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Situating Property within Habitat: Reintegrating Place, People, and the Law

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Situating Property within Habitat: Reintegrating Place, People, and Law

Margaret Davies,* Lee Godden,** and Nicole Graham#

“Habitat” refers to the socioecological complex of resources and relationships needed by organisms to sustain life and to flourish. Different for every lifeform, habitats comprise both a physical dimension, the requirements for life, security, and reproduction, including land and waters, and a relational social dimension. As a human construct, property is often seen as something different from habitat—a distributional technique imposed on an inert and otherwise legally unbounded set of freely-available resources. In this Article, we argue that, like all life-dependent systems, the different forms of property should be understood as situated within human and nonhuman habitats. The Article begins with a review of anthropocentric property narratives that are based on and maintain a distinction between human and nonhuman systems. It then considers existing attempts to connect property and habitat within an anthropocentric frame. Finally, the Article considers the reorientation that is possible if we think of property as situated within habitat. Rather than think of legal change through the lens of law reform, we argue that situating property within human and nonhuman habitat provides a narrative that can guide and prefigure property alternatives that will better serve future generations. We outline three key pathways for

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potential change. These pathways are: (1) change in the conceptual and sociocultural narratives associated with property, (2) continuing reform to the regulation of resource use (specifically land use) that affect the legal form of property, and (3) educative strategies for the transmission of future-oriented knowledge.

I.	Introduction	2
II.	Anthropocentric Property Narratives.....	7
III.	Habitat and Property: Tensions and Alignment	16
IV.	Re-Imagining Property as Habitat.....	31
	A. Conceptual and Socio-cultural Pathways to Change	36
	B. Stronger Alignment of Environmental Law and Ecology with Property.....	42
	C. Educative Pathways	46
V.	Conclusion: Property, Habitat, and Legal Change	48

I. Introduction

Habitats are essential for human and nonhuman life. Every living thing needs access to a place on Earth and sufficient local resources to survive. Humans encounter, participate, co-construct and depend on diverse habitats, across a range of scales, through various economies as regulated by property regimes. Property regimes regulate the use, distribution, and disposal of the resources that constitute the habitats in which they are embedded. Property regimes are facilitated and rationalized by culturally and materially specific knowledge systems. Both property and knowledge vary across time, space, and culture but their common foundational conditions and effects are all situated within habitats. In the history

of human property, private property regimes are relatively young. Private property establishes systems of access, use, distribution, and disposal of land and its resources at the level of individual entities (both human and abstract, such as a corporation) through the notion of an entitlement or right.

The twin rights that characterize private property are the rights (1) to exclude others from and (2) to alienate the component parts of a habitat. As such, private property is characterized by the conceptual and material separation of humans from habitats, the disaggregation of the networked processes and resources within and between habitats, and by the inhibition and alienation of the “material and cultural attachments of existing resource users”¹ (both human and nonhuman).

In Western knowledge systems, and particularly in colonial thought, land² is divided and distributed by the law of real property.³ Property law divides space using principles and techniques that represent land in intangible yet standardized ways.⁴ As a result, the dominant model of property law now current in many jurisdictions pays little attention to the physical characteristics of specific places.⁵ The division of space by property law enforces dispossession and displacement as foundational to the (re)allocation of land. It strips land of its physical and eco-social characteristics, and it emphasizes the economic exchange value of

¹ Gavin Bridge, ‘Resource Geographies I: Making Carbon Economies, Old and New’ (2014) 35 *Progress in Human Geography* 820, 824.

² Land is taken to include waters, environment, and resources associated with land where not expressly excluded by the divisions of property law.

³ “Since we are embodied beings, we always have a location. ... One of the functions of property rules, particularly as far as land is concerned, is to provide a basis for determining who is allowed to be where.” Jeremy Waldron, ‘Homelessness and the Issue of Freedom’ (1991) 39 *UCLA LRev* 295, 296.

⁴ See, eg, Lee Godden, ‘A Biography of Land, Law and Place’ in Paul Babie and Paul Leadbeter (eds), *Law as Change: Engaging with the Life and Scholarship of Adrian Bradbrook* (University of Adelaide Press 2014); Alain Pottage, ‘The Measure of Land’ (1994) 57 *MLR* 361.

⁵ Nicole Graham, *Landscape: Property, Environment, Law* (Routledge 2011) 8.

land rather than its importance as habitat. Aside from the (limited) constraints on property via planning law, the foundational role of land as habitat supporting human and nonhuman life on Earth does not enter into the dominant model of property law. This absence reveals a failure to recognize the ultimate function of a property regime and promotes a situation that is not viable. The unfettered fungibility and trade of the component parts of habitats in the totalizing forum of the global marketplace has degraded them and subsequently created intergenerational and interspecies disparities in access to a home and the goods of life. A new approach is needed.

We argue that it is necessary to situate the dominant model of property within habitat. Through the lens of habitat, we seek to connect and embed property within networks of ecological communities and systems – to reconstruct property as an adaptive function of dynamic and place-based socioecologies. There is a normative and a descriptive element to our approach.⁶ Describing property as situated in habitat, that is, understanding that human and nonhuman life is sustained on and by land, invariably understood in mainstream law as some form of property, permits us to focus on the interconnections between humans and our ecological conditions. Such a description may help to flesh out in a material sense, the bare notion that an individual owns a piece of life-enabling land in contrast to the constrained manner in which land is abstractly described on a title. A focus on these interconnections may begin to invert the classic Western

⁶ We have used the language of normative/descriptive to highlight different dimensions of our thinking in the framework of law. By contrast to mainstream legal thinking, the normative and the descriptive are not separate in much contemporary critical and social theory. For instance, Nicholas Blomley argues that performing property in a particular way embeds the reform in the practice and in the understanding of property. See, eg, Nicholas Blomley, 'Performing Property: Making the World' (2013) 26 CILJ 23; John Law and John Urry 'Enacting the Social' (2004) 33 Economy and Society 396; See also Margaret Davies, *Law Unlimited: Materialism, Pluralism, and Legal Theory* (Routledge 2017) 16.

Enlightenment tradition where nature simply precedes law and civilization.⁷ Instead, law's function may come to be understood as helping to sustain both life and civilization.

The Article is structured in three Parts. In the first Part, we set out the conceptual disconnection between property and habitat in the dominant property model, its anthropocentric discourse, and culture of individualistic entitlement. The view of land as both the object of human actions and as a commodity have related but conceptually distinct discursive trajectories in property law. The subject/object binary that is pervasive through many forms of law,⁸ finds expression in property law as the paradigm of an individual human subject exploiting land, having "sole and despotic dominion"⁹ over it. This view of exercising control over land is premised on a view of land as an alienable commodity of limited intrinsic value.¹⁰ This Part links the placeless and human-centered nature of the dominant model of property to the harms of dispossession and adverse anthropogenic environmental change.

In the second Part, we explore the concept of habitat and the possibility of investing it with a set of normative meanings and values that can inspire and guide a different model or practice of property. What John Bellamy Foster identifies as a "metabolic rift"

⁷ See generally, Robert Williams Jr, *Savage Anxieties: The Invention of Western Civilization* (St Martin's Press 2012) ch 2.

⁸ James Penner, 'The Objects of Property: The Separability Thesis' in James Penner, *The Idea of Property in Law* (OUP 1997); Margaret Davies and Ngaire Naffine, *Are Persons Property? Legal Debates About Property and Personality* (Ashgate 2001); Alain Pottage and Martha Mundy (eds), *Law, Anthropology, and the Constitution of the Social: Making Persons and Things* (CUP 2004).

⁹ William Blackstone, *Commentaries on the Laws of England, Vol II, Of the Rights of Things* (Clarendon Press 1766) 2; cf Carol Rose, 'Canons of Property Talk, or, Blackstone's Anxiety' (1998) 108 Yale LJ 601. Blackstone's influence on colonial appropriations should also be noted.

¹⁰ For a critique of commodification, see Carol Rose, 'The Comedy of the Commons: Custom, Commerce, and Inherently Public Property' (1986) 53 UChiLRev 711.

between urbanized human life and ecological processes¹¹ demonstrates the nonalignment of property as a mechanism of economic growth and ecological function. It underlines that the separation of the places of production, consumption, and deposition of waste has degraded habitats for all lifeforms. Reframing property around the notion of habitat emphasizes the dependence of human existence on ecological functionality.

In the third Part, we set out three pathways to guide and prefigure a model of property as situated within habitat. Despite the apparent intractability of dominant cultural framings of property and political obstacles, we argue that the alignment of law with the ecological needs of humans and the nonhuman world is possible. The first pathway is to change the conceptual framework of the dominant model of property and associated sociocultural discourses. The second pathway is to critically review the tensions arising from the taxonomic separation of entitlement to land (and its resources) from the laws regulating its use and distribution (and associated intergenerational consequences) with a view to aligning their interaction and effect in the future. The third pathway positions legal education as a critical agent of change and law reform. Educative strategies involve fundamental questions about what we know and what we do in relation to property, and how and why this knowledge and practice is reproduced and/or changed over time. Changing the dominant placeless and anthropocentric model of property requires changing the way

¹¹ John Bellamy Foster, 'Marx's Theory of Metabolic Rift: Classical Foundations for Environmental Sociology' (2010) 105 *AmJSoc* 366; Karl Marx, *Capital: A Critique of Political Economy* (Ben Fowkes trans; Penguin Books 1976) 637; see also Nicole Graham, 'Dephysicalised Property and Shadow Lands' in Robyn Bartel and Jennifer Carter (eds), *Handbook for Space, Place, and Law* (Edward Elgar 2021); Nathan McClintock, 'Why Farm the City? Theorizing Urban Agriculture Through a Lens of Metabolic Rift' (2010) 3 *Cambridge J of Regions, Economy, and Society* 191; Mindi Schneider and Philip McMichael, 'Deepening, and Repairing, the Metabolic Rift' (2010) 37 *J Peasant Studies* 461.

property is taught, and learning (and co-constructing) other – more viable – ways of knowing and enacting property.

II. Anthropocentric Property Narratives

Property is both an expression of sociopolitical values and a legal institution. These aspects are in many respects distinct, and the law of property does not reflect in any straightforward way either cultural narratives about property or the way it is represented in philosophy. Nonetheless, all these dimensions of property are elided in much scholarly discussion of property: despite its distinct nature, the legal institution of property is shaped and interpreted by political ideologies, by dominant social values, and by associated ideas about the purposes that property ought to promote. Across the spectrum of conservative and progressive property theorists, private property is frequently connected to a specific set of human needs, aspirations, and desires. The need to achieve human purposes is one factor offered in justification of the very existence of private property. Human purposes are variously framed and often underpinned by political values. The human purpose that private property addresses is sometimes said to be individual power in a social context – property provides a boundary around the individual in which he or she alone exercises control.¹² Property extends the zone of individual power, and it even has the effect of enlarging the individual in comparison to others and relative to the community and the state.¹³ Such an individualist understanding of property can be inflected with values that are libertarian (the free

¹² Charles Reich, 'The New Property' (1964) 73 Yale L.J. 733, 771.

