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Introduction

Does it spark joy in your life? Marie Kondo, the author of a self-help best seller wants us to ask ourselves this question about every single object we own.[1] If the object does not bring you joy upon touching it, then you do not need it and it should be discarded, donated, or thrown away. The assumption behind this advice is that we own too many possessions, more than we could ever enjoy, and these unneeded belongings burden our lives. Despite the declared purpose of helping us tidy up our house, Kondo's question is designed to inspire a much deeper change. Decluttering our home of personal belongings is an important step towards emotional decluttering and mindful living. Marie Kondo's book was a huge success, a bestseller in Asia, Europe, and the United States. She quickly became a pop icon, and her guiding question a popular cultural reference.

Kondo's popularity is not an isolated anecdote. The minimalist movement is another example. It embraces a unique philosophy of living that devalues material possessions. The philosophy teaches people to escape excess consumption and own only the most essential possessions, thus leaving room for experiences, creativity, and freedom.[2] Very much in the spirit of Kondo's catchphrase, the minimalists believe that happiness does not come from owning things. In order to live one's life to the fullest, one must get rid of all that is superfluous. Minimalists often evoke the concepts of freedom and control as key benefits of the move to minimalism. They suggest that giving up things frees the individual to engage with the more meaningful aspects of life.[3]

These phenomena represent a growing discontent with traditional consumption patterns and with ownership of goods more generally. This is an impressive shift. For years, consumer culture researchers have dubbed ownership as the ultimate goal of consumer desire.[4] According to numerous studies

[1] Marie Kondo, The Life-Changing Magic of Tidying Up: The Japanese Art of Decluttering and Organizing (2014).
[2] *See, e.g.*, the Minimalists, www.theminimalists.com/minimalism (last visited Dec. 17, 2018).
[3] Joshua Fields Millburn & Ryan Nicodemus, *Minimalism: An Elevator Pitch*, the Minimalists, www.theminimalists.com/pitch/ (last visited Dec. 17, 2018).
[4] Russel Belk, *Possessions and the Extended Self*, 15 J. Consumer Res.139 (1988).

in psychology as well as marketing and legal studies, ownership reflects and constructs the owner's identity, status, and the projected sense of self that one presents to the world.[5] The involuntary loss of material objects was understood in the literature as a potentially devastating experience, suggesting a process of grief and mourning.[6] Ownership was similarly lauded as a source of independence and freedom.[7] Today, this premise is being challenged. Consumer culture researchers agree that this perception of property ownership no longer accurately reflects consumers' goals. Young consumers, especially millennials, prefer experiences over things, comfort and ease of use over ownership.[8] This approach to property is hardly exclusive to minimalists. Consumers may still want to use diverse objects and enjoy luxury goods. In their use of the goods, however, the experience is important, not control of the property or long-term attachment. Material things do not necessarily reflect the identity of some consumers; they are functional, merely a means to an end.

The focus on use and functionality also characterizes the sharing economy – or access economy, as I later refer to it – another form of alternative consumption trend that has taken the media, social networks, and public discourse by storm.[9] Initially, the sharing economy was defined as collaboration in the production, creation, or use of products and services. With that collaboration now simplified and redefined by technological advances and online communication, people are able to share, barter, lend, rent, swap, and gift their property.[10] The sharing economy allows owners to rent out assets such as cars, homes, bikes, or even pets to strangers.[11] This type of consumption pattern has turned into a global, billion dollar industry that has been described by proponents as being "as big as the industrial revolution."

One of the fascinating aspects of the sharing economy, from a property perspective, is the rise of access. Access is a casual, short-term use of property. Simply put, instead of buying a drill, a user might choose to rent John's drill today and Jill's drill next month. Instead of buying a car or leasing one for a long period of time, one might choose to rent Ron's car today and Kate's car

5 *Id*; Margaret J. Radin, *Property and Personhood*, 34 Stan. L. Rev. 957 (1982); Jeremy Waldron, The Right to Private Property 352 (reprinted 2002); Helga Dittmar, The Social Psychology of Material Possession: To Have Is to Be (1992).

