THE IDEA OF PROPERTY
AN INTRODUCTORY EMPIRICAL ASSESSMENT

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The idea of property refers to the social imaginary of property, the informal or everyday ideas that people hold when they use or interact with resources, things, or items of social wealth. This article advances scholarship in property theory by studying this idea which, we argue, constitutes a set of norms and practices and provides insight into many pressing social and political problems. To study the idea of property, we employ an ethnographic mode of research, entering the social domain to conduct semi-structured interviews with a range of people living in Adelaide. This research reveals that people perceive that property provides them with choice and freedom over the use and allocation of scarce resources. Thus, choice (rather than responsibility or duties) represents the dominant understanding of property held by the respondents interviewed in this study.

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I. INTRODUCTION

The popular 1997 Australian film *The Castle* depicts the Kerrigans, a family forced to fight the compulsory acquisition of their home to allow for expansion of a local airport. Ostensibly about familial bonds and community, the film also provides a stark depiction of the place of property in the human psyche. For

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many people, their home is more than an exchangeable commodity; it is a place of memories to which are felt a great sense of attachment and belonging.\(^2\)

Yet the Kerrigan’s fight is beyond the comprehension of real property law and the officials who represent it with whom they interact. The Australian Constitution seemingly empowers the government to acquire land for its exchangeable value, not for its value to the owner.\(^3\) For the officials portrayed in the movie, that is the end of the matter. Moreover, the values that Daryl Kerrigan, the family patriarch, articulates cannot be reduced to monetary sums and are thus rendered unreal or unimportant. In one memorable scene, Kerrigan is asked by a judge whether his appeal is really about the amount of compensation his family has been offered. Thinking outside the strict bounds of positive law, Kerrigan responds:

They’re judging a place by what it looks like, if it doesn’t have a pool, a classy front, or a big garden it’s not worth saving. But it’s not a house, it’s a home. People who love each other. Memories. Family. But that doesn’t mean as much as a big . . . driveway.\(^4\)

In this scene, the Kerrigan’s idea of property collides head-on with property as found in the positive law. The law cannot accommodate his highly physical and familial sense of property and the narrative force of the film is propelled by this mutual lack of understanding. The film also reveals that thinking like a lawyer requires what Nicole Graham calls “a suspension of belief in physical reality, a denial of experience.”\(^5\) The law facilitates a culture of property articulated in terms of abstract symbols, certificates of title, conflicting interests rather than places, homes and biography.\(^6\)

*The Castle* dramatizes the idea of property in a humorous


\(^3\) *Constitution of Australia* s. 51(xxxi); Nicole Graham, *Lawscape: Property, Environment, Law* 11 (2010).

\(^4\) As cited in Graham, *supra* note 3, at 11.

\(^5\) *Id.*

\(^6\) *Id.*
way. But it turns out that life really does imitate art; one frequently finds that fictionalized drama played out in the real world. The Australian Federal Court decision in French v. Gray, for instance, involved a challenge to government action which not only captured public attention, but also resulted in significant economic, social and psychological consequences for the parties involved. Between 2005 and 2013, Graham French fought a federal government attempt to acquire compulsorily his farm in South Australia. Graham French is a real-life Daryl Kerrigan. While French won the case, as did Kerrigan, the former “lamented the time and money lost in the long process.”

And sometimes the drama produces tragic consequences. In 2014 Glendon Turner, an environmental officer for the NSW government, was killed by a farmer near the wheat belt town of Moree. When, shortly afterward, Ian Turnbull was charged with Turner’s murder, it emerged that “Turnbull had been involved in a legal dispute with the [NSW] Office of Environment and Heritage over illegal land clearing” in the Croppa Creek area. Because they limit the individual freedom of landowners to make choices about “their” land, “vegetation laws have been controversial in several Australian States for over a decade.” In commenting on the shooting, Moree Mayor Katrina Humphries said “I am not overly surprised that something dreadful like this has happened.”

These examples of the fictional Daryl Kerrigan and the real-world Graham French and Ian Turnbull reveal the importance of property to its holder. We know that property is at the center of each case, but the concept and theorizing about it fail to assist us in comprehending the events. The fact that property rights are

10. Id.
11. Id.
not absolute and that they exist alongside competing interests is not relevant. To understand the motivation of Daryl Kerrigan, or Graham French, or Ian Turnbull, we need to examine and understand what seemed to be operating in the minds of the protagonists. In short, each example prompts a question: why might anyone in Daryl Kerrigan’s, or Graham French’s, or in Ian Turnbull’s position react as they did, challenging the government’s attempt to take or otherwise deprive them of their land, their property?

Our answer is that underlying each challenge is a deeply personal yet widely held belief that governments, as Graham French said “shouldn’t be able to rip people’s lands off them for no good reason . . . it’s just wrong.” This belief, that property means that something cannot be taken by others, and perhaps especially by others, motivates a person to say about one’s things that they are “mine, I paid for them, they belong to me, they’re for my use” and so they “can’t be taken from me” (Participant C01_P07, Pilot Study). Put simply, ‘[xx] is my property’ or ‘this is mine’. Or, even more simply, it can be summed up by this advertisement by a South Australian State government home financing organization:

![Advertisement Image]

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12. Shepherd, supra note 8.

13. Subsequent references to participants in the Pilot Study will contain only the cohort and participant numbers, e.g. C01_P07, and will be cited in-text.
Based upon earlier work,\textsuperscript{14} we call the understanding captured by these various phrases the ‘idea of property’, and we argue that it is the primary way people understand what property is.

The purpose of this article is to advance property theory by studying the idea of property. As we will discuss, the idea of property has several different names in the legal literature. However, each approach is united by a common concern for the everyday beliefs that people hold and use to negotiate their own rules and devise their own norms and practices. These informal ideas, we argue, constitute a form of law and provide insight into many pressing social and political problems.

To unpack the idea of property, the article contains six parts. Part II describes how an elite group of people, theorists, understand the concept of property. This theory, which is grounded predominantly in philosophy and political science, is abstract and conceptual in nature. Influenced by liberal/neoliberal theory, it also focuses on justifications for property and tends to ignore the ways real people conceptualize or understand property. Part III explains why it is important to understand the disjuncture between elite theorizing about and the idea of property. Drawing on legal scholars such as Eugen Ehrlich and Duncan Kennedy we also theorize the idea of property as a kind of unofficial law which arises from people’s everyday perspectives and social interactions. Part IV describes the methodology we have developed so as to undertake our own empirical research into the idea of property. Part V presents the findings of our research. Part VI concludes.

II. “ELITE”

A disjuncture exists between how theorists and the great majority of people understand what property is. In order to outline that difference, we consider how ‘elite’ theorists understand property. That allows us to establish a definition of the idea of property which, building upon earlier work,\textsuperscript{15} we


\textsuperscript{15} Id. at 548.
argue, is how real people understand property.

For most of the twentieth century and into the twenty-first, liberal/neo-liberal thought dominates all theorizing about the content of the concept of property.\textsuperscript{16} Born of classical liberal thought, and nurtured by a disparate neo-liberal justificatory movement over the last fifty years,\textsuperscript{17} the liberal/neo-liberal theory posits individualism and absolutism as lying at the core of whatever property is: a bundle of rights, the three most important of which are use, exclusivity of use and alienability of goods and resources. This has been called the ‘liberal triad’ of rights, and it forms the core of what property is taken to mean in its modern, liberal/neo-liberal form.\textsuperscript{18}

Theorists who subscribe to the liberal/neo-liberal stance use three, often overlapping, claims to support the individualist and absolutist liberal triad of rights. Thus, there are those who argue that the liberal triad ought to achieve justice and liberty\textsuperscript{19} or protect individual rights.\textsuperscript{20} In contrast to liberty, justice and rights are those who use utilitarian or consequentialist approaches to compare the costs and benefits of different definitions and allocations of rights and entitlements.\textsuperscript{21} Finally, social relations theorists study the way that property structures social relations and access to resources.\textsuperscript{22}

Liberal/neo-liberal thought not only provides the content of property, it also justifies its existence, offering six different

\begin{itemize}
\item[17.] See David Harvey, A Brief History of Neoliberalism 20 (2007); see also Daniel Steedman Jones, Masters of the Universe: Hayek, Friedman, and the Birth of Neoliberal Politics (2012).
\item[18.] See Margaret Jane Radin, Reinterpreting Property 121 (1993).
\item[19.] See Ronald Dworkin, Taking Rights Seriously (1978); see also J.W. Harris, Property and Justice 303 (1996).
\item[20.] See Waldron, supra note 16, at 4.
\item[22.] See Joseph William Singer, Entitlement: The Paradoxes of Property 3 (2000).
\end{itemize}
approaches: first possession; labor/desert; personality and human flourishing; efficiency of allocation; justified expectations; and distributive justice. In each case, the invocation of property as a means of allocating resources, be it for justice, utilitarian or social reasons, is justified on the basis of the justificatory touchstone, be it possession, labor, human flourishing, and so forth.