¹³ For a discussion of liberal individualism and its alternatives, see Martha Albertson Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition' in Martha Albertson Fineman (ed), *Transcending the Boundaries of Law* (Routledge 2011) 161. For a discussion of the conflation of individual and social welfare in classical economics theory and the consequential invisibility of common and public goods, see Lynda Butler 'The Importance of Viewing Property as a System' (2021) 58 San Diego LRev (forthcoming).

individual in conflict with the state)¹⁴ or more progressive (enhancing the power of vulnerable citizens as against the state or the market).¹⁵

Given the association of property with an individual's power, it is unsurprising that a defining hallmark of the law and practice of property has been its association with exclusion. In addition to the right to alienate property, an individual proprietor also has the right to exclude all others from it. Property conceived in this manner is fundamentally about what Kevin Gray called "excludability."¹⁶ Moreover, closely associated with the right to exclude others is the concomitant right of an individual to use the property; in liberal philosophy such a right typically is asserted to be with few restrictions.¹⁷ Foregrounding excludability as a defining characteristic sets up a dualism whereby more relational concepts and practices of property are obscured by a strident insistence on the legitimacy of the actions of exclusion.¹⁸ Yet, property in its material consequences is as much about marginality as it is about exclusion. AJ Van der Walt pointed out,

... property law is not exclusively or even primarily about owners and holders of rights, but about those who do not own property and whose lives are shaped and affected by the property holdings of others; those who are required to respect property and who are owned as or through property. On the

¹⁴ Richard Epstein, *Takings: Private Property and the Power of Eminent Domain* (Harvard UP 1985); contra Fineman (n 13).

¹⁵ Reich, 'The New Property' (n 12) 733; Margaret Radin, 'Property and Personhood' (1982) 34 *StanLRev* 957; Margaret Radin, 'Market Inalienability' (1987) 100 *HarvLRev* 1849.

¹⁶ Kevin Gray, 'Property in Thin Air' (1991) 50 *CLJ* 252.

¹⁷ Thomas W Merrill, 'Property and the Right to Exclude' (1998) 77 *NebLRev* 730, 741.

¹⁸ Jennifer Nedelsky, 'Law, Boundaries, and the Bounded Self' (1990) 30 *Representations* 162.

margins, property law is deeply concerned with absence of property; no-property; not-property.¹⁹

A view of property as legitimizing excludability, and thereby marginalizing nonowners (including nonhuman species), has clear economic and political significance in market-oriented societies.²⁰ The power attached to the right to exclude consists partly in its centrality to wealth creation and capital accumulation.²¹ The social-structural implications of this model of property are evident in both historical and ongoing trajectories of wholesale “exclusions” of peoples and nations from their homes and lands. Since the enclosure of the English commons, the clearances of the Scottish highlands, and the colonization of lands far beyond Europe, the assertion and institutionalization of private property as a power to exclude has been necessarily accompanied by the dispossession of peoples.²² Dispossession not only removes legal rights from persons, it often removes people, communities, and the endemic ecosystems that have evolved with these communities in the lands and waters that exist in dynamic symbiosis with such cultures and livelihoods. Dispossession therefore is the corollary and logical end point of the right to exclude at the heart of the dominant model of

¹⁹ AJ Van der Walt, ‘Property and Marginality’ in Gregory S Alexander and Eduardo M Peñalver, *Property and Community* (OUP 2010) 90; See also Larissa Katz, ‘Exclusion and Exclusivity in Property law’ 2008 58 UTLJ 275.

²⁰ Estair Van Wagner, ‘Putting Property in its Place: Relational Theory, Environmental Rights and Land Use Planning’ (2013) 43 *Revue Generale de Droit* 275.

²¹ Ileana Porras, ‘Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations’ (2014) 27 *LJIL* 641; Butler (n 13).

²² EP Thompson, *The Making of the English Working Class* (Penguin 1968); MJ Daunton, ‘Open Fields and Enclosure: The Demise of Commonality’ in MJ Daunton, *Progress and Poverty: An Economic and Social History of Britain 1700-1850* (OUP 1995); Eric Richards, *The Highland Clearances: People, Landlords, and Rural Turmoil* (Birlinn 2000); Andrew Buck, John McLaren, and Nancy Wright (eds), *Land and Freedom: Law, Property Rights and the British Diaspora* (Ashgate 2001); Karl Polanyi, *The Great Transformation: The Political and Economic Origins of our Time* (first published 1944, Beacon Press 1957), in particular ch 3; ‘Habitation versus Improvement’.

property. The imminent material presence of dispossession shadows the positivist conferral of power through the right to exclude.

The temporal and spatial underpinnings of the dominant model of property in Anglophonic jurisdictions are products of the colonization of lifeworlds. While colonization took several different forms in settler jurisdictions,²³ invariably, Indigenous relationships to land and First Nations' laws were systematically marginalized or entirely excluded by the imposition of colonial rule. The sustained marginalization of Indigenous laws relating to lands and waters that occurred over centuries of colonial rule reinforces an anthropocentric and instrumental view of property simultaneously in the European metropole and the colonies. Given the passage of time and the pervasive impacts of colonization, a complete return to precolonial systems is precluded, but the more materially embedded and locally adapted laws of Indigenous peoples nonetheless offer valuable place-based ontologies that provide a sharp and instructive contrast to property regimes imposed as, and through, colonization. To date, however, Indigenous legal insights have been inadequately recognized, understood, and connected to the dominant property framework of Anglophone jurisdictions.

The taking and accumulating of private property out of non-property continues: from Indigenous peoples, from the environment, from the commons, from state-owned resources, or from interests previously protected by an understanding of the public interest (as happens when environmental or heritage protections are weakened).²⁴ There is of course, some movement in the opposite direction, with resources that are privately owned

²³ Robert Miller, Jacinta Ruru, Larissa Behrendt, and Tracey Lindberg, *Discovering Indigenous Lands: The Doctrine of Discovery in the English Colonies* (OUP 2012).

²⁴ See, e.g., David Harvey, *The New Imperialism* (OUP 2001); Saskia Sassen, 'A Savage Sorting of Winners and Losers: Contemporary Versions of Primitive Accumulation' (2010) 7 *Globalizations* 23; Antonia Layard, 'Public Space: Property, Lines, Interruptions' (2016) 2 *JLPS* 1.

being acquired for public purposes, usually in the name of state-governed economic development.²⁵ Private property, by instituting and upholding the excludability of others, thus bears serious and escalating adverse impacts on human and nonhuman communities, and other elements of the natural world, as exponential biodiversity loss and the impacts of climate change on habitat demonstrate.²⁶ By determining a society's having and not having, private property both creates and perpetuates propertylessness.

The aggregation of property and its continuing impact on the wellbeing of humans and the nonhuman world remains tethered to the conceptual and material structure of its early liberal genesis. A person's ownership consists of the right to exclude others, and the concentration of private property in a finite number of individuals and corporations is made possible by the mass exclusion of many more human and nonhuman communities. The legal cultures of private property and the sociopolitical narratives and values it manifests are not identical through these historical movements but they are nevertheless frequently aligned and mutually reinforcing. For instance, as feminist and other critical theorists of property have pointed out, early modern liberal philosophies of property did not, for centuries, extend their liberalism to women, to racial minorities, or to indigenous peoples, instead modeling the individual proprietor as a privileged male figure.²⁷ Not coincidentally, this model relied upon notions of allegedly "natural" autonomy or

²⁵ It is often commented that scholarly discussion of public property is rare, but see John Page, 'Property, Values, and the Empirics of Place' (2019) 28 GLR 1; John Page, *Property Diversity and Its Implications* (Routledge 2017) 37.

²⁶ Intergovernmental Panel on Climate Change, 'An IPCC Special Report on climate change, desertification, land degradation, sustainable land management, food security, and greenhouse gas fluxes in terrestrial ecosystems—Summary for Policy Makers' August 2019 available at <https://www.ipcc.ch/site/assets/uploads/2019/08/Edited-SPM_Approved_Microsite_FINAL.pdf> 26 August 2020.

²⁷ Barbara Arneil, 'Women as Wives, Servants, and Slaves: Rethinking the Public/Private Distinction' (2001) 34 CJPS/RCSP 29; Nedelsky, 'Law, Boundaries, and the Bounded Self' (n 18).

personal boundaries attributed only to European men and figured as a kind of valuable property in itself.²⁸ Despite liberalism, and in some ways because of its alignment with ideologies of class, gender, and race, most people were, for centuries, legally excluded from the subject-position of property-holder. Though formal equality might now be taken for granted, the historical development of the model private proprietor continues to shape the distribution of property in the present.

By contrast to accounts of property concerned principally with its capacity to facilitate and satisfy individual needs, the progressive property movement, together with feminist property scholars, emphasize the significance and reliance of property on social relationships between people. Progressive property scholars have reconceptualized property to foreground the responsibilities and obligations arising from it,²⁹ while preserving the notion of entitlement and the right to exclude.³⁰ Property from this perspective is often said to mediate the boundary between community and individual interests: it performs the social function of balancing the interests of owners with the interests of the community and imposes obligations as well as rights.³¹ This important work to restore community and obligation to the idea of property, however, has paid less attention to the nature of subjectivity in an interconnected world, and the contingent temporality of property as it emerges from the changing relationships of humans in the world. Significantly, with its central focus on human society, progressive property accounts have tended to marginalize the nonhuman members of our broader community

²⁸ C.B. MacPherson, *The Liberal Theory of Possessive Individualism: Hobbes to Locke* (Clarendon Press 1964); Cheryl Harris, 'Whiteness as Property' (1993) 106 HarvLRev 1707.

²⁹ Gregory Alexander, 'Ownership and Obligations: The Human Flourishing Theory of Property' (2013) 43 HKLJ 451; Joseph William Singer, *Entitlement: The Paradoxes of Property* (Yale UP 2000).

³⁰ Merrill (n 17) 730.

³¹ Laura Underkuffler, 'On Property: An Essay' (1990) 100 Yale LJ 127.

at the scale of habitat. In a world of growing human population, ever more scarce resources, an account of property that does not take into account the fundamental conditions for all life, that perpetuates the division of human and nonhuman lifeforms, and subject from object so central to property law³² is less viable over the long term.

Moving beyond the prevailing attention to the human sphere, some property scholars in recent decades have also emphasized the role of property as an agent of anthropogenic environmental change. Such scholarship has focused on ways that the institution could change to better sustain natural resources.³³ Many significant critiques of the property-environment nexus have been developed. These critiques address the multiple and mutually reinforcing layers of the property form that make it so resistant to change: its economic role,³⁴ its cultural significance and social meanings,³⁵ its historical emergence,³⁶ the governance arrangements that protect

³² Larissa Katz, 'Spite and Extortion: a Jurisdictional Principle of Abuse of Property Right' (2013) 122 Yale LJ 1444, 1477; Lynda Butler, 'The Pathology of Property Norms: Living Within Nature's Boundaries' (2000) 73 SCallRev 927.

³³ See, eg, David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability: The Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff 2011).

³⁴ Samuel Alexander, 'Property Beyond Growth: Towards 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* (Martinus Nijhoff 2011) 117; Bernard Rudden, 'Things as Things and Things as Wealth' (1994) 14 OJLS 81; Robert Costanza and Carl Folke, 'The Structure and Function of Ecological Systems in Relation to Property Right Regimes' in Susan Hanna, Carl Folke and Karl-Goran Maler (eds), *Rights to Nature: Ecological, Economic, Cultural, and Political Principles of Institutions for the Environment* (Island Press 1996).

³⁵ Val Plumwood, 'The Concept of a Cultural Landscape: Nature, Culture and the Agency of Land' (2006) 11 Ethics & The Environment 115; Sandie Suchet-Pearson, Sarah Wright, Kate Lloyd and Laklak Burarrwanga, and on behalf of the Bawaka Country, 'Caring as Country: Towards an Ontology of Co-becoming in Natural Resource Management' (2013) 54 Asia Pacific Viewpoint 185; Pottage and Mundy, *Law, Anthropology and the Constitution of the Social* (n 8).