6 Paul C. Rosenblatt et al., Grief and Mourning in Cross-Cultural Perspectives (1976).

7 D. Benjamin Barros, *Property and Freedom*, 4 N.Y.U. J. L. & Liberty 36 (2009).

8 Loïs Crespo Moreno, How Do Millennials Fit in the Luxury Industry? Insight on Their Characteristics, Motivations and Consumption Behavior (2016) (unpublished Master thesis, Louvan School of Management), https://dial.uclouvain.be/memoire/ucl/object/thesis:7178.

9 Rachel Botsman & Roo Rogers, What's Mine Is Yours: The Rise of Collaborative Consumption (2010). *See also* Beth Buczynsk, Sharing Is Good: How to Save Money, Time and Resources Through Collaborative Consumption (2013).

10 *Id.* at p. xv.

11 Peer-to-peer (P2P) markets are markets where trade occurs between peers. *See, e.g.*, Anindya Ghose et al., *Reputation Premiums in Electronic Peer-to-Peer Markets: Analyzing Textual Feedback and Network Structure*, 3 ACM SIGCOMM Workshop on Econ. of Peer-to-Peer Systems (2005).

next week. Access offers users a flexible but consistent way to use objects, one that does not include control, attachment or stability. Users do not need to own, lease or otherwise informally possess the good. They can just use it when they need it. Moreover, users do not commit to using a particular object. They can change preferences and use different items every week. Studies in consumer culture research now explore the meaning of access for individuals, the motivations of access, and the impact of the anticonsumption agenda on the value of ownership.[12] But legal theory lags behind.

1.1 The Argument

This book studies the changing landscape of property and the emergence of access as an important form of property engagement. I argue that the sharing economy increases the role of flexibility in property law and theory. Traditionally, property conduces to stability. Property rules do accommodate a certain level of flexibility, mainly when it comes to property's exchange value, the ability to sell the property or use it as collateral for a loan. However, property use, the enjoyment of a particular object, is typically stable. The law protects property use under the assumption of long-term, continuing engagement with a single property. The sharing economy fragments stable use, because it allows for multiple short-term uses of various objects without forming attachments to any of them. It pushes for a mobile and flexible vision of engaging with possessions and, as a result, with other people. Property's role as a source of permanence and a facilitator of stable, long-term relationships is not likely to vanish, but it is gradually decreasing in importance.

However, access, much like every other supposedly new development, builds on familiar legal forms, previous developments, and wider trends. The destabilization of property begins with the rise of alienability and the availability of other forms of long-term use, such as leases. In this respect, access constitutes another step in the direction towards flexibility. Despite this continuity, access does represent a crucial moment in property thought. Moreover, leases, for example, facilitate uses for relatively long periods of time (months or years), sufficient for the user to become attached to the property. Leases represent a relation to a single object, whereas access allows users to use multiple, replaceable items, without creating commitments or attachments. Even though the option of accessing property was available prior to the sharing economy, it was used rather rarely, on unique, nonroutine occasions such as travel and leisure activity. Access therefore not only increases the alienability of goods, but also fragments the traditional understanding of property use.

[12] Russell Belk, *You Are What You Can Access: Sharing and Collaborative Consumption Online*, 67 J. Bus. Research 1595 (2014); Fleura Bardhi & Giana M. Eckhardt, *Access-Based Consumption: The Case of Car Sharing*, 39 J. Consumer Res. 881, 890 (2012).

Changing consumption patterns in the sharing economy create an alternative. Two pillars of property theory stand out. The first is the notion of property as a form of controlling a physical space (land or personal property), thereby supporting freedom, independence, identity, and attachment. The second pillar concerns the protection of intimate property, of which the home is a central example, understood to be an inherently personal and private location. These two pillars support a vision of property as rooted in stability and security, because all of these values are realized within a given well-defined space and work to connect the right holder to that spatiality and to the community around it.