Above all, though, the overarching liberal/neo-liberal thought which supports the existence of property, and especially private property, characterizes property as individualist in one important sense: that it promote freedom by allowing its holder to suit one’s own preferences, act in a self-seeking way, or “set the agenda” for control and use of the thing so held. And it is said that property is absolutist in the sense that, once it exists, those who subscribe to this view argue against any state-imposed limitations or restrictions placed upon the freedom it confers. This view is reflected in judicial rhetoric. The United States Supreme Court’s decision in Kelo v. City of New London, or the High Court of Australia’s decision in JT International SA v. Commonwealth of Australia; British American Tobacco Australasia Limited v. The Commonwealth, for example, are recent examples in a long line of such cases and they are representative of the judicial rhetoric in other jurisdictions, all of which adopts a liberal/neo-liberal theory.

Thus, in purely theoretical terms, the liberal/neo-liberal

25. See G.W.F. Hegel, Elements of the Philosophy of Right (1991); see also Radin, supra note 18, at 1.
26. See Garrett Hardin, The Tragedy of the Commons, 162 Sci. 1243, 1245 (1968); see also Posner, supra note 21, at 529.
27. See Bentham, supra note 21, at 41; see also Singer, supra note 22, at 210–211.
28. See Waldron, supra note 16, at 5; see also Singer, supra note 22, at 209.
project, when applied to property, protects individual freedom and self-seeking choice. By choice we mean that when a person is said to have property in a given resource, what they really have is a set or a bundle of rights, or choices, created, conferred, and backed by the state in cases of dispute. Thus, property is the creation, conferral, protection, and regulation of individual choice in relation to the control, use and disposition of any resource capable of forming the subject-matter of property, whether it be tangible or intangible.

Yet it is doubtful that in the actual operation of any real-world legal system a society has ever truly deployed a pure liberal/neo-liberal theory of property. The reason for this is that the liberal/neo-liberal individual does not live alone. Rather, we live in a web of social relations and so our choices affect others. As such, some theorists explain, most property systems treat regulation, and so limitation upon the freedom of action of the individual, not only as necessary, but also as inherent to a functioning system of property. Without state-imposed regulation, property would destroy itself through unfettered exercises of the freedom seemingly secured by it; thus, ultimately, property would destroy the very freedom it was said to promote.

All of this theorizing, though, remains the preserve of a small intellectual elite, the work of whom has, for the vast majority of people, very little resonance in what it means to say “this is mine” and what it allows a person to do with a thing if they can say that. Charles Taylor has developed the concept of the “social imaginary” to describe how ordinary people interact with the social world around them through common understandings of concepts about how that world works. Thus, theorists work on theories, writing largely for other theorists, while the person in the street carries with them the social imaginary in order to

34. SINGER, supra note 22, at 36.
navigate their daily activities.\textsuperscript{36}

Importantly, the relationship between theory and social imaginary is limited. Liberal/neo-liberal theories expounded by elite theorists may have little resonance with the person in the street’s understanding of what property means for them; but the notion of choice does. And that brings us back to the idea of property. While property theory can tell us much about the content of what the concept of property means in terms of liberal/neo-liberal thinking, what it tells us nothing about is the way people who are said to have property think that means. In other words, what do the Daryl Kerrigans, Graham Frenches, and Ian Turnbuls of the world think that it means to say they have property in their house, their land, or whatever it might be? Property theory tells us nothing about that. The idea of property does. Or, to put it another way, using Taylor’s terminology, property theories are the work of elite theorists, while the idea of property is the social imaginary of property.

III. “COMMON”

A. ‘Idea’

Theories of property mean little if what we are trying to do is understand why people do what they do with things said to be the subject of their property. In other words, no theory of property tells us what a person actually understands property to mean when they hold a thing subject to it and exercise a self-seeking choice in furtherance of it. Rather, if we want to understand why someone did something that may be harmful to the community, to the environment, etc., using as their defense ‘it is mine, so I’ll do with it as I please,’ then we need to know something about what the real, flesh and blood person in the street understands property to mean for that person when deciding what to do with things held by them pursuant to the property conferred upon them by the state. In other words, it brings us back to Daryl Kerrigan, or Graham French, or Ian Turnbull. What were they thinking when they acted as they did in respect of ‘their own’? If property, as a matter of theory, is self-seeking or agenda setting

\textsuperscript{36} \textit{Id.}
choice, then why a person chooses to do one thing and not another with a thing is a matter of the idea of property. The idea of property runs deep in the human psyche, and that tells us something about how real world, flesh and blood people actually make choices about the things said to be ‘theirs’.

The idea can be traced in nascent form to the work of Rousseau, if not earlier to Locke and Hobbes. More recently, Laura Underkuffler writes: “From our earliest moments of childhood, we feel the urge to assert ourselves through the language of possession against the real or imagined predations of others.” And the scholarly literature reveals glimpses of it in, for example, what Jon L. Pierce calls “psychological ownership”; or Geir Stenseth’s “psychology of property”; Burns H. Weston and David Bollier refer to “vernacular law”; and Aboriginal scholar Irene Watson has identified “raw law”. While discrete differences exist in each of these approaches they are united by a common concern for the informal, everyday beliefs that people hold and use to negotiate their own rules and devise their own norms and practices. These informal beliefs about property constitute an undeniable form of law and represent “the most important and continuous normative experience” for individuals. This is the ‘idea of property’ first identified in Babie’s earlier work.

44. W. Michael Reisman, Law in Brief Encounters 4 (Yale Univ. ed., 1999).
45. Babie (2010), supra note 14, at 548.
More broadly, one finds a growing body of theoretical research in other disciplines on what is called the “psychology of property”.46 The early progenitors were Leon Litwinski47 and Lita Furby,48 who argued that there is a “psychology of mine” that is projected onto material objects. Others have been interested in the possessive and individualizing tendencies of property,49 with some offering genetic explanations for such psychological states,50 while others argue that they are the product of social practices.51 Still other theorists working with the conceptual framework of socio-biology combine both biological and social explanations to account for the tendencies toward possessiveness in property relations.52 Alongside this theoretical research one finds limited qualitative evidence for the psychology of property,53 which explores popular expectations about the circumstances under which government should be permitted to take property from a private owner54 or regulate property rights for environmental protection.55

50. Caroline Frear Burk, The Collecting Instinct, 7 PEDAGOGICAL SEMINARY 179, 205 (1900).
53. Pierce, supra note 39, at 104; Stenseth, supra note 40; Metcalf, supra note 46.
In Babie’s work, the idea of property therefore resolves itself into a rather simple question: what do people mean when they defend an action taken in respect of something said to be their property with ‘it is mine, so I'll do with it as I please’? We hypothesize here, based on the limited available research in the area, that it is *individualist/absolutist*, not in the liberal/neo-liberal theoretical sense, but in the sense of the psychology of what the person in the street thinks it means to say ‘I have property’, or as expressed by a participant in our pilot study, to which we turn in Parts IV and V: “Those things are mine; I paid for them, they belong to me, they're for my use.” (C01_P07).

Quite apart from theory, from the perspective of a person making a choice about their ‘stuff’, we posit, it is done not on the basis of any legally imposed regulation, but on the basis of what that person *thinks* property means and what choices that person *thinks* it offers to them in a given circumstance. The idea of property, then, more closely approximates than does any real-world system of property Blackstone’s familiar aphorism that property is ‘that sole and despotic dominion over a thing’. Or, more colloquially, we argue that the idea of property is typified by the phrase ‘a man’s home is his castle’ and that that idea is what leads a person to think, as a matter of psychology, that they may do with their ‘stuff’ whatever they might choose with no regard for others or for the environment.

The idea of property is no elite theory; it is no sterile academic issue. Serious challenges facing humanity emerge from competing understandings of what property means—these include, but are not limited to, climate change, unequal distributions of wealth and resources, biodiversity loss, and innovation. We contend that it is not possible to address these

56. See Babie (2010), *supra* note 14, at 533–34; but see Metcalf, *supra* note 46, at 693.
challenges through government or market interventions alone, nor by continued self-reflexive theorizing about property. Rather, it is necessary to focus attention on the response of real people to any such interventions, and the idea of property must inform and drive that response.