³⁶ Henry Jones, 'Property, Territory and Colonialism: An International Legal History of Enclosure' (2019) 39 LS 187; Dan Priel, 'The Political Origins of English Private Law' (2013) 40 JLS 481.

it,³⁷ the structure of laws that differentiate and place it at the center of law,³⁸ specific legal doctrines that define it,³⁹ and its ontological separation from the material world.⁴⁰ Building on these critiques, many important suggestions for change have been offered that address the multilayered nature of the property form as both a legal institution and as a matrix of sociopolitical narratives about identity, status, and control.

In summary, suggestions for change to integrate into property relevant environmental concerns typically address three broad

³⁷ Todd Aagaard, 'Environmental Law as a Legal Field: An Inquiry in Legal Taxonomy' (2010) 95 *Cornell LRev* 221.

³⁸ Joseph Sax, 'Environmental Law Forty Years Later: Looking Back and Looking Ahead' in Michael Jeffery, Jeremy Firestone and Karen Bubna-Litic (eds), *Biodiversity Conservation, Law and Livelihoods* (CUP 2008); Nicole Graham, 'This is Not a Thing: Land, Sustainability and Legal Education' (2014) 26 *JEL* 395; Sean Coyle and Karen Morrow, *The Philosophical Foundations of Environmental Law: Property, Rights and Nature* (Hart 2004). But cf Eloise Scottford and Rachael Walsh, 'The Symbiosis of Property and English Environmental Law – Property Rights in a Public Law Context' (2013) 76 *MLR* 1010.

³⁹ Bob Purvis, 'I love this land, I was born here' in Jim Sinatra and Phin Murphy (eds), *Listen to the People, Listen to the Land* (Melbourne UP 1999); Katz, 'Spite and Extortion' (n 32); Justine Bell and Sharon Christensen, 'Use of Property Rights Registers for Sustainability – A Queensland Case Study' (2009) 17 *APLJ* 86; Sharon Christensen and William Duncan, 'Aligning Sustainability and the Torrens Register: Challenges and Recommendations for Reform' (2012) 20 *APLJ* 112; Craig Anthony Arnold, 'Sustainable Webs of Interests: Property in an Interconnected Environment' in David Grinlinton and Prue Taylor (eds), *Property Rights and Sustainability: the Evolution of Property Rights to Meet Ecological Challenges* (Martinus Nijhoff 2011); Zada Lipman and Robert Stokes, 'Shifting Sands: the Implications of Climate Change and a Changing Coastline for Private Interests and Public Authorities in Relation to Waterfront Land' (2003) 20 *Environment and Planning LJ* 406; A Craig Roussac and Susan Bright, 'Improving Environmental Performance Through Innovative Commercial Leasing: an Australian Case Study' (2012) 4 *ILJBE* 6; Michael Weir and Tina Hunter, 'Property Rights and Coal Seam Gas Extraction: the Modern Property Law Conundrum' (2012) 2 *Property LRev* 71.

⁴⁰ Bradley Bryan, 'Property as Ontology: On Aboriginal and English Understandings of Ownership' (2000) XIII *CJLJ* 3; Craig Anthony Arnold, 'The Reconstitution of Property: Property as a Web of Interests' (2002) 26 *HarvEnvtlLRev* 281; Margaret Davies, 'Material Subjects and Vital Object – Prefiguring Property and Rights for an Entangled World' (2016) 22 *AJHR* 37; Robyn Bartel and Nicole Graham, 'Property and Place Attachment: A Legal Geographical Analysis of Biodiversity Law Reform in New South Wales' (2016) 54 *Geographical Research* 267.

limitations of mainstream understandings of property and the institution of property law. The first of the three strategies includes ascribing rights to the natural world, an action reminiscent of the liberal model of progressively extending rights in an analogous fashion to other classes of humans, from the dominant paradigm of the privileged white male.⁴¹ This strategy is congruent with a second position that seeks to invert the subject/object dichotomy in an effort to give equivalence for identified purposes between humans and nonhuman elements in socioecological systems. The third, long-standing strategy is to posit duties and obligations for humans in regard to their behavior toward the environment.⁴² The first strategy is evident in recent measures to redefine “nature” or identified parts of it, such as rivers and mountains, as a legal subject by ascribing legal personality to that entity.⁴³ It provides a quasi-property model in that elements of the natural world, are legally transformed under rights for nature models, which—depending on the model—may create a form of self-ownership for specific purposes. It transforms the classic liberal subject-object dichotomy.

The New Zealand statutory settlements with Maori peoples adopt this model,⁴⁴ although the political intent of the New Zealand government to date in adopting such a model is to deflect the

⁴¹ Christopher Stone, ‘Should Trees Have Standing? – Toward Legal Rights for Natural Objects’ (1972) 45 SCallRev 450; Peter Burdon and Claire Williams, ‘Rights of Nature: A Constructive Analysis’ in Douglas Fisher (ed), *Research Handbook on Fundamental Concepts of Environmental Law* (Edward Elgar 2016); Michelle Maloney, ‘Finally Being Heard: The Great Barrier Reef and the International Rights of Nature Tribunal’ (2015) 3 Griffith JL and Human Dignity 40; For an early contribution see Roderick Nash, *The Rights of Nature: A History of Environmental Ethics* (University of Wisconsin Press 1989).

⁴² See, e.g., the adoption of environmental duties to prevent harm in a wide range of pollution statutes.

⁴³ See, e.g., Erin O’Donnell and Julia Talbot-Jones, ‘Creating Legal Rights for Rivers: Lessons from Australia, New Zealand, and India’ (2018) 23 Ecology and Society art 7.

⁴⁴ See, eg, Waikato-Tainui Raupatu Claims (Waikato River) Settlement Act 2010; Ngati Tuwharetoa, Raukawa, and Te Arawa River Iwi Waikato River Act 2010; Nga Wai o Maniapoto (Waipa River) Act 2012.

ultimate issue of whether Maori Iwi groups “own” rivers. In a growing number of jurisdictions, rights for nature have parallels with human rights models, where courts declare natural entities to have fundamental or inalienable rights.

While these models often seek to give effect to Indigenous peoples’ concepts of coexistence with the natural world and are instituted due to a deep concern about degradation of the environment, they have several limitations. The most obvious difficulty is that the reproduction and extension of rights discourse to individualized parts of the natural world may demote more comprehensive protection of entire habitats at the system level. Secondly, rights for nature tend to be adopted over public lands and waters, leaving private property as a model and practice intact. Any inversion of the subject/object dichotomy that is achieved in these models is similarly constrained and dependent on the willingness of the legal system to ascribe and enforce rights. The instigation of various duties and obligations that seek to prevent harm or to provide redress against harms to human and nonhuman elements of socioecological systems potentially may offer more expansive habitat protections but these measures encounter significant suspicion and resistance from propertied interests. Accordingly, a new vantage point is required for understanding property theory and property law.

III. Habitat and Property: Tensions and Alignment

Although property theory is a flourishing area of scholarship across the world, there remains much scope for loosening the conventional boundaries of property and reconnecting it to the materiality of places and things, as well as to human relationships. In particular, there is an increasingly urgent need for fundamental change in the way we understand property and to reformulate the dominant model to address both its negative social and

environmental impacts. Aligning the idea of property with the habitat of human and nonhuman life has the potential to restore its decreasing functionality and re-establish property as both fundamental and relational, essential and dynamically connected to place and things. Situating property within habitat enhances the core function of property as a legal form and provides an imaginary to connect fields, such as environmental and property law, that are insufficiently conceptually or practically integrated. Most importantly, understanding property within habitat brings into a single socioecological frame both the human and nonhuman *oikos* or home.⁴⁵ While today, human habitats are highly constructed, they remain reliant upon the habitats of nonhuman beings.

Habitat is a complex concept with various resonances in different disciplines. The concept of habitat was used in early conservation law, which aligned habitat generally with nature. A more specific ecological meaning of habitat connects lifeforms to geographical places and their variability through time. Habitat has become fundamental to ecological research, although sometimes it is used interchangeably with closely related concepts of environment and niche.⁴⁶ Habitat in scientific understandings is used to describe "the living place of an organism or community, characterized by"⁴⁷ its biotic and abiotic properties, "which affords it relatively favorable conditions for existence."⁴⁸ Because the concept of habitat is species-specific, ecologists have argued that conflating it with environment or native vegetation "can result in

⁴⁵ "The very etymology of Ecology, from the Greek 'Oikos', 'the household', implies that ecologists should devote some attention to the 'house' or habitat of the population or community they are studying." TRE Southwood, 'Habitat, the Templet for Ecological Strategies?' (1977) 46 *J Animal Ecology* 337; see also discussion of eco-centric approaches in environmental law that were informed by this derivation of ecology in Lee Godden et al., *Environmental Law* (OUP 2018) 13.

⁴⁶ M Kearney, 'Habitat, environment and niche: what are we modelling?' (2006) 115 *Oikos* 186.

⁴⁷ *A Dictionary of Ecology* (4th edn, OUP 2010).

⁴⁸ *A Dictionary of Geography* (4th edn, OUP 2009).

the under-appreciation of differences between the unique habitat requirements of different species.”⁴⁹ The particularity and specificity of habitat as a concept in ecological research is antithetical to the abstractness and dephysicalization of property in mainstream legal scholarship.⁵⁰

The contrast between the conceptualization of lands and waters in ecological and much legal research highlights their ontological divergence. But the concept of habitat is not only at odds with conceptualizations of lands and waters in law—the discipline of economics is also dominated by a “powerful and abstracted” model that is “marked off from ... the ecological.”⁵¹

Mainstream economic discourse uncritically advances the notion of unlimited economic growth as an inherently possible, positive, and exclusively human activity “that appears to be independent from the living world upon which it depends.”⁵² Against this model, ecological economists ask “what if we were to see economic activities not in terms of a separate sphere of human activity, but instead as thoroughly social and ecological?”⁵³ The shared etymological root of the words “economy” and “ecology” in the Greek term *oikos*, translates as “household” or “habitat.”⁵⁴

⁴⁹ J. Fischer and David B Lindenmayer, ‘Landscape Modification and Habitat Fragmentation: A Synthesis’ (2007) 16 *Global Ecology and Biogeography* 265, 268.

⁵⁰ There are exceptions to mainstream property approaches to landowning. Pertinent examples can be found in Nicole Graham and Robyn Bartel, ‘Farmscapes: Property, Ecological Restoration, and the Reconciliation of Human and Nature in Australian Agriculture’ (2017) 26 *GLR* 221.

⁵¹ J K Gibson-Graham and Ethan Miller, ‘Economy as Ecological Livelihood’ in Katherine Gibson, Deborah Bird Rose and Ruth Fincher (eds), *Manifesto for Living in the Anthropocene* (Punctum Books 2015) 7.

⁵² *ibid* 8.

⁵³ *ibid*.

