economic scale of ecological degradation.<sup>95</sup> The initial difficulty here was the enduring influence of the neoliberal conception of property,<sup>96</sup> which resisted state regulation in the economy and which placed undue

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<sup>89</sup> Joseph Guth, 'A Law to Protect the Earth: The Tort of Ecological Degradation' (2009) *Science & Environmental Health Network* 7, <[www.sehn.org](http://www.sehn.org)> at 10 November 2010.

<sup>90</sup> For a more detailed discussion of the new tort, see Guth, 'Law for an Ecological Age,' above n 87.

<sup>91</sup> One of the most significant, albeit indirect, implications of this Tort was how it made strong environmental legislation seem less like a 'taking' of property, since such legislation would not be departing so far from common law. See Guth, 'Law for an Ecological Age,' above n, 87, 435.

<sup>92</sup> See generally, Peter Burdon, *An Invitation to Wild Law* (2011, forthcoming).

<sup>93</sup> See also, Samuel Alexander, 'Earth Jurisprudence and the Ecological Case for Degrowth' (2010) 6 *J. Juris.* 131.

<sup>94</sup> See Meadows et al, above n 79, xv.

<sup>95</sup> Douglas Kysar, 'Sustainability, Distribution, and the Macroeconomic Analysis of Law' (2001) 43 *B.C. L. Rev.* 1.

<sup>96</sup> See John Meyer, 'The Concept of Private Property and the Limits of the Environmental Imagination' (2009) 37(1) *Political Theory* 99.

faith in markets.<sup>97</sup> It was a remarkably simple question, however, which gave rise to a radically new approach: *Do property owners have the right to use land in ecologically unsustainable ways?* Although the response came dangerously late, politicians were eventually pressured by growing public outrage to answer that question in the negative and to act on that basis. Let us briefly consider the general line of argument and the main developments.

At the height of the ecological crisis, when nothing less than Earth's life-support systems were at risk of collapsing,<sup>98</sup> policy makers realized that they urgently needed to pay much more attention to the duty of property holders not to cause 'harm.'<sup>99</sup> The meaning of harm, at any given time, is indeterminate and often contentious, of course, but that just means that it is a concept that must be defined democratically, for the common good.<sup>100</sup> As the problems of overconsumption, loss of biodiversity, and climate change intensified, the meaning of the 'duty not to harm' inevitably expanded, narrowing the rightful scope of property rights. By intervening in the property system to enforce this 'duty not to harm,' the state was not actually *changing* the prior regime, properly understood, but only *maintaining* the 'rightful scope' of the prior regime in which the duty not to harm was always recognized. Accordingly, such preventative action or maintenance was not 'taking' anything that owners ever held (or properly held), from which it followed that in such circumstances no right to compensation could arise.<sup>101</sup>

To provide a famous, ground-breaking example of this approach, we need only note the case of Australia, which, in 2025, was the first of many nations to pass legislation to the effect that coal mining and the logging of old-growth forests were no longer acceptable uses of land and would be faded out (with minor exceptions).<sup>102</sup> Unsurprisingly, powerful, self-interested economic agents at this time cried out piously about the alleged violation of their property rights; all the more so when they received little or no compensation. But slave owners once cried out in the same vein,

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<sup>97</sup> See Terry Anderson and Donald Leal, *Free Market Environmentalism* (Rev. ed, 2000); Richard Epstein, *Skepticism and Freedom: A Modern Case for Classical Liberalism* (2003).

<sup>98</sup> See, e.g., New Economic Foundation, '100 Months: Technical Note' (2008) <[www.neweconomics.org](http://www.neweconomics.org)> at 20 May 2010.

<sup>99</sup> See Murry Raff, 'Environmental Obligations and the Western Liberal Property Concept' (1998) 22 *Melbourne U. L. R.* 657.

<sup>100</sup> Eric Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (2007) 115.

<sup>101</sup> See Margaret Radin, *Reinterpreting Property* (1993).

<sup>102</sup> Such strong environmental legislation is arguably a manifestation of the sensibility earlier encapsulated in Ecuador's constitution, which, in 2008, was the first constitution on the planet to grant 'rights to nature' and to allow human beings to sue on nature's behalf in court. See Peter Burdon, 'The Rights of Nature: Reconsidered' (2010) 49 *Australian Humanities Review* 69.

and their claims to compensation were properly ignored too.<sup>103</sup> In short, once democratically mandated lawmakers decide that property law has been wrong to protect certain use rights, and that no such rights do or should exist, it would seem to contradict that recognition to turn around and grant compensation as if the property rights did exist after all. As the preamble to the Australian *Land Ethics (Amendment) Act 2025* still reads: 'The government does not accept for compensation purposes the very baseline that regulatory protection recognizes as wrongful.'<sup>104</sup>

This Act arguably marked a turning point in the development of property law in advanced capitalist societies, representing the beginning of an ideological movement away from predominately market-based approaches to environmental protection toward a greater recognition that, due to the pervasiveness of market failures, effective environmental law ultimately requires a strong component of what used to be pejoratively labelled 'command-and-control.'<sup>105</sup>

## 2.6. *Inheritance and Bequest*

Another key feature in the transition from growth capitalism to the politics of Entropia was the revolutionary reforms that took place in relation to the laws of inheritance and bequest. A few words will suffice to convey the essence of these changes and their salutary effects.

Opposition to the laws of inheritance and bequest was as old as the laws themselves.<sup>106</sup> Allowing huge concentrations of wealth to be passed down a family line, from generation to generation, was open to criticism for being an inequitable relic of feudalism that somehow survived the transition to capitalism. The overthrow of feudalism was driven, after all, by a distaste for the arbitrary birthright privileges (of wealth, status, power, etc.) that were bestowed upon the 'nobility,' and one of the bedrock principles of political liberalism which shaped the post-feudal world was a

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<sup>103</sup> See Radin, above n 101, 150.

<sup>104</sup> For an early defence of this position, see Radin, above n 101, 150.

<sup>105</sup> See Richard Stewart, 'Models for Environmental Regulation: Central Planning Versus Market-Based Approaches' (1992) 19 *B.C. Env. Aff. L. R.* 547, 547 (rhetorically equating the command-and-control approach with 'Soviet-style' regulation). Somewhat ironically, such 'command-and-control' or 'paternalistic' approaches often prove to be the most efficient path to environmental protection, which means that 'efficiency' arguments can used against the very market-based theorists who invented them. See, e.g., Daniel Cole and Peter Grossman, 'When is Command-and-Control Efficient? Institutions, Technology and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection' (1999) 5 *Wisconsin L. R.* 887. See also, Eyal Zamir, 'The Efficiency of Paternalism' (1998) 84 *Va. L. R.* 229.