Hence, it is important to understand the informal, everyday beliefs that people hold and which they use to negotiate their own rules and devise their own norms and practices as they navigate their daily activities. And those beliefs, rules and norms are found in the idea of property. Such informal beliefs constitute an undeniable form of law. Indeed, some scholars suggest that they are more powerful than anything enacted by the state or enforced by courts, that they have not been superseded by the state and therefore remain “the most important and continuous normative experience” for individuals. In other words, the idea of property matters because it becomes itself a form of law. And if that is the case, it matters that we understand what people are doing when they make choices predicated upon property. It matters, in other words, that we understand the idea of property, because it is law.

B. Becomes Law

How is it that the idea of property becomes law? To answer that question, we must turn back for a moment to the theory of property. We argue that the state-conferral of choice is, theoretically, nothing less than a grant of sovereignty, in Morris Cohen’s sense that the person with property has in fact received a grant of power or control which renders them what we might call a “little sovereign” over whatever the thing in question is. But what is that sovereignty? It is certainly not anything that elite theorizing tells us about liberal/neo-liberal rights and choice. It is, in short, what a person thinks they have when they are


63. REISMAN, supra note 44, at 4.

exercising choice; it is the idea of property. And the holding of such sovereignty has serious implications if the person who holds it thinks of property in individualist/absolutist terms. We are dealing here with two types of law: what the state thinks it is conferring, and what the individual thinks she, he, or it (in the case of corporations) is receiving. How do we reconcile the two?

The work of Eugen Ehrlich assists in sorting out what the state thinks it confers and what the individual thinks it receives in the case of the sovereignty of property. In the early 20th century, Ehrlich developed the socio-legal concept of the “living law”, which sees law in two ways. On the one hand, there are formal, positive laws which govern a particular set of circumstances; it is normally only necessary that officials within legal structures be familiar with such formal positive laws. On the other hand, though, many members of society will not only have little familiarity with such formal positive laws, but they also will govern their day to day lives by a set of social norms and rules which are often at odds with that formal positive law. Ehrlich referred to this as the ‘living law’, others as ‘vernacular law’, an umbrella term capturing the realm of unofficial law emanating from people’s everyday perspectives and social interactions.

Ehrlich further argued that to ignore the living/vernacular law is to ignore the reality of law in the lives of most people. And, as Reisman elaborated, an emphasis on the state as the only “source of law” is too narrow a perspective: “The law of the state may be important, but law, real law, is found in all human relations, from the simplest, briefest encounter between two people to the most inclusive and permanent type of interaction.” Indeed, William Twining identifies this living/vernacular law as but one form of law that currently operates the world over, giving rise to a plurality of legal structures.

In the case of property, theory posits that choice is inherently

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66. WESTON & BOLLIER, supra note 62, at 229.
67. REISMAN, supra note 44, at 2.
68. TWINING, supra note 62, at 66.
limited by obligation as imposed through regulation. That may be so, but only to the extent that law—in the form of positive statements of law by courts or legislatures—actually acts, or ‘speaks’, so as to impose that limitation. And here the positive law lets us down. In fact, the law regulates only a small portion of the choices available to people.69 And in the case of property, the choices that people make are contingent solely on their idea of property, the living law of property, rather than anything that theorists might say about property being “socially relational” or “communitarian”, or, more importantly, that the law might impose so as to restrict or regulate the freedom to choose.

The law can thus ‘speak’ in two ways. It may do so in its positive pronouncements or, as we argue, where the law is silent on a given action or course of conduct that may affect and harm others, it nonetheless ‘speaks’ through that silence. That is the living law. Kennedy argues that “inaction [on the part of a legal system] is a policy . . . and the law is responsible for the outcome, at least in the abstract sense that the law could have made it otherwise.”70 In short, law does not act in, control or move into all “spaces/places” of human conduct, it does not move into the ‘living law’; rather, many of those spaces/places are left entirely untouched.71 Indeed, Kennedy argues, a great swathe of human conduct is left unregulated in this way.72

To the extent that the law issues no positive prohibition on a given course of conduct, the idea of property held by an individual, and backed by state-conferred sovereignty over the thing or resource so held, becomes, for lack of any limitation, the law as concerns the thing or resource in question with all of the attendant consequences for others that may flow from that choice. Cohen’s little sovereign becomes truly a sovereign, a situation which persists until the state ‘speaks’ otherwise through positive law. And until the law speaks in that way, the state conferral of sovereignty leaves in its wake myriad small living ‘legal systems’ as a result of the corresponding myriad individual choices.

69. See Kennedy, supra note 43, at 83–125.
70. Id. at 91.
That vast area of human conduct that law chooses to leave un-restrained/un-regulated through positive pronouncement, as opposed to the very small fraction that it does choose to restrain, has seldom been studied. Yet, as Ehrlich warned, if we fail to understand living law, we fail to understand law. In the case of property, then, what is that living law; or, put another way, what is the idea of property? We turn to answering that question in the next Part.

IV. ANALYSIS

A. Conceptual Framework

The Psychology of Property Law Pilot Project (2013-2016) we conducted was a small-scale qualitative study. Ehrlich’s ‘living law’ informs this study’s methodological foundation; Ehrlich argued such a study requires empirical methods. As such, we aimed to demonstrate that Ehrlich’s concept of the living law explains how members of Australian society imagine their ownership of property. Furthermore, if there appeared to be a correlation, we sought to identify both actual or potential behaviors associated with such beliefs, and apparent gaps between social and legal norms of property.

B. Methodology

The goal of qualitative research, collecting and analyzing ‘languaged data’, is to “describe and clarify experience as it is lived and constituted in awareness.”\(^7^3\) To achieve our pilot project’s aim, we employed an ethnographic mode of research, entering the social domain to conduct semi-structured interviews with a range of people living in Adelaide. The interview transcripts formed the sole data set for the empirical component of our study.

We drew on Grounded Theory as a strategy of inquiry to guide our data collection and preliminary stages of discourse analysis, and, albeit to a lesser extent, our subsequent interpretation of the analyzed data. Since its development in the 1960s, Grounded

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Theory evolved through many variations and disciplinary applications, resulting in a “constellation of methods” rather than a single approach.\textsuperscript{74} In general, this approach generates concepts and hypotheses from the insights gained through systematic, iterative processes of data gathering and analysis. Researchers “build their patterns, categories, and themes from the bottom up, by organizing the data into increasingly more abstract units of information.”\textsuperscript{75} Significantly, researchers direct their attention to the meaning that participants themselves bring to the subject. The quality of emergence sets this inductive method apart from deductive research methods whereby investigators commence with a hypothesis which directs data collection and analysis methods. In this instance we did not start with a hypothesis about what we thought people would say about property, but rather we invited people to tell us about how they imagined and experienced different forms that may be the subject of property.

C. Research Questions

The so-called ‘classic’ approach in Grounded Theory recommends that researchers conduct only a light literature review in a project’s preliminary stages; this helps them remain open to their own interpretations of data rather than being overly influenced by existing theory, notwithstanding their possible existing familiarity with relevant theoretical debates.\textsuperscript{76} As we have criticized property theory for not being grounded in social reality, it made sense to follow this approach. Our literature review focused on two issues. First, we surveyed recent empirical legal studies examining the psychology of property (of which we found very few), and second, we identified key contributions to property theory produced within a socio-legal framework.

Subsequently we drafted two high-level Research Questions to frame our investigation of how the living law of property is both experienced and created in Australian society:

\textsuperscript{74} KATHY CHARMAZ, CONSTRUCTING GROUNDED THEORY 14 (Jai Seaman ed., 7th ed. 2014).
\textsuperscript{75} JOHN W. CRESWELL, RESEARCH DESIGN: QUALITATIVE, QUANTITATIVE, AND MIXED METHODS APPROACHES 175 (3d ed. 2009).
\textsuperscript{76} Id. 
(i) Are the informal, everyday beliefs of Australians about property such that people consider themselves not bound by any limitation on the scope of the freedom afforded them by property, or do Australians consider themselves bound by an obligation to others in exercising that freedom?

(ii) Do the informal, everyday beliefs of Australians about property include a sense of limits about what they can do with their things?

From these core concerns, we generated a set of six related questions, which would underpin our interview instrument:

a) What does it mean to say “something is my property”?
b) What are the rights associated with property?
c) What can you do legally with (valuable) things associated with your land?
d) What can you do legally with cultural property?
e) What is the relationship between corporate property rights and ethical decision-making?
f) What is the relationship between property rights and the right to compensation?

D. Research Design

Interview-based qualitative studies, even those seeking to “develop or test a general theory,” do not require a large sample size or many demographic variables.\(^\text{77}\) This is in contrast to survey-based quantitative studies, which must have minimum participant numbers to reduce margins of error and increase confidence levels so that any generalizations arising from statistical analysis can apply to specific populations.\(^\text{78}\) For practical reasons, we defined our sample universe as residents of Adelaide, considering that a sample size of 40 participants would offer enough variation and richness.

