

Human rights, property and the search for ‘worlds other’*

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While some accounts of rights and property paradigms see property as an inherent incident of a colonizing form of human rights law and discourse, others draw out the contradictions between them, suggesting that human rights and property have opposing impulses towards inclusion and exclusion respectively. While not rejecting the insights of either of these positions, the author argues that a fundamental ambivalence lies at the heart of human rights law and discourse demonstrating both oppressive and emancipatory potential. This ambivalence is, the author argues, also internal to the Western property concept – a claim facilitating a renewed emphasis upon property’s inclusory potential as an institutional foundation for a more eco-humane and vulnerability-responsive ordering of legal relations.

Keywords: *human rights, property, critique, ambivalence, exclusion v excludability, ‘worlds other’, environment, eco-humane subjectivities*

1 INTRODUCTION

In the frequently fractious and under-theorized relationship between human rights and the environment, the question of property is often implicated. Human rights, it will be suggested below, have a high degree of elusiveness and contestability and are the target of a range of critiques which are (perhaps especially in the environmental context) ultimately united by an attempt to expose, resist and/or replace the ontological suppositions lying at the foundations of Western narratives of ‘progress’, private property and the unsustainable capitalist exploitation of natural resources.¹ At the same

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1. See, for example, U Baxi, *Future of Human Rights* (OUP, Oxford 2006); K Bosselmann, *When Two Worlds Collide: Society and Ecology* (RSVP, Auckland 1995); M Horkheimer and T Adorno, *Dialectic of Enlightenment* (Stanford University Press, Stanford 2002); V Shiva, *Staying Alive: Women, Ecology and Development* (Zed Books, London 1989); V Shiva, *Stolen Harvest: The Hijacking of the World Food Supply* (South End Press, Cambridge MA 2002); U Matei and L Nader, *Plunder* (Wiley-Blackwell, Oxford 2008).

time, however, another perspective suggests that human rights are inherently at odds with the more exclusive implications of the Western property construct and operate as a kind of limit on property claims.² While both of these views provide powerful insights into the complex relationship between human rights and property, it is potentially more transformative to appreciate the relationship between them in terms of a *shared ambivalence* reflecting their mutual and fundamental openness to conflicting impulses of oppression and emancipation, exclusion and inclusion. This article will suggest that property, despite its mainstream formulation as being predominantly exclusive,³ can be theorized in such a way as to render it open to alternative readings that are more compatible with ontological suppositions supporting a re-imagined relationship between human rights and the environment⁴ in the search for ‘worlds other’ and for an eco-humane future worthy of the name. The account here will begin by introducing the elusiveness and contestability of human rights, before organizing their complex contradictions using the framework of Baxi’s ‘two notions’ of human rights.⁵ After linking the two notions (‘modern’ and ‘contemporary’) directly with the history of human rights in relation to the right to property and to historically related patterns of social exclusion (and countervailing claims for inclusion) the ambivalence of property itself will be explored. It will be argued that exclusion is analytically separable from the function of ‘excludability’⁶ as the conceptual foundation of any coherent property claim, and that there is scope, even within the much-maligned Western property paradigm, for an inclusive re-imagination of property. This can be linked to an inclusive, emancipatory form of human rights in order to reveal the mutual potential of human rights and property in the service of fashioning a distributive, environmental justice responsive to a re-imagined ontology of both the human and the environmental. This development is fundamentally necessary for the transformation of the relationship between human rights and the environment and for an eco-humane future worth living.

2 THE ELUSIVENESS AND CONTESTABILITY OF HUMAN RIGHTS

Human rights are arguably still the dominant ethical language of claim⁷ – a fact which may help explain, in part at least, why environmental imperatives are now so often

2. See especially, K Gray and S Gray, ‘Private Property and Public Propriety’ in J McLean (ed) *Property and the Constitution* (Hart Publishing, Oxford 1999) 11–39; K Gray and S Gray, ‘Civil Rights, Civil Wrongs and Quasi-Public Space’ (1999) *European Human Rights Law Review* 46.

3. ‘In some deep sense the sustained exercise of exclusory power is perhaps all there really is to the grand claim of proprietary ownership’: K Gray, ‘Property in Common Law Systems’ in GE van Maanan and AJ Van der Walt (eds), *Property on the Threshold of the 21st Century* (MAKLU, Antwerp 1996) at 265.

4. See A Grear, ‘The Vulnerable Living Order: Human Rights and the Environment in a Critical and Philosophical Perspective’ (2011) 2/1 *Journal of Human Rights and the Environment* 23.

5. Baxi (n 1) at 33–58.

6. See K Gray, ‘Property in Thin Air’ (1991) 50 *Cambridge LJ* 252 and discussion below at n 59 and related text.

7. M Ignatieff, *Human Rights as Politics and Idolatry* (Princeton University Press, Princeton 2001) at 53, n 1 and n 2 and the references cited there; E Wiesel, ‘A Tribute to Human Rights’ in Y Danieli and others (eds), *The Universal Declaration of Human Rights: Fifty Years and Beyond* (Baywood, Amityville NY 1999) at 3 (describing human rights as a ‘world-wide secular religion’), and N Gordimer, ‘Reflections by Nobel Laureates’, in Y Danieli and others (eds),

brought within the legal and rhetorical ambit of human rights law and discourse. For all their undoubted power, however, human rights remain the subject of a range of excoriating critiques, some of which are now well-embedded within mainstream human rights scholarship and debate. It is well known, for example, that cultural relativist arguments deconstruct the 'universalism' of human rights and bring a range of critiques to bear, including those emerging from 'Asian values', Islam and postmodernism.⁸ Implicit and explicit within such accounts is a closely related accusation that the Universal Declaration of Human Rights is an instrument of 'Western cultural imperialism', a mere Trojan horse for the imposition of 'Western' commitments upon 'non-Western' cultures – that the notion of human rights is Eurocentric in both origin and formulation.⁹ This accusation, moreover, addresses itself directly and indirectly to the ontological and epistemological assumptions informing mainstream human rights law and discourse – a fact linking a range of 'outsider' critiques directly to ecological critiques of our current philosophical and juridical paradigms.¹⁰ Ranging through feminism, post-colonial critique, intersectional analyses sensitive to speciesism, accounts sensitive to ecological epistemology, the politics of everyday location, to so-called third world (TWAAIL) scholarship,¹¹ a chorus of critics point to the closures

ibid, at vii describing the Universal Declaration of Human Rights as 'the essential document, the touchstone, the creed of humanity that surely sums up all other creeds directing human behaviour'. Former UN Secretary-General Kofi Annan viewed the Declaration as 'the yardstick by which we measure human progress' (Ignatieff, ibid).

8. See, for examples of discussions canvassing relevant and related arguments, K Engle, 'Culture and Human Rights: The Asian Values Debate in Context' (2000) 32/2 *Journal of International Law and Politics* 291; H Samuels, 'Hong Kong on Women, Asian Values and the Law' (1999) 21/3 *Human Rights Quarterly* 707; AJ Langlois, *The Politics of Justice and Human Rights: South East Asia and Universalist Theory* (CUP, Cambridge 2001); K Dalacoura, *Islam, Liberalism and Human Rights* (3rd edn) (IB Tauris and Co Ltd, London 2007); M Ignatieff, 'The Attack on Human Rights' (2001) 80 *Foreign Affairs* 102; Z Arslan, 'Taking Rights Less Seriously: Post-modernism and Human Rights' (1999) 5 *Res Publica* 195; T Campbell, KD Ewing and Adam Tomkins, *Sceptical Essays on Human Rights* (OUP, Oxford 2001).

9. For example, see M Matua, 'Savages, Victims and Saviours: The Metaphor of Human Rights' (2001) 42/1 *Harvard International Law Journal* 201.

10. See L Code, *Ecological Thinking: The Politics of Epistemic Location* (OUP, Oxford 2006), who proposes an epistemic revolution comparable to the Kantian shift which installed 'man' as the centre of the universe. She points out that the recognition of the parochialism of Kant's conception of 'man', and which lay at the heart of what she names as 'Kant's Copernican revolution' in the sphere of the philosophical-conceptual, is recognized by a range of theoretical stances: feminist, socialist, post-colonialist and by critical race theory (at 3). Code's thesis links the epistemological closures of the West fairly unambiguously to environmental devastation. See also, K Bosselmann, 'Losing the Forest for the Trees: Environmental Reductionism in the Law' (2010) 2 *Sustainability* 2424.