<sup>106</sup> See Pressman et al, above n 27, 55 (reviewing the history of opposition and referring to opposition to intergenerational transfers of wealth as a 'recurrent historical demand'). See also, Robert Miller and Stephen McNamee, *Inheritance and Wealth in America* (1998).

commitment to 'equality of opportunity,' that is, to the belief that privileges in life should be based as far as possible on merit and justice, not accident, chance, or caste.<sup>107</sup> Yet, despite entrenching arbitrary privileges and keeping concentrations of wealth intact for reasons other than merit, the laws of inheritance and bequest endured for hundreds of years after the transition to capitalism, almost as if they were essential to any and every private property system.<sup>108</sup>

But essential they are not. Private property is a concept that has many conceptions. According to one persistent conception (useful though incomplete), property is a 'bundle of rights.'<sup>109</sup> What is clear is that the 'bundle of rights' can be reconfigured, sometimes significantly, while remaining a private property system,<sup>110</sup> and over the last century private property has indeed been significantly reconfigured. As discussed below, the right to bequeath one's property upon death has been disaggregated from the bundle of rights associated with property ownership; and when that right disappeared, so too did any alleged right of potential beneficiaries to inherit property. The political reforms of Entropia have shown not only that there can be private property systems which do not recognize the right to bequeath or inherit property, but also that such revised systems better accord with the arguments (based on freedom, justice, utility, security, etc.) used to justify the institution of private property in the first place.<sup>111</sup>

Nevertheless, despite the conceptual possibility and normative attractiveness of a private property system that does not recognize the rights of inheritance and bequest, reconfiguring the 'bundle of rights' in that manner required political tact. Rather than an outright abolition of those inheritance and bequest laws, in most jurisdictions it proved to be more politically attractive to gradually increase Inheritance Taxes (and Gift Taxes).<sup>112</sup> In fact, even today, bequest and inheritance are still technically recognized in many of the advanced economies, where allowances are properly made for dependents (children, parents, grandparents who are in need of support) as

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<sup>107</sup> See Anne Alsott, 'Equal Opportunity and Inheritance Taxation' (2007) 121 *Harv. L. R.* 469. See also, John Rawls, *Political Liberalism* (1993).

<sup>108</sup> Richard Epstein, in fact, claimed that inheritance and bequest are an essential component of private property. See Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (1985) 304 ('The conception of property includes the exclusive rights of possession, use, and disposition. The right of disposition includes disposition during life, by gift, or by sale, and it includes disposition at death...').

<sup>109</sup> See Tony Honore, 'Ownership' in Anthony Guest (ed), *Oxford Essays in Jurisprudence* (1961).

<sup>110</sup> See, e.g., Myrl Duncan, 'Reconceiving the Bundle of Sticks: Land as a Community-Based Resource Essay' (2002) 32 *Envtl. L.* 773; Robertson, above n 69.

<sup>111</sup> For philosophical discussions on the foundations of property, see Lawrence Becker, *Property Rights: Philosophic Foundations* (1977); Alan Ryan, *Property and Political Theory* (1984); Alan Carter, *The Philosophical Foundations of Property Rights* (1989).

<sup>112</sup> Stuart White, 'What (if Anything) is Wrong with Inheritance Tax?' (2008) 79(2) *Political Quarterly* 162.

well as certain other exceptions (such as limited gifts to charities, NGOs, etc.). But beyond providing for the essential needs of dependents, which is very limited in our age of the Basic Income, a citizen's property upon death is generally taxed in excess of ninety percent. This effectively, though not technically, disaggregates the right of bequest from the bundle of rights associated with ownership. It is perhaps surprising that only in England, where the roots of feudalism were deepest, have inheritance and bequest been abolished outright. In that jurisdiction, a citizen's property upon death is now distributed by the Justice Tribunal (according to the balancing principle of 'most pressing need') which was established in 2042.<sup>113</sup> It is a system that has acquired widespread support, but whether other jurisdictions establish similar institutions remains to be seen.

Whether through taxation or outright abolition, disaggregating inheritance and bequest from the institution of private property has been a landmark achievement on the path to Entropia. Not only has it contributed greatly to the democratic ideals of equality of opportunity in life and a broad-based distribution of wealth, it has also provided (and still provides) states around the world with the public resources necessary to adequately confront the ecological crisis and adapt to climate change, among other things. In fact, many progressive political parties, particularly in Western Europe, took full advantage of an increased cultural concern with environmental issues, by campaigning for the reform of inheritance and bequest laws on the very basis that the bulk of the new tax revenues would be directed toward urgent environmental initiatives, such as the creation, on mass, of solar and wind energy farms. Indeed, it would be fair to say that the transition to clean and renewable energy systems that we saw over the first half of this century was funded, to a large extent, by the proceeds of the property and tax reforms related to inheritance and bequest.

## 2.7 Working Hours

The reforms outlined above represent several of the most significant structural changes that have occurred over the last century to Western-style property systems. Before concluding our review of the paradigm shift, it is important to note one final revolutionary reform, this time in labour law, which is considered central to a stable macro-economics beyond growth.<sup>114</sup>

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<sup>113</sup> On the Justice Tribunal, see John Harris, 'Inheritance and the Justice Tribunal,' in Stephen Munzer, *New Essays in the Legal and Political Theory of Property* (2001) 106.

<sup>114</sup> See Peter Victor, *Managing without Growth: Slower by Design, not Disaster* (2008).

Over the last century working hours in the West have dramatically decreased, representing a culture-wide exchange of money for time. This was partly due to cultural changes in attitudes to consumption (i.e. the less one consumes the less one needs to work to support one's lifestyle), but it was also facilitated by important structural changes, outlined below. Economic theory posits that actors in an economy should be free to maximize their happiness (or 'utility') by selling as much or as little of their time (or 'labour-power') as they want.<sup>115</sup> Under growth capitalism, however, there were structural biases that functioned to promote over-work (i.e. working hours that were not 'optimal' or 'utility maximizing'), such as laws which treated the 40-hour work week as 'standard' and which excluded part-time workers from many of the non-pecuniary benefits enjoyed by those who work full-time.<sup>116</sup> The effect of these structural biases was essentially to force many people to work longer hours than they wanted or needed to, which gave rise to cultures that tended to over-consume resources and under-consume leisure.<sup>117</sup> This led to higher GDP per capita, of course, but at the cost of quality of life and planetary health.<sup>118</sup>

During the 21<sup>st</sup> century many jurisdictions introduced, first the 35-hour work week, then the 28-hour week, and in some places the work week was reduced more significantly.<sup>119</sup> In a progressive response to pressures arising from the GFC, the US state of Utah, for example, shifted to a four-day work week for all public employees. Almost immediately it was reported that the resulting pattern of work reduction led to 'significant environmental benefits, with reduced transport and energy costs.'<sup>120</sup> Furthermore, the extra day off also led to a 'dramatic increase in community volunteering.'<sup>121</sup> Many governments around the world have shown leadership in this

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<sup>115</sup> See generally, Jean Kimmel and Emily Hoffman, *The Economics of Work and Family* (2002); Tim Robinson, *Work, Leisure, and the Environment: The Vicious Circle of Overwork and Overconsumption* (2009).

<sup>116</sup> See Lyle Grant, 'Sustainability: From Excess to Aesthetics' (2010) 19 *Behavior and Social Issues* 5 (noting that 'one impediment to reducing working hours is that employment in industrialized countries is mainly offered on a full-time 40-hour/week basis or not at all). See also Sanne, above n 15.

<sup>117</sup> For example, in 2007, 28.7% of full-time workers in Australia worked 50 hours per week or more. Of these workers, 46% claimed they would prefer to work fewer hours, accepting a drop in pay. See Australian Conservation Foundation, *Better than Growth* (2010) 11. See also, John de Graaf (ed), *Take Back Your Time* (2003); Robinson, above n 115.

<sup>118</sup> Anders Hayden, *Sharing the Work, Sparing the Planet: Work Time, Consumption, and Ecology* (1999); Robinson, above n 115.