We used a ‘purposive’ (or non-random) sampling strategy to ensure that particular categories of cases within our study population were represented. Specifically, we sought to ensure


\(^{78}\) Id.
that the participant pool reflected gender balance, and a reasonable range of ages. In addition, we were interested to discover whether or not formal legal training appeared to make a difference to how people experienced and created the living law. Finally, we sought participants who possessed good communicative and analytical skills, because in qualitative research “one well-placed articulate informant will often advance the research far better than any randomly chosen sample of 50.”

Accordingly, we recruited 3 cohorts. Cohort 1 comprised people with no legal training; Cohort 2 comprised lawyers and law students; Cohort 3 comprised referrals from both Cohorts 1 and 2. To source the sample for Cohorts 1 and 2, we drew upon our professional and community networks in Adelaide. These included the Catholic diocese, community housing, environmental activism, home-schooling, media arts, small business, education, and the law. During interviews, we asked interested participants to invite potential interview subjects to join Cohort 3 (the ‘passive snowballing’ recruitment method). Participants were not offered any material incentives for their involvement.

We were cognizant that one limitation of the pilot project could be the issue of diversity within Cohorts 1 and 2, particularly in terms of educational background and socio-economic status, and, quite possibly, political leanings, due to the Adelaide-based networks that we could readily access. Nevertheless, although we did not intend to compare the responses across different demographic configurations, we were satisfied that the final sample (n=27) was balanced for gender (15 females, 12 males) and age variables (most between ages 25-54 years of age), and therefore reflected some measures of diversity (see Table 1). We do not claim that the responses are necessarily representative of the wider Australian population’s views, and hence we would like to continue and expand on the pilot project’s work.

In this study, property theory informed the interview. Primarily, we endeavored to elicit people’s conceptions, concerns and attitudes about property. Furthermore, the semi-structured conversational style of the interviews had the potential to reveal some underlying psychological, cultural and social influences that might have shaped participants’ imaginings. As with some existing empirical studies on the psychology of property, many questions elicited responses to specific hypothetical scenarios or vignettes about different forms of property (for example, land; natural resources; fungible commodities; intellectual property) and property choices, to ascertain people’s willingness to agree to intrusions upon their property rights so as to benefit the public good. We included some questions canvassing personal experiences of property (for example, items holding sentimental significance; what the concept of home means with regard to ownership), to draw out psychological and affective dimensions of ownership that might influence acceptance of property limitations. Other questions sought to discover understandings of obligation as part of the psychology of property. Figure 1 illustrates various types of interview questions (please see Appendix 1 for the full interview instrument).

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<td>3</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>M</td>
<td>1</td>
<td>5</td>
<td>3</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Other</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
</tbody>
</table>

Table 1
Demographic breakdown of participants according to gender identification and age bracket.

80. See, e.g., Metcalf, supra note 46, at 687; see also Nadler and Diamond, supra note 54, at 737.
E. Data Collection

After obtaining ethics approval from the University of Adelaide, we conducted 27 semi-structured interviews over a period of 6 months from December 2013 to May 2014. It is common in qualitative studies to monitor data collection and adjust sample size “within agreed parameters on theoretical or practical grounds.”\(^{81}\) ‘Organic’ or responsive sampling is explicitly encouraged in Grounded Theory, where ideally data collection and analysis occur simultaneously. Consequently, researchers can decide when categories of analysis are theoretically saturated and further data collection unlikely “to produce any additional or novel contribution to the theory-development process.”\(^{82}\) Accordingly, after we had reviewed the first interview batch of transcripts, we reduced the sample size from 40 to 27 participants; we considered that this number would provide us with a rich data set and avoid analytic overload.

Cohort 1 (non-lawyers) had 17 participants, Cohort 2 (lawyers or law students) 4 participants, and Cohort 3 (‘snowballed’ or ‘nominated’ referrals) 6 participants. Interviews typically lasted between 45 to 60 minutes and were conducted either in a private

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82. Id.
room at the Adelaide Law School or, in some instances, at participant’s workplaces in the central business district. We conducted all interviews in accordance with a protocol that included: giving participants a Project Information Sheet and Consent Form; explaining that participation was voluntary, consent could be withdrawn at any stage, and data would be de-identified; emphasizing that participants could choose not to answer any question without explanation; and inviting questions on the project and interview process. The only demographic data we requested was participant’s gender identification and age range; participants could choose whether or not to provide this information, although all did answer these questions. We captured the interview with a digital voice recorder, and subsequently the audio files were professionally transcribed and the transcripts de-identified.

Interviews are often conducted by non-specialists in the subject being investigated. In this instance, the interviews were led by the third author, who has a background in qualitative research in the arts and social sciences. We followed the principles of ‘intensive interviewing’, a “gently-guided, one-sided conversation that explores participants’ perspective on their personal experience with the research topic.”83 During the conversation a researcher stays attuned to what is said, alert to what is left unsaid or implied, and is sensitive to the emotional content of the discourse, pausing or redirecting a dialogue in response to participants’ reactions. For example, although we did not anticipate that asking people to respond to various hypothetical scenarios about property would trigger observable sadness or emotional discomfort, in some instances certain questions did just that as they evoked memories of, for example, loved family members who had passed away, or personal struggle, or hardship. In contrast, some questions called forth happier recollections. A number of participants commented afterwards that the questions were not what they were expecting and had challenged them to think about property and ownership in a different way. Interview transcripts do not necessarily capture dialogues’ emotional content, and so the authors discussed these

83. CHARMAZ, supra note 74, at 56.
impressions as we were analyzing the transcripts as they illustrated that people’s ideas of property at times contain emotional as well as cognitive content and can be quite charged.

F. Data Analysis

Grounded Research offers a systematic method to build emergent high-level theory, constituted by reiterative data collection and data analysis processes, and continual reflection on increasingly abstracted ideas. In this project we performed three stages of data analysis, each enriched by our engagement with contemporary debates about property and by dialogue with leading international scholars in this field.

Analysis begins with an “open coding” stage that entails “naming segments of data with a label that simultaneously categorizes, summarizes and accounts for each piece of data.” We used the qualitative data analysis software program NVivo to create a hierarchy of thematic categories and sub-categories (called “nodes” and “sub-nodes” in NVivo). Working all together or in pairs we coded the first interviews against an initial node set that both included the interview questions, and, more usefully, a small group of themes that we anticipated participants’ answers might cover. As new analytical categories emerged from responses to the set questions and interviewer prompts, we added more nodes. To ensure consistency of coding among the three researchers, we defined each node’s properties, and added definitions to those sub-nodes whose names were not self-explanatory.

Coding hierarchies shifted, categories moved or merged, in the process of “constant comparison” that is a hallmark of Grounded Theory. Because most categories emerged throughout the duration of the first pass of data analysis, we performed a second pass of coding, to ensure that each transcript had been reviewed.

85. CHARMAZ, supra note 74, at 111.
in light of all possible categories. We added memos to individual transcripts to capture insights about how people’s expression of their ideas of property ownership seemed to reflect, or embody, various property theory concepts. Each researcher brought their own subject interests and expertise to the task, resulting in a multi-perspectival interpretation of the material.

By the conclusion of open coding we had generated 9 core categories: Individual-Absolutist, Justifications of Property, Social Relationships, Choice and Freedom, Ethical and Ecological, Property and Equality, Conceptual Understandings, Entitlement and Compensation, and Emotional Connection. Many quotes were coded against more than one category or sub-category, producing a total of 3,539 references in the transcripts (see Table 3, Typology of Property).  

The next stage of content analysis involved “selective coding”, a process of “selecting the central or core category, systematically relating it to other categories, validating those relationships, and filling in categories that need further refinement and development.” We chose three categories that had a strong interrelationship with one another: Choice and Freedom, Individual-Absolutist, and Social Relationships. Within these higher-level categories we selected those sub-themes which promised to be the most useful in suggesting answers to our research questions (see Table 4, Typology of Choice-Freedom). We sifted through a possible 1,452 coded references, choosing quotes which suggested patterns, trends and anomalies that would help us “explicat[e] a story” about people’s ideas of property by examining the interconnection of these categories. This process yielded 381 quotes and some related memos, giving us approximately 26% of this data subset to interpret in light of our

87. This tally excludes the nodes matching the interview questions. We were coding the transcripts to discover and interpret themes, commonalities and differences, rather than comparing how interview subjects variously answered specific questions. However, we noted one question where there was almost universal agreement amongst participants. See infra Table 3.


89. CRESWELL, supra note 75, at 178.
original research questions (see Table 2, Comparative Results of Open Coding and Selective Coding for data subset).

