

**PLURALIST MORAL THEORY IN THE PHILOSOPHY OF PROPERTY AND THE
LEGAL FORM OF THE CONDOMINIUM**

by

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Abstract

This thesis outlines three major moral theories in philosophy – utilitarian, deontological, and pluralist or neo-Aristotelean – and examines their application to the law of condominium. The thesis uses a combination of moral analytic theory and a study of legislation and case law. The thesis begins with a discussion of theoretical methods in legal philosophy, adopting and defending an approach based on general pragmatism and legal realism. It then canvasses the application of moral approaches to property law, with an emphasis on explaining and further developing the application of pluralist moral theory to property. The thesis then considers how each of the three schools of philosophy analyzes the structure of condominium and makes predictions about how condominium issues would be resolved by each approach. In particular, this analysis focuses on how condominium presents a challenge to traditional views of property and highlights the connection between property and sovereign power by incorporating concepts of democratic governance. Afterward, the thesis engages a detailed review of statutes and case law that apply to condominium disputes in British Columbia and Ontario. The thesis concludes that courts and legislatures have been alternating between deontological approaches and pluralist approaches to condominium, with a general trend in recent developments away from the deontological approaches and towards pluralist approaches. The thesis tentatively suggests that on the whole, pluralist approaches lead to more just and equitable results in condominium, and suggests further avenues for study.

Preface

This dissertation is original, unpublished, independent work by the author, Jason Leslie.

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Dedication

For my wife, Dr. Rachel A. Lewis, whose emotional support and endless patience made this thesis possible.

Chapter 1: Introduction

Property is a concept that most people never examine closely. Yet, the way this concept is used impacts how power is constructed and distributed within our society, how people understand and define themselves, and how people understand their relationships to each other, to their communities, and to the state.

The question of why we have property rights is an ancient one, and can be approached from several different perspectives. In my thesis, I am deliberately choosing to approach this question primarily as a moral or ethical question, as opposed to an anthropological, historical, psychological, economic, or strictly legal question. I take the view that moral analysis is necessary for any normative stance on property rights. While the perspective of other disciplinary approaches may help to explain what property is and how it operates, the question that drives this thesis is whether we *should* have property rights, and if so, what shape they *should* take. This normative formulation is irreducibly a moral one.

I focus on private property as the dominant institution of property in western liberal democratic societies. In doing so, I touch on other forms of property ownership, such as common property and collective property, but primarily by way of contrast.¹ However, the concept of private property tends to function as a default or paradigm upon which other forms of property are based and to which they are primarily compared. Understanding the moral framework that addresses rights to private property is thus fundamental to any general theory of property rights.

¹ For a detailed exposition of the forms of private, common, and collective property, see Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 37-42.

The tradition of moral property theories that I examine, explain, and defend in this thesis is variously described as the “neo-Aristotelian,” “value ethics,” “virtue ethics,” or “pluralist” tradition. Generally I use the phrase “pluralist moral theories” or “pluralist theories” as a useful umbrella term to refer this tradition. I refer to these theories as a “tradition” because there is no definitive version. Instead, there are a number of competing versions that share common characteristics but also have some fundamental differences. Furthermore, I do not defend a specific, fully worked out theory from among the possibilities. Instead, I defend the approach to property taken by these theorists as a group, and set out some suggestions for what an ideal theory from within this tradition would involve.

To provide context for the theoretical discussion, and to test it against a concrete example, I look closely at the legal form of condominium. This form, which I describe in more detail in chapter 4, is a relatively recent arrival to the law of real property in the common law world, and poses some interesting doctrinal and moral challenges. By enabling a form of ownership that is bound up with community membership, common ownership of structural elements and public areas, and a democratic process, condominium has required courts and commentators to adjust their expectations about what property means and how it functions.

In assessing pluralist theories and comparing them against the most prominent alternatives – utilitarian theories and deontological theories – I examine the strengths and weaknesses of each group of theories as a way to describe existing property doctrine. I consider the theories both in broad overview and as applied to the particular example of condominium. My goal is to describe how the current law of condominium can be interpreted as embodying these theories. I see this as a first step in developing a normative framework for understanding the underlying moral basis of property rights.