11. See, for example, the discussions in M-B Dembour, *Who Believes in Human Rights? Reflections on the European Convention* (CUP, Cambridge 2006); C Douzinas, *Human Rights and Empire: The Political Philosophy of Cosmopolitanism* (Routledge-Cavendish (Glasshouse), Abingdon 2007); C Gearty, *Can Human Rights Survive?* (CUP, Cambridge 2006); MA Glendon, *Rights-Talk: The Impoverishment of Political Discourse* (Free Press, New York 1996). For discussions of the exclusions of human rights in particular, see, for example, D Otto, 'Disconcerting "Masculinities": Reinventing the Gendered Subject(s) of International Human Rights Law' in D Buss and A Manji (eds), *International Human Rights Law: Modern Feminist Approaches* (Hart Publishing, Oxford 2005) 105–29; D Otto, 'Lost in Translation: Rescripting the Sexed Subjects of International Human Rights Law' in A Orford (ed), *International Law and its Others* (CUP, Cambridge 2006); F Beveridge and S Mullally, 'International Human Rights and Body

of human rights as they find expression within the liberal legal paradigm and the neo-liberal world order.

The structural tendencies and ideological tilt of the international human rights law regime does, it must be said, offer evidence in support of such critiques. The criticism, for example, that civil and political rights are favoured over economic and social rights within the institutional mechanisms of international human rights law¹² is frequently understood to reflect a fundamental privileging of liberal constructs of rights descended from the ideological commitments of the 'West'. It has even been convincingly argued that the entire international human rights law project stands discursively colonized by the project of neoliberal capitalism and by the hegemonic power of transnational corporations within the international legal order.¹³ Such arguments can obviously be linked to numerous critiques drawing upon an earlier Marxist characterization of natural rights as being individualistic tools of the capitalist project.¹⁴ Such critiques (both historical and contemporary) strongly imply that hierarchies and asymmetries observable in international human rights law reflect agendas far removed from the affirmation of the equal worth and dignity of all members of the 'human family'. This is a criticism borne out, moreover, even in the context of the so-called 'third generation' (or 'solidarity') rights, including the human right to a clean environment: a range of problems reflecting the fundamental fracture between the broadly (neo)liberal ideological commitments linked to the primacy of civil and political rights and a lamentable failure to realize the economic and social rights of the economically disempowered peoples and nations of the earth replicate themselves in the context of environmental injustice, including climate change injustice.¹⁵ Indeed, the environmental crisis itself can be interpreted as a crisis of human hierarchy.¹⁶ It is fair to say that human rights law, in both theory and practice, is riven with contradictions, disputations, rival framings and oppositional accounts, and that such critical instabilities render rights paradigms at best complex.

Matters become even more challenging when we consider that the epistemic complexity of human rights law and discourse is exacerbated by the *contingency* of all its available framings. Framings are always an exercise of epistemic closure or limitation

Politics' in J Bridgeman and S Millns (eds), *Law and Body Politics: Regulating the Female Body* (Dartmouth, Aldershot 1995); R Kapur, 'Human Rights in the 21st Century: Take a Walk on the Dark Side' (2006) 28 Sydney Law Review 664; M Dekha, 'Intersectionality and Post-human Visions of Equality' (2008) 23 Wisconsin Journal of Law, Gender and Society 249; A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge 2005).

12. See, for an introduction to the depth of the challenge, D Beetham, 'What Future for Economic and Social Rights?' (1995) 43/1 Political Studies 41. See also, the excoriating critique of the imperatives of neoliberal globalization and their deleterious effect upon the realization of socio-economic rights offered by Baxi (n 1).

13. See Baxi (n 1); S Gill, 'Globalisation, Market Civilisation and Disciplinary Neoliberalism' (1995) 24 Millennium Journal of International Studies 399.

14. See K Marx, 'On the Jewish Question' in *Selected Essays by Karl Marx* (HJ Stenning, trans.) (Leonard Parsons, London and New York 1926).

15. For more, see the contributions in (2010) 1/2 The Journal of Human Rights and the Environment 131–256.

16. This is an insight intrinsic to, for example, eco-feminism, but is also underlined by realities such as environmental racism. See L Westra, *Faces of Environmental Racism: Confronting Issues of Global Justice* (Rowman and Littlefield, London 2001).

in the sense that we inevitably tend to draw attention to selected aspects of a perceived 'something' at the expense of a host of other candidates for attention¹⁷ – and such contingency, particularly in a highly contested field such as human rights, presents the fractious challenge of negotiating a path through a highly varied set of epistemic limitations and closures. However, neither the semantic and political contestability of human rights, nor the deep realities of contingency and epistemic limitation are necessarily a cause for despair. Indeed, the energy implicit in the wide range of critical accounts of human rights implies that the unsettledness of human rights can be understood as productive – even emancipatory. Thus human rights can be understood to function as 'ideas' (albeit powerful, world-shaping ideas) which operate as semantically elusive 'placeholder[s] in a global conversation that allows a constant deferral of the central defining moment in which rights themselves will be infused with substance'.¹⁸ This insight emphasizes the *productive* sense in which the meaning of human rights is always 'up for grabs'.

Despite the ideological closures that can be seen to accompany them, human rights always remain, to borrow the language of Douzinas, 'floating signifiers'.¹⁹ their promise of 'worlds other', the sense in which they construct an emancipatory imaginary, draws out a deeply human longing for an ever-deferred 'not yet' of a justice hoped for, as yet, unseen, but glimpsed as an *eskhatos* (a final, furthest, remote horizon). The meanings of human rights remain contestable, semantically and semiotically unsettled, radically porous, open to co-option, colonization and, importantly, never, ever above the interplay of power relations. This openness, like the face of Janus, is bi-directional. It is the source of the susceptibility of human rights to, for example, colonization by corporations,²⁰ but also of the emancipatory energies that overflow the present limits of rights in the name of rights and the justice they reach for. Human rights, in short, have a fundamental ambivalence, a dual capacity for producing and cloaking privilege and simultaneously for unveiling oppression and articulating emancipatory hope and resistance. Human rights, when deployed as a basis of an inclusory claim by the 'others' of rights,²¹ function as the 'rights of those who have not the rights that they have and have the rights that they have not' – in the famous words of Ranciere.²² It would be a mistake, therefore, to assume a univocal meaning of the term 'human rights', or to suppose that the term necessarily provides a stable referent, when thinking about the relationship between rights and property paradigms at the nexus between human rights and the environment.

As indicated briefly above, a central critical claim made concerning human rights and property paradigms is the claim that human rights emerge from a liberal

17. 'Frames are principles of selection, emphasis and presentation composed of little tacit theories about what exists, what happens, and what matters': T Gitlin, *The Whole World Is Watching: Mass Media in the Making and Unmaking of the New Left* (University of California Press, Berkeley and London 1980) at 6.

18. A Ely-Yamin, 'Empowering Visions: Towards a Dialectical Pedagogy of Human Rights' (1993) 15/4 *Human Rights Quarterly* 640 at 663.

19. C Douzinas, *The End of Human Rights* (Hart Publishing, Oxford 2000) 253–61.

20. See Baxi (n 1); A Gear, *Redirecting Human Rights: Facing the Challenge of Corporate Legal Humanity* (Palgrave MacMillan, Basingstoke 2010).

21. See n 11.

22. J Ranciere, 'Who is the Subject of Human Rights?' (2004) 103 *South Atlantic Quarterly* 297 at 302.

framework in which rights and property are densely imbricated. Indeed, so intimate is the ideological relationship between liberal legal rights subjectivity and property ideology that the rights-bearing person and the construct of private property have been conceptualized as being mutually interdependent in analytical terms.²³ There is a strong case for suggesting that the ontology of human rights, private property and autonomous liberal persons share fundamental presuppositions implicating the central Western subject-object distinction/mind-body split/rational-mastery/irrational-‘nature’ relation closely linked to environmental degradation.²⁴

Yet, despite the fact that human rights share fundamental ontological suppositions with liberal property paradigms and liberal legal systems there remains, as already noted, a human rights energy which reaches ‘beyond’ – beyond the ‘now’ of law towards the ‘not yet’ of justice as law’s endlessly elusive horizon. Accordingly, despite the fact that the challenges presented by legal closure seem to become more intense as human rights themselves become more technical and positivistic (as they are internalized by legal systems as ‘positive’ law) there remains a vivid sense in which the language and aspiration of human rights as an ‘idea’ functions resistively as a supra-legal category of critique directed at positive human rights law itself.²⁵ Douzinas argues that the ‘extensive positivisation of human rights... [means that] the external division between legal and human rights has been replicated in the body of human rights themselves’,²⁶ exposing a key facet of their fundamental ambivalence. Importantly, this supra-legal critique can be understood to be energized *not* by human beings conceived of as mere abstractions or bloodless universals, but as beings conveying a ‘felt’ injustice.²⁷ In other words, subtending the legal closures of human rights and even the philosophical abstraction of arguments concerning ‘moral rights’, is a visceral energy emerging from the ‘felt’ socio-physical predicaments of human beings who deploy the idea and language of rights as vivid claims to precisely that to which they are *not* yet legally entitled²⁸ in order to rupture the surface of the legal order with calls for a justice reaching beyond it and responsive to their most creaturely predicaments. There exists an energizing space between human rights as law and human rights as carriers of possible ‘worlds beyond’, or ‘worlds other’. In this, we can explicitly conceptualize the voices disrupting the settled patterns of

23. See the discussion in Grear (n 20), Chapters 3 and 4, and the references therein, especially: M Davis and N Naffine, *Are Persons Property? Legal Debates about Property and Personality* (Ashgate, Aldershot 2001); P Halewood, ‘Law’s Bodies: Disembodiment and the Structure of Liberal Property Rights’ (1996) 81 *Iowa Law Review* 1331; J Nedelsky, ‘Law, Boundaries and the Bounded Self’ (1990) 30 *Representations* 162.