Both pillars are unsettled by different manifestations of the sharing economy. The challenge is twofold. First, the rise of access is replacing long-term possession with casual use. Instead of buying new things, a person can choose to rent an item only when needed. The property itself is replaceable, and there is no attachment involved. As access becomes a prominent alternative to consistent property use that coexists alongside traditional forms of use, it challenges the superiority of attachment and stability. Access supports flexibility, mobility and experimentation. Because people own less property, they are less confined to a physical location and can relocate more easily. Access does not involve a commitment to using one particular object, and it therefore allows people to experiment with their preferences and identity. Think of a child that exchanges toys in a toy lending library. Studies show a distinct difference in attitudes when people buy a toy as opposed to when they borrow one from a library.[13] When people buy toys, parents and children stick to the familiar, to pre-established preferences and assigned gender roles. When people exchange toys, children are more willing to experiment, and boys are willing to try toys associated with girls.[14] Because there is no commitment and one uses the toys for only a short period of time, it is an opportunity to experiment. The cost of choosing a toy one will not enjoy is relatively low. Similarly, when people access property instead of owning it, they are not encumbered by the object when they want to relocate. Not surprisingly, global nomads own very little property and do not form attachments to possessions.[15]

Second, the sharing economy dislocates and fragments intimacy and privacy within one's most personal spaces. If people rent out a room in their home to tourists via Airbnb, the home becomes a site of both commercial and intimate activity as well as a platform for interaction with strangers that come and go. Domestic workers and home businesses are earlier examples of

[13] Lucie K. Ozanne & Paul W. Ballantine, *Sharing as a Form of Anti-Consumption? An Examination of Toy Library Users*, 9 J. Consumer Behav. 485 (2010); Lucie K. Ozanne & Julie L. Ozanne, *A Child's Right to Play: The Social Construction of Civic Virtues in Toy Libraries*, 30 J. Pub. Pol'y & Marketing 263 (2011).
[14] Ozanne & Ballantine, *supra* note 13.
[15] Fleura Bardhi et al., *Liquid Relationship to Possessions*, 39 J. Consumer Res. 510 (2012).

commercial activity in the home. In this sense, home sharing continues the disruption of the liberal ideal of the home. Yet home sharing also presents a unique challenge. Living with others no longer exclusively represents stable, continuous relationships, but now involves hosting casual, short-term relationships. Even commercially mined co-living arrangements such as living with domestic workers are still a stable, long-term, committed form of living with others. In other words, Airbnb not only commercializes home activity, but also destabilizes intimacy in the home, bundling it with flexible, casual and thin interactions. This counterintuitive comingling of intimacy and flexibility challenges several legal rules. Most prominently, antidiscrimination rules are based on a clear distinction between the commercial and the intimate, and this book encourages lawmakers to rethink this distinction.

Both these developments are embedded in larger social and economic processes such as instability in the job market, technological advances, ecological awareness and generational attitudes. The sharing economy promotes an alternative form of use. Ownership and long-term possession are not a thing of the past, but flexible forms of use should prompt us to rethink current values associated with property and property use. Property as flexibility creates vulnerabilities and opportunities; it merits normative, relational and institutional deliberation. However, the current legal and regulatory response falls short. A systematic, holistic approach to this alternative vision has yet to emerge.

This book offers a broad theoretical and normative framework by developing this vision of flexibility and studying its diverse relational and communal implications. The current liberal vision of stability in property use naturally supports communities and relationships. When people are attached to a location and do not relocate frequently, they form attachments to the community as well. The vision of flexibility in property use has complex relational implications that depend on the type of access one chooses to use. Peer-to-peer markets foster a broad spectrum of weak and casual interactions. They foster diversity, at least potentially, but not meaningful and deep associations. In contrast, access in community-based projects such as toy libraries supports cohesion among members.

In addition, the vision of flexible property has broader economic and institutional ramifications. Access encourages us to rethink property's values and strengths, but it is exposed to vulnerabilities and manipulation. Flexibility for property users relocates ownership but doesn't eliminate it. Rental companies such as Zipcar remain the owners of vehicles in popular car-sharing projects. In peer-to-peer markets, owners and nonowners bargain over short-term use of property, but their transactions are mediated, controlled and constituted by powerful platforms. The imagery of shifting attitudes towards property could potentially conceal the corporate power at play. I argue that this vision of flexibility will ultimately fail as an alternative if not provided with a different infrastructure and institutional framework to support it. This book also explains the required legal changes to maintain this new vision as a normatively valuable alternative, including the restraint of platform power, evaluation of competing institutional models for access, and removal of the legal barriers to access today.

Stability and flexibility thus represent two competing visions of property, attachments and relations. Because the two visions coexist, it is important to compare their strengths and weaknesses. This book describes and analyzes the emerging vision of flexibility in property use, evaluates it against the vision of stability, argues that it has normative worth, and develops the necessary conditions for it to flourish.