In this regard I draw inspiration from Gregory Alexander, who along with his colleague Eduardo Peñalver has led a discussion to reimagine property law from a pluralist perspective.² Alexander and Peñalver outline how pluralist theory applies to property law generally and consider its implications for expropriation,³ nuisance law,⁴ land use regulation,⁵ the right to exclude,⁶ redistribution of wealth,⁷ and intellectual property.⁸ Here, I add to this analysis by reviewing pluralist property theory generally and considering its application in another context: condominium.

I tentatively conclude that pluralist theories provide a more robust framework than competing moral theories for understanding the conceptual and moral underpinnings of private property. On the theoretical level, pluralist theory allows for consideration of a broader range of human interests that can be served through property, and a more flexible understanding of the benefits and responsibilities of ownership within a social order. On a practical level, pluralist theory leads to a better understanding of the interplay between property rights and democratic decision-making in condominium, and allows condominium owners and courts more avenues to achieve justice, stability, and flourishing in a condominium complex.

² See e.g. Gregory S Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge University Press: New York, 2012); Gregory Alexander, "The Social-Obligation Norm in American Property Law" (2008-2009) 94 Cornell L Rev 745; Gregory S. Alexander, "Reply: The Complex Core of Property" (2008-2009) 94 Cornell L Rev 1063; See also Eduardo Peñalver, "Land Virtues" (2009) 94 Cornell L Rev 821.

³ Alexander and Peñalver, *ibid.* ch 8.

⁴ Alexander, "The Social Obligation Norm in American Property Law," *supra* note 2 at 779 et seq.

⁵ *Ibid.* at 791 et seq.

⁶ Alexander and Peñalver, *supra* note 2 ch 7.

⁷ *Ibid.* ch 6.

⁸ *Ibid.* ch 9.

I now outline the particular perspective that I take towards private property as a concept, the approach that I take towards normative enquiry in the context of legal theory, and the particular method that I use in this thesis.

First, I adopt an explicitly realist perspective towards law and legal theory, at least in relation to property law. Under this perspective, law is understood as a social construction, designed by and through human institutions and practices to achieve instrumental ends. I contrast this perspective with essentialist or formalist approaches that take law and legal concepts to have an objective, discoverable, and independent nature.

Second, I take a pragmatic but non-relativist approach to normative legal theory. This approach accepts that normative reasoning about law may be non-linear and iterative, taking legal concepts as partially constitutive of morality and working alongside ideas and observations from other disciplines such as philosophy, history, economics, psychology and political theory.

Third, I adopt a two-stage method in this thesis. For the first stage, I examine property law from a purely theoretical level, describing and defending pluralist moral theory through comparing and contrasting it with other popular competing moral theories. For the second stage, I take condominium law as a “case study” to test how well pluralist moral theory can describe, explain, and justify the doctrine of a particular area of property law.

I elaborate on each of these points in detail below.

1.1 Perspective: Legal Realism

There is more than one way to approach the fundamental nature of law and the relationship between law and morality. In particular, there are two broad approaches that are traditionally

considered to be the main competitors in western legal thought. These approaches can be usefully referred to as “formalist” and “realist”.¹

In relatively simple terms, the formalist approach takes law to have some measure of objective existence, determined independently of any formal political process or conscious design of legal rules. In some versions of formalism, such as the traditional “natural law” approach, law is considered to be integrated with morality. Moral principles “naturally” incorporate a legal regime, or at least, some bare-bones framework of legal principles. On this conception, moral philosophy is, at least in part, about discovering pre-existing, universal legal principles. Under some formulations of this approach, “natural laws” cannot be altered by political action, and any law that purports to do so is invalid. In other formulations with a more positivist bent, “natural laws” provide a default, or starting point, and laws validly enacted by a political body can alter or override them. This general view of the relationship between law and morality was popular during the revolutionary period of 18th and 19th century Europe and North America and was particularly influential in the United States.² Other versions of formalism are less connected with morality, but still derive the existence of objective, discoverable and universal legal principles from some source outside of law itself, such as economics, psychology, or anthropology. Joseph Singer convincingly describes many strands of current liberal legal theory, including “legal process” theorists such as Hart and Sacks, “rights” theorists such as John

¹ For a detailed discussion see Joseph Singer, “Legal Realism Now”, Book Review of *Legal Realism at Yale: 1927-1960* by Laura Kalman, (1988) 76 Cal L Rev 465. The article is nominally a review of Laura Kalman’s book on the history of legal realism at Yale, but Singer spends most of the piece expounding his own view on the current impacts of legal realism.