24. Bosselmann (n 1); Code (n 10); Anghie (n 11).

25. This is a central argument in Douzinas (n 19) above.

26. Douzinas (n 19) at 244.

27. Baxi analogously captures this tension in a distinction between the politics ‘of’ human rights (closely linked to statecraft and law) and the politics ‘for’ human rights: ‘This new form of sensibility, arising from the responsiveness to the tortured and tormented voices of the violated, speaks to us of an *alternate politics* seeking, against the heavy odds of the histories of power, that order of progress which makes the state incrementally more ethical, governance progressively just, and power increasingly accountable’, Baxi (n 1) at 58.

28. This dynamic was key, for example, in the dismantling of apartheid; it lay at the roots of the civil rights movement in the US; in the energies of women’s rights movements all over the world, and more recently, animates campaigns for gay equality and marriage rights, animal rights and so forth.

human rights as positive law as belonging to inter-relationally co-formed beings whose embodied vulnerability and fundamental 'animality' (in a non-perjorative, creaturely sense) places them in common cause with non-human animals and the ecologies of which humans are but a particularly self-conscious element. Breaching, therefore, the comparatively closed surface of human rights as law, there emerge claims and possibilities reflecting *lived ontologies* unaccounted for by the hegemony of mono-cultural Western epistemic mastery.²⁹ The space opened up between human rights as law and human rights as critique in this formulation offers the chance for a re-directed human rights ethics, but it also, importantly, invites fresh energies to confront the concept of property.

Property, it will be argued, (suitably re-imagined) can be united with precisely the kind of critical human rights energy reaching for new forms of ecological and distributive justice. Indeed, it may even be the case that the relationship between rights and property paradigms cannot adequately be theorized *without* examining it squarely in the light of the semiotic and political ambivalence of human rights. How then, are we to move towards a re-imagination of the relationship between rights and property paradigms in the light of the complexity, tensions and sheer contestability surrounding human rights? Fortunately, Baxi has offered a formulation channelling the complexity of human rights law and critique into two distinct notions of human rights which can usefully be deployed here in order to offer a property-sensitive account of human rights ambivalence.

3 TWO NOTIONS OF HUMAN RIGHTS

Baxi characterizes two distinct and competing notions of human rights: 'modern' and 'contemporary'.³⁰ He argues that the two notions differ in four major respects: (1) their respective encapsulation of the logics of exclusion and inclusion; (2) the distinctive languages of human rights utilized; (3) in relation to 'ascetic versus carnivalesque rights production'; and (4) in their contrasting relationships between human rights and human suffering.³¹ Baxi's account is particularly useful for present purposes because there is a high degree of what we can call property-sensitivity in his framework, in the form of a structural intimacy between the 'modern' conception of human rights, the modern subject and property. Baxi argues, in line with post-colonial critiques, that the 'modern' notion of human rights has historically been deployed to produce 'justified' forms of human suffering. Clearly implicating the ontological foundations of the Western conception of the subject, Baxi argues that:

[t]he criteria of individuation in the European liberal tradition of thought furnished some of the most powerful ideas in constructing a model of human rights. Only those beings were to be regarded as 'human' who were possessed of the capacity for *reason* and autonomous moral *will*. What counted as *reason* and *will* varied in the course of the long development of the European liberal traditions; however, the modern paradigm of human rights, in its major phases of development excluded 'slaves', 'heathens', 'barbarians', colonized peoples, indigenous populations, women, children, the impoverished, and the 'insane', at various

29. V Plumwood, *Feminism and the Mastery of Nature* (Routledge, London 1993).

30. Baxi (n 1).

31. *Ibid.*, 44–50.

times and in various ways, from those considered worthy of being bearers of human rights. The discursive devices of Enlightenment rationality constituted the grammars of violent social exclusion.³²

Accordingly, for Baxi, the principal historical role performed by the ‘modern’ construction of human rights was the imposition of ‘justified’ suffering in the cause of colonialism and imperialism: ‘The “modern” human rights cultures, tracing their pedigree to the Idea of Progress, Social Darwinism, racism and patriarchy (central to the “Enlightenment” ideology) justified global imposition of cruelty as “natural”, “ethical” and “just”’.³³ Indeed, Baxi even suggests that ‘[m]aking human suffering *invisible* was the hallmark of “modern” (liberal) human rights formations’.³⁴

This account resonates with many a critical account of the ‘human’ embedded in the ‘modern’ notion of human rights, linking the ‘subject of rights’ as a Western ideological construct with the historical imposition of ‘justified’ (invisible) suffering not only upon marginalized humans as the ‘others’ of rights, but upon non-human animals.³⁵ The subject at the heart of the notion of modern human rights emerges as the patriarchal, raced and appropriative rational property owner. Indeed, this property-owning paradigmatic bearer of rights possesses a dominance extensively identified by authoritative, detailed historical accounts of the genesis of rights, and which inexorably link rights settlements at the moment of their transmutation from revolutionizing social energies into their institutionalized forms³⁶ with the preservation of the power of propertied male elites.³⁷ It is, in short, the white, male property owner which emerges as the quintessential ‘modern’ human rights beneficiary.

The precise contours of the ‘human’ of the ‘modern’ human rights notion are further revealed *and contested* by the characteristically ‘carnivalistic’ (exuberant) production typical of the ‘contemporary’ notion of human rights. ‘Contemporary’ human rights dynamics have produced a heterogeneous array of documents specifying the rights of marginalized humans, the ‘others’ of the modern paradigm – the human rights, for example, of ‘the girl child, migrant labour, indigenous peoples, gays and lesbians (...), prisoners and those in custodial institutional regimes, refugees, and asylum-seekers’ children’.³⁸ This dynamic, significantly, emphasizes the explicit contours of the historically real exclusions forged by the universal subject of human rights, presenting a set of repeated critiques emerging from a world of embodied, situated, ‘felt’ exclusion/s and injustice and reflecting the supra-legal transcendent energy of human rights critique.

From this we can see the clear contrast between the contemporary and modern notions of human rights. The construction of ‘modern’ human rights reveals, in

32. Baxi (n 1) at 44, emphasis original.

33. U Baxi, *The Future of Human Rights* (OUP, Oxford 2002) at 32.

34. Baxi (n 33) at 33.

35. See Dekha (n 11); D Nibert, *Animal Rights/Human Rights: Entanglements of Oppression and Liberation* (Rowman and Littlefield, Lanham MD 2002).

36. N Stammers, *Human Rights and Social Movements* (Pluto Press, London 2009); N Stammers, ‘Social Movements and the Social Construction of Human Rights’ (1999) 21 *Human Rights Quarterly* 980.

37. M Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era* (University of California Press, Berkeley 2004); L Hunt, *The French Revolution and Human Rights: A Brief Documentary History* (Bedford/St Martin’s Press, New York 1996).

38. Baxi (n 33) at 32, footnote 17. See also, B Weston ‘Human Rights’, *Encyclopedia Britannica* 20: 56.

essence, a radical and mutually constituting interdependence between personhood and property and the elevation of the private property right. Indeed, it seems that property was always pivotal to the freedoms of the liberal human rights bearer. As Woodiwiss points out:

...at the point in time when [French Declaration and the American Bill of Rights (1791)] were written and even today, especially in the United States, economic inequality was and is unchallenged ... because as both compendia make explicit, property ownership represents the principal mode of securing one's life and pursuing happiness.³⁹

Baxi is explicit concerning the fact that the 'absolutist right to property' forms one of two constitutive elements of the 'modern' human rights paradigm (along with 'the collective human right of the coloniser to subjugate "inferior" peoples').⁴⁰ Thus:

[L]ong before slavery was abolished, and women got recognition for the right to contest and vote at elections, corporations had appropriated rights to *personhood*, claiming due process rights for regimes of property denied to human beings. The unfoldment of ... 'modern' human rights is the story of near-absoluteness of the right to property as a basic human right. So too is the narrative of colonisation/imperialism which began its career with the archetypal East India Company (which ruled India for a century) when *corporate sovereignty* was inaugurated.⁴¹

4 HUMAN RIGHTS AND PROPERTY PARADIGMS

It is not just post-colonial and other critical accounts that underline the intimacy between rights and property. Indeed, well established historical analyses emphasize the fact that the very idea of 'subjective right' first emerged from the central idea of *dominium* over property.⁴² Accordingly, relatively mainstream historical accounts unite with broadly critical accounts to suggest that human rights have, at various points, been *inherently* concerned with the privileging of property interests. Clearly, depending upon how property is formulated, this linkage or intimacy will have either oppressive or emancipatory possibilities – but in so far as the intimacy between human rights and property is the embodiment of 'an exclusionary conception of autonomy',⁴³ it will tend towards the exclusory social practices so impugned by critical accounts.