1.2 Property Rights and Property Use

This book's argument is a study of property in its social context, and its perception of property requires some clarification. According to the formal understanding of property, property rights are in rem rights; rights that affect a large number of unconnected, disparate groups of people.[16] In rem rights are considered superior to contractual rights or other forms of in personam powers and liabilities that have a more limited scope. My argument does not dispute the important distinction between in rem and in personam rights. The idea of property as a predetermined set of rights that hold power over others serves to categorize rights and their implications. Yet at a higher level of generalization,[17] the concept of property also identifies a social institution that regulates the way people use and enjoy goods. Property is also a platform for interactions and activities. In some ways, this understanding joins a rich scholarship that highlights property's social and relational attributes.[18] This scholarship is typically nonformalistic. It engages with the social aspects of property in different contexts, employing a range of arguments.[19] Because property is a social institution, property analysis must engage with new technologies, consumption trends and other economic or social developments.

This perspective illuminates the connection between property and new consumption technologies. According to conventional wisdom, property is unaffected by consumption trends. Property concerns the legal relations with respect to a thing, and it entails powers to control that thing.[20] Because it deals

[16] Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 Wm. & Mary L. Rev. 1849 (2007).

[17] *Cf.* Laura S. Underkuffler, The Idea of Property: Its Meaning and Power (2003).

[18] *Id.*; Gregory S. Alexander, Property and Human Flourishing (2018); Joseph William Singer, Entitlement: The Paradoxes of Property (2000); Hanoch Dagan, Property: Values and Institutions (2011).

[19] Gregory S. Alexander, *The Social Obligation Norm in American Property Law*, 94 Cornell L. Rev. 745 (2009); Joseph W. Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611 (1988).

[20] Morris R. Cohen, *Property and Sovereignty*, 13 Cornell L. Rev. 8, 12 (1927); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. Toronto L.J. 275 (2008).

with a formal relation, property law as a field of study is less interested in consumer choices. The choice whether or not to own or whether or not to lease property is extrinsic to property law, a preliminary, somewhat irrelevant process. This perception is flawed. Property is not a static concept. Understanding property as a social institution, at a higher level of generalization, allows us to think of property's social and economic role and engage with the different ways in which property responds to technological, social, and economic changes. Changing attitudes towards property have profound normative implications for the legal rules that support and shape property's relational and social attributes.

This book, however, does not argue that access is a property right in the traditional sense. By definition, access is not a relation to one particular thing. It is a form of consistent use that involves multiple objects. The contribution of access to property thought lies in establishing an alternative to the way we typically understand and use property. Even scholarship that embraces the social and relational aspects of property, and recognizes its informal forms, still supports the property as stability model. It protects long-term possession and attachment to property.[21] Both formal and informal approaches understand property use as a continuous engagement with one object. In this respect, access and the fragmentation of use it fosters provide a fundamental alternative to the values and purposes that traditional property promotes.

Consequently, the focus of my argument is use rather than formal property rights. Property law traditionally centers on rights to things: from ownership to leases, easements, licenses and mortgages. Use is very important in property law and theory, but it is mostly discussed within the property rights discourse. For example, Harold Demsetz argues that property rights are necessary to support efficient use.[22] According to this view, ownership incentivizes use because the owner will reap the rewards of investing in and using the property. Others argue that the Demsetzian view devalues use and disregards the personal value that people attach to property,[23] or that in certain emerging markets property rights create opposite incentives and do not encourage efficient use.[24] Achieving efficient levels of use is therefore a primary goal for property theorists. The right way to achieve this goal and the values that use promotes are disputed.

The vision of property flexibility does not incentivize use per se, nor does it seek to promote use as a primary goal. Rather, it identifies use as one of the most critical elements of property more generally and from this perspective develops a theory that accounts for changes in use. The argument tracks shifts in forms of use, preferences and attachments to property as they transform

[21] *See, e.g.*, Singer, *supra* note 19.
[22] Harold Demsetz, *Towards a Theory of Property Rights,* 57 Am. Econ. Rev. 347 (1967).
[23] Eduardo M. Peñalver, *Land Virtues*, 94 Cornell L. Rev. 821 (2009).
[24] Rashmi Dyal-Chand, *Useless Property*, 32 Cardozo. L. Rev. 1369 (2011).

and reshape property values and social interactions. Casual short-term use of property as a consistent, culturally acceptable form of use encapsulates promises and risks that are distinctively different than the values and concerns associated with stable forms of use. Focusing on use, then, allows us to explore how changing consumption patterns affect property as a social institution.