² For a detailed discussion of natural law and its role in shaping early American property law doctrine, see MJ Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992) at 145-167.

Rawls and Ronald Dworkin, and “law and economics” theorists such as Richard Posner, as versions of legal formalism.³

By contrast, the realist approach takes law to be a creation of society and politics. This does not mean that legal principles must be arbitrary and cannot be informed by moral considerations or by the observations of social science. On the contrary, many realists are driven by both ethical and empirical concerns. However, in the realist view, legal principles are not “out there” waiting to be discovered by the judicial or legislative process. Instead, law is explicitly created, by both legislatures and judges, to achieve social and political ends. In the area of property law, this perspective is often characterized by the “bundle of sticks” metaphor, under which a specific property right is not an atomic whole, but instead a “bundle” of legal rights and duties that can be divided up in a wide variety of ways.⁴

In many areas of law the difference between a formalist and a realist approach is subtle. It may not matter, for example, whether a criminal prohibition against murder is taken to be the objective embodiment of a moral injunction against killing, or whether it is taken to be a human invention meant to discourage people from the morally reprehensible act of killing: the results

³ See e.g. Singer, *supra* note 1. Regarding law and economics, it is possible to take either a formalist or realist view of the conception of property. A formalist view would hold that legal principles somehow “arise naturally” out of the results of economic analysis in a deterministic fashion, while a realist view would hold that economics is merely a useful tool in deciding how to craft legal rules. I will deal with the realist version of law and economics in more detail later in this thesis.

⁴ Gregory Alexander notes that “[n]o expression better captures the modern legal understanding of ownership than the metaphor of property as a ‘bundle of rights.’ ... While legal Progressives and their Realist descendants were not the first to make these points, they were the first to popularize them in the world of legal scholarship and legal education.” Gregory S. Alexander. *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776-1970*. (Chicago: University of Chicago Press, 1997). See also Stuart Banner, *American Property: A History of How, Why, and What We Own* (Cambridge MA: Harvard University Press, 2011) ch. 3, describing in detail the transition during the late 19th and early 20th centuries from an atomistic approach to a bundle of rights approach to property in the U.S.

are essentially the same. However, when it comes to laws about property, I argue that the differences matter more. Realist approaches to law lead towards an instrumental and provisional attitude towards property rights, under which property law can be actively shaped to advance particular results. Property thus becomes the servant of morality. By contrast, formalist approaches support the view that the very nature of property implies specific moral consequences. Morality thus becomes the servant of property.

To make this clear, I contrast some recent approaches to property law that take formalist and realist perspectives. On the formalist side are two recent attempts to justify theories about the essential nature of property. In a series of papers, Thomas Merrill takes up the traditional Blackstonian notion of property as the right of an owner to exclude others from possession and use of the owned resource.⁵ Merrill rests his claim on three primary grounds: first, that all the incidents of property ownership can be derived from the right to exclude; second, that historically the right to exclude is the first attribute to arise in any property system; and third, that all forms of property involve a right to exclude.⁶ Along similar lines, Larissa Katz suggests that the “defining characteristic” of property is the owner’s “special authority to set the agenda for the resource,”⁷ and not necessarily to right to exclude others from accessing or using the resource. Unlike Merrill, Katz does not explicitly argue against a realist understanding of

⁵ I will primarily discuss Merrill’s exposition of his position from Thomas Merrill, “Property and the Right to Exclude” (1998) 77 Neb L Rev 730. Similar views are also expressed in conjunction with Henry Smith in other works such as Thomas Merrill & Henry Smith, “What Happened to Property in Law and Economics” (2001) 111 Yale LJ 357 and Thomas Merrill & Henry Smith, “The Morality of Property” (2007) 45 Wm & Mary L Rev 1849.

⁶ Merrill (1998), *ibid.* at 740-750.

⁷ Larissa Katz, “Exclusion and Exclusivity in Property Law” (2008) 58 UTLJ 275.

property in favour of an essentialist one; instead, she assumes that property has an essential nature and then argues that this nature is “agenda-setting” as opposed to “exclusion.”