<table>
<thead>
<tr>
<th>Category/Sub-category</th>
<th>Open Coding: total quotes coded 2 stages, 2014-2015</th>
<th>Selective Coding: total quotes selected 1 stage, 2016</th>
</tr>
</thead>
<tbody>
<tr>
<td>Choice &amp; Freedom</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>Choice</td>
<td>117</td>
<td>46</td>
</tr>
<tr>
<td>Desire for less legal limitation or regulation</td>
<td>24</td>
<td>11</td>
</tr>
<tr>
<td>Personal perception of burdens of ownership</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>Personal self-limiting choices</td>
<td>99</td>
<td>39</td>
</tr>
<tr>
<td>Individual-Absolutist</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>Individualism</td>
<td>203</td>
<td>44</td>
</tr>
<tr>
<td>It's Mine</td>
<td>207</td>
<td>49</td>
</tr>
<tr>
<td>Property is Absolutist</td>
<td>138</td>
<td>22</td>
</tr>
<tr>
<td>Property is Not Absolutist</td>
<td>274</td>
<td>27</td>
</tr>
<tr>
<td>Social Relationships</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Communitarian view of Property</td>
<td>134</td>
<td>50</td>
</tr>
<tr>
<td>Community power in defining or protecting property</td>
<td>204</td>
<td>62</td>
</tr>
<tr>
<td>Property includes responsibility or obligation</td>
<td>39</td>
<td>22</td>
</tr>
</tbody>
</table>

Table 2
Comparative results of Open Coding and Selective Coding for data subset.

V. FINDINGS

This Part contains two sections which, together, introduce our interpretations and preliminary theoretical insights derived from the pilot study. The first section proposes a ‘tripartite schema of property’ while the second explores our findings in detail, proposing a ‘typology of property’.

A. Relativism and a Tripartite Schema of Property

Can we ever know why a person really acted the way they did in relation to those things in respect of which they hold the choice conferred by property? Probably not. But what we can and must do is seek to understand, to the extent that it is possible, what
people say about their motivations for action. While we can, then, never really know what a person is thinking, what the motivations for acting are, we can learn more about those motivations by asking people about them than not. As such, we are certainly not taking a positivist view of ‘reality’, but rather, a relativist one based upon Herbert Blumer’s symbolic interactionism:

Insofar as sociologists or students of human society are concerned with the behavior of acting units, the position of symbolic interaction requires the student to catch the process of interpretation through which they construct their actions. This process is not to be caught merely by turning to conditions which are antecedent to the process. Such antecedent conditions are helpful in understanding the process insofar as they enter into it, but . . . they do not constitute the process. Nor can one catch the process merely by inferring its nature from the over action which is its product. To catch the process, the student must take the role of the acting unit [people or collectives of people, such as corporations] whose behavior . . . is [being] stud[ied]. Since the interpretation is being made by the acting unit in terms of the objects designated and appraised, meanings acquired, and decisions made, the process has to be seen from the standpoint of the acting unit.

For Blumer, the point of symbolic interactionism was to avoid the risk of becoming "the objective observer [who] is likely to fill in the process of interpretation [undertaken by acting units] with [one's] own surmises in place of catching the process as it occurs in the experience of the acting unit which uses it." We have, in

90. Harold Blumer made clear that this is the goal of social research, to the extent that it is possible to understand people’s motivations for action by asking them about those motivations. HAROLD BLUMER, SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD 198–99 (Univ. of Cal. ed., 1969); see also Sheila Trahar, Beyond the Story Itself: Narrative Inquiry and Autoethnography in Intercultural Research in Higher Education, 10 F. QUALITATIVE SOC. RES. SOZIALFORSCHUNG 1, 4–5 (2009), http://www.qualitative-research.net/index.php/fqs/article/view/1218; see also Carl Ratner, Subjectivity and Objectivity in Qualitative Methodology, 3 F. QUALITATIVE SOC. RES. SOZIALFORSCHUNG (2002) http://nbn-resolving.de/urn:nbn:de:0114-fqs0203160.
91. BLUMER, supra note 90, at 86.
92. Id.
other words, sought to avoid placing our own biases and assumptions over the process of interpretation of the respondents we interviewed in the pilot study. Thus, relying upon Blumer’s symbolic interactionism, we interpret what respondents, the acting units in this study, have reported to us as their beliefs for acting or thinking as they do (which may or may not be ‘truthful’).

As such, the quasi-scientific numbering in the Table 3 below reflects not an external, objective, positivist set of truths, but rather, the sense we have made of that which was reported to us. To the extent that it is possible, then, to know why people act as they do in respect of things over which they hold the choice conferred by property, the methodology we have employed in this pilot study reveals it. We proceed on that basis.

Our results reveal a tripartite schema of property: all actors interviewed in our pilot study understood private property as securing choice-freedom in the use and control of a thing, whatever it may be. That choice can be exercised in one of two ways, either in an individualist-absolutist way, or according to an understanding of the web of social relationships understood by an actor and within which that person acts. This is represented in Diagram 1, Tripartite Scheme of Choice-Freedom. Sometimes, we found, depending on circumstances and context, the exercise of choice-freedom is not always consistently done, even by the same individual.
B. **Typology of Property**

We developed a Typology of Property, by which we mean a hierarchical theoretical framework that evolved by categorizing the research participants’ expressed ideas, beliefs and attitudes with reference to existing concepts in property theory. The nine higher-level categories generated 64 sub-categories, and we coded 3,539 references against these in the data set of 27 interview transcripts (‘Sources’). The table below illustrates the categories of analysis, with those that subsequently we selectively analyzed and then interpreted highlighted in blue.

<table>
<thead>
<tr>
<th>Category/Sub-Category</th>
<th>Sources</th>
<th>References</th>
</tr>
</thead>
<tbody>
<tr>
<td>01: Individual-Absolutist (13 sub-categories)</td>
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<td>0</td>
</tr>
<tr>
<td>Aboriginal title sui generis and ultimate</td>
<td>15</td>
<td>17</td>
</tr>
<tr>
<td>Accumulation of things</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Belief that Aboriginal ownership is absolutist</td>
<td>23</td>
<td>26</td>
</tr>
<tr>
<td>Castle Doctrine</td>
<td>19</td>
<td>95</td>
</tr>
<tr>
<td>Individualism</td>
<td>17</td>
<td>69</td>
</tr>
<tr>
<td>It’s Mine</td>
<td>27</td>
<td>207</td>
</tr>
<tr>
<td>Liberal Triad</td>
<td>21</td>
<td>111</td>
</tr>
<tr>
<td>Property as a bundle of rights</td>
<td>23</td>
<td>203</td>
</tr>
<tr>
<td>Property is Absolutist</td>
<td>25</td>
<td>138</td>
</tr>
<tr>
<td>Property is not absolutist</td>
<td>27</td>
<td>274</td>
</tr>
<tr>
<td>Subject to any legal limitations, it’s absolutist and it’s mine</td>
<td>23</td>
<td>105</td>
</tr>
<tr>
<td>The thing determines the shape of property</td>
<td>26</td>
<td>154</td>
</tr>
<tr>
<td>Understanding of externalities</td>
<td>19</td>
<td>109</td>
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<td>Total references for Category 01</td>
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</tr>
<tr>
<td>02: Justifications of Property (3 sub-categories)</td>
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<tr>
<td>Justification First Occupancy</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>Justification Labour</td>
<td>10</td>
<td>19</td>
</tr>
<tr>
<td>Property begins with Self-ownership</td>
<td>4</td>
<td>10</td>
</tr>
<tr>
<td>Total references for Category 02</td>
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<td>31</td>
</tr>
<tr>
<td>03: Social Relationships (9 sub-categories)</td>
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<td>2</td>
</tr>
<tr>
<td>Communitarian view of Property</td>
<td>23</td>
<td>134</td>
</tr>
<tr>
<td>Community power in defining or protecting property</td>
<td>26</td>
<td>204</td>
</tr>
<tr>
<td>Cultural and or social significance</td>
<td>24</td>
<td>69</td>
</tr>
<tr>
<td>Legal limitations on what’s owned</td>
<td>27</td>
<td>197</td>
</tr>
<tr>
<td>Millsian conception of liberty</td>
<td>12</td>
<td>51</td>
</tr>
<tr>
<td>Category</td>
<td>Sub-category</td>
<td>References</td>
</tr>
<tr>
<td>--------------------------------------------</td>
<td>--------------------------------------------------</td>
<td>------------</td>
</tr>
<tr>
<td>04: Choice &amp; Freedom (4 sub-categories)</td>
<td>Choice</td>
<td>17 138</td>
</tr>
<tr>
<td></td>
<td>Desire for less legal limitation or regulation</td>
<td>8 26</td>
</tr>
<tr>
<td></td>
<td>Personal perception of burdens of ownership</td>
<td>6 7</td>
</tr>
<tr>
<td></td>
<td>Personal self-limiting choices</td>
<td>26 99</td>
</tr>
<tr>
<td></td>
<td>Total references for Category 04</td>
<td>272</td>
</tr>
<tr>
<td>05: Ethical and Ecological (5 sub-categories)</td>
<td>Intergenerational considerations and or choices</td>
<td>16 41</td>
</tr>
<tr>
<td></td>
<td>Property abstracted from ecological reality</td>
<td>3 4</td>
</tr>
<tr>
<td></td>
<td>Property in Persons or Animals</td>
<td>5 8</td>
</tr>
<tr>
<td></td>
<td>Sense of stewardship</td>
<td>17 41</td>
</tr>
<tr>
<td></td>
<td>Wild Law understanding of property</td>
<td>11 61</td>
</tr>
<tr>
<td></td>
<td>Total references for Category 05</td>
<td>155</td>
</tr>
<tr>
<td>06: Property &amp; Equality (2 sub-categories)</td>
<td>Relationship between property and inequality</td>
<td>5 11</td>
</tr>
<tr>
<td></td>
<td>Understanding of initial distribution of things</td>
<td>6 6</td>
</tr>
<tr>
<td></td>
<td>Total references for Category 06</td>
<td>18</td>
</tr>
<tr>
<td>07: Conceptual Understandings (18 sub-categories)</td>
<td>Benthamite - Take away law and property</td>
<td>2 9</td>
</tr>
<tr>
<td></td>
<td>Connection between concept and rights</td>
<td>5 33</td>
</tr>
<tr>
<td></td>
<td>Copyright</td>
<td>13 31</td>
</tr>
<tr>
<td></td>
<td>Dead hand of the law and strict settlement</td>
<td>1 1</td>
</tr>
<tr>
<td></td>
<td>Intellectual Property</td>
<td>12 28</td>
</tr>
<tr>
<td></td>
<td>Lay understanding of numeros clausus</td>
<td>1 1</td>
</tr>
<tr>
<td></td>
<td>Non-material perspective on property</td>
<td>2 2</td>
</tr>
<tr>
<td></td>
<td>Object not replaceable</td>
<td>2 3</td>
</tr>
<tr>
<td></td>
<td>Ownership=use value</td>
<td>18 55</td>
</tr>
<tr>
<td></td>
<td>Personality and status</td>
<td>8 23</td>
</tr>
<tr>
<td></td>
<td>Pre-modern conception of property</td>
<td>9 13</td>
</tr>
<tr>
<td></td>
<td>Property Fetish</td>
<td>7 11</td>
</tr>
</tbody>
</table>
Our Typology of Property demonstrates the scope and depth of the concepts we discovered by analyzing, and later interpreting, the words of so-called ordinary people. These people appeared to inhabit not only a material world constituted by things that are the subject of property and related social and legal norms, but also an immaterial world of memories of people, places, experiences, events and emotions associated with their relationships with property. In short, we found that property, for all participants, was something closely tied to their sense of personhood and being. Indeed, what we found confirmed that Underkuffler’s notion that “from our earliest moments of childhood, we feel the urge to assert ourselves through the
language of possession against the real or imagined predations of others."