<sup>119</sup> New Economics Foundation, *21 Hours: Why a 21-Hour Work Week can Help Us All Flourish in the 21<sup>st</sup> Century* (2010) <[www.neweconomics.org](http://www.neweconomics.org)> at 10 December 2010.

<sup>120</sup> Australian Conservation Foundation, above n 117, 12. See also, David Rosnick and Mark Weisbrot, 'Are Shorter Working Hours Good for the Environment? A Comparison of U.S. and European Energy Consumption' (2006) <[http://www.cepr.net/documents/publications/energy\\_2006\\_12.pdf](http://www.cepr.net/documents/publications/energy_2006_12.pdf)> at 10 November 2010.

<sup>121</sup> *Ibid.*

regard, by down-shifting most government positions to a reduced work week and by providing tax incentives to private employers which do the same.

As well as reducing the standard work week, labour laws have also been broadly reformed to better protect those in part-time employment and those who wish to job-share. In many places these policies have gone a long way to eliminating unemployment (since labour is systematically spread); furthermore, the increase in leisure has resulted in many other social and ecological benefits, including healthier and happier populations with more time to pursue their private passions and enjoy their civic responsibilities, and with lower ecological footprints (since they are consuming and travelling less).<sup>122</sup> The *Hours Adjustment Act 2000* in Holland is representative of the structural changes which occurred in this regard. This path-breaking Act allowed workers to reduce their hours to part-time simply by asking their employers. As explained by pioneering work reductionist, John de Graaf:

Unless there is a clear hardship for the firm – something shown in less than 5% of cases – the employer must grant the reduction in hours. Workers keep the same hourly salary, full health-care, and pro-rata additional benefits like vacation time and pensions. This law, in the most concrete terms, allows workers to trade money for time, without losing their jobs or healthcare. As a result, more than a third of Dutch employees work part-time, the highest ratio in the world.<sup>123</sup>

Those who complained that these work policies would not maximize GDP per capita were obviously missing the point. The point of an economy is to efficiently promote quality of life, and if a smaller economy promotes quality of life by providing increased leisure but less money for its participants, then a smaller economy is the most economically rational option to choose. In a word, this is the rationality of degrowth.<sup>124</sup>

### 3. CONCLUSION: THE LAW OF PROGRESSIVE SIMPLIFICATION

According to Arnold Toynbee's 'Law of Progressive Simplification',<sup>125</sup> as a civilization evolves it will come to transfer increasing increments of energy and attention from the material (money and possessions) to the non-material side of life (relationships, self-development, spirituality, community, art, etc). If we accept this aspect of

<sup>122</sup> Hayden, above n 118; de Graaf, *Take Back Your Time*, above n 117; Rosnick and Weisbrot, above n 120.

<sup>123</sup> John de Graaf, 'Political Prescriptions,' in Alexander (ed), *Voluntary Simplicity*, above n 14, 274.

<sup>124</sup> See, e.g., Serge Latouche, 'Why Less Should Be So Much More: Degrowth Economics' (2004) *Le Monde diplomatique* <[www.hartford-hwp.com/archives/25/126.html](http://www.hartford-hwp.com/archives/25/126.html)> at 15 November 2010.

<sup>125</sup> See Arnold Joseph Toynbee, *A Study of History* (New ed, 1972).

Toynbee's conception of history, which posits material simplicity of living as the peak of civilization, then ours has ultimately been a century of uneven but discernible progress. As Toynbee and others predicted, nature compelled us to revert to a stable state on the material plane, and thus we found ourselves forced to turn to the realm of the spirit to satisfy our hunger for infinity.<sup>126</sup> As the dust settles upon the path we have travelled this century, we look back and gain a new prospect of the world and our place in it. When placed in the context of history, the legal evolution in property relations which we have seen this century is surely as great as the transition from feudalism to capitalism.<sup>127</sup>

If there is one lesson that humanity will take from this difficult century it will surely be that legal and political reforms which slow or even have a negative impact on growth, and which thereby lower 'standard of living' (measured by per capita income), can actually increase 'quality of life' (measured by subjective well-being). Put otherwise, the lesson is that lower productivity and consumption are a small price to pay for unprecedented well-being, the advancement of distributive justice, and enhanced ecological conditions. Looking back we see how easy it would have been to avoid so much suffering and destruction had we only realized this earlier, or, rather, had we only acted earlier upon what we knew very well.

Of course, despite huge advances, our world today is far from perfect. Global poverty has not been eradicated and it is probably too early to claim that the ecological crisis is over. In particular, we will still need to adapt as the climate changes further, and the countless tonnes of carbon deposited in the atmosphere by earlier generations may still have unforeseeable impacts on global ecosystems. But genuine and significant progress has unquestionably been made. Far from signifying the end of history, however, it is clear that this moment in time, like every moment, is simply the beginning of the future. And that is the challenge which confronts us, which has always confronted us.

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<sup>126</sup> See William Burch, Herbert Bormann and Dennis Meadows, *Beyond Growth: Essays on Alternative Futures* (1975) 127.

<sup>127</sup> See generally, Sprat et al, *The Great Transition*, above n 18.



If the earth must lose that great portion of its pleasantness which it owes to things that the unlimited increase of wealth and population would extirpate from it, for the mere purpose of enabling it to support a larger, but not a better or happier population, I sincerely hope, for the sake of posterity, that they will be content to be stationary, long before necessity compels them to it. – **John Stuart Mill**

## CONCLUSION

### 1. SUMMARY OF ARGUMENTS AND OUTCOMES

The march of history has clearly disappointed Mill's hopes for a posterity content with a stationary state of production and consumption. As a recent report published by the OECD illustrates, 'going for growth' remains the primary goal of even the richest nations on the planet.<sup>1</sup> It may be, then, that a stationary state will not materialize until necessity – the biophysical necessity of nature's ecological limits to growth – compels humanity to it. There is in fact a large and disconcerting body of literature warning that the age of ecological compulsion will dawn upon us sooner rather than later – that it is already dawning upon us.<sup>2</sup> But it would be wrong to think that adjusting life and law to these biophysical limits necessarily implies any diminishment in human experience; any limitation to what Mill called 'the Art of Living.'<sup>3</sup> On the contrary, a sub-text of this thesis has been that the challenge of rethinking what constitutes the good life – and what constitutes a just and prosperous society – is a challenge that would be desirable even in the absence of the ecological crisis.<sup>4</sup>

This thesis began by arguing that when macro-economic systems expand beyond a certain size, the additional social and ecological costs of growth begin to outweigh the benefits, making any further growth 'uneconomic.' It was seen that an emerging body of credible evidence indicates that many of the most developed regions of the world have entered or are entering a phase of uneconomic growth. On that evidential basis, Chapter One concluded that the developed nations should stop seeking to maximize growth and instead shape their policies and institutions for the purpose of achieving welfare-enhancing objectives more specific than growth –

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<sup>1</sup> Organization for Economic Co-Operation and Development, *Going for Growth* (2010) <<http://www.oecd.org>> at 10 November 2010.

<sup>2</sup> See, e.g., Donella Meadows, Jorgen Randers and Dennis Meadows, *Limits to Growth: The 30-year Update* (2004); Richard Heinberg, *Peak Everything: Waking up to the Century of Declines* (2007).