Whether taken to be “exclusion”, “agenda-setting”, or something else, the very notion that there is a fundamental essence to property tends towards a thicker concept and a particular normative view. If an owner by definition has the right to exclude others or the right to set an agenda, a dynamic of individualistic control and struggle against outsiders follows. Conversely, if the right to exclude others or the right to control a resource automatically leads to ownership, as an essentialist approach would suggest, then a robust notion of property suddenly appears as the only tool that can secure stability, privacy, autonomy, and other necessities for human life.⁸

I prefer to remain more skeptical, flexible, and humble when it comes to defining property and its relationship to moral theory. Legal realism does so. One modern theorist whose approach has realist tendencies is Jeremy Waldron. With regard to private property in particular, Waldron emphasizes that private property is a general “concept” of which various particular “conceptions” are possible.⁹ Waldron starts by adopting a lighter version of the “agenda-setting” theory advanced by Katz, stating that “in a private property system, a rule is laid down that, in the case of each object, the individual person whose name is attached to that object is to determine how the object is to be used, and by whom.”¹⁰ However, this apparently essentialist move is then countered by the concept/conception distinction. The agenda-setting authority is

⁸ Essentialists need to address the relationship between what they claim is “essential” for property and what the necessary and sufficient conditions are for ownership. Take the case of the right to exclude. Clearly, an essentialist would claim that ownership implies a right to exclude. However, if a right to exclude does not always imply ownership, then the essentialist must answer why not. In providing such an answer, the essentialist would have to bring in considerations other than the “right to exclude” as playing a role in determining property ownership, which then weakens the essentialist’s claim.

⁹ Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988) at 52.

¹⁰ *Ibid.* at 39.

presented, not as a conceptually defining feature of private property, but as an “organizing idea” of a property system that can help give people a relatively simple, intuitive notion about how the system works generally and why it is justified. In the details, however, there is no essential feature that is necessary or sufficient for something to be a private property right, and the specific “contents” of private ownership rights can vary from society to society.

Hanoch Dagan takes a more explicitly realist approach.¹¹ Agreeing with earlier realist work on property,¹² he notes that “[p]roperty law, like law in general, is a coercive mechanism backed by state-mandated power.”¹³ As a social and legal construct, Dagan advocates against attempting to identify an “essence” to property, preferring instead to take an approach that he calls “property as institutions.” This approach operates much like Waldron’s concept/conception distinction, but allows for differences in the nature of property not just from one society to the next but from one type of property to the next within the same society. Property rights are thus flexible and variable. As Dagan explains, “the conception of property as institutions suggests that ownership for one purpose does not necessarily imply ownership for another and that the configuration of property rights is context dependent.”¹⁴ Moreover, the normative functions that property is designed to serve play a direct role in the legal analysis of property rights, as “the realist approach takes the values underlying forms of property, and not only the existing doctrinal content of these forms, as part and parcel of the legal analysis, and thus makes these

¹¹ Hanoch Dagan, *Property: Values and Institutions* (Oxford: Oxford University Press, 2011).

¹² See especially Walter Wheeler Cook, “Privileges of Labor Unions in the Struggle for Life” (1918) 27 Yale LJ 779; Felix Cohen, “Transcendental Nonsense and the Functional Approach” (1935) 35 Colum L Rev 809; Wesley Hohfeld, “Some Fundamental Legal Conceptions as Applied in Judicial Reasoning” (1913) 23 Yale LJ 16; Robert Hale, “Coercion and Distribution in a Supposedly Non-Coercive State” (1923) 38 *Political Science Quarterly* 470; and Morris Cohen, “Property and Sovereignty” (1927) 13 Cornell Law Quarterly 8.

¹³ Dagan, *supra* note 11 at 29.

¹⁴ *Ibid.* at 30.

values an object of ongoing critical and constructive inquiry.”¹⁵ Reasoning about property, both in theory and in doctrine, thus flows straight from both moral and empirical considerations, rather than being mediated through a formal essence.

Dagan does advocate for some theoretical deference to existing forms of property. This deference is not based on essentialist grounds. Instead, it has a pragmatic foundation. Dagan claims that the accumulated wisdom of history and tradition should not be lightly cast aside. Property institutions have evolved in their particular ways for a reason, and so “one assumes that the existing configurations of rights, powers, privileges and immunities of any given property institution constitute helpful frameworks for social interaction.”¹⁶ As such, the traditional forms of property holding are best seen “as tentative suggestions for dividing the social universe into economically and socially differentiated segments.”¹⁷ While not set in stone, existing property forms provide a reasonable starting point for legal analysis and policy making. It is possible, and may sometimes be desirable, to consciously change the legal elements of a particular institution of property, but the burden of proof is on those who want to make the change and there is a preference for changes to be incremental rather than revolutionary.