One particularly influential contrasting perspective on the relationship between property and human rights is based upon the assertion that human rights and property

39. A Woodiwiss, *Human Rights* (Routledge, Abingdon 2005) at 39. Interestingly, although the 1776 American Declaration of Independence makes no reference to property rights, listing the inalienable rights as 'life, liberty and the pursuit of happiness', it has been suggested that, by the time of the Constitution of 1787, there had been, in effect, a counter-revolution by propertied elites.

40. Baxi (n 33) at 31.

41. *Ibid.*, at 154.

42. See R Tuck, *Natural Rights Theories* (CUP, Cambridge University Press 1979), Chapter 1 – cited by Douzinas (n 19) at 244.

43. Woodiwiss (n 39) at 13. Woodiwiss makes reference to the well-known arguments of Glendon concerning the impoverishment of rights-talk: Glendon (n 11).

serve contrasting, or inherently contradictory, ends.⁴⁴ This view (which in its more recent formulations could owe something, perhaps, to the contemporary notion of human rights) juxtaposes human rights and property in a partially *contradictory* relation, and implies that human rights are inherently democratic (or inclusory) while property tends to be predominantly exclusory in formulation and function. This is an important view. It is partially reflected, for example, in the influential work of Gray and Gray⁴⁵ and hints at the way in which human rights rhetoric and aspiration can indeed press property towards tantalizing new horizons of access and justice.

Matters, however, are more complex even than this. As argued above, human rights are far from straightforwardly inclusory (even at the international level). While it is correct to suggest that property is *predominantly* constructed as exclusory, and that human rights discourse can be read as inclusory, it is ultimately more enlightening to emphasize the idea that *both* human rights and property are radically normatively and interpretively open to contradictory constructions of their nature.⁴⁶ Both property and human rights, in other words, possess oppressive and emancipatory potential – both are ambivalent. Property – in short – potentially shares with human rights a *productive* contingency yet to be fully exploited in the cause of environmental and distributive justice.

In order to explore this possibility and to trace its emancipatory implications, it is important to examine the nature of property in relation to human rights claims a little more closely. This is important, not only because of the intimacy between property and human rights, but because, in practice, human rights and environmental considerations are frequently outweighed by assertions of property rights (whether as a human right or a private law right). How we conceptualize *property itself* thus has a crucial role to play in reformulating the balance of relationships between human rights and property in the human-environmental nexus.

First, it is important to concede that property is rightly at the heart of numerous critiques concerning social exclusion and injustice. Property rights and appropriative impulses enacted through the defence of property rights have been thoroughly implicated in a wide range of forms of social and economic exclusion linked to the privileging of the liberal legal subject and to that subject's dominant construction as the bounded, atomistic and autonomous property owner.⁴⁷ Property has been linked to the abstract quasi-disembodiment and commodification of the liberal subject of rights;⁴⁸ to the related dominance in Anglo-American law of a construct of the property owner-legal-subject;⁴⁹ to the widespread predations of

44. This is an understandable assumption, since there are clear tensions between an exclusory reading of the property right and countervailing human rights interests in, for example, democratic inclusion: Gray and Gray (n 2).

45. Above (n 2).

46. A Grear, 'A Tale of the Land, The Insider, The Outsider and Human Rights' (2003) 23 *Legal Studies* 33.

47. Nedelsky (n 23).

48. Halewood (n 23).

49. Davis and Naffine (n 23). It should be noted that this is a construct/subject for which the corporation is an almost perfect match: C Federman, 'Constructing Kinds of Persons in 1886: Corporate and Criminal' (2003) 14 *Law and Critique* 167; Grear (n 20). Its production has been decisively linked to the ideological production of the criminal legal subject to protect the emergent interests of a rising capitalist propertied class in the nineteenth century in England: A Norrie, *Crime, Reason and History: A Critical Introduction to Criminal Law*

the colonial era;⁵⁰ to extensive forms of contemporary abuse under the conditions of advanced neo-liberal globalization.⁵¹ Property is rightly problematized, therefore, by those critiques centring upon its exclusory impulses and implications. Yet, despite the undoubted potency of such critiques, property is a right of considerable and mounting complexity in the human rights context⁵² and is becoming ever more contested.

4.1 Property: a contested concept under increasing pressure

Property is a site of intense and growing contestation, perhaps most particularly at those sites of legal interaction reflecting the most intimate links between human embodiment, embodied situatedness and/or bodily movement and basic needs, such as land disputes and water rights conflicts. Both of these raise issues that are only set to become more challenging as the unfolding climate change crisis progresses and we move towards new pressures on land and the likely scenario of mass environmental refugee migrations and water wars.⁵³ It is an obvious point (perhaps too often overlooked in legal property and human rights discourse) that human beings, as *corporeal* beings,

(Butterworths, London 2001). In America there was an even more revealing, virtually simultaneous production of the corporate legal subject and the criminal subject in the service of the same elite capitalist interests, also in the relevant nineteenth century time period: Federman (n 49). This was a period in which capitalist states were at great pains to emphasize the independent legal subjectivity of the corporate form: M Neocleous, 'Staging Power: Marx, Hobbes and the Personification of Capital' (2003) 14 *Law and Critique* 147. The influence of the changing needs of the dominant economic elite has decisively influenced theories of the corporation in the courts: GA Marks, 'The Personification of the Business Corporation in American Law' (1987) 54 *The University of Chicago Law Review* 1441; J Flynn, 'The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept' in W Samuels and A Miller (eds), *Corporations and Society: Power and Responsibility* (Greenwood Press, New York 1987); M Horwitz, 'Santa Clara Revisited: The Development of Corporate Theory' (1985) 88 *West Virginia Law Review* 173. Meanwhile, corporations have taken full advantage of the demise of theorization to exploit the protections of the American Bill of Rights: CJ Mayer, 'Personalising the Impersonal: Corporations and the Bill of Rights' (1990) 41 *Hastings Law Journal* 577. All these developments help explain the corporate colonization of international human rights law (see Baxi (n 1); Grear (n 20)).

50. Baxi (n 1); J MacLean, 'The Transnational Corporation in History: Lessons for Today?' (2004) 79 *Indiana Law Journal* 363.

51. Baxi (n 1); R Shamir, 'Corporate Social Responsibility: A Case of Hegemony and Counter-Hegemony' in B De Sousa Santos and CA Rodrigues-Garavito (eds), *Law and Globalisation from Below: Towards a Cosmopolitan Legality* (CUP, Cambridge 2005) 92–117; Anghie (n 11); T Evans and AJ Ayers, 'In the Service of Power: The Global Political Economy of Citizenship and Human Rights' (2006) 10 *Citizenship Studies* 239–308.

52. For example, consider the fact that while Article 17 of the UDHR endows 'everyone' with the 'right to hold property, alone or in association with others' that, while other rights in the UDHR are further elaborated in the ICCPR and the ICESCR, the right to property finds no further elaboration in these two covenants (see Baxi, above (n 33) at 145). This perhaps signals a certain ambivalence concerning property rights in relation to the inherently more distributive concerns underlying socio-economic rights.

53. L Westra, *Environmental Justice and the Rights of Ecological Refugees* (Earthscan, London 2009); M Hertsgaard, *Hot: Living Through the Next Fifty Years on Earth* (Houghton Mifflin Harcourt, Boston MA 2011); see also the discussion of 'Scarcity, Conflict and Warfare' in D Nibert, 'The Fire Next Time: The Coming Cost of Capitalism, Animal Oppression and Environmental Ruin' (2012) 3/1 *Journal of Human Rights and the Environment* 141 at 155–8.

cannot ultimately be separated from what we call ‘the environment’.⁵⁴ Our radical dependence upon the materialities of the environment becomes particularly non-negotiable in the context of land and water disputes, and in our contemporary situation legal regimes, including the institutional machinery of human rights law, are increasingly required to face up to the implications of complex effects of globalization and pressures of climate change upon our interdependencies with the living world. We, as a species, understand almost as never before (yet continue to avoid the implications of) the radical continuities between our existence, our practices, the environment, and the violently uneven⁵⁵ global economic system now controlling our fates and deepening the crisis of both humanity and earth.

At present (and set against this background) there are a set of identifiable and growing tensions in the law concerning access to land, which have been characterized as being tensions *between* property and human rights – including those tensions introduced at important sites of civic interaction such as city centres where public values of access and inclusion are increasingly threatened by the commercial privatization of previously public spaces.⁵⁶ Responding to precisely this challenge, Gray and Gray⁵⁷ conceptualize property as a predominantly exclusory discourse that stands challenged by human rights to civil and political *inclusion* conceived of as a *counter-discourse*. This is indeed, a widely reflected characterization, long embraced, for example in common law jurisdictions beyond that of England and Wales, and reflected there in the on-going judicial negotiation of the relationship between the Human Rights Act 1998 and the traditional conception of property rights in land. In this context, the question is to what extent the more ‘open textured secular morality of the EHCR’ will ultimately be enabled to challenge traditional exclusory applications of property-reasoning.⁵⁸

What is really at stake in such situations, however, is not a conflict between human rights and property paradigms in any homogenous sense. The conflict is between an *exclusory construction* of property and an *inclusory construction* of human rights.