<sup>3</sup> John Stuart Mill, *Principles of Political Economy: With Some of their Applications to Social Philosophy* (2004 [1848]) 191.

<sup>4</sup> See Valerie Fournier, 'Escaping the Economy: The Politics of Degrowth' (2008) 28(11/12) *International Journal of Sociology and Social Policy* 528, 536 (noting that many defenders of degrowth argue that degrowth is a choice that should be made even without the oncoming ecological crisis).

objectives such as eliminating poverty, lessening inequalities, and protecting the environment – even if this would inhibit growth or induce a phase of economic degrowth. Relying on Peter Victor, Tim Jackson, steady-state economics, and degrowth scholarship, it was argued that such a macro-economic framework is viable and desirable – and perhaps imminently necessary. This thesis arose out of the supposition that such a macro-economic framework would have significant legal implications, on the laws of property, in particular.

Having outlined a macro-economic framework beyond growth, Chapter Two proceeded to consider various foundational issues in property jurisprudence which are raised by the prospect of transitioning, by way of degrowth, to a steady-state economy. The goal was to understand whether, or to what extent, legal property relations in advanced capitalist societies could be restructured for the purpose of achieving the progressive environmental and redistributive goals of the degrowth movement. Responding to the objection that such institutional restructuring would violate established property rights and therefore be unjustifiable, this chapter drew upon legal realism, critical legal studies, and the ‘social relations’ theory of property to argue the following three points: (1) that due to the indeterminacy of property, contract, and market concepts, significant reform of a private property / market system is not a conceptual impossibility; (2) that the state is always and necessarily involved in defining property entitlements and market structures, a point that fundamentally blurs the private / public distinction which is often used to insulate the economy from state intervention; and (3) that defining those property entitlements and market structures is a normative, value-laden undertaking and therefore cannot be done in such a way that is neutral between conceptions of the good life. The chapter then turned to the works of Eric Freyfogle and Margaret Radin, among others, arguing that the ‘duty not to harm,’ which was shown to be *internal* to any coherent understanding of private property, has the potential to transform private property systems when contexts change and new harms arise or are recognized. Since reshaping property rights to prevent harm should not be understood to be ‘taking’ anything that owners ever held (or properly held) – since owners simply do not have the unqualified right to cause harm – it follows that in such circumstances no right to compensation should arise.<sup>5</sup> Together these arguments open up the theoretical

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<sup>5</sup> The issue of regulatory takings is obviously more complicated than this – both legally and politically – but the point remains, as a general proposition, that enforcing the ‘duty not to harm’ provides a legitimate and powerful justification for the state to regulate for the common good without incurring prohibitively large compensation costs. For an insightful and more detailed discussion of ‘when to pay,’ see Eric Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (2007) 105-30.

space needed for the ‘internal development’ of private property / market systems, since they suggest that if a state’s social vision changes – perhaps due to public pressure – so will the manner in which the state defines and interprets property, contract, and market rules. In this way, among others, private property / market systems can and do evolve, and in potentially radical ways. I concluded that there is no reason, therefore, why existing private property / market systems could not be radically reconfigured to serve the ecological and redistributive aims of the degrowth movement, given the political will.

Having established that property law, in particular, and the legal framework of the economy, in general, are malleable creatures of legal convention, the argument of this thesis became explicitly engaged with questions of normativity and value. Constructing and maintaining a private property / market system necessarily involves making value judgements about which goals a society should pursue and in what ways; how society should be organized; how competing interests should be ordered or prioritized; and which types of relationships should be structurally fostered and which should be structurally opposed. In other words, abstract legal concepts such as ‘private property’ and ‘free contract’ can be given concrete institutional content only by reference to policy considerations arising out of some normative framework – a view Joseph Singer sums up with the phrase, ‘Property implies a vision of the social world.’<sup>6</sup> One implication of this is that property theorists are inevitably implicated in questions of normative ethics and moral philosophy, and in Chapter Three that challenge was explicitly acknowledged and explored by turning to the life and ideas of Henry David Thoreau.<sup>7</sup> Opposing the cultural norm which equates increased market consumption with personal well-being, Thoreau’s ‘alternative economics’ raised the perhaps counter-intuitive possibility that well-being could be increased by *reducing* consumption and leading a life of voluntary simplicity. Since a degrowth transition toward a steady-state economy implies a reduction in overall consumption (in over-consuming societies, at least), it was argued that Thoreau’s alternative economics provide a coherent and attractive normative foundation upon which to construct a post-growth jurisprudence of property.

But it is not enough, the argument continued, simply to propose a new normative foundation for a property system and trust that a new property system would spontaneously arise; that is, more was needed than the mere articulation of Thoreauvian ideals. Specifically, an explanation was needed as to how those ideals of simplicity and sufficiency could become infused into law, and that process of legal

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<sup>6</sup> Joseph Singer, *Entitlement: The Paradoxes of Property* (2000) 142.

<sup>7</sup> See especially, Henry David Thoreau, ‘Walden’ in Carl Bode (ed), *The Portable Thoreau* (1982).

transformation was the issue explored in Chapter Four. This chapter focused particular attention on theories of law reform arising out of the growing literature on law and social movements.<sup>8</sup> Developing that literature in the context of this thesis, the foundational argument of this chapter was that law can be understood, to a large extent, as a reflection of cultural values, such that cultural evolution tends to induce legal evolution. In more theoretical terms, the argument was that if legal concepts (including property) are social constructs, then social movements can be understood as a cultural mechanism through which legal concepts are socially constructed and reconstructed.<sup>9</sup> Upon that foundation, the chapter proceeded to define and discuss the Voluntary Simplicity Movement, an emerging social movement which represents the most coherent manifestation of the Thoreauvian ideals of sufficiency and simplicity. It was argued that this social movement or something like it will almost certainly need to expand, organize, and politicize, if anything resembling a post-growth property system is to emerge through democratic processes. The basic reasoning here was that the legal structure of a property system will not reflect an ethics of simplicity and sufficiency until such an ethics is embraced at the socio-cultural level.

The final chapter went beyond foundational theory and critique and sketched an outline of what a post-growth property system might actually look like as a legal reality. It was argued that the main objectives of a post-growth property system would be to eliminate poverty, lessen inequalities, and protect the environment, and in pursuing these objectives the efficient growth in GDP *or lack thereof* would be treated as a by-product of secondary importance. Predicated on the assumption that a post-growth property system would be judged according to the 'extended accounts' of the Genuine Progress Indicator (or some such alternative to the narrowly economic accounts of GDP),<sup>10</sup> the following reforms were proposed:

- (1) GUARANTEE A MINIMAL BASIC INCOME (OR A VARIETY THEREOF, SUCH AS A PARTICIPATION INCOME OR NEGATIVE INCOME TAX) FOR ALL PERMANENT RESIDENTS.

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<sup>8</sup> See generally, Michael McCann (ed), *Law and Social Movements* (2006).

<sup>9</sup> The relationship between law and culture is not unidirectional or monolithic, however, in the sense that law can sometimes take the *lead* in social development and can be influenced by things *other* than cultural forces. But drawing on number of socio-legal theorists, it was argued that law is more the *product* of social and cultural change than the reverse.

<sup>10</sup> See Philip Lawn, 'A Theoretical Foundation to Support the Index of Sustainable Economic Welfare (ISEW), Genuine Progress Indicator (GPI), and Other Related Indexes' (2003) 44(1) *Ecological Economics* 105.