We chose the nine higher order categories based upon our understanding of the relevant property theory literature, and our early assessment of the qualitative data gathered as part of the Pilot Study. Thus, we grouped the nine categories into two broad groups which align closely with the two broad dimensions of property theory: normative content and justification. The first grouping, which captures the substantive normative content of what property is, included:

1. Individual-Absolutist
2. Justifications of Property
3. Social Relationships
4. Choice & Freedom
5. Ethical and Ecological
6. Property & Equality, and
7. Conceptual Understandings, and
8. Entitlement & Compensation

The second group, capturing the theoretical justifications offered for the existence of the substantive content of property, whatever it might be, included:

2. Justifications of Property
6. Property & Equality, and
9. Emotional Connection

We found it interesting the extent to which all respondents had some familiarity with the fact that property always involves normative content (as we define it, choice) and justifications offered for why the world should be divided up according to the concept of property. In short, what we found is that the idea of property, for most people, included these two dimensions of property also found in elite theory: normative content and justification. Thus, the choices we made were easy, given that the majority of the data directly addressed the research questions which initially motivated this project and they confirmed what elite property theory has to say about the concept of property.

Having categorized the higher order categories this way, we found that the data fell into the typology of property set out above:

93. Underkuffler, supra note 38, at 1.
choice freedom exercisable either in an individualist-absolutist way or in a way motivated by an understanding of a web of social-relations within which those choices are made, or, sometimes, according to both imperatives. We turn now to an analysis of that data.

To make sense of the material, to create a coherent narrative about property and the living law, and to bring us back to our research questions, we sharpened our focus on three categories which were deeply interconnected: Choice-Freedom, which can be exercised either in an individual-absolutist way, or in a way that takes account of the context within which the choice occurs as comprising a “web of social relationships.” For that reason, we have chosen this as the way to organize the responses we address here.

In Table 4, the Typology of Choice-Freedom, we define the scope and bounds of the categories and sub-categories we selectively coded, and then interpreted, to find answers to our research questions (for the questions, see Section IV.C).

<table>
<thead>
<tr>
<th>Category/Sub-Category</th>
<th>Definition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Choice &amp; Freedom</td>
<td>An aggregate of all relevant nodes relating to choice and freedom.</td>
</tr>
<tr>
<td>Choice</td>
<td>Property as enabling choice and freedom.</td>
</tr>
<tr>
<td>Desire for less legal limitation or regulation</td>
<td>An understanding that while property involves choice, it is choice that comes also with limitation imposed by law, although such limitation is not entirely welcome.</td>
</tr>
<tr>
<td>Personal perception of burdens of ownership</td>
<td>An understanding that while property involves choice, it is choice that comes also with limitation imposed by law, which places a burden, either formally through law, or informally, through one’s own ethical or moral stance.</td>
</tr>
<tr>
<td>Personal self-limiting choices</td>
<td>An understanding that whatever the law may impose by way of regulation, the individual holder also plays a role in limiting one’s own choices through one’s own ethical or moral stance.</td>
</tr>
</tbody>
</table>
Not surprisingly from a liberal/neo-liberal perspective, at the broadest level of abstraction, there seemed broad agreement among respondents that property brings with it a degree of autonomy and freedom. This found expression in a number of ways, including the most direct, in response to what it means to say that one’s house is mine, that “it gives me that autonomy and freedom from a lot of stress that I might encounter otherwise” (C01_P18), to the more general sense that saying that one has property in a thing means that a person has the ability to choose, to set an agenda, about that thing, be it a rubbish bin, a car, a house, or even a pet: “what would the law let me do with [that item]? — probably quite a lot really . . . ” (C01_P18) or “I have to be able to say “no” because that’s my own and . . . [others] can’t do that [interfere], so I think I will be able to have a choice to say “yes” or “no” and I think that’s what I want from law, to have a choice.” (C01_P19). And that freedom extends to determinations to be made about the future use of a thing, thus “you can choose who you want to pass on your property to.” (C01_P08).
Significantly, respondents viewed this freedom of choice as “my right” (*C01_P20*; other respondents answered similarly, such as in *C01_P09*), a right which in turn provides protection not only against others, but also against government, so that, in determining whom one must consult before felling a tree on one’s land, “if I have to ask anyone it’s my neighbors not government . . .” for to do otherwise would be for government to “take[e] over my choice.” (*C01_P19*). Still, respondents were clearly troubled by the appropriate balance to be struck between one’s rights and obligations owed to the broader community, so that “I can see that there would be a place for government and, and even my neighbors to have a right to have a say over what happens to [the tree].” (*C01_P19*). This may seem paradoxical, although it may simply represent a genuine belief that with rights come duties.

Yet, while law might constrain the freedom of choice inherent in the right, meaning that a balance between individual and community might be struck by government, respondents still saw property as choice, no matter if constrained by law through regulation. This view was prevalent when considering the conduct of corporations in exercising choice; thus, when asked about a corporation having the legal right to pollute within certain parameters, many respondents answered that “within the bounds of the regulation we put in place, Companies should be able to, to maximize their activities.” (*C02_P01*), or “well I think no . . . but . . . it’s their choice and the government has said that they have the right to.” (*C01_P16*).

Some responses were slightly more nuanced when considering corporations, although still emphasizing the paramountcy of choice: “it depends on the owners of that company, what they think. They might say “Okay, you know, we’ve got that limit but you know, we can sort of try and not go that far, we can go a bit under it or half-way or whatever or our systems enable us to not have to use the, the full amount — we’re able to say, go to 50 per cent” and I think it’s up to them . . . if they make that decision well then . . . that’s what they would go with but I think it’s just dependent on their conscience or . . . their morals . . . in relation to society.” (*C01_P06*; other respondents answered similarly, such as in *C01_P03*). The notion that at its core, property is choice
remains powerful: “but then again the company has the . . . legal right to do it even if it’s not a sort of moral right.” (C01_P11).