We have already seen that the exclusory modern notion of human rights (E/R) is intimately continuous with the violent social exclusions of property impulses identified by critical accounts (E/P). Can we align an inclusory construction of human rights (I/R) with an inclusory construction of property (I/P)? Can we, in other words, underline the ambivalence and contingency of property itself and do so for emancipatory and/or inclusory ends? Indeed, it seems that we can. Gray’s analysis implies rich scope

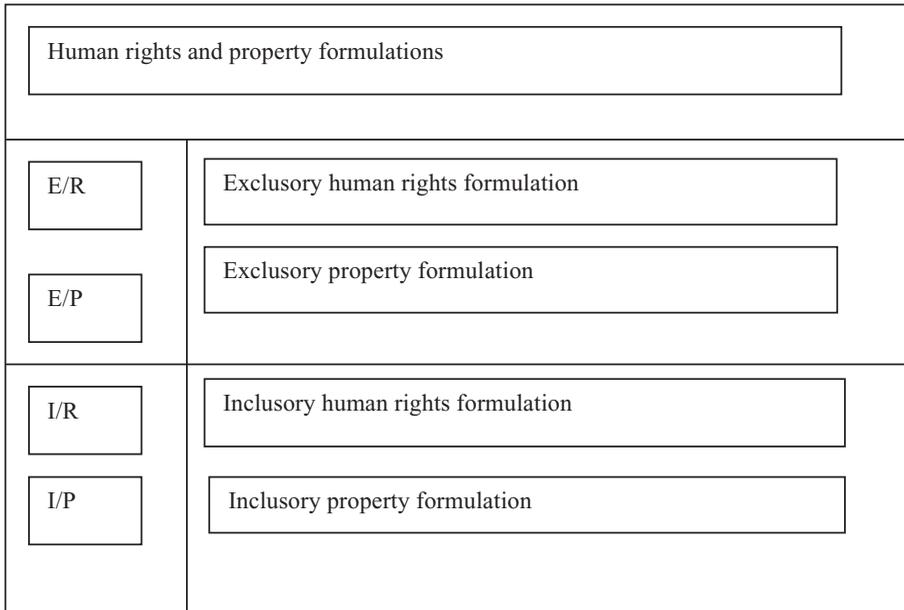
54. The term ‘environment’ is problematic, in so far as it indicates that which surrounds or, literally, spins around (‘envirer’ in the French) the ‘subject’: see A Phillipopoulos-Mihalopoulos (ed), *Law and Ecology: New Environmental Foundations* (Routledge, London 2011).

55. Radhakrishnan argues that the production of the increasingly asymmetric socio-material and juridical relations of globalization should be understood, not only as uneven, but ‘co-symptomatic’: ‘it is only on the basis of a theoretical ethic [based on the ‘symptomatic *immanetization* of unevenness’] ... that a young entrepreneurial billionaire can be persuaded to feel, perceive and understand his or her reality as an inhabitant symptom of global unevenness – as much of a symptom as the abject and voiceless poverty of a homeless being anywhere in the world. In other words, within the etiology as well as the pathology of the disease [of capitalism], both the billionaire with a plutocratic lifestyle and the instant-to-instant contingency of the homeless person are *co-symptomatic*’: R Radhakrishnan, *Theory in an Uneven World* (Blackwell, London 2003) at vii.

56. Gray and Gray (n 2).

57. Above (n 2) ‘Civil Rights’.

58. See K Gray and SF Gray, *Elements of Land Law* (Oxford University Press, Oxford 2005) at 130–40 for a discussion of this issue and the relevant case law.



Human Rights and Property Formulations

for a re-imagination of property in such terms. However, it is possible to go beyond Gray’s analysis to emphasize the idea of an I/P re-imagination of property as being fundamental to a renewed relationship between human rights and the environment by deploying an alternative ontology. We can, in short, and as will be indicated below, found I/P explicitly upon new ontological foundations – on an *inter-relational ontology of the human and environmental* which we can think of as placing *eco-humane* limits, as a normative matter, upon the exclusory interpretation and application of property rights and human rights *alike*. Such an approach unites human rights, property and environmental concerns in framework of commonality-in-vulnerability, enabling rights and property to function as key constructs for reaching ‘beyond’ to ‘worlds other’ in the search for an ecologically responsible, just and humane future.

4.2 Excludability and exclusion: separating the analytical from the ideological

Before we can fully appreciate the theoretical argument in favour of an I/P construct and then supplement that account with an alternative ontology, it is important to isolate the conceptually necessary element of ‘excludability’ in the property construct from its inappropriate extension in the forms of social exclusion associated with the modern notion of human rights and the environmentally destructive ideology implicated by it. We need, in other words, to draw a distinction between the social exclusions at stake in the property construct as deployed within the modern human rights paradigm and ‘excludability’⁵⁹ as the conceptual foundation necessary to

59. Gray discusses the conceptual significance of this concept in the provision of vital clues to the identification of the ‘propertiness’ of property in relation to land: Gray (n 6) at 268–92.

make sense of a 'property' claim at all.⁶⁰ Accordingly, I attempt to provide analytical clarification of the difference between *excludability* and *exclusion* in order to facilitate separating the conceptually necessary incidents of a property claim from a problematic discourse of exclusion and control at odds with countervailing, embodiment-centred, eco-responsive values.

First, it is important to emphasize the complexity of property. Property, like human rights, is not a monolithic concept and for present purposes, we will follow Harris and broadly define 'property' as a social and legal institution for organizing human relationships concerning land and other things and resources, both in terms of their allocation and use⁶¹ – a definition which reveals property to be a *characteristic human institution*. Indeed, Harris argues that while it is possible to imagine societies that have no property concept at all (not even common property),⁶² such societies are unknown in practice.⁶³ It appears to be the case, therefore, that *all* human societies have a social institution of property whether they are Western or Indigenous. However, it is also the case that in some societies the property concept does not encompass all things – for example, the Aboriginals of Australia provide a clear example of a society with a generally non-proprietary relationship with land. As Blackburn J suggests in *Milirrpum v Nabalco Pty Ltd*,⁶⁴ Aboriginals have 'a more cogent feeling of obligation to the land than of ownership of it', and that it is easier to say that 'the clan belongs to the land than that the land belongs to the clan'.⁶⁵ It seems, therefore, that while excludability is a necessary feature of a property relationship, and while all human societies have a social institution of property, excludability need not characterize every aspect of human social organization concerning things (such as land, water, or other elements of the living world).⁶⁶

Gray has provided an elegant theoretical account of excludability as the analytical foundation of property, focusing upon private property.⁶⁷ His work provides a very useful basis for linking property meaningfully to human rights, environmental concerns and a re-imagined relationship between property, inclusion and justice. Gray

60. See the extensive discussion of the conceptually necessary elements of a property institution in JW Harris, *Property and Justice* (Clarendon Press, Oxford 1996), especially his discussion of trespassory rules (which delineate Gray's 'excludability') and the ownership spectrum.

61. Harris (n 60) at 3.

62. Societies such as these would have no sense of 'excludability' as an aspect of social organization. Importantly, Harris emphasizes that societies without a concept of private property could not have a notion of common property. This is because concept of private property is logically prior to the notion of common property. Harris argues that without a concept of private property, common property as '*property*' makes no conceptual sense (n 60) at 15.

63. See Harris's chapter on 'Imaginary Societies' (n 60) at 15–22, together with his discussion on the ubiquity of property in the introduction to the book (and the references cited there to AI Hallowell, 'The Nature and Function of Property as a Social Institution' in AI Hallowell, *Culture and Experience* (University of Pennsylvania Press, Pennsylvania 1955).

64. (1971) FLR 141.

65. At 270ff. In that case, the lack of a concept of a right to exclude others was a decisive obstacle to the founding of a conventional common law property claim (272 ff). See the discussion of this case and native title generally in the context of considering 'equitable property' in traditional country in K Gray, 'Equitable Property' (1994) 47 *Current Legal Problems* 157 at 181–8.

66. Importantly, we should note that 'unpropertized' resources remain outside property, available for use and enjoyment by all: Gray (n 6) at 268.

67. *Ibid*, 252.

argues that a resource can only be 'propertized' if it is 'excludable' and that a resource is only 'excludable' if it is 'feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent in the resource'.⁶⁸ The notion of excludability is conceptually indispensable, 'import[ing] a hidden structure of rules which critically define the legal phenomenon of private property'.⁶⁹ However, a resource may be viewed as being non-excludable for physical, legal or moral reasons. Importantly, a resource cannot be propertized if it lacks the quality of excludability on any of these grounds.⁷⁰ We shall consider them briefly in turn.