⁵⁴ J K Gibson-Graham, Ann Hill and Lisa Law, ‘Re-embedding Economies in Ecologies: Resilience Building in More than Human Communities’ (2016) 44 *Building Research and Information* 703, 706; Satish Kumar unpacks the economy-ecology connection more literally: “The words ‘ecology’ and ‘economy’ come from the same Greek root, *oikos*, meaning home. *Logos* means knowledge and

Gibson-Graham and Miller use the concept of habitat to contend that “other species and living entities” have economies with which human economies are in a “continual interdependent relationship.”⁵⁵

There is no more ground for the construction of a human “economy” separate from its ecological context than there would be for ecologists to consider the provisioning practices of bees as an independent “system” ... wholly separate from their constitutive interrelationships with flowering plants, other pollinators, soil mycorrhizae, nitrogen fixing bacteria, seed dispersing birds and mammals.⁵⁶

Consequently, they advance the notion of a “community economy” in which habitat is maintained by transactions, encounters, and consumption that supports and sustains “humans and earth others.”⁵⁷

Habitat is a key concept in biodiversity conservation and threatened species law,⁵⁸ and in common law jurisdictions is known for its tension with private property.⁵⁹ “The status of habitat in American society represents a dramatic shift in political power over lands and natural resources.”⁶⁰ While this statement might

nomos means management. So ecology is knowledge of the home and economy is management of it. If we do not know our home we cannot manage it. If there is no healthy Earth community, there can be no healthy human community.”; Satish Kumar, ‘Cutting Carbon is a Rich Fool’s Errand’ (*The Guardian* 30 Aug 2007) <<https://www.theguardian.com/society/2007/aug/29/guardiansocietysupplement.comment1>> accessed 26 August 2020; see also Hannah Arendt, *The Human Condition* (University of Chicago Press 1958) 28.

⁵⁵ Gibson-Graham, Hill and Law ‘Re-embedding economies in ecologies’ (n 54) 703, 706.

⁵⁶ Gibson-Graham and Miller (n 51) 10.

⁵⁷ Gibson-Graham, Hill and Law ‘Re-embedding economies in ecologies’ (n 54) 708.

⁵⁸ Peter S Alagona, ‘What Is Habitat?’ (2011) 16 *Environmental History* 433.

⁵⁹ Richard Epstein, ‘Babbitt v Sweet Home Chapters of Oregon: The Law and Economics of Habitat Preservation’ (1997) 5 *SupCtEconRev* 1; Karen Bradshaw, ‘Expropriating Habitat’ (2019) 43 *HarvEnvtlLLRev* 77.

⁶⁰ Alagona (n 58) 436.

overestimate the shift in political power associated with the recognition of habitat, it highlights the perceived dualism between nonhuman habitat and private property. Ecological research often considers the adverse impact of private property on habitat protection programs,⁶¹ and ways that private property might operate otherwise than as a barrier to ecological restoration and the protection of threatened species. The troubled relationship between private property and habitat accompanies the emergence of private property as an instrument of forced eviction, colonization, and accumulation. Enclosures, clearances, and the sovereign acquisitions and land grants to settlers that accompany colonization⁶² and large-scale commercial land acquisitions⁶³ are not necessarily analyzed as a removal of human *habitat* as such, but are nonetheless clearly understood as forced and systematic removals of human communities from their homes and livelihoods.⁶⁴ Scholarly analyses of these land appropriations commonly emphasize the attendant severance of long-established

⁶¹ Leila Hatch, Mar'ía Uriarte, Daniel Fink, Laura Aldrich-Wolfe, Richard G Allen, Colleen Webb, Kelly Zamudio, and Alison Power, 'Jurisdiction Over Endangered Species' Habitat: the Impacts of People and Property on Recovery Planning' 12 (2002) *Ecological Applications* 690; David Norton and Nick Reid, *Nature and Farming; Sustaining Native Biodiversity in Agricultural Landscapes* (CSIRO Publishing 2013).

⁶² Legally the process of British colonization involved first, acquisition by the state and then either a subsequent grant to British subjects or recognition of pre-existing property rights in conquered or ceded territories. Even companies such as that involved in the establishment of Virginia were Royal Charter companies. Private property was not formally the instrument of colonization however it was often encouraged and in several colonies state acquisition was really a formalization of the fact that colonists had already taken land.

⁶³ Yorck Diegarten, 'Indigenous or Out of Scope? Large-scale Land Acquisitions in Developing Countries, International Human Rights Law and the Current Deficiencies in Land Rights Protection' (2019) 19 *HRLRev* 37.

⁶⁴ Marx (n 11) 874; E P Thompson, *The Making of the English Working Class* (Vintage Books 1968) especially 213; Polanyi (n 22); Jeanette Neeson, *Commoners: Common Right, Enclosure and Social Change in England, 1700-1820* (CUP 1993).

human connections to place.⁶⁵ Land-clearing for agriculture, mining, transport, tourism, and other human activities, on the other hand has frequently been understood as a removal of nonhuman habitat, albeit in the service of human needs and desires.

The acquisition of private property has therefore been historically connected with the removal of human and nonhuman life support, and conceptually justified in the terms of the Enlightenment: human progress, improvement, and economic development.⁶⁶ Practically, however, those able to draw comfort from the institution of private property have been constrained to a subset of humanity and an even smaller group of attendant domestic nonhuman species. Modern property law relied on the concept of improvement to rationalize the enclosure of common lands in Britain and the colonization of foreign lands.⁶⁷ The classification of land as unimproved or improved was consistent with broader Enlightenment thought, particularly its dichotomous anthroparchic model of the world as human/nonhuman life. Habitat, however, situates humans within nonhuman life and thus collapses the artificial distinction between improved and unimproved lands which persists into the twenty-first century in relation to the regulation of many land-use practices.⁶⁸

⁶⁵ E P Thompson (n 64); James Hunter, *The Making of the Crofting Community* (Edinburgh Press 1976); Neeson, (n 64); Getie Gelaaye, 'Peasant Poetics and State Discourse in Ethiopia: Amharic Oral Poetry as a Response to the 1996-97 Land Redistribution Policy. (1999) 6 Northeast African Studies 171; Patrick Bresnihan, 'John Clare and the Manifold Commons' (2013) 3 Environmental Humanities 71; Galarrwuy Yunupingu (ed), *Our Land Is Our Life* (University of Queensland Press 1997); Kim TallBear, 'Caretaking Relations, Not American Dreaming' (2019) 6 Kalfou 24; Irene Watson, 'Buried Alive' (2002) 13 Law & Crit 253.

⁶⁶ Graham, *Landscape: Property, Environment, Law* (n 5) 56.

⁶⁷ See discussion above and as analysed in Graham, *Landscape: Property, Environment, Law* (n 5) 85.

⁶⁸ Nicole Graham, 'Sydney's Drinking Water Catchment: A Legal Geographical Analysis of Coal Mining and Water Security' in Tayanah O'Donnell, Daniel Robinson, and Josephine Gillespie (eds), *Legal Geography: Perspectives and Methods* (Routledge 2020).

Enclosure and colonization accompanied the rise of the possessive individual, whose claim to title was founded on the atomistic separation of an individual from their community, rather than by virtue of their membership in the community. The individuation of property forms has been ideologically associated with certain economic goals, as private property is regarded as a vehicle of market efficiency. The goal of economic growth is framed as more ambitious, more responsible, and more universal, than the goal of simple sustenance. Such framing works by displacing the benefits of acquisition to a different sphere, one which is allegedly spread across a much larger human population via the goods of work and economic growth:

There has been a profound, if little discussed, evolution by which the concepts originally devised for real property have been detached from their original object, only to survive and flourish as a means of handling abstract value. The feudal calculus lives and breeds, but its habitat is wealth not land.⁶⁹

A more positive association of property with nonhuman and, by comparison, human habitat can be found in the work of one of the most influential U.S. property commentators of the twentieth century, Charles Reich. In his celebrated work, “The New Property,”⁷⁰ Reich argued that government assistance or “largesse” across the economic system (franchises, licenses, subsidies, benefits, jobs, services, and so forth) ought to be protected in the same way that conventional property is protected, essentially because (like property) it serves the purpose of providing security for individuals and organizations, and hence is the basis for social change and growth. Decades later, Reich supplemented this work with “The Individual Sector” and a lesser known but arguably equally

⁶⁹ Rudden (n 34) 81.

⁷⁰ Reich, ‘The New Property’ (n 12) 733.

important article, "Beyond the New Property: An Ecological View of Due Process."⁷¹ It is worth looking closely at this work to help delineate our own argument about property as habitat. Writing in furtherance of his argument that the things that an individual requires to sustain their life must be regarded as their property, Reich argues that property rights need to be approached ecologically:

The crisis of the natural environment and the crisis of the unprotected individual are similar. Both crises derive from the destructive aspects of our modern economic system. The lakes, trees and wildlife dying from acid rain and the human beings dying on our city streets are alike in that they are victims of an economic system out of control in that it denies and displaces its costs. Protecting the natural environment and the social environment must go together We realize that the death of nature threatens our own survival, but continue to believe that the destruction of the more vulnerable members of a human community is not threatening to the community as a whole. It is time we took an ecological approach to the plight of human beings. An ecological approach to individual economic rights would begin with the question what kinds of habitat, nurture, and protection from harm are needed to produce a healthy individual. This is the starting point for plants or animals—why not for human beings?⁷²

⁷¹ Charles Reich, 'The Individual Sector' (1991) 100 Yale LJ 1409; Charles Reich, 'Beyond the New Property: An Ecological View of Due Process' (1990) 56 BrookLRev 731; The "ecological" article may have had less impact for a number of reasons, including that it is more openly polemical than the other two and is published in a less prestigious law journal.

⁷² Reich, 'Beyond the New Property' (n 71) 734. We might quibble about whether Reich correctly describes the general level of consciousness about the environment in this passage, though it is entirely possible that, in some ways, this moved backwards for a time from 1990 with advancing neoliberalism.

The contemporary relevance of Reich's scholarship is highlighted by its accordance in many respects with legal developments that articulate a right to environment.⁷³ He makes several significant points in the extract quoted above. First, social inequality and environmental destruction are alike because they are both the consequence of "an economic system ... that denies and displaces its costs."⁷⁴ Second, to address the vulnerability of the individual within a community, it is necessary to understand and protect the conditions for a healthy human existence. Later, he argues explicitly that property, as essential to human life, is like the habitat of an animal:⁷⁵

Like an animal's habitat, property represents the individual's means of survival. It is attached to the individual by a biological bond. Indeed, it is part of the definition of the individual. We would not define a fish in such a way as to exclude the water in which it swims, nor would we define a bird without its nesting site, nor an otter without its food supply. Life does not exist in artificial isolation.

In consequence, Reich argues that a "person" cannot be defined without their "life support system" – their property.⁷⁶ "The bare or naked individual does not exist in nature."⁷⁷ He explicitly connects the state of homeless and impoverished people with historically dispossessed people. Referring to the enclosures, he says, the "whole history of industrialization tells us that we are seeing forced loss of habitat, not a refusal to contribute to society."⁷⁸

In this way, Reich argues that property for individual humans performs the same function that habitat does for animals, and

⁷³ See for example the right to environment, Article 19(8) of the Constitution of Chile.

⁷⁴ Reich, 'Beyond the New Property' (n 71) 734.

⁷⁵ *ibid* 737.

⁷⁶ *ibid*.

⁷⁷ *ibid*.

⁷⁸ *ibid* 742, citing also Polanyi (n 22).

clearly associates social inequalities and the dispossession of human beings with environmental destruction. The political rationale for Reich's solution to inequality seems reasonably clear. In an intensely liberal context where essentially only the individual and the state are visible to law, policy, and theory, one direct route to addressing vulnerability is to strengthen the individual. In Reich's argument, this means applying the due process clauses of the U.S. Constitution to government distributions in the same way as it applies to conventional property⁷⁹—in fact to transform such distributions into property that cannot be removed without due process. Clearly welfare benefits and taxi licenses are not habitat, but they are the means of subsistence for some humans just as habitat is for nonhumans.