Nonetheless, use is of course a very general term. We use various types of property: real, personal and intellectual. The term can accommodate all forms of property, but the argument regarding access in the sharing economy targets physical property exclusively. It focuses on physical goods, their embodiment in the world and their effect on relationships, commitments, and opportunities. The argument studies the fall of stability from this particular perspective. Physical property, both personal and real, is a marker of stability because it defines a tangible space and fosters attachments to this spatiality. Possession of a physical good translates to a continuous spatial engagement with the good.

In contrast, while virtual, intellectual property has undergone important changes over the years as well, it was never a marker of stability. In fact, intellectual property has consistently presented an alternative as regards property enjoyment. We do not need to own a physical copy of a book, a movie or an album.[25] We can download music or eBooks and enjoy them wherever we are and whenever we want. The popularity of virtual property, nonphysical goods, had eroded property stability long before the sharing economy, but in a very different way. Virtual property facilitates the enjoyment of certain goods without being bound to a place or a community because it has no physical presence. Interestingly, the sharing economy continues this process and allows us to enjoy things flexibly, without commitment, not by shedding the physical traits of property, but by changing the legal relation to property. People who prefer access over ownership and long-term possession detach property use from a commitment to a physical space and a community.

But detachment breeds anxiety. The fear is that access will lead to the de-commodification of relationships and property. This anxiety has historical roots. The decline in stability of exchange value in the eighteenth century, culminating in the ability to sell property and raise credit on it, was also met with anxiety.[26] The assumption is that changes in property and property use affect relationships. Stability in property cultivates attachments and supports stable commitments to one's community. When people cannot transfer their land, they are less able to change their physical environment and freely choose a different community. Destabilization in property is tied to commercialization of value and raises concerns of commodification and fragmentation of attachments and commitments. The rise of access feeds into these anxieties. However, property stability also raises important concerns. It fosters

25 Aaron Perzanowski & Jason Schultz, The End of Ownership (2016).
26 Gregory S. Alexander, *Time and Property in the American Republican Legal Culture*, 66 N.Y.U L. Rev. 273 (1991).

homogeneity of relations, stagnation of preferences and identities, and it is not spread equally in society. From this perspective, the rise of access in the sharing economy can be read as part of a broad destabilization process in the history of property.

1.3 The Sharing or Access Economy

The sharing economy creates new opportunities for flexible use. The phenomenon itself is highly controversial. It typically refers to a collection of economic practices that are based on collaborative forms of consumption.[27] These consumption patterns have been simplified by technological advances, online communication and improved reputation mechanisms; people are now able to share, barter, lend and rent their property.[28] The phenomenon quickly became so pervasive and challenging that from its initial stages it was widely discussed and celebrated. In 2011 Time magazine named the sharing economy among its "10 Ideas that Will Change the World."[29] It has rapidly gained significant financial momentum. According to a report by PwC, a global network of assurance, tax and consulting service, five sharing economy sectors alone could generate $335 billion in revenues by 2025.[30] Forbes estimated the revenue flowing through the sharing economy in 2013 at 3.5 billion dollars.[31]

The concept itself is ambiguous. There are currently about 10,000 companies participating in the sharing economy,[32] representing a diverse range of transactions. The typical property-related transaction includes goods that are designed for private consumption but hold an unutilized excess capacity.[33] Cars, bikes and personal possessions are the perfect examples. An owner might only use her car during the weekdays but never on the weekends. On weekends the car is simply parked in the driveway. Sites like Getaround.com or JustShareIt.com facilitate renting out cars and Peerby.com allows people to rent out or share everyday possessions. The scope of the phenomenon varies among societies and in different cultural and economic settings. In some societies, the rental of everyday goods is flourishing, while in others, only a