Still, there were some who felt more strongly that choice is a freedom that must be balanced. Perhaps this respondent summarized the feeling about the tension between choice and limits best: “where people are going “Ooh, this is mine, this is mine, this is mine and I’m not going to let it go now because God knows what’s going to happen in the future” and I think we’ve maintained that kind of mindset . . . .” (C03_P03).

What the results demonstrate, then, is the belief that property is about saying ‘it’s mine’, but perhaps, one might suggest, we ought also to think of limits when considering the impact of our choices on others. And it is here where two contrasting approaches to choice-freedom emerge: on the one hand, there is a strong ‘individualist-absolutist’ stance in the responses, countered by an equally strong ‘web of relations’ stance, with some people sometimes exhibiting both approaches depending upon the context.


While some might see the need for limits, a very strong strand of thinking emerged that choice can be exercised by its holder so as to suit one’s preference, individualistically, absolutely: “They’re mine [a good or resource]; I paid for them, they belong to me, they’re for my use.” (C01_P07). Some even made use of the most commonly associated metaphor for this stance: “It’s mine because I think the saying “your home is your castle”” (C01_P06), or “the law allows a sort of . . . sovereignty somehow if you’re in your own home; . . . it’s like your own little castle, you’re in charge of, you can make rules there . . . .” (C01_P012). This in turn means that property “allows me to do whatever I want in there [a home].” (C01_P06; other respondents answered similarly, such as in C03_P04), conferring “a degree of being seen as ‘I’m the boss of my place’” (C01_P012), or simply, “so yeah, it belongs to you, you do what you want with it.” (C03_P05). Although, some did see that there might be some limits upon this power, so that while “everyone’s home should be their castle and . . . you’re entitled to do whatever you want in there,” this was still limited by some regard that one not “annoy the neighbors or anybody else . . . .”
(C01_P07). For some, the security that comes with this absolute power “has a lot of positive impacts on someone’s . . . mental health and well-being . . . to have that security whether it’s a piece of land or a house or possessions.” (C01_P011).

Thus, because it is an absolute power, decisions about what one considers their property affect only the person making the choice; in deciding whether to fell a tree on one’s land, account need not be taken of the views of neighbors “because if it’s on my land it should really only be affecting me . . . and the decision should be up to me in what I should do and not them [neighbors].” (C03_P06). Or, in relation to the polluting corporation, even “having the right does not necessarily mean that it is right” (C01_P05) (in other words, the corporation has the right to act unilaterally in polluting, although one might wish it were otherwise). And in relation to one’s house, “This is my home, it’s my place; you come in if you’re invited; if you’re not invited you are not going past those gates . . . it’s where I can close myself off, I can shut down, I can, I can yell and scream, I can run around, I can do whatever I want to do. So, it’s my little place of security . . . I don’t have to put up with everybody else, I can switch off and do all those sorts of things I guess, that’s what I mean by ‘my home’.” (C03_P03). And this means that “I don’t think it’s really any of the neighbor’s business, they have no rights, yeah, over the property . . . .” (C01_P07).

The fact of financial investment seemed to strengthen the absolutist view, so that if “you’ve bought the land, it’s yours. Why should you have to get permission from somebody else, unless they want to buy your house and then they can make the decisions . . . Because you put your money into it.” (C02_P03). Some respondents understood that the corollary of this power was “excludability” (C02_P01), the power to act to the “exclusion of everyone else.” (C03_P02). In short, “it’s mine.” (C03_P02). And this, in turn, brought with it the power to “have a say over the future of this property to a degree.” (C01_P20).

But not all saw choice as exercisable in an individualist-absolutist way. Thus, while some might believe property to confer absolute choice, they sometimes expressed the wish that that was not the case, suggesting that “I understand that it is law but I don’t think it, it should be—I don’t think they [others, i.e.
neighbors] should have a say in what’s on your property.” (C01_P07). This respondent put it much more colorfully in relation to whether the government should compensate for the loss of power a landowner might have to fell a tree: “People need to grow the fuck up . . . the whole notion that we should be able to fucking choose every little last detail and that we are somehow violated if we can’t decide every aspect of our life—I think it’s a relatively new social concept. It’s a very first world concept . . . and it’s highly individualistic and I, I worry about that as being a somehow more and more being able to be somehow enshrined legally. My individual rights somehow take precedence over what might actually be good for my community.” (C01_P12).

This desire that it might be otherwise than individualist-absolutist power serves as the transition that some respondents identified from understanding the choice exercisable pursuant to property as absolute, to an understanding that such choices occur within a web of social relationships, requiring that one take account of others in making such choices. Thus, “you don’t really have a choice in the matter, legally anyway . . . that’s a misconception on the part of the owner of the property I guess. You’re the owner of the property but that doesn’t include necessarily being able to do whatever you want with anything that’s on that property.” (C01_P18). We turn now to this understanding of the web of social relationships as the contextual qualifier of the individualist-absolutist exercise of freedom-choice.


Some respondents felt very strongly that while property is a conferral of freedom in the form of choice over things, those choices nonetheless occur within a web of social relationships. This was put both fully and clearly by this respondent:

“Well to live . . . happily within [my house], however I’m also . . . in a community and the way I live as a neighbor to others, shapes relationships with others and their relationships in turn with others, so there’s a kind of a network of inter-relationships that occurs around the area that I live in. So in terms of . . . what I can do with my home, how I can be in the home, has a network of
relationships and then what happens when I need to do things to the home in terms of maintenance, that too develops a whole other network of tradespeople and others who are connected to the upkeep of the home. So, there’s a kind of a responsibility of safety, health to the people that actually come into the home as well, there’s . . . an environmental . . . protection and safety and so there’s that kind of I think legal kind of obligation really to make sure that people are safe within an environment.” (C01_P05).

And this means that in deciding whether to cut down a tree on one’s land because “we aren’t private individuals, but we are individuals within a network of relationships called community; so that’s why I’d be respecting, respecting them.” (C01_P05).

The sense of a web of relationships produces a concern that the rights of others ought at least to receive the same protection that one’s freedom of choice enjoys; again, in the case of cutting down a tree on one’s land, . . . it’s just common courtesy to tell the neighbors that I intend to . . . cut the tree ‘cos it would affect their shade, their view I guess, their privacy.” (C01_P08; other respondents answered similarly, such as in C01_P18), because trees are a “heritage [that] belongs to everybody.” (C01_P02).

Or, when faced with potential rationing of a scarce commodity, such as petrol, rather than a desire that one be compensated for that rationing, which affects one’s freedom of choice in using an automobile, some respondents replied that “we’re all in the same boat and we’re all going to chip in . . . and do our bit to ease that petrol crisis, whatever, then I think it’s only fair that . . . we all cop it and say ‘You know what, we’re all in it . . . I don’t expect anything for it.’” (C01_P06).

And again, when asked about a polluting corporation, “why should they be allowed to pollute the air?—I mean it affects everybody and . . . they’re a company that’s doing things for profit and I don’t think they should be able to pollute things that everybody has to use and it belongs to everybody . . . .” (C01_P02), air and water being a “shared resource.” (C01_P17). In summary, what emerges is the notion that in the exercise of choice-freedom, while limiting that power in the hands of the person holding
property, we may need to “suffer personal constraints for the collective good . . .” (C02_P01).

While it did not appear as though legal training made any noticeable difference to a participant’s psychological understanding of property, what was paradoxical, however, was the fact that some respondents said something that was both individualist-absolutist and sensitive to the web of social relations. Thus, while one respondent said this when asked about minerals that might be found under their land “I’d expect you’d be allowed to extract them and sell them off cos . . . the property does technically belong to you so, that’s what I’d hope anyway,” they said this when asked about consulting neighbors before felling the tree: “especially if it’s say blocking off the sun during a particularly hot part of the day . . . you might suddenly end up with direct sun . . . that’s really not going to be particularly nice . . . so you should certainly consult; whether you use that to determine what you want to do, I mean when it comes down to it, it is your tree so if you want it to go . . . I guess it’s kind of just nice to consult with your neighbors, not to necessarily let them form your opinion.” (C01_P15).

VI. CONCLUDING REFLECTIONS

A. The “Idea”

What emerges from this study is the ‘idea of property’ as that concept has been defined in earlier work. And what characterizes the idea postulated in our earlier work and tested in this pilot study? The typology of choice-freedom, which can be exercised, almost schizophrenically and paradoxically, either in an individualist-absolutist way or in a way taking account of the web of social relationships within which one acts. What is most surprising, and may warrant further empirical study (both qualitative and quantitative), is the extent to which both approaches to choice-freedom can sometimes be seen in the same respondent.