In sum, Reich connects the human sphere and natural habitat in two ways. First, he connects them by their relation to private property, that is, by a regulatory and economic framework based on dispossession and displacement. Today, the constant demand for growth and neoliberal policies that enforce an extremist version of individualism place the costs of economic improvement on the natural environment and the disempowered.⁸⁰ The legal form of property is complicit in (indeed underpins) this system because it permits externalization of the social and environmental costs of owning. Second, Reich connects the human and nonhuman realms via a comparison: just as animals need habitat, humans need subsistence. He terms this perspective an ecological approach and his remedy is to shore up the individual, to enhance and protect

⁷⁹ The fifth and fourteenth amendments state that a person should not be deprived of 'life, liberty, or property, without due process of law'.

⁸⁰ Marx's analysis of 'primitive accumulation' in *Capital*, Vol 1 has in recent decades been expanded to encompass the multitude of ways in which capitalist growth continues to dispossess and accumulate from sources outside itself. See e.g., David Harvey, 'The "New" Imperialism: Accumulation by Dispossession' (2004) 40 *Socialist Register* 63; Derek Hall, 'Primitive Accumulation, Accumulation by Dispossession, and the Global Land Grab' (2013) 34 *TWQ* 1582; Sassen, 'A Savage Sorting of Winners and Losers' (n 24) 23.

human property by extending the concept of property to the material things that a human needs to sustain their life.

There are several tensions in Reich's argument. The most critical of these tensions is that he extends property without modifying its form as an excludable individualized space to address the crisis of human dispossession. Reich wishes to aggregate more power to property in its conventional private form, without addressing the role it plays in both the destruction of the environment and the creation of the social inequalities he wants to remedy. Moreover, there is tension between the recognition that "life does not exist in artificial isolation"⁸¹ and the idea that it is the *individual* sector that needs to be reinforced.

Reich's ecological approach is therefore limited by the ontology implied in his view that the human-social and the nonhuman-natural spheres are *alike* – comparable but different. His argument maintains the separation of the human and the nonhuman and, within the human sphere, strengthens the individual in relation to their community and nation. It adopts an ecological analogy but arguably stops short of a socioecological approach, because it compares the human and the natural world without acknowledging their interdependence and the consequent need for integration of human and natural spheres. Reich's ecological approach is an ecological metaphor that retains the silos of human and nonhuman. Given the human origin and orientation of mainstream law, especially property law, his approach is understandable – his primary concern is, after all, human need. But it is not property that is essential to human survival – it is habitat. Only if property is situated *within* habitat, in the sense that it has the characteristics ascribed to habitat in supporting life, does Reich's argument work. The corollary is that property must take on the character of habitat

⁸¹ Reich, 'Beyond the New Property' (n 71) 737.

as material interconnectedness, rather than being essentially of an enclosed and individualized character.

In the thirty years since Reich wrote of the need for an ecological approach to property, our consciousness and understanding of human reliance on and interconnection with ecological systems has become much more widespread, and better reflected in all academic disciplines. Extensive thinking outside the environmental sciences has promoted the reintegration of human beings with nonhuman life and Earth systems.⁸² By contrast to Reich, and with the benefit of several more decades of investigation in the scholarly and activist context, the more integrated approach that we adopt turns on the recognition that humans are part of, not separate from, the biosphere and that our habitats include the conditions of life itself. While ecology introduced the need to consider interrelationships between elements of an ecosystem, later socioecological thinking has extended those connections to expressly include social interactions as part of the ecological web of relationships—with obvious implications for law as defining and instituting relationships within societies.⁸³ A fundamental material point requires re-emphasizing: humans *are* biological creatures necessarily embedded in habitat. Although our habitats tend to be highly modified, our existence remains reliant on the success of cycles and systems of life in the nonhuman sphere.

At the same time, some humans have created a world that relies on extreme disruptions to and conflicts between human lifestyle

⁸² Indeed, there was a good deal of literature already in existence by 1990, the date of Reich's article, including the early literature on bioregionalism. See, e.g., Paul Berg and Raymond F Dasman, 'Reinhabiting California' (1977) 7 *The Ecologist* 399.

⁸³ See, e.g., Paul R Ehrlich, Anne H Ehrlich and John P Holdren, *Human Ecology: Problems and Solutions* (WH Freeman 1973); Fikret Berkes and Carl Folke, 'A Systems Perspective on the Interrelations Between Natural, Human-made, and Cultural Capital' (1992) 5 *Ecological Economics* 1; Carl Folke and Fikret Berkes, 'Mechanisms that Link Property Rights to Ecological Systems' in Susan Hanna and Mohan Munasinghe (eds), *Property Rights and the Environment: Social and Ecological Issues* (World Bank 1995).

and the biosphere. For instance, mass industrial agriculture has effected what has been termed a “metabolic rift” between human and nonhuman natures.⁸⁴ Karl Marx discussed the separation or “rift” in the “metabolic interaction between man and the earth,” drawing on contemporary soil science to point out that this rift arose from nutrients being removed from soil in large-scale agricultural production that could not be sufficiently returned to the soil.⁸⁵ “Metabolism” in this context refers to the processes of material exchange between human activity/economy and environmental processes and cycles that are necessary for production and reproduction. “Metabolic rift” is produced by a matrix of factors: removal and inadequate replacement of nutrients, over-reliance on supplementary fertilizers, and the separation of agricultural production from food consumption.⁸⁶ The problem is exacerbated by the acceleration of metabolic repetitions consequential upon industrialized processes: everything is produced faster by industry than it was using traditional agricultural techniques and in greater quantities, making the human-nature separation wider. As a result, our human habitat under capitalist industrial-scale agriculture is disconnected from its material conditions, and the “rift” is social and individual as well as biophysical,⁸⁷ to the detriment of all life.

Analyses of processes such as the metabolic rift illustrate why simply extending the scope of property into a new domain of human need, as Reich would do, is insufficient. It is also insufficient

⁸⁴ Foster, ‘Marx’s Theory of Metabolic Rift’ (n 11) 375-380. Although the phrase “metabolic rift” is his own, Foster locates the concept in Marx who in turn was influenced by German scientist Justus von Liebig. See also John Bellamy Foster, “Robbing the Earth of its Capital Stock” *An Introduction to George Waring’s Agricultural Features of the Census of the United States for 1850’* (1999) 12 *Organization and Environment* 293; George Waring, ‘Agricultural Features of the Census of the United States for 1850’ [1855] (1999) 12 *Organization and Environment’* 298.

⁸⁵ Marx (n 11) 637.

⁸⁶ Foster, ‘Marx’s Theory of Metabolic Rift’ (n 11) 375.

⁸⁷ McClintock, ‘Why Farm the City?’ (n 11).

to construct and then prioritize the human sphere as a separate entity. Property needs to be conceptually transformed in such a fundamental way that the rift between human and nonhuman materialities is narrowed, repaired, or more plausibly, mitigated by more sustainable exchanges.⁸⁸ At the same time, the social problems that have arisen as a result of the extreme fungibility of real property, and the consequent inequitable distribution of property holdings, need to be addressed. These social problems include mass forced eviction and displacement of communities, appropriation of traditional and communal forms of ownership, and within otherwise affluent societies extensive homelessness and its criminalization,⁸⁹ alongside other forms of marginalization.⁹⁰ Marginalization of some people is occurring also from the perspective of interactions between human and nonhuman species, as the fragmentation of habitat escalates, particularly in areas of accelerating urbanization.⁹¹ The scale and rapidity of urbanization in many countries is limiting access to “nature.” Such trends intensify the normativity of a property interest as essentially fungible and abstracted from its context.

This trend replicates earlier property transformations where the uncoupling of sites of production and consumption that accompanied the rise of industrial-scale agriculture replaced place-based knowledges and land-use decision-making in the contexts of habitats with a placeless model of property devoid of understanding and responsibility for its material effects.⁹² For over

⁸⁸ *ibid*; Schneider and McMichael, ‘Deepening, and Repairing, the Metabolic Rift’ (n 11).

⁸⁹ James Petty, ‘The London Spikes: Homelessness, Urban Securitisation and the Question of “Hostile Architecture”’ (2016) 5 *IJ Crime, Justice and Social Democracy* 67.

⁹⁰ Eoin O’Sullivan, ‘Responding to Homelessness’ in *Reimagining Homelessness: A Blueprint for Policy and Practice* (Policy Press 2020) 21.

⁹¹ See for example, Kirsten Parris, ‘Urban Environments’ in *Ecology of Urban Environments* (John Wiley & Sons 2016) 36, 56.

⁹² Graham, *Lawscape: Property, Environment, Law* (n 5) 124, 190.

a century, the violation of the apparent “balance” of the human and nonhuman worlds caused by the alienation of people from their habitat⁹³ has been the subject of sustained scholarly enquiry outside the discipline of law. The notions of metabolic rift,⁹⁴ “ghost acres,”⁹⁵ “phantom lands,”⁹⁶ “shadow ecologies,”⁹⁷ and “ecological footprints”⁹⁸ contributed from the disciplines of chemistry, economics, ecology, sociology, and geography have considered the fragmentation of human and nonhuman habitat and its attendant process of global social stratification. The rupture of integrated ecological and social systems into separate worlds of human and nonhuman domains, and into “nice places” and “shadow places”⁹⁹ underpins many forms of environmental degradation such as the vast changes in habitat that are unfolding due to the conditions of climate change, which may well impact nice and shadow places alike.¹⁰⁰

Property-based displacement thus is not confined to humans; displacement is rapidly displacing nonhuman communities. Large areas of habitat continue to be degraded or destroyed, directly by land clearance and various forms of overexploitation¹⁰¹ or indirectly

⁹³ George Marsh, *Man and Nature; or, Physical Geography as Modified by Human Action*, (Scribner & Co. 1864).

⁹⁴ George E Waring [1857] and Justus von Liebig (1862) and Karl Marx (1863) are discussed in relation to the concept of metabolic rift in Foster, Bellamy, ‘Marx’s theory of metabolic rift’ (n 11).

⁹⁵ Georg Borgstrom, *The Hungry Planet: The Modern World at the Edge of Famine* (Macmillan 1965).

⁹⁶ William Catton, *Overshoot: The Ecological Basis of Revolutionary Change*, (University of Illinois Press 1980).

⁹⁷ Jim MacNeill, Pieter Winsemius and Taizo Yakushiji, *Beyond Interdependence: The Meshing of the World’s Economy and the Earth’s Ecology* (OUP 1991).

⁹⁸ Mathis Wackernagel and William Rees, *Our Ecological Footprint: Reducing Human Impact on the Earth* (New Society Publishers 1996).

⁹⁹ Val Plumwood, ‘Shadow Places and the Politics of Dwelling’ (2008) 44 *Australian Humanities Rev* 139.

¹⁰⁰ Jan McDonald et al., ‘Adaptation pathways for conservation law and policy’ (2019) 10 *WIREs Climate Change* 555.

¹⁰¹ See discussion of land degradation in United Nations Environment Program, ‘Summary for Policymakers’ *Global Environmental Outlook 6* (CUP 2019) 12.

by globally instigated problems such as environmental change and water scarcity leading to inadequate river flows due to water extraction for commercial agriculture and food production.¹⁰² The resulting fragmentation of habitat has resulted in widespread extinction or near-extinction of large numbers of species.¹⁰³

IV. Re-Imagining Property as Habitat

In this final Part, we outline a general framework for imagining change, and identify three pathways to promote transition to a conception of property that is reintegrated with habitat.