Physical non-excludability 'arises where it is not possible or reasonably practicable to exclude strangers from access to the benefits of a particular resource in its existing form'.⁷¹ The essence of this claim is that no-one can claim property in a resource in respect of which it is impracticable to exercise consistent, long-term physical control over access. Gray uses the example of *Victoria Park Racing*,⁷² a case in which the plaintiff sought to prevent the defendant broadcasting races and starting prices for unauthorized off-course betting purposes using information gathered from the vantage point of a raised wooden platform erected on neighbouring land. The plaintiff's claim failed, among other reasons, because of his failure to prevent 'visual intrusion' onto his land. The contested resource (the 'spectacle') was deemed, at the time the case arose for determination at least, to be physically non-excludable.⁷³ Legal non-excludability concerns an analogous failure successfully to use legal means to protect a resource from strangers by deploying, for example, intellectual property rules or protective contractual terms.⁷⁴ If a claimant has failed to call into play the relevant legal trespassory rules,⁷⁵ he or she will have failed to protect his/her claim by delineating and asserting legal excludability.⁷⁶ Moral non-excludability, Gray argues, reveals the *moral limits* to property – and often concern values close to the heart of human rights discourse:

[C]laims of 'property' may sometimes be overridden by the need to attain or further more highly rated social goals ... It is no accident that the goals to which 'property' defers often relate to fundamental human freedoms. It is in the definition of moral non-excludables that the law of property most closely approaches the law of human rights ... Moral non-excludables are essentially concerned with the furtherance of constructive interaction, purposive dialogue and decent (or 'moral') communal living.⁷⁷

68. Ibid, 268.

69. Ibid, 269.

70. Ibid.

71. Ibid.

72. *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479.

73. Gray (n 6) at 270. Note also Gray's insistence that the test of physical excludability be applied with care, because it only applies to the property in its existing form. 'Ultimately', he suggests, 'most resources can be physically insulated from access by strangers – if only through vast expenditures of money or imagination', at 272.

74. 'The plaintiff who neglects to utilise relevant legal protection has failed, so to speak, to raise around the disputed resource the legal fences which were plainly available to him. He has failed to stake out his claim; he has failed in effect to propertise the resource': Gray (n 6) at 274.

75. See Harris (n 60) at 23–41 for the way in which trespassory rules form part of the minimum necessary structure of a property institution.

76. Gray (n 6) 274–80.

77. Gray (n 6) at 281.

It is in the notion of moral excludability that we can most clearly locate and negotiate the boundary between E/P and I/R, for it reflects a key interface, arguably, at which legal private property conceptualism comes into direct tension with countervailing values of inclusion, distributive justice, participatory norms and the needs of embodied human beings and the environment.

To the degree that it rests upon excludability, the liberal private property construct simply exhibits a conceptually necessary feature of any property claim – an analytical foundation equally indispensable to concepts of common property.⁷⁸ However, within the Western legal paradigm, excludability has often been translated, as we have seen, into an impulse towards a high degree of exclusory control linked historically and contemporaneously to a predictable and patterned set of social exclusions operative in law – including in human rights law. This much is clear from a wide range of critical accounts, as already mentioned, which underline the complexity and ambivalence of human rights. In particular, violent exclusions, socio-historically implicated by the ‘modern’ human rights project as delineated by Baxi and other post-colonial critics, now have important continuities with the exclusions of an ascendant neo-liberal discourse which continues to favour an exclusory property paradigm within an uneven market-driven global order,⁷⁹ with direct and deleterious effects upon human and animal populations and the health of ecosystems.

How then, might we re-imagine property as a construct fully sensitive to I/R values – or – even more importantly – as an I/P formulation?

4.3 Re-imagining property

It has already been suggested that both property and human rights should be understood to be *productively* ambivalent. If there are a set of exclusions in human rights and property that can be read as meaningfully continuous (E/R-E/P) in historical and ideological terms, it makes good sense (minimally for emancipatory political purposes) to re-imagine property as I/P and render it theoretically harmonious with the inclusory human rights impulses emerging in the ‘contemporary’ (I/R) notion of human rights.

Fortunately, reconceptualizing property as an inclusory notion is not a new idea though it stands, as Gray has suggested, in need of revitalization.⁸⁰ His analysis, moreover, implies that the conceptual resources for reformulating the dominant Western notion of property exist in the tradition of the West itself – thus allowing I/R proponents to apply a notionally ‘culturally internal’ form of critique to E/P. Gray reflects upon two theoretical examinations of the re-conceptualization of property which place a ‘central emphasis on the need to ensure access to certain human goods as a vital precondition of securing freedom, dignity and the flourishing of the human spirit’.⁸¹ The works in question are CB Macpherson’s *The Political Theory of Possessive Individualism*,⁸² and Charles Reich’s seminal article ‘The New Property’.⁸³ Reich’s argument supports the recognition of a ‘new property’, involving the application of

78. See (n 62) and (n 66).

79. See Radhakrishnan’s argument on this point (n 55).

80. Gray (n 65).

81. *Ibid.*, at 170.

82. CB Macpherson, *The Political Theory of Possessive Individualism: From Hobbes to Locke* (Clarendon Press, Oxford 1962).

83. C Reich, ‘The New Property’ (1964) 73 *Yale Law Journal* 733.

protections traditionally accorded to older property forms to modern entitlements such as welfare payments, pensions, salaries, licences, and subsidies, and crucially, environmental rights,⁸⁴ and does not require, as Harris argues, 'any expansion in the concept of property'.⁸⁵ Accordingly, we will focus upon Macpherson's re-imagining of property, because Reich's formulation offers less to the present analysis than Macpherson's more far-reaching argument.

Macpherson draws on the history of property to argue for a reform(ulation) of it. He argues that in the seventeenth century, certain key shifts in the conception of property took place, and that what happened, significantly, was *reductive* – encompassing a move from a richer, more relational conception of property towards a more impoverished, individualistic and possessive one. In this shift, MacPherson suggests, property became primarily a thing rather than a right – a reification of property accompanied, significantly, by the rise of a capitalist market economy and the related 'replacement of old limited rights in land and other valuable things by *virtually unlimited rights*'.⁸⁶ Secondly, Macpherson argues that the meaning of property was reduced to private property, a development with the effect of obscuring the previously important concept of common property to the point where it 'drop[ped] virtually out of sight'.⁸⁷ So complete, indeed, was this reductive conceptual movement that common property became (incorrectly) treated as 'a contradiction in terms'.⁸⁸ So, as Gray puts it, there was for Macpherson a problematic

tension between two opposed views of the insitutional function of property. On one view, property comprises essentially a right to exclude strangers from privately owned resources while, on an older and more expansive view, property had once consisted of a right *not to be excluded* from participation in the goods of life.⁸⁹

Drawing upon this older, more expansive view we can reasonably argue that this conception of property will have common ground with inclusory notions of social relationship, potentially sensitive, moreover, to concerns of distributive justice and environmental responsibility. We urgently need to capture a vivid, contemporary sense of the tension between opposed views of property – to emphasize the ambivalence of property – and to theorize this tension in the context of neoliberal globalization and the ineluctably material pressures of climate change. To the degree that property is conceived of as being exclusively E/P it will almost inevitably obscure important I/R considerations by treating them as *external* to the property right, or hide them behind E/R juridical constructions of entitlement. If history is any reliable guide, E/P-E/R interests will tend to prevail over I/R considerations. Macpherson's analysis provides a basis for challenging E/P with a discourse of rights of access, inclusion and participation as a characterization of *property itself*. In other words, his account offers us the foundation for an I/P formulation of property relations – one preserving excludability without endorsing problematic forms of social exclusion.

In the contemporary global context there is also great merit in elevating the ideas of common and communitarian property to a higher status in our consciousness. Such a

84. Gray (n 65) 169.

85. Harris (n 60) at 151.

86. CB Macpherson, *Property: Mainstream and Critical Positions* (Toronto University Press, Toronto 1978) at 7 (emphasis added).

87. *Ibid*, at 10.

88. *Ibid*.

89. Gray (n 65) at 167.

shift could serve a potentially important political and rhetorical role, redirecting conceptions of property (including private property) towards a more inclusive frame of social reference and turning the mind towards intrinsically *non-individualistic* conceptions of property relations. A re-emphasis on common property could, for example, provide an important conceptual mechanism for the curtailment of over-extended exclusory claims by asserting, in effect, the *limits* of private property in the face of other important interests but crucially, by deploying an *alternative property concept*. This need not necessitate the defeat of private property claims and relations, but could usefully re-contextualize and nuance them. An emphasis on the ‘commons’, for example, can be used as a powerful counter-commodification strategy to human rights arguments in the context of natural resources disputes in order to resist commodity-based property impulses.⁹⁰ Such strategies need not obscure conceptually necessary aspects of excludability in the boundary function of property. They do, however, openly emphasize the possibility and desirability of having privatization and dispossession ‘no-go’ zones – even *within* property relations.