[27] *See* Botsman & Rogers, *supra* note 9.
[28] *Id.* at p. xv.
[29] *10 Ideas That Will Change the World*, Time, http://content.time.com/time/specials/packages/0,28757,2059521,00.html (last visited Dec. 17, 2018).
[30] Laura French, *Sharing Economy Shakes Up Traditional Business Models*, New Econ. (Apr. 13, 2015), www.theneweconomy.com/business/the-sharing-economy-shakes-up-traditional-business-models.
[31] Tomio Geron, *Airbnb and the Unstoppable Rise of the Share Economy*, Forbes (Feb. 11, 2013), www.forbes.com/sites/tomiogeron/2013/01/23/airbnb-and-the-unstoppable-rise-of-the-share-economy/.
[32] Ryan Ayres, *5 Ways Big Data Is Fueling the Sharing Economy*, SmartDataCollective (Dec 12, 2017), www.smartdatacollective.com/5-ways-big-data-is-fueling-the-sharing-economy/.
[33] Yochai Benkler, *Sharing Nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production*, 114 Yale L.J. 273 (2004).

few types of assets are being accessed. Access depends not only on technological feasibility and the relevant transaction costs, but also on the culture-specific social norms.[34]

One of the most successful rental markets has grown around the utilization of excess capacity of houses and homes. Airbnb.com offers an online tourist marketplace that allows owners to rent out spare rooms in their homes. Airbnb hosts are not looking for roommates; they offer short-term multiple rentals to tourists. This new use by owners opens up opportunities for users who prefer to access assets on a casual basis instead of purchasing new objects, creating peer-to-peer markets of goods.

Nonetheless, access takes other institutional forms. The sharing economy also includes citywide cooperative projects such as bike sharing and car-sharing. Bike sharing is a fairly new form of transportation, and it is becoming increasingly popular worldwide.[35] These projects offer a "cheap, efficient, and healthy means of navigating dense urban environments."[36] Users can rent a bike or a car not only from their peers, but also from a city-sponsored project or a business enterprise. Business companies now offer services that are based on access rather than ownership or long-term possession. Automobile manufacturers are buying or starting car-sharing enterprises such as Zipcar (Avis) and Car2Go (Benz).[37] This business strategy is a response to new consumption trends, as young people are gradually losing interest in car ownership.[38] Moreover, users can also access property in the community. Cooperative communal endeavors include tool libraries that are "[N]o longer just places to get a drill when you need one [. . .] [but rather] neighborhood hubs offering classes, community building spaces, workshops and a variety of tools ranging from belt sanders to lawnmowers and more."[39] Another example is seed libraries that allow farmers and gardeners to borrow and share seed varieties.[40]

Sharing economy transactions are not limited to access of goods. Transactions include lending, bartering, and swapping.[41] Swap.com, Swapstyle.com,

[34] Anders Fremstad, *Gains from Sharing: Sticky Norms, Endogenous Preferences, and the Economics of Shareable Goods*, 74 Rev. Soc. Econ. 194 (2016).

[35] Oliver O'brien et al., *Mining Bicycle Sharing Data for Generating Insights into Sustainable Transport Systems*, 34 J. Transport Geography 262 (2014).

[36] *Id.* at 262.

[37] Russell Belk, *You Are What You Can Access: Sharing and Collaborative Consumption Online*, 67 J. Bus. Res. 1595, 1597 (2014). *See also* Joerg Firnkorn & Martin Müller, *Selling Mobility Instead of Cars: New Business Strategies of Automakers and the Impact on Private Vehicle Holding*, 21 Bus. Strategy & Env't 264 (2012) (indicating that the number of private vehicles is dropping due to consumer preferences).

[38] Belk, *supra* note 37, at 1597–98.

[39] Cat Johnson, *The Tool Library Movement Gains Steam*, Shareable (Jan. 29, 2014), www.shareable.net/blog/the-tool-library-movement-gains-steam.

[40] Christopher D. Cook, *Seed Libraries Fight for the Right to Share*, Shareable (Feb. 11, 2015), www.shareable.net/blog/seed-libraries-fight-for-the-right-to-share.

[41] *See generally* Juho Hamari et al., *The Sharing Economy: Why People Participate in Collaborative Consumption*, 67 J. Ass'n for Info. Sci. & Tech. 2047 (2016).