That said, however, the theme which emerges most strongly, no matter how one might view the way in which choice can be exercised, is the simple fact of choice. Every respondent saw property as encompassing some form of freedom of choice,
whether it was absolute in the hands of its holder, or limited, either by law or by the actor who holds, choice still represents the dominant understanding of property, the social imaginary of property, held by every respondent we interviewed.

This has deeply significant implications for the way in which government might achieve significant objectives, such as providing for the protection of the environment. For it means that achieving those objectives requires adjustments to the idea of property—choice—and such adjustments whether explicitly stated or implicit to a change effected by government, will cause varying levels of disaffection among the wider community. A view of property which misses or ignores the reality of the social imaginary, the idea, will inevitably fail if this truth is ignored.

B. Law Reform

How, then, can a government ensure that in seeking to achieve policy initiatives that might infringe upon the idea of property, as we have revealed it in this article, in ways that encourage the wider society to accept the necessity of such change, rather than to reject them as unwarranted intrusions into the inner core of choice? In a recent book, eminent legal sociologist Lawrence M. Friedman94 suggests that law involves the modification of human behavior, and the study of law therefore involves two main questions: first, the consideration of “where . . . the laws, decisions, rules, and regulations come from?”,95 which involves primarily the investigation of judges, legislators, and lawyers,96 while the second question asks “what kind of impact or influence . . . any of these act within the legal system have?”,97 which is really the issue of “impact . . . [on] behavior tied causally, in some way or other, to some particular law, rule, doctrine, or institution.”98 Too much of what legal

94. LAWRENCE M. FRIEDMAN, IMPACT: HOW LAW AFFECTS BEHAVIOR (2016).
95. Id. at 1.
96. Id. at 2.
97. Id.
98. Id. (emphasis in original).
academics do is in respect of the first of these questions, Friedman argues, and not enough about the second.99

The point here, which is simple, is frequently overlooked: we need to know more about how law, and changes to law, can impact upon human behavior so as to change the interpretations of acting units, individuals, both natural and legal, in ways that will produce positive outcomes sought to be achieved by the principal actors in a legal system, sometimes judges but much more importantly, legislators. If we focus solely on what the law is, and not how it might impact behavior, we will never change behavior, whatever we might think about those attempts. Indeed, we will fail to understand at all where such efforts ought to be directed. Or, put another way, while we might disagree about how we want to affect, impact upon, behavior, it seems clear that what governments seek to do is that very thing: affect, impact upon human behavior so as to change it in the pursuit of some end.

The pilot study presented here is an effort to understand how people interpret property as part of their social vernacular law, or social imaginary of property—the ‘idea’ of property—and how people then utilize the idea in their lives and activities. Our goal has been to reveal, as the evidence we have presented does, that people hold an idea of property which is a conferral of choice as concerns the allocation, distribution and use of resources; that choice may be exercised in a self-seeking way, either to serve only one’s own preferences in an individualist-absolutist way or in ways that understand the relationship of those choices to outcomes for other people. But either way, choice comprises the core of the idea.

If governments seek to achieve any objectives that relate to the way in which people understand their multi-valent relationship to the world around them through the idea of property, they must understand that that relationship is understood by people as conferring choice exercisable, to a greater or lesser degree, as one sees fit. Our study demonstrates that failure on the part of governments to understand the idea of property will continue to lead to disjuncture between ends sought and results achieved. In short, in the realm of law reform

99. *Id.*
involving the use of resources (which covers a vast swathe of environmental and economic policy), we must seek a better understanding of acting units’ (legal persons, both natural and fictional (such as corporations)) motivations for acting—the idea of property—before such reform can truly achieve its desired outcomes.
Appendix 1: PSYCHOLOGY OF LAW PILOT PROJECT INTERVIEW INSTRUMENT

Demographic Information (answers are optional):

IV0.01 Which gender do you identify with?

IV0.02 Which of the following age ranges do you belong to?

<table>
<thead>
<tr>
<th>18-24</th>
<th>25-34</th>
<th>35-44</th>
<th>45-54</th>
<th>55-64</th>
<th>65+</th>
</tr>
</thead>
</table>

1. Mid-level Research Question a) What does it mean to say ‘something is my property”? Interview Questions related to RQ-a:

IV1.01 Think of something that is yours that you have a strong sentimental or emotional attachment to. Please tell me what it is. What does it mean to you to say that this [***] is mine?

IV1.02 Now think of something that belongs to you that you don’t have a strong attachment to. In other words, something that you could easily replace and it wouldn’t matter much to you that you had a replacement. Please tell me what it is. What does it mean to you to say that “this [***] is/are mine”?

IV1.03 What is your main means of transport? (If applicable) What does it mean to you to say that “this [bike] [car] [***] is mine”?

IV1.04 Thinking of your own home, what does it mean to you to say that “this house or apartment is mine”?

IV1.05 What is your most treasured or valued possession? Why is it your most treasured possession? What does it mean to you to say that “this [***] is mine”?

IV1.06 What particular thing, or set of things, do you own that you think your closest friends might say identifies you? What do you think about that?
2. Mid-level Research Question b) What are the rights associated with property? Interview Questions related to RQ-b:

IV2.01 What do you think that the law allows you to do with your [thing with sentimental or emotional value - insert participant’s answer to the first part of IV1.01]?

IV2.02 What do you think that the law allows you to do with your [replicable thing - insert participant’s answer to the first part of IV1.02]?

IV2.03 What do you think that the law allows you to do with your [mode of transport - insert participant’s answer to the first part of IV1.03]?

IV2.04 What do you think that the law allows you to do with your home?

IV2.05 What do you think that the law allows you to do with your most valued possession [as identified in answer to the first part of IV1.05]?

3. Mid-level Research Question c) What can you do legally with (valuable) things associated with your land? Interviewer advises participant: In this series of questions we are not looking for right or wrong answers according to law as it in fact exists, but rather, we are interested in what you think the law is, or might be, in these hypothetical vignettes. Interview Questions related to RQ-c:

IV3.01a You have discovered that there is something very valuable under your land. In this case it is water. What do you think that the law will allow you to do with that water?

IV3.01b What if the valuable resource under your land is a mineral deposit? What do you think that the law will allow you to do with those minerals?
IV3.01c Now imagine that you have discovered some ancient Aboriginal artefacts under your land. What do you think that the law will allow you to do with those artefacts?

IV3.02 You have been informed that a flight path will change, and planes will now fly over your land or home. What do you think that the law will allow you to do in that situation?

IV3.03 Your neighbor is doing major property renovations that will involve a crane periodically swinging over your land or home for lengthy periods. What do you think that the law will allow you to do in that situation?

4. Mid-level Research Question d) What can you do legally with cultural property? Interview Questions related to RQ-d:

IV4.01 You have finished reading a paperback book that you think an acquaintance might enjoy also. What choices do you have?

IV4.02 You have paid for and downloaded a song from a digital music portal. A friend asks you to make a copy for them. What do you do?

IV4.03 In that situation you paid for that song. Do you think that you own that song?

5. Mid-level Research Question e) What is the relationship between corporate property rights and ethical decision-making? Interview Question related to RQ-e:

IV5.01 The law says that Company X can dump up to Z units of airborne pollutants into the air. Should Company X do it?

IV5.02 The law says that Company X can dump up to Z units of effluent into the water. Should Company X do it?

6. Mid-level Research Question f) What is the relationship
between property rights and the right to compensation? Interview Question related to RQ-f:

IV6.01 There is a world oil shortage, and consequently the government has implemented a petrol rationing system. The government has decreed that people can only fill their cars’’ petrol tanks once a fortnight. Should you be compensated? Why, or why not?

IV6.02a There is a 40 meter-high healthy tree on your property. You want to cut it down to build a new patio and pool. Should you be required to consult with your neighbors before felling the tree? Why or why not?

IV6.02b Should you be required to consult with the government before felling this tree? Why or why not?

IV6.02c Should the government ever be able to stop you from cutting down the tree?

IV6.02d If you are not allowed to cut down the tree, should the government compensate you for your loss of choice in this matter?

Closing Question:
Is there anything else you would like to say about what property and ownership means to you?

Invitation to help extend the study:
Interviewer advises participant: We are planning to conduct a second round of interviews in early 2014. The way we are recruiting the next group of interviewees is to ask our initial group of participants give us a referral. Would you be interested in describing the project to someone you know — they do not need to be a property owner necessarily, and then passing on our contact details to them if they are interested? They could then contact us themselves directly.