- (2) ESTABLISH A HIGHLY PROGRESSIVE INCOME TAX THAT CULMINATES IN A DEMOCRATICALLY DETERMINED 'MAXIMUM WAGE.' (ALTERNATIVELY, ESTABLISH A HIGHLY PROGRESSIVE CONSUMPTION TAX.)
- (3) FACILITATE THE EMERGENCE OF WORKER COOPERATIVES AS THE DOMINANT CORPORATE FORM IN THE ECONOMY.
- (4) DEVELOP MORE PRECAUTIONARY ENVIRONMENTAL LAWS, SUCH AS A COMMON LAW TORT OF ECOLOGICAL DEGRADATION, AND MORE STRICTLY ENFORCE THE PROPERTY HOLDERS' 'DUTY NOT TO HARM' THROUGH LEGISLATIVE COMMAND-AND-CONTROL (RATHER THAN RELYING SO HEAVILY ON MARKET MECHANISMS).
- (5) CURTAIL THE LAWS OF INHERITANCE AND BEQUEST THROUGH HIGH LEVELS OF TAXATION OR ABOLITION.
- (6) REDESIGN LABOUR LAWS TO ENCOURAGE SYSTEMATICALLY THE EXCHANGE OF INCOME/CONSUMPTION FOR MORE FREE TIME.<sup>11</sup>

Although I acknowledged that these proposed reforms may well slow an economy's quantitative growth – even to the point of inducing a phase of degrowth – and thereby not maximize a nation's GDP per capita, the underlying argument of this thesis has been that the reforms would at the same time: (1) increase human well-being; (2) promote social justice; and (3) enhance the health and integrity of the planet's ecosystems. This is the potential 'triple dividend' which makes a post-growth property system such an alluring and promising prospect.

## 2. THESIS RECONSIDERED

With the review now complete, it may be worthwhile stepping back from the thesis to consider the arguments as a whole. This should provide a new perspective on the thesis and perhaps raise new issues which deserve attention. One objection that may well arise is that the thesis, now that it can be viewed as a whole, is fundamentally

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<sup>11</sup> Redesigning labour laws for this purpose is a necessary part of a post-growth property system since in Chapter One it was seen that an economy not based on growth would rely for its stability on a reduction of working hours rather than an increase in production and consumption. See especially, Peter Victor, *Managing without Growth: Slower by Design, not Disaster* (2008).

utopian in its outlook. I will deal with this point first. After doing so, two other points of objection will be anticipated and commented on.

### 2.1. *The Ambiguous Charge of Utopianism: Four Responses*

The charge of utopianism can be dealt with in the following four ways. First, if the charge is meant to imply that the premise of growth scepticism (upon which a post-growth jurisprudence of property is founded) is unrealistic, then there is a sense in which that charge must be turned on its head. It is limitless growth on a finite planet that is unrealistic. After all, what could be more utopian, in the pejorative sense, than the neoclassical growth model which takes as ‘given’ certain non-physical parameters (e.g. market price, preferences, technology, wealth distribution, etc.) but on that basis purports to be independent of the biophysical laws of nature?<sup>12</sup> Recognizing the biophysical (and other) limits to growth may indeed require a radical new approach to how property law is structured, as I have argued it does; but this would be in *recognition* of certain realities, not in any attempt to *transcend* them.

In a second sense, however, the charge of utopianism should be embraced, not as an indictment, but as a defence. ‘Without the hypothesis that a different world is possible,’ Genevieve Decrop has recently stated, ‘there can be no politics, but only the administrative management of men [sic] and things.’<sup>13</sup> In this sense, degrowth is indeed a utopian movement, a source of hope that a different world is possible. But as Serge Latouche has aptly explained, ‘Far from representing a flight of fancy, it is an attempt to explore the objective possibility of its implementation.... Degrowth is therefore a political project in the strong sense of the term.’<sup>14</sup> With a nod to Latouche, a post-growth jurisprudence of property can be defended in similar terms.

But there is a third sense in which this thesis is not utopian at all – not if ‘utopia’ refers to that which does not and could never exist. Granted, there is no property system on the planet which resembles, in any significant way, the system described in Chapter Five. Nevertheless, almost all the proposals *do find reflection in existing legal systems*. As noted in Chapter Five: (1) Brazil and the American State of Alaska have already successfully established a modest Basic Income System, laying the path for more radical models within those jurisdictions and beyond; (2) the policy of using a highly progressive income tax to create a de facto maximum wage was in place even in the United States as recently as 1961, when the top tax rate was 91

<sup>12</sup> See Herman Daly, *Beyond Growth: The Economics of Sustainable Development* (1996) 4.

<sup>13</sup> As quoted in Serge Latouche, *Farewell to Growth* (2009) 32.

<sup>14</sup> *Ibid.*

percent; if this was possible in the past, it is possible again; interestingly, the global financial crisis has given the maximum wage agenda a significant boost (in relation to corporate executives, at least), and this may provide a stepping stone to the mainstreaming of the idea; (3) as for worker cooperatives, the Mondragon Corporation proves their financial viability and social attractiveness, and it provides a workable model to emulate and refine; (4) environmental laws already exist, of course, they arguably just need radicalizing to be effective; the Ecuadorian approach of granting ‘rights to nature’ is one example of an existing movement toward radicalization, but the Tort of Ecological Degradation provides another possibility, among others; (5) Inheritance and Gift taxes already exist in most advanced capitalist societies, which means that disaggregating the ‘right of bequest’ could be achieved, in effect, by significantly raising those existing taxes; and (6) the Dutch have passed labour laws which were designed (and are functioning) to induce a culture wide exchange of money for more time; similarly, all public sector jobs in the American State of Utah have been reduced to a 4-day work week. On top of all this, alternative indicators to progress are clearly on the rise in developed economies and elsewhere.<sup>15</sup> What this review of *real-world* law and policy indicates is that a post-growth system is not at all a utopian fantasy, but rather, if it may be so put, a fragmented reality awaiting jurisdictional unification.

Finally, some might claim that this thesis is utopian – again, in the pejorative sense – for the reason that it posits a theory of legal transformation which relies upon the uptake of voluntary simplicity. Human beings are essentially consumers with insatiable material desires, the objection might run, and the Simplicity Movement will never get off the ground because voluntary simplicity asks people to act against their personal interests.<sup>16</sup> Any response to this point should begin with the social critique of growth (see Chapter One), which is based on the large and robust body of hedonics research ratifying what many people, perhaps, know intuitively, namely, that ‘beyond a certain threshold, more material wealth is a poor substitute for community cohesion, healthy relationships, a sense of purpose, connection with nature, and other dimensions of human happiness.’<sup>17</sup> Since the evidence suggests that many people in affluent societies are above such a ‘threshold,’<sup>18</sup> there are strong

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<sup>15</sup> See, e.g., Joseph Stiglitz, Amartya Sen and Jean-Paul Fitoussi, *Mis-Measuring Our Lives: Why GDP Doesn't Add Up* (2010); Philip Lawn, *Sustainable Development Indicators in Ecological Economics* (2006).

<sup>16</sup> See, e.g., Aaron Ahuvia, ‘If Money Doesn’t Make Us Happy, Why do we Act as if it Does?’ (2008) 29(4) *J. Econ. Psych.* 491.