In colonized nations, the project of reimagining property within a framework of habitat is aligned with the project of decolonization. Reimagining property involves engaging deeply with Indigenous property systems as well as shifting both consciousness and practice of Western property thought towards an ecologically situated future. The spiritual materiality of Indigenous peoples' connection to traditional land and waters and their careful management of habitat over millennia is belatedly being acknowledged in many settler post-colonial countries. Mainstream Anglophone property has largely remained impervious to these movements – and to an ongoing, open and grounded performative of reconciliation.¹⁰⁴ Embracing the mutuality of co-existence between human and nonhuman species is central to the knowledge and practices of many Indigenous nations.¹⁰⁵ Even so, overlaying Indigenous

¹⁰² 'Investigation of the causes of mass fish kills in the Menindee Region NSW over the summer of 2018-2019' (*Academy of Science*) <<https://www.science.org.au/files/userfiles/support/reports-and-plans/2019/academy-science-report-mass-fish-kills-digital.pdf> > accessed 26 August 2020.

¹⁰³ United Nations Environment Program (n 101) 8.

¹⁰⁴ Mark McMillan and Sophie Rigney, 'Race, Reconciliation, and Justice in Australia: From Denial to Acknowledgment', (2018) 41 *Ethnic and Racial Studies*, 759.

¹⁰⁵ See, eg, Emma Woodward et al (eds), *Our Knowledge, Our Way in Caring for Country: Indigenous-led Approaches to Strengthening and Sharing our Knowledge for Land and Sea Management*, (NAILSMA and CSIRO 2020).

cultures with Western environmental and property law objectives should be treated carefully as it represents a simplification of complex cosmologies in which land exists simultaneously as habitat, economy, obligation, and as the source of law.¹⁰⁶ Indigenous laws and relationships to country offer viable place-based counterpoints to mainstream property laws but these laws are inadequately acknowledged and rarely integrated into the dominant property frameworks of colonized jurisdictions. The opportunities for aligning Indigenous knowledge and associated protections for habitat, with Western property have been constrained in most settler nations as Indigenous peoples' laws typically are classified as customary or merely normative.¹⁰⁷ Therefore, Indigenous relationships to the nonhuman world are rarely seen as equivalent in status and effect to mainstream proprietary interests. More recently, the slow but growing accommodation of Indigenous laws beside or within Anglophonic legal systems, have foregrounded the long and successful duration and diversity of Indigenous peoples' relationships to nonhuman species, land, and waters.¹⁰⁸ This situation provides a platform for cultural and legal learning to initiate more meaningful engagement with Indigenous laws.¹⁰⁹ Traditional Indigenous ecologies provide important ontologies through which to reimagine property as habitat.¹¹⁰

¹⁰⁶ Shepard Krech III, *The Ecological Indian: Myth and History* (Norton 1999); Christine Black, *The Land is the Source of the Law* (Routledge 2011) 3.

¹⁰⁷ Peter Karsten, *Between Law and Custom: 'High' and 'Low' Legal Cultures in the Lands of the British Diaspora – The United States, Canada, Australia and New Zealand, 1600–1900* (CUP 2002).

¹⁰⁸ Cristy Clark et al, 'Can You Hear the Rivers Sing? Legal Personhood, Ontology, and the Nitty-Gritty of Governance' (2018) 45 *Ecology LQ* 787.

¹⁰⁹ For discussion of the association between Indigenous peoples' law and mainstream legal education see for example, Darcy Lindberg, 'Miyo Nehiyawiwin (Beautiful Creeness): Ceremonial Aesthetics and Nehiyaw Legal Pedagogy' (2018) 16 *Indigenous LJ* 51.

¹¹⁰ See generally, Woodward (n 105).

According to the narrow anthropocentric indicia of property in Anglophonic regimes, many Indigenous practices are not regarded as legally proprietary in character. Breaking down the dominant colonial construct of property/not property is important to the project of learning from alternative property regimes in advancing property as situated within habitat.¹¹¹ Significantly, it allows us to contest the centrality of excludability and displacement in many Anglophone understandings of property. The difficulty of course is that the mainstream conceptual structure of property is reinforced in a variety of property law doctrines and rules and is manifested in everyday practices.¹¹² Nonetheless, we propose that a re-conceptualization of property as situated within habitat is both possible and vital. Such reconceptualization has already commenced in various ad hoc forms. The question that now arises is how to harness incipient changes so that they evolve into a more thorough transformation of property. In this Part, we consider the potential for using the insight that property is embedded within human and nonhuman habitats as a narrative that can guide and prefigure property alternatives that will better serve future generations.

Our approach to legal transformation draws on the idea of prefigurative practice and its theoretical correlates.¹¹³ The notion of prefigurative politics has been used by activists over many decades as a practice of imagining or prefiguring the future. Starting with the recognition that short-term revolutionary change is both conceptually flawed and unlikely in practice, prefigurative politics promotes the idea that it is possible to “be the change” by

¹¹¹ Gordon Christie, ‘Obligations, Decolonization and Indigenous Rights to Governance’ (2014) 27 CJLJ 259.

¹¹² Henri Lefebvre, *Critique of Everyday Life II: Foundations for a Sociology of the Everyday* (Verso 2002).

¹¹³ See Davina Cooper, ‘Prefiguring the State’ (2017) 49 *Antipode* 335; Davies *Law Unlimited* (n 6); Davina Cooper, ‘Towards an Adventurous Institutional Politics: The Prefigurative “As If” and the Reposing of What’s Real’ (2020) 68 *The Sociological Rev* 893.

performing alternative practices that both challenge mainstream politics and model an improved world. Prefigurative politics is an acknowledgement that fundamental change accumulates incrementally – through repeated behavioral change, piecemeal reforms, and the development of narratives to guide larger transformations.

Translated into scholarly research, prefigurative thought may also merge descriptive and normative approaches to research. Such a coming together of a factually described present and a prescriptive future is possible because, as John Law and John Urry have compellingly argued, so-called descriptive accounts of complex phenomena also enact the realities they describe.¹¹⁴ Methods constructed to describe reality also perform or produce it and, if different methods can produce different results, this is not necessarily indicative of varying perspectives on a single underlying reality, but rather of the production of different realities. The researcher or theorist is engaged in the production of reality and therefore, necessarily, engaged in an ethics and a politics that pertain to that reality. We have choices about how we produce the world:

The issue is not simply how what is out there can be uncovered and brought to light, though this remains an important issue. It is also what might be made in the relations of investigation, what might be brought

¹¹⁴ Law and Urry, 'Enacting the Social' (2004) (n 6) 390. Law and Urry illustrate the point with examples from the history of the social sciences, such as the production of class inequality, public opinion, and suicide rates, as social realities by social sciences. Blomley has made a related argument regarding the 'performative' nature of property (n 6). Similar arguments about the non-separation of "is" and "ought" have also been made in other disciplines. See, eg, Carolyn Merchant, *The Death of Nature: Women, Ecology, and the Scientific Revolution* (Harper and Row, 1980) 4.

into being. And indeed, it is about what should be brought into being.¹¹⁵

This is not to say that anything at all can “be brought into being.” Far from it. The critical point is that in the process of constructing narratives, scholars are faced with choices about which aspects of the complex and often contradictory present and past “we want to make more real, and which less real.”¹¹⁶ Translating this approach into property means conceptualizing property in a way that is commensurable with its past and present, but extracting and affirming aspects that might provide a guiding narrative or direction for the future.

Indeed, property is an eminently suitable topic for such a project because of its multi-faceted nature and because of the pressure for reform that is being applied to it from many directions. As we have suggested above, property is a composite sociolegal concept, everyday practice and legal form with no single foundation or rationale. As a legal institution in the Anglosphere, property crystallized from centuries of custom and statutory innovations and from colonial impositions of English law onto different First Nations, using a myriad of legal strategies.¹¹⁷ But these historically and jurisdictionally complex legal forms of property are difficult to disentangle from sociopolitical narratives, where property is defined in relation to everyday practices, cultural values, and ideologies, such as individualism, and longstanding philosophical justifications. As property is a multi-faceted institution, its reconceptualization and transformation must be similarly multi-

¹¹⁵ Law and Urry, ‘Enacting the Social’ (n 6) 396. As Law and Urry clarify, it is still possible to say that some methods might be better than others for finding what is being sought, that some are more useful for specific purposes, and that some do produce “perspectives,” such as Marxist or feminist perspectives, 396-97. However, they argue that fundamentally method “is *performative*: it helps to produce the realities that it describes.”

¹¹⁶ *ibid* 404; see also Blomley (n 6), 35.

¹¹⁷ That is, subsequently legitimized in some way from the point of view of the colonizers.

faceted. In proposing that habitat provides a narrative within which property can be understood in the future, and mindful of the difficulties of transforming entrenched property views, the following sketches out three key pathways for potential changes to property and law that might better recognize the integration of ideas of property with habitat. These pathways are: (1) change in the conceptual and sociocultural narratives associated with property; (2), continuing reform to the regulation of resource use (specifically land use) that affect the legal form of property; and (3), educative strategies for the transmission of future-oriented knowledge. In addition to promoting a more interconnective socioecological account of property, each of these pathways also makes possible a movement away from the colonial property imaginary and therefore may assist in the process of decolonizing property.

A. *Conceptual and Socio-cultural Pathways to Change*

The first pathway to change consists of developing a conceptual basis for understanding property as part of habitat while harnessing existing sociocultural and scholarly developments that support such a view. Anthropocentric notions of property assume that human law and regulation affects or impinges upon “nature” but is separate from it conceptually and socially. The less human-centered, socioecological, approach that we take is based on a different starting point: because all human activities are reliant on the Earth, property is necessarily situated within ecological systems. Therefore, human and nonhuman habitats need to be reintegrated conceptually, socially, and economically, with that merging reflected in law. This task involves thinking together physical ecologies, social existence, and legal discourse. As Gilles Deleuze and Felix Guattari put it, “[e]very territory, every habitat, joins up not only its spatiotemporal but its qualitative planes or

sections.”¹¹⁸ The “planes” of ecological existence are relational in the most extensive sense—as humans, we can readily understand that our social and physical beings are constituted by relations with other human and nonhuman life, with present and future generations, and also with locations that are comprised of complex living and nonliving systems. Habitat is not only the external physical context surrounding lifeforms, but is a “complex network of locations and relations, whether social, historical, material, geographical, cultural, racial, sexual, institutional, or other, where organisms—human and nonhuman—try to live well, singly and collectively.”¹¹⁹ All organisms are agents in these relations, participating in habitat construction, at the same time as it is our “context.” It is in the nature of ecological relationality that any stability that exists is constantly being produced by dynamic systems. Taking this as a conceptual beginning, the challenge is to see property as a regulatory system that sits within these larger processes and is answerable to them.

Developing a worldview in which people, proprietary interests, and habitat are conceptually and socially integrated seems a long way from our present anthropocentric and liberal individualism. But there already exist longstanding examples of such thinking. At the lifeworld scale, Indigenous peoples’ property systems offer a compelling model from which to draw inspiration for the reintegration of people and habitat—not least as such obligations conjoin responsibilities for place and nature. Aboriginal proprietary interests are a spiritual bequest and as such are subsumed within the social relationships with the sacred ancestral past from which that bequest emanates. The bequest bestows not simply rights but, “a social world and for particular people arduous duties and

¹¹⁸ Gilles Deleuze and Felix Guattari, *What is Philosophy?* (Verso 1994) 185.

¹¹⁹ Lorraine Code, *Ecological Thinking: The Politics of Epistemic Location* (OUP 2006) 91.

responsibilities that are transmissible across generations.”¹²⁰ Similarly, for Aboriginal peoples the law *is* the land, and thus the two elements are inseverable.¹²¹ The distinctions between the concepts of people, nature, and place embedded in Western knowledge systems that underpin property regimes and the contrast with Aboriginal approaches have been explored in property/jurisprudential literature,¹²² and in Indigenous peoples’ law.¹²³ The challenge is to move beyond the recognition of difference between two laws to explore in substantive terms how Indigenous peoples’ ontologies could inform and reshape property systems to offer more integrative approaches.