Harris argues that Macpherson’s strategy of re-imagining property and deploying it as a label for certain aspirational inclusory rights is mistaken.⁹¹ Clearly, this is an important objection for the current argument to face. For Harris, despite the apparent rhetorical advantage gained by the ‘prestige’ accorded to ‘property rights’, the strategy is ‘wholly implausible’ because, in modern consciousness, the rhetoric of ‘human rights’ has more prestige than property.⁹² While it may be true that the rhetoric of human rights has more prestige in contemporary consciousness than property, human rights discourse, as we have seen, is profoundly ambivalent in its implications. One significant strand of it is intimately associated with the historically absolutist E/P conception of property and inhospitable to I/R claims. Harris is therefore mistaken to criticize Macpherson on the grounds of a misplaced rhetorical strategy as if human rights were straightforwardly benign in their rhetorical dominance and prestige. E/P is so foundational to E/R (and so utterly central to the contemporary materialities of neoliberal globalization, corporate human rights colonization and myriad forms of commodification, exploitation and control associated with widespread environmental degradation and rampant forms of human oppression⁹³) that its role as property ideology needs to be made explicit and counteracted – not by I/R alone – but by I/P. Property, in other words, needs to be strategically reformulated – even if predominantly rhetorically – *as property*.

Gray and Gray have argued that ‘property’ is a ‘spectrum concept’⁹⁴ sensitive to the allocation of socially approved user power represented by someone’s ‘property’ in a resource. This, crucially, and in the final analysis, depends ‘upon collective

90. For example, see K Bakker, ‘The “Commons” Versus “Commodity”’: Alter-globalization, Anti-privatization and the Human Right to Water in the Global South’ (2007) 39 *Antipode* 430. See also the work being done on commons and rights-based ecological governance for an even more radical extrapolation of the logic of common property conceptions being pioneered by Burns H Weston and David Bollier: <<http://www.commonslawproject.org/>> (date of last access 20 June 2012).

91. JW Harris, ‘Is Property a Human Right?’ in J McLean (ed), *Property and the Constitution* (Hart Publishing, Oxford 1999).

92. Addressing CB Macpherson, ‘Capitalism, and the Changing Concept of Property’ in E Kamenka and RS Neale (eds), *Feudalism, Capitalism and Beyond* (Australian National University Press, Canberra 1975) at 119–22 and Macpherson (n 86), cited by Harris (91) at 73.

93. As argued above.

94. Gray and Gray, ‘Private Property’ (n 2) at 13.

perceptions of the social permissibility or public merit attributable to various kinds of competing user of the resource in question' implying that 'a deep sub-text of 'propriety' has always pervaded the social and legal definition of 'property'.⁹⁵ This brings us almost full-circle to considerations in relation to the question of moral excludability – the point at which property notions most closely approach human rights – but it also represents a site at which cross-currents of inclusion and exclusion could shift their balance in relation to each other and to *both* human rights and property paradigms in a newly responsibility-framed I/P conception of property sensitive to questions of embodied need and distributive justice. Let us move on from our predominantly land-based considerations thus far and consider the implications of such an I/P re-imagination (and the need for it) through the lens of a very brief but salutary consideration of a rather extreme situation concerning the right to water.

4.4 A brief illustration: the right to water

Water offers a highly symbolic, strategically important and instructive case study of the tensions noted in this article⁹⁶ and it is set to become the most symbolic and contested battleground between E/P-E/R and I/R. Certainly, it appears to present a clear case of a resource ripe for an I/P re-imagination of the property relations clustered around it as it is a most salient point at which E/P-E/R formulations encounter I/R-I/P resistive energies. Contestation over the right to water can be conceptualized as being the ultimate 'frontier issue' between rights and property paradigms. It forms perhaps the most decisive existing interface between the logic of economic rationality in a globalized world economy and a logic based on embodiment-centred, countervailing impulses as a 'rhetorically and symbolically powerful... threshold to defend against ever-encroaching commodification and the spread of economic rationality'.⁹⁷ Indeed, many regard water as being the site of an 'intuitive "last bastion" against privatization',⁹⁸ and its socially exclusive implications. Water is also especially relevant in the context of neo-liberal globalization and E/P property absolutism, for it is at the international level that the controversy over private sector involvement in water service delivery reaches its pitch of fiercest intensity. It provides a justice-sensitive lens through which to refract the underlying issues, because in the globalized context, the closely related problem of north-south distributional justice takes political centre-stage – as does the vexing question of climate injustice. Morgan comments that water serves to draw attention to existing market inequalities between the global south and north in a particularly focused way.⁹⁹ In her view, the disputation over water is ultimately linked to the wider issue of placing appropriate limits on capitalism itself.¹⁰⁰

95. Ibid.

96. Morgan argues that water has a particular salience for public discourse: B Morgan, 'Emerging Global Water Welfarism: Access to Water, Unruly Consumers and Transnational Governance' in F Trentmann and J Brewer, *Consumer Cultures, Global Perspectives* (Berg Press, Oxford and New York 2006) at 383. Available at <<http://seis.bris.ac.uk/~lwbmm/documents/Trentmann%20and%20Brewer%20book%20chapter%202006.pdf>> date of last access 19 June 2012.

97. B Morgan, 'Water: Frontier Markets and Cosmopolitan Activism' (2004) 27 *Soundings: A Journal of Politics and Culture* 10 at 15.

98. Ibid, at 10.

99. Ibid, at 11.

100. Ibid, at 18.

It is salutary to reflect upon the fact that according to Morgan, just three transnational corporations effectively dominate the entire global water market, providing water services to 300 million individuals in over 200 countries and reflecting the emergence of an increasingly integrated global water regime in which public aid supplements private sector investment by the dominant global actors of our age, multinational corporations.¹⁰¹

Arguably, no case is more instructive or symbolic than the notorious *Bechtel v Bolivia* case,¹⁰² or the ‘Water War’ as it became known.¹⁰³ In the late 1990s, the World Bank threatened to withhold debt relief and other development assistance so that the government of Bolivia was effectively forced to privatize the public water system of Cochabamba, the country’s third-largest city.¹⁰⁴ There was only one bidder for the contract, International Water, a consortium which included the Bechtel Corporation, a US based transnational corporation.¹⁰⁵ The consortium was granted a 40 year lease to take over the control of Cochabamba’s water supply through a subsidiary, Aguas del Tunari.¹⁰⁶ Within a matter of weeks, the subsidiary imposed water rate rises of more than 50 per cent on average which forced families living on the minimum wage to face the prospect of spending up to 25 per cent of their monthly income on water alone.¹⁰⁷ Moreover, the legal framework negotiated had the effect of making the collection of rainwater subject to a paid permit system – effectively making the unpermitted collection of rainwater illegal.¹⁰⁸ Morgan argues that this particular outcome can perhaps best be understood as stemming from the interaction between two competing frameworks, one reflecting the idea that rainwater is quintessentially in the commons in an unmediated relationship with human beings, and the other, reflecting the idea that water is transmuted into a service susceptible to regulation by a technical infrastructure. Understood in this light, Morgan argues, from the point of view of the service provider, ‘requiring a permit for rainwater collection may seem a normal part of an exclusivity clause in the regulatory framework’.¹⁰⁹ This outcome can also be read as a stark example of the outworking of the logic of the E/P framework. Critical concerns over the exclusory effects of an E/P formulation find their ultimate epitome in this starkly

101. *Ibid.*, at 11. The three companies are Thames Water, Suez and Vivendi. While 85 per cent of the world’s population is not supplied by these providers, their operations are significant and part of a rapidly consolidating, and contested, paradigm for water services delivery.

102. Eventually settled on a ‘no pay’ basis after the International Centre for the Settlement of Investment Disputes (ICSID) held that it had jurisdiction to hear the merits of *Aguas Del Tunari S.A. v Republic of Bolivia*: ICSID Case No ARB/02/3 Decision on Respondent’s Objections to Jurisdiction, 21 October 21 2005.

103. For an in-depth account of the case and its implications, see A de Gramont, ‘After the Water War: The Battle for Jurisdiction in *Aguas Del Tunari S.A. v Republic of Bolivia*’ (2006) 3 *Transnational Dispute Management* available at <http://www.crowell.com/documents/After-the-Water-War_The-Battle-for-Jurisdiction-in-Aguas-del-Tunari_v_Bolivia.pdf> date of last access 19 June 2012). For an analysis addressing the complex problems of jurisdictional arbitrage see J Dine, ‘Jurisdictional Arbitrage by Multinational Companies: A National Law Solution?’ (2012) 3/1 *Journal of Human Rights and the Environment* 44.

104. S Anderson and S Grusky, ‘Challenging Corporate Investor Rule: How the World Bank’s Investment Court, Free Trade Agreements, and Bilateral Investment Treaties have Unleashed a New Era of Corporate Power and What To Do About It’, *Food and Water Watch*, April 2007.

105. Morgan (n 97) at 14.

106. T Johnson, ‘“Water War”: A Test-Case on Trade Transparency’, *Miami Herald*, 13 October 2002, cited by Anderson and Grusky (n 104).