<sup>17</sup> John Talberth, ‘A New Bottom Line for Progress,’ in *State of the World* (2008) 21 <[http://www.worldwatch.org/files/pdf/SOW08\\_chapter\\_2.pdf](http://www.worldwatch.org/files/pdf/SOW08_chapter_2.pdf)> at 10 September 2010

<sup>18</sup> See Chapter One, Sect. 2. (reviewing the evidence).

grounds for thinking that reducing consumption in such cases would actually increase personal happiness.<sup>19</sup> Relying on the expansion of the Simplicity Movement would be more problematic, of course, if voluntary simplicity were a living strategy founded solely upon altruism, or if it implied sacrificing personal well-being for the sake of ecological health. But plainly its foundations are less demanding. Although many in the Simplicity Movement are indeed motivated by humanitarian and ecological concerns,<sup>20</sup> the most promising sign for the expansion of the movement lies in the fact that almost all those who practise simplicity report being happier in their lifestyle choice, *despite a reduction in income and consumption*.<sup>21</sup> What is more, evidence indicates that a 'post-materialist' shift is already underway.<sup>22</sup> A utopian theory of property seems much less utopian, I would suggest – as would any theory of social reorganization – when it is based upon a living strategy that is demonstrably in people's best interests, including their own happiness. For all these reasons, I contend that this thesis is not utopian in any problematic sense.

## 2.2. *Within or Beyond the Private Property Paradigm?*

A second objection that may arise when reflecting on the thesis as a whole relates to the core concept of private property. Drawing on the critical methodology of Roberto Unger, this thesis stated from the outset that it would retain the central organizing concepts of 'private property' and the 'the market' but explore the possibility of giving them a radically new content through the mechanism of 'internal development' or 'revolutionary reform.'<sup>23</sup> When reflecting upon the post-growth property system outlined in Chapter Five, however, some may question whether it is a system which can be accurately described as a system of private property. Admittedly, the post-growth property system described in Chapter Five is radically different from capitalism as we know it. But as I argued at length in Chapter Two, private property is a concept that has many conceptions and interpretations, such that past and present forms of private property by no means exhaust the range of institutional possibilities.

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<sup>19</sup> See Chapter Four, Sect. 5.1. (discussing the personal benefits of voluntary simplicity).

<sup>20</sup> See generally, Cecile Andrews and Wanda Urbanska (eds), *Less is More: Embracing Simplicity for a Healthy Planet, a Caring Economy and Lasting Happiness* (2009).

<sup>21</sup> See Clive Hamilton and Richard Denniss, *Affluenza: When Too Much is Never Enough* (2005) 153 (reporting that 90 per cent of 'downshiffters' are happier with their changed lifestyle, despite having reduced income).

<sup>22</sup> See Ronald Inglehart, 'Changing Values Among Western Publics from 1970 to 2006' (2008) 31(1/2) *Western European Politics* 130-46.

<sup>23</sup> See Roberto Unger, 'The Critical Legal Studies Movement' (1983) 96(3) *Harv. L. R.* 561 (arguing that reformers, even radical reformers, should work *within* culturally entrenched institutions rather than overhaul them).

This opens up theoretical space for systems of property that are radically different from capitalism as we know it but which are nevertheless systems of private property – and that has been the basic structure of my argument. But even if it is accepted that there can be many types of private property systems, that does not mean that *any* property system can be accurately labelled private property, and some might insist that the system described in Chapter Five is *not* a private property system. By arguing for a Basic Income system, worker cooperatives, and the abolition of the laws of inheritance and bequest – to list what are perhaps the most radical proposals – has this thesis not moved beyond the private property paradigm?

I would insist that it has not. To begin with, let us not forget that Milton Friedman – the arch-capitalist himself – argued for a form of Basic Income (specifically, the Negative Income Tax).<sup>24</sup> No one could suggest that *he* was seeking to replace private property, and so it cannot be said that the support for such a proposal in this thesis is opposed to private property just because my arguments are rooted in entirely different soil. As for worker cooperatives, while there are varieties of the cooperative model which would fall outside the private property paradigm,<sup>25</sup> the model I proposed (drawing on the more elaborate arguments of Michael Robertson)<sup>26</sup> still falls coherently within the private property paradigm. Workers, I explained, would still have individual ownership interests in the cooperatives, and the state would not determine what the cooperatives produce. Furthermore, the system I described would still be based on market exchanges, since cooperatives would gain income by selling their goods and services to customers. This would remain a private property system, therefore, albeit one of a very different form from contemporary capitalism.<sup>27</sup> As for abolishing the laws of inheritance and bequest, the preliminary argument here was to show that the ‘bundle of rights’ which currently attaches to private property can be reconfigured in many ways – by disaggregating or redefining certain ‘sticks’ – while remaining a private property system. On that basis it was argued that there are no *conceptual* grounds for thinking that the ‘right of bequest’ is an essential or necessary part of any and every private property system. I contend that those who disagree with this are really disagreeing on political and ideological grounds, not conceptual grounds.

This conceptual defence could continue at length, but I feel the case has already been made. A post-growth property system would not look much like contemporary

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<sup>24</sup> Milton Friedman, *Capitalism and Freedom* (1962).

<sup>25</sup> See, e.g., See Bertell Ollman and David Schweickart, *Market Socialism: The Debate Among Socialists* (1998).

<sup>26</sup> Michael Robertson, 'Reconceiving Private Property' (1997) 24(4) *J. of Law and Society* 465.

<sup>27</sup> *Ibid.*

capitalism, that much is clear; but it is by no means a conceptual or semantic fraud to say that the system I proposed is, nevertheless, a private property / market system.<sup>28</sup>

### 2.3 Globalization and the Problem of 'Empire'

There is one final point which deserves some further comment, even if space does not permit a detailed inquiry. The age of globalization is upon us, and it could be that any attempt to realize a post-growth property system will face forms of resistance today that may not have been faced as recently as fifty years ago. We could call this the problem of 'Empire.'<sup>29</sup> Not only are nation-states today constrained by numerous international trade agreements and influenced by powerful global institutions, but the free flow of capital around the globe has given new power to transnational corporations which can now move their financial resources from country to country with unprecedented ease.<sup>30</sup> Many argue that this has led to economic forces becoming more autonomous from political controls, and consequently that political sovereignty has declined.<sup>31</sup> But as Hardt and Negri have argued, '*The decline in sovereignty of nation-states... does not mean that sovereignty as such has declined.*'<sup>32</sup> Sovereignty, they argue, has just taken on a new, globalized form – the form of 'Empire' – which can be understood as a decentralizing and deterritorializing apparatus of power which is 'composed of a series of national and supranational organisms united under a single logic of rule.'<sup>33</sup> The logic of rule to which they refer, of course, is the globalized logic of profit maximization.