Thinking prefiguratively from Western knowledge involves collecting and intensifying the elements of Eurocentric property thought that challenge its colonial character, its individualism, and its anthropocentrism. Property scholarship already contains many proposed reconstructions centered on issues of human justice and obligation to the nonhuman world that, taken together, form the beginnings of an integrated account of property within ecological systems. These reconstructions are often prefigurative in the manner we suggest, that is, they excavate law, history, and philosophy for countertraditions and forgotten laws that speak to the relationships that produce persons and property and the obligations inherent within these relationships.¹²⁴

To begin with, there are reconstructions of the autonomous individual who is the typical proprietor of Western property

¹²⁰ Marcia Langton, ‘The Estate as Duration: “Being in place” and Aboriginal Property Relations in Areas of Cape York Peninsula in North Australia’ in Lee Godden & Maureen Tehan (eds), *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge 2010) 75, 76.

¹²¹ Black (n 106) ch 1.

¹²² Bryan (n 40) 3.

¹²³ See, eg, John Borrows, ‘Seven Gifts: Revitalizing Living Laws Through Indigenous Legal Practices’ (2016) 2 *Lakehead ULRev* 1.

¹²⁴ See, eg, Cristy Clark and John Page, ‘Of Protest, the Commons, and Customary Public Rights: An Ancient Tale of the Lawful Forest’ (2019) 42 *UNSW LJ* 26.

systems. As Jennifer Nedelsky says, “what actually makes human autonomy possible is not isolation but relationship.”¹²⁵ There is no pre-social natural person who unilaterally “owns” something. Rather, all legal designations of persons and all property arise from and hence are consequential to social relationships.¹²⁶ The role of property in the capacity of people to flourish therefore must be situated within an extended set of community relationships, as Gregory Alexander has argued.¹²⁷ It is a short step from understanding that autonomy and flourishing are the result of relationships with human others to seeing them as based on cross-species and intergenerational human and nonhuman relationships, as we have indicated above. To give just one relevant example, property is often justified by reference to John Locke’s notion that we own ourselves and therefore own things that we produce.¹²⁸ The formula presupposes unidirectional production of property objects by human subjects, a human worker producing things out of an entirely passive Earth. It erases both the mutualistic practices of Indigenous societies and also the agency of the Earth in the processes of production.¹²⁹ Acknowledging that production is co-production within the many relations that constitute habitat might permit a new and more nuanced iteration of this property

¹²⁵ Nedelsky, ‘Law, Boundaries, and the Bounded Self’ (n 18) 169. The relational view of autonomy as it applies to law is developed in depth by Nedelsky in *Law’s Relations: A Relational Theory of Self, Autonomy, and Law* (OUP 2011).

¹²⁶ *ibid*; see also Gregory Alexander, ‘Property as Fundamental Constitutional Right? The German Example’ (2003) 88 Cornell LRev 733; Underkuffler, ‘On Property: An Essay’ (n 31).

¹²⁷ Alexander (n 126).

¹²⁸ John Locke, *Two Treatises of Government*, (Peter Laslett ed, first published 1690, CUP 1988) 287-288.

¹²⁹ Bruce Pascoe, *Dark Emu* (Magbala Books 2014); Deborah Bird Rose, *Nourishing Terrains: Australian Aboriginal Views of Landscape and Wilderness* (Australian Heritage Commission 1996); Bawaka Country et al, ‘Co-becoming Bawaka: Towards a Relational Understanding of Place/Space’ (2016) 40 Progress in Human Geography 455; on reconfiguring the Lockean justification see Margaret Davies, ‘Distributed Cognition, Distributed Being, and the Foundations of Law’ in Marc de Leeuw and Sonja van Wichelen eds, *Personhood in the Age of Biolegality: Brave New Law* (Palgrave Macmillan 2020) 215-218.

justification. Locke's often-forgotten qualification, that "as much and as good" be preserved for others, might also be read to refer to the imperative to preserve and restore the abundance of the Earth for nonhumans and for future generations.

Accordingly, as land is habitat for both humans and nonhumans and, therefore rather than seeing these spheres as separate or in conflict, a situation that leads to habitat degradation across the board, it is necessary to develop ecological models of property ownership that prioritize human-nonhuman relationality. Changes are also needed to companion legal rules and institutional requirements,¹³⁰ that facilitate the transfer and fungibility of property such as tenure and registration systems.¹³¹ Conventional templates for property registration systems for example that have their origins in scientific modes of using space that do not consider habitat and ecological context need to be reformulated to account for habitat conservation and restoration agendas. Potentially such platforms could enhance practical measures for habitat-property integrations such as conservation easements.¹³²

Social and conceptual pathways to change are also promoted by bringing to light alternatives to the models of property extant in the Anglosphere. The development of a human right to property in European law provides a less individualistic and more universal approach insofar as it is based on a right extended to citizens in general. In the case of Germany, the constitutionally protected right to property is framed around a collective sense of public interest, and is responsive to the "fundamental values of human dignity and

¹³⁰ Justine Bell, 'Greening the Land Title Register: How Can the Land Title Register Assist with Sustainable Decision-Making' (2010) 18 APLJ 10.

¹³¹ Sarah Keenan, 'Making Land Liquid: On Time and Title Registration' in Sian Beynon-Jones and Emily Grabham (eds), *Law and Time* (Routledge 2018) 145; Sarah Blandy, Susan Bright and Sarah Nield, 'The Dynamics of Enduring Property Relationships in Land' (2018) 81 MLR 85.

¹³² Kelly Kay, 'Breaking the Bundle of Rights: Conservation Easements and the Legal Geographies of Individuating Nature' (2015) 48 Environment and Planning A 504.

self-realization.”¹³³ In itself, such a human right does little to challenge anthropocentric and individuated interests in land. It does allow consideration of property interests that support human dignity and community interests to be differentiated from property that is held for purely commercial purposes. This strategy is a potential pathway towards locating property within human-nonhuman communities. Moreover, given that privatization and individuation of property interests have been implicated in the fragmentation of habitat and the rift between human and nonhuman natures,¹³⁴ a reorientation to communal ownership and the commons as a platform for reintegrating property as habitat seems overdue. A substantial body of scholarship is re-engaging with the concept of a “commonwealth,” in part triggered by the climate change crisis, which will have severe habitat impacts.¹³⁵ Habitat loss, particularly through land clearance, also occurs on state owned i.e. public lands as well as lands regulated by the state such as through planning law controls,¹³⁶ despite efforts to establish various reserves and protected areas in many Anglophone jurisdictions since the middle of the nineteenth century. Therefore, addressing the drivers of fragmentation of habitat through reconceptualizing property will thus necessarily affect both private and state property, particularly if landscape ecology models are contemplated as the basis for re-imagining property.

¹³³ Alexander, ‘Property as Fundamental Constitutional Right?’ (n 126) 740.

¹³⁴ See the now largely debunked narrative, that associates overuse tragedies with communal ownership, Garrett Hardin, ‘The Tragedy of the Commons’ (1968) 162 (3859) *Science* 1243; and for contrast, Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (CUP 1990).

¹³⁵ Jedediah Purdy, *This Land Is Our Land: The Struggle for a New Commonwealth* (Princeton UP 2019); Silvia Federici, *Re-Enchanting the World: Feminism and the Politics of the Commons* (PM Press, 2019); Peter Brown, *The Commonwealth of Life: Economics for a Flourishing Earth* (2nd edn, Black Rose Books 2008).

¹³⁶ See, eg, John G Reid and Thomas Peace, ‘Colonies of Settlement and Settler Colonialism in Northeastern North America, 1450–1850’ in Edward Cavanagh and Lorenzo Veracini (eds), *The Routledge Handbook of the History of Settler Colonialism* (Taylor & Francis 2016).

B. *Stronger Alignment of Environmental Law and Ecology with Property*

Re-imagining property to address habitat loss and fragmentation will require a stronger engagement between property law and environmental law, where the latter gives effect to ecological priorities such as biodiversity protection and the prevention of environmental harm. Environmental law at times can be ambivalent in its aims and functions; and depending on jurisdiction and political context, it may not offer robust protection for habitat. Yet, where environmental law is able to provide measures to constrain “development” and highly exploitative uses of land and resources, it must be more seamlessly integrated with the conceptual structure and substantive measures that give effect to real property law. In other words, instead of regarding environmental law and regulation as an interference with property rights,¹³⁷ we need to be able to conceptualize property *ab initio* as based on ecological dependence.¹³⁸ Therefore, instead of accepting human dominance and improvement as the fundamental hallmarks of property, greater attention needs to be paid to the contributions of ecosystems, including as human and nonhuman habitats, to many forms of production that constitute “property;” including the common goods of cultural and aesthetic values.¹³⁹ Research and scholarship have advanced some models for integration of environmental law, ecological systems, and property. Ecological economics, for example, posits degrowth models in which property is conceptually separated from, and practically detached from,

¹³⁷ Graham *Landscape: Property, Environment, Law* (n 5) 161; Nicole Graham, ‘The ALRC Freedoms Inquiry, Real Property and Environmental Law’ (2017) 31 AER 364.

¹³⁸ Graham ‘This is not a Thing: Land’ (n 38).

¹³⁹ Alice Palmer, ‘Legal Dimensions to Valuing Aesthetics in World Heritage Decisions’ (2017) 26 Social and L Studies 581.

growth economies.¹⁴⁰ Despite the potential appeal of market disengagement, however, little practical progress has been made in disassociating property from market fungibility—leaving the dominant notion of property as commodity largely intact.

From a prefigurative perspective, the efforts to advance some practical integration of environmental law, ecology, and property have taken two main directions. First, a cross fertilization of property and ecosystems has taken tangible shape, in terms of conceiving of ecological inputs to social and economic systems as natural capital or as ecosystem services.¹⁴¹ Such approaches, which are based on complex, instrumental methods of accounting for ecological values, seek to attach positive proprietary value to nonhuman elements of ecosystems. The underlying rationale is that if ecosystems are regarded as equivalent to proprietary market values then, theoretically, the protections property enjoys ought to be extended to the parts of nature that have such value. Natural capital approaches also are designed in part to address the perceived lack of quantitative indicia for measuring nonhuman contributions in the cost-benefit analyses that inform decisions about development project approvals. Ecosystem services models aim to integrate (some) environmental costs into resource use and land-use development decision-making¹⁴² by providing a proprietary or market valuation of the services provided by the environment to humanity such as clean air and clean water.

¹⁴⁰ For degrowth theories see Julien-François Gerber et al, 'Degrowth and Environmental Justice: An Alliance Between Two Movements?' in Brendan Coolsaet (ed), *Environmental Justice: Key Issues* (Routledge 2020).

¹⁴¹ The seminal articulation is Robert Costanza et al, 'The Value of the World's Ecosystem Services and Natural Capital' (1997) 387 *Nature* 253.

¹⁴² See Becca Madsen, Nathaniel Carroll and Kelly Moore Brands, 'State of Biodiversity Markets Report: Offset and Compensation Programs Worldwide' (*Ecosystem Marketplace*, 1 September 2010) <<http://www.ecosystemmarketplace.com/wp-content/uploads/2015/09/sbdlmr.pdf>> accessed 20 December 2016.