107. Johnson (n 106).

108. Morgan (n 97) at 14.

109. *Ibid.*, at 15.

illustrative case which exposes a logic antithetical to human embodied survival and flourishing, brutally exclusive in its implications and profoundly at odds with any conception of property as a claim for access to the basic goods of life. It is radically anti-I/P in that sense. Indeed, the privatization of water has in some cases led to outbreaks of disease and in widespread deaths,¹¹⁰ an outcome exposing the ultimately macro-political ratiocination animating E/P-E/R paradigms.

The ambivalence of both property and human rights take on particularly destructive and hyper-extended implications in the context of neo-liberal imperatives. To the extent that they are colonized by neo-liberal closures (and the evidence is widespread concerning the savage realities of this)¹¹¹ human rights and property become virtually synonymous with a commercial thanato-logic¹¹² in which the pursuit of profit fully obscures the potential juridico-ethical implications of human and environmental vulnerability while simultaneously entrenching and exacerbating it.¹¹³ One possible way among many of 'reading' the mass street protests that erupted against the water corporation in Bolivia is as a direct clash between the cold, untrammelled economic logic of E/P and a countervailing response emerging from a visceral, 'felt' ontology of embodied need and the related intuition that water, particularly rainwater, should either be morally non-excludable from propertization or governed by an I/P notion of common property. The clarity of this fundamental underlying conflict between commercial logic and I/R-I/P energy remains undiminished by the fact that the discursive dichotomy between perceptions of water as a 'commodity' and water as a basic need is by no means straightforward in the context of the emergent regulatory framework of global water welfarism, as Morgan's subtle and sophisticated work reveals. In the context of regulatory frameworks the underlying conflicts between the logics of commodification and human rights impulses becomes incredibly complex, for among other things, they are mediated by shifting assumptions, practices of routinization, and a dense network of legislative and regulatory rules and practices that make analysis truly challenging.¹¹⁴ Despite this, it is nonetheless abundantly clear that the intuitive bottom-line remains a rather intractable clash reflecting a powerful disjunction between E/R-E/P and I/R-I/P.

5 CONCLUDING REFLECTIONS – TOWARDS NEW ONTOLOGICAL FOUNDATIONS

An I/P reformulation sensitive to embodied need is now vital in the search for 'worlds other', particularly in the context of vulnerability-deepening globalization¹¹⁵ and climate

110. See P Bond and J Dugard, 'Water, Human Rights and Social Conflict: South African Experiences' (2007) 1 *Law, Social Justice and Global Development Journal* <http://go.warwick.ac.uk/elj/lgd/2008_1/bond_dugard/> date of last access 19 June 2012. The authors itemize the lethal effects of the privatization or commercialization of water in South Africa – see pp. 7–8.

111. Baxi (n 1); Westra (n 16); Shiva (n 1); Nibert (n 35).

112. 'Thanato-' is a combining form meaning 'death', and the term 'thanato-logic' implies the inexorability of the violence and morbidity of the more extreme imperatives of neo-liberalism.

113. P Kirby, *Vulnerability and Violence: The Impact of Globalisation* (Ann Arbor Press, London 2006).

114. For a sophisticated account of these complexities, see B Morgan, 'The Regulatory Face of the Human Right to Water' (2004) 15 *Journal of Water Law* 179–87.

115. Kirby (n 113).

change pressures. An I/P concept, however, might fail to do full justice to the nexus between human rights and the environment unless it is based upon a re-imagined ontology.

Before delineating the outline contours of this alternate ontology, however, it is helpful to re-trace some argumentative steps. It is likely that the relationship between human rights and property paradigms is critically important to the relationship between human rights and the environment. Human rights, as we have seen, are far from straightforward in their relationship with property, and it has been argued here that our understanding of human rights and property, if it is to be adequate to the complex challenges facing us must take full account of the ambivalence of human rights, and of property itself. We have noted dense linkages and continuities between E/P and E/R in the modern notion of human rights. We have traced the conflict between the logics of exclusion (implicated in private property discourse, privatization, corporatization and commodification) and inclusory energies and impulses emerging from embodiment-centred reactions to exclusion. We have noted that these can be understood, and often are, in E/P-E/R v I/R terms and that it is possible to think of I/R as forming a *limit* on the property concept (as an instance of moral excludability). Another way of conceptualizing this relationship, however, is to argue, as has been done here, that property rights themselves are nuanced (ambivalent, even) and that E/P can be directly countered by a notion of property constituted in I/P terms: property as a radical claim for inclusion and access to the basic goods of life itself.

This claim is both empowering and emancipatory, but it can, and should, be taken further. I/P-I/R could and should be enabled to open into an eco-responsible breadth of vision based upon transformed or re-imagined ontological foundations. Sitting at the heart of all these conflicts and tensions lies the fundamental question of ‘who “we” are’.¹¹⁶ Are we the disembodied, abstract selves whose humanity is constituted through the fantasy of the self-referential, appropriative subject acting upon the world as ‘object’? Or are we visceral, embodied beings whose thinking animality is co-formed in living intimacies with each other and our nearest neighbours (whether human, non-human animal or elements of a living order to which we owe our very life)? New ontological foundations fundamental to a truly transformative re-imagination of property would need to embrace the richest possible set of implications arising from our embodied, material vulnerability – the blood, bone and affective foundation of ‘felt’ resistance to injustice. A core implication of our embodied materiality is that we exist in the middle (but not the centre)¹¹⁷ of a living field which forms the inescapable, material location within which our corporeality acts and is acted upon by a web of relations, forces and inter-relational flows. We and the *eco-field* share, in short, a fundamental, inescapably inter-relational existence marked by a radical ontic vulnerability carrying profound ethico-juridical implications.¹¹⁸ We humans share with other living beings and systems a mutual, inter-dependent affectability which could be embraced as the radix of an *eco-humane* subjectivity, which when proffered as an ontological

116. A fundamental question exercising philosopher Lorraine Code’s exploration of ecological subjectivity.

117. A Philippopoulos-Mihalopoulos, ‘...the Sound of a Breaking String’: Critical Environmental Law and Ontological Vulnerability’ (2011) 2/1 Journal of Human Rights and the Environment 5.

118. This is the major premise, arguably, underlying L Westra, K Bosselmann and R Westra, *Reconciling Human Existence with Ecological Integrity* (Earthscan, London 2008).

foundation for I/P could transform it into a radical inclusory conception of property carrying a deep sub-text of vulnerability-responsive, eco-humane responsibility, obligation and eco-social propriety. In this sense, the deep sub-text which has always pervaded property¹¹⁹ takes on newly contemporary sensitivities. I/P becomes, in this light, an ecologically-tempered conception responsive to considerations of distributive and environmental justice.

Our relationships with our 'environments' are never neutral, for we are unavoidably co-constituted by and with the 'landscapes' or 'spaces' that we inhabit, not only in material, but in social and discursive dimensions.¹²⁰ Serious reflection on human rights understood on the basis of their ambivalence in relation to power, and in productive conversation with an eco-humane ontology will always inexorably lead to reflection on the environment and the relationship between its constitution and questions of inter- and intra-species justice. The environment itself could (and should) increasingly be understood as an inescapable element of our very existence as human selves. We need to grasp, both imaginatively and juridically, the ontological reality of our inter-corporeal enfoldment with (to borrow Merleau-Ponty's language)¹²¹ the living 'flesh' of the world. As Primavesi puts it,

[t]he environment is in immediate relation to me: there is no gap between us. In its totality (viewed as a microcosm or as a macrocosm) it mediates life and death, health and danger, joy and despair, imagery and companionship. ... *Thinking of it in this way the image of the person-in-the-environment is dissolved by a relational, total-field image.* The relationships between me and any other being are such that they belong to the basic definition of what we are. They are an essential component of what I am in myself.¹²²

MacPherson's call for a re-imagination of the Western property paradigm cannot be realized in a manner adequate to the twenty-first century situation without transforming the ontology supporting both rights and property in their current dominant Anglo-American formulations. We need, urgently, a new sense of *self and world* if I/P is to fulfil its rich promise at the nexus between human rights and the environment. Property can be re-imagined. So, however, must *we*.

119. Gray and Gray (n 2) 'Private Property' at 13.

120. 'What space is depends on who is experiencing it and how. Spatial experience is not innocent and neutral, but invested with power relating to age, gender, social position and relationships with others. Because space is differentially understood and experienced it forms a contradictory and conflict-ridden medium through which individuals act and are acted upon.' C Tilley, *A Phenomenology of Landscape: Places, Paths and Monuments* (Berg, Oxford 1994) at 11.

121. M Merleau-Ponty, *The Phenomenology of Perception* (C Smith (trans.) (Routledge Classics, London 2002).

122. A Primavesi, 'Faith in Creation' in A Race and R Williamson (eds), *True To This Earth: Global Challenges and Transforming Faith* (Oneword Publications, Oxford 1995), 101–2 (emphasis added).