With respect to the arguments of this thesis, could it be that the materialization of 'Empire' means that it would be impossible for one nation-state to implement the

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<sup>28</sup> There may be some who feel that whether or not a system is *labeled* 'private property' is of little consequence compared with the actual *nature* of the property system. In one sense, I am inclined to agree, and there may even be dangers in relying too heavily upon 'private property' as a rhetorical category. However, the fact is that the idea of private property is deeply entrenched in Western culture and, as noted in Chapter Two, any reform program that advocates the abolition of private property is unlikely to gain any popular support, at least in the current political climate. For that reason, among others, I feel that justifying the label of 'private property' in relation to a post-growth property system is by no means inconsequential. On the other hand, however, there may be some who feel that by retaining 'private property' and 'the market' this thesis is merely propagating the central institutions of neoliberalism. As argued in Chapter Two, however, it is my view that those who think along such lines are held captive by a particular, unduly narrow understanding of what 'private property' and 'the market' mean. This thesis is not merely 'tinkering' with neoliberal capitalism – as the proposals in Chapter Five should make clear. Rather, this thesis outlines a program for revolutionary reform.

<sup>29</sup> Michael Hardt and Antonio Negri, *Empire* (2000).

<sup>30</sup> See generally, Joseph Stiglitz, *Globalization and its Discontents* (2001).

<sup>31</sup> See, e.g., Saskia Sassen, *Losing Control? Sovereignty in an Age of Globalization* (1996); Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation* (2nd ed, 2002); Hardt and Negri, above n 29; Victor, above n 11, 221.

<sup>32</sup> Hardt and Negri, above n 29, xi (their emphasis).

<sup>33</sup> *Ibid.*, xii.

post-growth reforms proposed in Chapter Five without either violating international trade agreements or inducing, almost instantaneously, the mass exodus of capital?<sup>34</sup> Though I cannot respond to the problem(s) of Empire in any detail, I can indicate a response, and it is a response that returns us to the central normative ideas of this thesis, namely, voluntary simplicity and the grass-roots theory of legal transformation expounded in Chapter Four. If indeed it is so that Empire is slowly but steadily emasculating the nation-state, such that it is becoming progressively less likely that legal transformation of the nature described in this thesis will ever originate from the top down, then it follows, perhaps necessarily, that true opposition to Empire and the forces of globalization may only be possible today if it is driven from the grass-roots up. What could defy the profit-maximizing logic of Empire more fundamentally than a large, oppositional social movement based on the living strategy of voluntary simplicity? What could challenge the rule of capital more directly than thousands upon millions of people militantly embracing, yet at the same time celebrating, the tantalizing paradox that less is more? Although framed in different terms, this is a proposition that Hardt and Negri, the pre-eminent theorists of Empire, make themselves:

Militancy today is a positive, constructive, and innovative activity. This is the form in which we and all those who revolt against the rule of capital recognize ourselves as militants today.... This militancy makes resistance into counterpower and makes rebellion into a project of love.<sup>35</sup>

Significantly, it is in the life of St Francis of Assisi – one of the most radical and inspirational figures in the history of voluntary simplicity<sup>36</sup> – where Hardt and Negri discover ‘the ontological power of a new society.’<sup>37</sup> They conclude their text with a message both of hope and opposition – or rather, hope *in* opposition – a message which is reproduced here in sympathy: ‘Once again in postmodernity we find ourselves in Francis’s situation, posing against the misery of power the joy of being. This is a revolution that no power will control...’<sup>38</sup>

While the problem of ‘Empire,’ then, must be recognized as a real one, there is a sense in which the very nature of the problem provides further validation for the defining commitment of this thesis to a grassroots theory of legal transformation

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<sup>34</sup> See Victor, above n 11, 221-2.

<sup>35</sup> Hardt and Negri, above n 29, 413 (emphasis omitted).

<sup>36</sup> See, e.g., John Talbot, *The Lessons of St. Francis* (1998).

<sup>37</sup> Hardt and Negri, above n 29, 413 (emphasis omitted).

<sup>38</sup> *Ibid.*

based on the oppositional living strategy of voluntary simplicity. The logic of justification here is quite simple, even if its implications are not: so far as the power of one's political representatives is taken away (or misused), one's individual political responsibility increases. And, as Hardt and Negri suggest, this may be the only logic more powerful than the profit-maximizing logic of capital.

It was Victor Hugo who once said, 'There is nothing more powerful than an idea whose time has come.'<sup>39</sup> While there are no grounds for complacency, just perhaps voluntary simplicity is such an idea.

### 3. DIRECTIONS FOR FUTURE RESEARCH

The notion of a post-growth property system is complex and, in many ways, controversial. It will come as no surprise, therefore, to hear that there are as many directions for future research as there are radii from one centre. Although based on scholarship which is already quite robust, the social, ecological, and economic critiques of growth reviewed in Chapter One need further development and refinement if they are to induce a macro-economic paradigm shift beyond growth. It is equally important that a description and justification for an alternative macro-economic model be provided, as well as a rigorous explanation of how the alternative model would function. Steady-state and degrowth economists have been developing an alternative macro-economic model for some time, and details of how this model would function (including its legal superstructure) are beginning to emerge.<sup>40</sup> But the work is far from over.

With specific reference to property jurisprudence, it was seen that the literature addressing degrowth and steady-state economics is almost non-existent. Indeed, this thesis is the first book-length examination. However, given the complexity of the issues raised in property jurisprudence by a degrowth transition to a steady-state economy, it scarcely needs remarking that this thesis has only scratched the surface of what needs to be done. Degrowth and steady-state economics, it was argued, implies (among other things) a radical environmentalism and a significant redistribution of wealth. Both these policy objectives are intimately linked with the laws of property, and Chapter Two outlined some of the most important issues and arguments in property jurisprudence that are raised by such policy objectives. The

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<sup>39</sup> Victor Hugo, *A History of a Crime* (1888), quoted in Harold Schultz, *English Liberalism and the State* (1971) ix.

<sup>40</sup> See Introduction and Chapter One.

reality is, however, that the examination in Chapter Two was a preliminary scoping of ideas and perspectives, all of which need further development and elaboration.

One line of inquiry, in particular, that may well bear fruit, concerns the relationship between property jurisprudence, neoclassical economics, and Herman Daly's concept of 'uneconomic' growth.<sup>41</sup> For example, how would neoclassical property theorists respond if existing or future research convinced them that the property structures of capitalism were indeed 'uneconomic'? Consider this question briefly in the context of the theory of property evolution famously advanced by Harold Demsetz, who argued that 'property rights develop to internalize externalities when the gains of internalization become larger than the cost of internalization.'<sup>42</sup> Put otherwise, and in simpler terms, Demsetz argued that *property rights evolve for economic reasons*; and he employed this reasoning to explain why systems of common property evolve into systems of private property. Such an evolution, he argued, just makes economic sense. But what follows from Demsetz's logic, one might fairly ask, if a particular system of *private* property is or becomes 'uneconomic'? The macro-economic concept of 'uneconomic' growth only exists because GDP does not internalize all externalities – that is, because GDP does not include in its accounts all the *costs* of growth (and even includes some of those costs as benefits).<sup>43</sup> But suppose over time more and more externalities were internalized (which, of course, is the aim of the 'extended accounts' of the GPI, ISEW, etc). Might a post-growth property system, then, *just make economic sense*, as I have argued it does, and therefore emerge 'naturally' according to the evolutionary logic of economic efficiency set out by Demsetz? This is hardly a result one would expect to flow from Demsetz's neoclassical theory of property evolution, and one should be wary of relying on a neoclassical model to deconstruct a property system arguably built upon it. But perhaps – and only perhaps – such an approach may result in some unlikely alliances between neoclassical property theorists, on the one hand, and degrowth or steady-state property theorists, on the other. More analysis will be needed, however, before this could be confidently tabled even as a hypothesis.<sup>44</sup>

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<sup>41</sup> Herman Daly, 'Uneconomic Growth: In Theory, in Fact, in History, and in Relation to Globalization' in Herman Daly, *Ecological Economics and the Ecology of Economics: Essays in Criticism* (1999) 8-24.