While natural capital and ecosystems services have become embedded in several forms of environmental law and development approvals systems, there has been strong critique of these measures. The quantification of ecological benefits in these quasi-property measures while exhibiting some prefigurative transformations can reinforce an anthropocentric paradigm by valuing nonhuman ecology largely in terms of the extent to which it serves human needs. Moreover, many of the contingent qualities associated with habitat continue to be undervalued in ecosystem-services models.¹⁴³ The limitations inherent to these measures highlights that there remains a pressing need to demonstrate how it is possible to reconfigure property more fundamentally by reference to ecological criteria. The association of property with natural capital and ecosystem services, therefore while a first step toward realigning property with habitat, still entrenches assumptions of human systems of capital as ecosystems that comprise habitat, even if human uses of ecosystems are more attenuated. By contrast, a reconceptualization of property as habitat could bring together scholarship that broadens environmental law to include ecological framings, melding concepts such as ecosystem services, resilience, and environmental justice.¹⁴⁴

Parallel to the development of models that combine ecology with economy, legal scholars working from a prefigurative stance have sought to blend property with sustainability approaches. Sustainability has evolved into a flexible, yet contested term since its inception in *Our Common Future* over thirty years ago.¹⁴⁵ Sustainability at its core seeks to place ecological concepts and

¹⁴³ See analysis of contingent valuation in Matt Curnock et al, 'Shifts in tourists' sentiments and climate risk perceptions following mass coral bleaching of the Great Barrier Reef' (2019) 9 *Nature Climate Change* 535.

¹⁴⁴ Adrian Martin, 'Biodiversity: Crisis, conflict and justice' in Brendan Coolsaet (ed), *Environmental Justice: Key Issues* (Routledge 2020) 137-9.

¹⁴⁵ See, eg, Grinlinton and Taylor (n 33); Brad Jessup and Kim Rubenstein (eds), *Environmental Discourses in Public and International Law* (CUP 2012).

processes and human social phenomena in a specific relationship of balance and mutual interdependency.¹⁴⁶ The three pillars of sustainability typically comprise human health and well-being, ecological integrity, and social and cultural equity.¹⁴⁷ Integrating strong sustainability principles into the conceptualization of property requires less exploitative modes of human life and production premised on the requirement to balance the needs of human and nonhuman species, including habitat protections.¹⁴⁸ Alternatively, sustainability in its weaker formulations remains conceptually committed to anthropocentric outcomes, privileging human development over environmental protection but emphasizing the efficient use of land and resources to achieve such outcomes. Thus, depending on the formulation adopted, sustainability endorses a spectrum of property relationships between humans and the nonhuman world, from constrained stewardship to the mutuality of coexistence, care, and obligation between human and nonhuman species. A blended property and sustainability legal model clearly could provide a broadly accepted platform to reformulate property as habitat – and indeed there have been many efforts directed to that goal. Yet without a more fundamental restructuring of property concepts, sustainability remains predominantly a contested “add on” to property law.

In turn, there are calls to reframe property through instituting greater reuse of property “things” and for the more effective recycling of resources between human and nonhumans to minimize

¹⁴⁶ World Commission on Environment and Development, *Our Common Future* (OUP 1987); Julie Sze, ‘Sustainability and Environmental Justice: Parallel Tracks or at the Crossroads?’ in Brendan Coolsaet (ed), *Environmental Justice: Key Issues* (Routledge 2020) 110.

¹⁴⁷ See, eg, *Transforming Our World: the 2030 Agenda for Sustainable Development*, UN GAOR, 70th sess, 4 mtg. Agenda items 15 and 16, UN DOC A/RES/70/1 (21 October 2015).

¹⁴⁸ The concept of sustainable development (sustainability) is often conceived as a limit on development and therefore qualifies rather than fundamentally changes the priority accorded to development. See discussion of the limitations of sustainability as guiding principle in Godden (n 45) 67.

habitat destruction. Such calls have become more insistent with the mounting residue of discarded property things, such as plastic waste, that degrade habitat. Programs promoting resource efficiency or product stewardship increasingly to be found in national legislation are designed to ameliorate the current capitalist patterns of production and consumption of property that have such devastating impacts on global habitat. Yet few of these programs for reducing property things exist at a scale sufficiently large to reduce the metabolic disjunctures between human economic activities and broader ecological processes that are facilitated by modern property law and discourse. Upscaling and extending such programs, challenging the logics of such production, and integrating these concepts into property law are necessary to prevent the accelerating habitat loss.

C. *Educative Pathways*

Education is foundational to legal knowledge and praxis, and therefore central to any law reform strategy. An important pathway for situating property within habitat is therefore to enable students to develop a critical understanding of the role of legal education in both the historical development and reform of property law. “Traditional legal education is characterized by pedagogies [that] arose in response to the industrial revolution”¹⁴⁹ and “by the long absence and late incorporation’ of the histories of conquest and slavery.”¹⁵⁰ Learning what property is now, how it became thus, what it could and should become, and learning how to regulate and practice property are prerequisites for change. Changing the conceptualization and discursive constructs of property and

¹⁴⁹ Brad Jessup and Claire Carroll, ‘The Sustainability Business Clinic—Australian Clinical Legal Education for a “New Environmentalism” and New Environmental Law’ (2017) 34 EPLJ 542.

¹⁵⁰ K-Sue Park, ‘Conquest and Slavery as Foundational to Property Law’ (2021) Georgetown University Law Center available on SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3793972

aligning the laws of landownership with the laws regulating the use of land and natural resources involve different ways of knowing and practicing property. Enabling law students to connect diverse place-based First Nations land laws,¹⁵¹ and Western scientific knowledge¹⁵² about the particularity and diversity of habitats, to the Western property regime could help to overcome institutional “barriers to adaptation.”¹⁵³

Foregrounding the cultural specificity of the dominant model of property in the context of its dependency and impact on habitats would enable “embryonic lawyers”¹⁵⁴ to situate property within its material function. The pressure on the climate-striking generation to rapidly reform dominant regulatory models of land use and ownership to overcome their accelerating and ubiquitous adverse socioecological impacts is substantial.¹⁵⁵ Reformulating a property regime that “sustain[s] good relations among all the beings that

¹⁵¹ Irene Watson and Marcelle Burns, ‘Indigenous Knowledges: A Strategy for Indigenous Peoples Engagement in Higher Education’ in Sally Varnham, Patricia Kamvounias, and Joan Squelch (eds), *Higher Education and the Law* (Federation Press 2015); Nicole Graham ‘Indigenous Property Matters: Embedding Indigenous Content and Perspectives in Real Property’ (2009) 19 *Legal EducRev* 289; Annette Gainsford, ‘Connection to Country: Place-Based Learning Initiatives Embedded in the Charles Sturt University Bachelor of Laws’ (2018) 28 *Legal EducRev* 1; Marcelle Burns, ‘Are We There Yet? Indigenous Cultural Competency in Legal Education.’ (2018) 28 *Legal EducRev* 215; Teresa Lloro-Bidart, ‘A Political Ecology of Education in/for the Anthropocene’ (2015) 6 *Environment and Society: Advances in Research* 128; Clinton Beckford, Clint Jacobs, Naomi Williams and Russell Nahdee, ‘Aboriginal Environmental Wisdom, Stewardship and Sustainability: Lessons from the Walpole Island First Nations, Ontario, Canada.’ (2010) 41 *J Environmental Education* 239.

¹⁵² Lee Godden and Pat Dale, ‘Interdisciplinary Teaching in Law and Environmental Science: Jurisprudence and Environment.’ (2010) 11 *Legal EducRev* 239; Graham ‘This Is Not a Thing: Land’ (n 38).

¹⁵³ Jan McDonald, ‘Mapping the Legal Landscape of Climate Change Adaptation’ in Tim Bonyhady, Andrew Macintosh and Jan McDonald (eds), *Adaptation to Climate Change: Law and Policy* (Federation Press 2010) 8.

¹⁵⁴ Leon Thomas David, ‘The Clinical Lawyer-School: the Clinic’ (1934) 83 *UPaLRev* 1.

¹⁵⁵ Nicole Graham, ‘Learning Sacrifice: Legal Education in the Anthropocene’ in Kirsten Anker, Peter Burdon, Geoffrey Garver, Michelle Maloney and Carla Sbert Carlsson (eds), *From Environmental to Ecological Law* (Routledge 2021) 209-222.

inhabit these lands”¹⁵⁶ will depend on a differently educated generation of legal scholars and practitioners who are ecologically literate and capable of “integrative thinking”¹⁵⁷ so that they can situate and adapt property within habitats. This will be necessary to subvert the abstract and anthropocentric logic of the dominant property model appurtenant to infinite-growth economies “beyond their colonialist foundation” that framed “the natural world as property that is divided up for sale, profit and exploitation.”¹⁵⁸

V. Conclusion: Property, Habitat, and Legal Change

Fundamental to the tentative strategies for situating property within habitat and any consequent reforms to property law is the commitment to shift from understanding property as power, sovereignty, and individual dominion, toward understanding property as located always and already in socioecological relationships in and across time and place.¹⁵⁹ Property is a dialectical relationship between time, space, and ecology that is materially manifest as habitat. Deconstructing existing relationships of excludability and control and the instrumental use of habitats as objects of property rights to enable the rebuilding of mutual relationships of community for human and nonhuman life is a formidable but necessary task requiring legal change. In this task, property holders can be neither the subject nor object of property, rather, they are dependent on their habitat, giving rise both to obligation and to connection with all living others. A

¹⁵⁶ TallBear (n 65).

¹⁵⁷ Stephen Dovers, ‘Clarifying the Imperative of Integration Research for Sustainable Environmental Management’ (2005) 1 J Research Practice art M1.

¹⁵⁸ Irene Watson, ‘Aboriginal Relationships to the Natural World: Colonial “Protection” of Human Rights and the Environment.’ (2018) 9 JHRE 119, 138, 126.

¹⁵⁹ Vivien Holmes and Simon Rice, ‘Our Common Future: The Imperative for Contextual Ethics in a Connected World’ in Reid Mortensen, Francesca Bartlett and Kieran Tranter (eds), *Alternative Perspectives on Lawyers and Legal Ethics* (Routledge 2011) 56.

socioecological understanding of property as habitat therefore involves adopting a relational view of human subjectivity emerging from and constrained by material connections with both the human and nonhuman spheres. Neither separate from nor in absolute control of our world: the formalized identities of humans, as persons and owners hinge upon ties across many registers: between individuals and human society, between the human biological characteristics as organisms and habitats, and between the meanings inspired by and imposed upon these socioecological convergences. Recognizing these socioecological convergences commits us to reworking relationships across cultural and species divides and temporalities, acknowledging the pivotal role that law and property play in intergenerational transmission. That element of transmission inherent to property law must move beyond short-term fungibility that is centered on a mono-species model, to one of ecological intergenerational transmission that embraces habitat.

None of this reimagining of property as habitat necessarily involves returning human-nonhuman relatedness to some idealized preindustrial state of nature. Nor does it mean that there will be a single and simple pattern for a new understanding of property. If property is to be place-based and ecologically integrated, it must be released from the fixed notions that define and limit it. Approaches that situate property in a timeless and context-free world, that reify, then elevate its logic, characteristics, and composition defy property's historical trajectory and its manifest, material presence in the world.

It is time to reconsider the mainstream conceptualization of property in legal and cultural discourses. We contend that concepts of property would benefit from conscious engagement and alignment with habitat and ecological imperatives. Social obligation models of property that resonate with relational concepts offer promising platforms for envisioning property as habitat but even these progenitors must engage other legal ontologies and

knowledges that incorporate ecology. Moreover, the legal changes necessary to give effect to such models typically are ad hoc or promulgated on extending existing frameworks such as rights protections for nature. As ecological, social, and economic crises escalate, the need for more fundamental change to property and property law is compelling.