<sup>42</sup> Harold Demsetz, 'Toward a Theory of Property Rights' (1967) *57(2) Am. Econ. Rev.* 347, 350.

<sup>43</sup> See above n 15.

<sup>44</sup> This line of inquiry would differ from the approach taken in this thesis in that it would attribute changes in property law not to social and cultural forces, but to economic forces. While these approaches could lead to different conclusions, there is no reason, a priori, why that would necessarily be so.

In terms of Chapters Three and Four, again, many issues were raised that warrant further attention. The ethics of consumerism which currently dominate advanced capitalist societies (and increasingly elsewhere) cannot really be separated from the growth model of progress – including its legal superstructure. To advocate a post-growth property system, therefore – indeed, to advocate any arrangement based on a macro-economics beyond growth – is to implicate oneself inextricably in consumption theory. Consumption is just too fundamental a part of any market society to think that questions of social import could be properly understood independently of it – a point legal scholars and policymakers have not appreciated in any great numbers.<sup>45</sup> As we have seen, a post-growth property system (and a degrowth society more generally) has been defended partly on the grounds that it would enhance human well-being, *despite it implying a phase of planned macro-economic contraction*. This argument called for an explanation of how well-being could be increased while consumption is reduced, and Thoreau's 'alternative economics' were used to frame this explanation. But although I argued that Thoreau gets us struggling with the right question – the question of 'how much consumption is *enough* to live well and to be free?' – it is a question that unavoidably touches on the deepest issues concerning the human situation and the human condition, and not even a thinker as great as Thoreau could hope to address those issues comprehensively or without controversy; far from it. The creative challenge of re-imagining the good life beyond consumer culture certainly has much to gain from drawing on Thoreau's ideas – his anti-consumerist discourse was chosen simply because I felt it was the most relevant to our times; his critique of consumerism the most powerful, meaningful, and incisive. But at the end of the day, Thoreau's is but *one* perspective, and as contemporary philosophy of language shows, every perspective inevitably conceals as it reveals.<sup>46</sup> Accordingly, life and law need to be enriched by other perspectives on consumption too, and I contend that there are vast and potentially fruitful terrains of consumption theory which lie open for legal scholars to explore more closely in the future.<sup>47</sup>

The 'grass roots' or 'bottom up' theory of legal transformation outlined in Chapter Four would also benefit from a more detailed and nuanced explication. Assuming,

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<sup>45</sup> For the first scholarly article dedicated solely to law and consumption, see James Salzman, 'Sustainable Consumption and the Law' (1997) 27 *Environmental Law* 1243. See also, Albert Lin, 'Virtual Consumption: A Second Life for Earth' (2008) 2008 *BYU L. R.* 476 (noting that 'Laws or policies that directly address consumption are rare').

<sup>46</sup> See, e.g., Richard Rorty, *Contingency, Irony, and Solidarity* (1989).

<sup>47</sup> See generally, Tim Jackson (ed), *Sustainable Consumption* (2005); Tim Kasser and Allen Kanner (eds), *Psychology and Consumer Culture: The Struggle for a Good Life in a Materialistic World* (2003); Thomas Princen et al (ed), *Confronting Consumption* (2002).

however, that the general approach is sound – that the social sphere is an important source of law – one area in particular that needs more development is the *specific* actions that the Simplicity Movement could take in attempting to socially reconstruct law. Chapter Four framed the Simplicity Movement in the context of law and social movement scholarship, indicating that social movements can shape or mobilize law in three main ways: (1) by influencing the culture within which judges adjudicate and thereby change what is considered a legitimate interpretation of law; (2) by more directly engaging with the judicial process by initiating legal proceedings in an attempt to challenge existing interpretations of law; and (3) by using electoral votes and cultural influence to mobilize the legislative process. But although I provided this theoretical framework for the social reconstruction of law, a detailed and specific program for grass-roots action was not provided, partly because any such program would be a thesis in itself; and partly because such program – if it is indeed to be grass-roots – needs to be locally organized and context-specific, a task which resists any general or universalizing pronouncement. Nevertheless, if the Simplicity Movement is to become engaged politically then the question of how the movement can become a more significant oppositional force needs to be given more attention by activists, educators, and scholars. This is, in part, a matter of *political advocacy*. But before any such task can be validated, it must be based upon sound intellectual foundations, and it is the role of scholarship to provide and assess such foundations.

With respect to the actual reforms proposed in Chapter Five, it is clear that more comprehensive analyses are needed here also. Outlining proposals is necessary in the early stages of a program for law reform; but once the coherency of the program has been established – which this thesis hopes to have achieved, at least in a preliminary way – more details are needed if the program is to advance. In particular, the proposals for law reform in this thesis, if they were ever to be taken up, would need to be reassessed and developed in jurisdictional context and shaped according to time, place, and circumstance. Furthermore, I do not pretend to have exhausted the possible areas of property law reform relevant to a macro-economics beyond growth. For example, this thesis could be undertaken all over again for the purposes of addressing the important questions of what role state property or common property would play in a post-growth property system. I leave these large questions open for future consideration.

Finally, while the law reform proposals outlined in Chapter Five are not, in themselves, original to this thesis, what is original is the way they were presented systematically in relation to a macro-economics beyond growth. This new macro-economic framework provides a new justificatory basis for the proposals, and it is

suggested that there would be considerable value in looking further into the mutually-supportive relationship between the proposals and a macro-economics beyond growth. For if growth were ever to lose its privileged position as the touchstone of policy and institutional success, it would be likely that whole new avenues of law reform would open up. And this may just help to shift the balance of justification in favour of the proposals made in this thesis.

#### 4. CLOSING REMARKS

Although the arguments of this thesis were generally presented tentatively, the arguments themselves were bold, meaning that this thesis certainly has not answered every question about what a property system beyond growth might look like, how it might function, or how the transition toward one might play out. At the same time, the best available evidence indicates that the macro-economic foundations upon which this thesis is based are strengthening and will continue to strengthen.<sup>48</sup> Eventually, if not today, then tomorrow, it seems clear that the economies of our world – starting with the richest ones – are going to have to learn how to stop growing, and to stop growing in a way that is stable and deliberate, not the result of unplanned recession or eco-systemic collapse. Macro-economists like Peter Victor and Tim Jackson have started work on how an economy could ‘manage without growth,’<sup>49</sup> to use Victor’s phrase, or ‘prosper without growth,’<sup>50</sup> to use Jackson’s phrase. But the greater project of overcoming growth economics and transitioning by way of degrowth to a steady-state economy is undeniably still in its infancy. Since the laws of property are so integral to the structure of capitalism, any transition beyond growth economics will require a fundamental rethinking of how those laws are shaped and what purposes those laws should serve. In developing a post-growth jurisprudence of property, this thesis aimed to provide some of the groundwork needed to advance this important debate.

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<sup>48</sup> See Chapter One.

<sup>49</sup> Victor, above n 11.

<sup>50</sup> Tim Jackson, *Prosperity without Growth: Economics for a Finite Planet* (2009).





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