I find Dagan’s approach persuasive. I concur with the realists that theoretical and doctrinal reasoning about property works best if it accounts for underlying moral and empirical concerns rather than searching for a formalist essence from which to derive abstract principles. I also agree that property can, does, and should take many different forms, depending on the types of resources and relationships engaged. I may be less willing than Dagan to defer to existing

¹⁵ *Ibid.*

¹⁶ *Ibid.* at 28.

¹⁷ *Ibid.* at 30.

forms of property. Perhaps I am more sensitive to the realist critique that traditional forms of property may not be founded on the “wisdom of the ages” so much as on long-standing patterns of social power and coercion. Nevertheless, I do agree that dramatic re-configuring of property norms may lead to social disruption, and that existing forms of property deserve a close look before being radically altered or abandoned.¹⁸

To anticipate the main theoretical discussion of this thesis, it could be argued that a realist approach discounts the viability of deontological approaches to moral theory from the outset. In advocating an essential nature to property, the formalist approach may appear to have an affinity with moral justifications based on individual rights, autonomy, and entitlement, while the more context-sensitive realist approach has an affinity with the more communitarian and systems-oriented approaches of both utilitarianism and pluralist moral theory. If this is the case, then the real debate is between the formalists and the realists, not between deontologists and pluralists or utilitarians, and the theoretical discussion to follow avoids the main issues rather than addressing them.

There may be some danger here. However, in the context of this thesis I do not think it is appropriate to tackle head-on the foundational questions of legal theory. If, ultimately, the question of which moral theory best underlies property law boils down to the question of the nature of law itself, then this is a larger project than is possible in this context. Pragmatically, it

¹⁸ Cf AJ van der Walt, *Property at the Margins* (Oxford: Hart Publishing, 2009) at 20, arguing that “the stand-off between the moral, political, and constitutional obligation to change and the cultural, doctrinal, and methodological tendency to resist, postpone or minimize change is not only a fruitful but an essential locus for critical reflection about property.” Van der Walt goes on to conclude that “[p]roperty regimes reflect the outcomes of political power but are simultaneously always open to political reform; hence they are constantly prone to transformative change.” *Ibid.*

is much more feasible to simply adopt realism as a long-standing, major tradition of legal philosophy and work within it.

However, I also think there are good reasons to suppose that the relationship between legal theory and the moral underpinnings of property law is not so one-sided and direct. For one thing, it is certainly possible to be both a legal realist and a moral deontologist. A theorist can hold that law is fundamentally contextual and instrumental while also holding that morality is based on an individualistic consideration such as autonomy or personal control. For such a theorist, legal institutions should be designed in such a way as either to promote or to interfere as little as possible with the privileged moral consideration, but the relationship between the legal regime and its moral underpinnings could be highly context-dependent and nuanced.

Furthermore, the interaction between legal theory and moral theory may well run in both directions. A theorist's concepts about law could influence his or her understanding about the nature of morality, but the opposite could also legitimately be the case. If a particular type of moral theory is highly persuasive on its own terms, *and* it strongly points towards a particular conception of the nature of law and legal rights, then that is a strong argument in favour of that particular conception of law. There is no *a priori* reason to think that theoretical support should flow only in one direction.

However, if concepts of law and morality can be mutually reinforcing, then it is necessary to take care to avoid creating an echo chamber in which a pre-conceived notion of one buttresses a particular notion of the other, which can then lead to further support for the original pre-conceived notion, and so on. How this is to be avoided is a central issue addressed in my approach to the relationship between law and morality, addressed in the next section.

1.2 Approach: Theory and Doctrine

Methodology in philosophy is something of a paradox. In one sense, the methodology of theoretical argument is relatively uncontroversial and has been settled for millennia. Such methods include traditional devices such as deductive reasoning, conceptual analysis, intuitive insight, real and hypothetical examples, and empirical observations from related disciplines.¹⁹ Yet in another sense, philosophical methodology is completely uncertain and constantly up for debate. This is because the nature of argument and knowledge is itself a branch of philosophy, called epistemology.

There is a lively debate in contemporary philosophy regarding the nature of conceptual analysis and its relationship to empiricism. Many frame the debate in terms of “naturalism” vs “non-naturalism”, though not all would agree that this is a coherent distinction.²⁰ Roughly speaking, “naturalism” is a movement that attempts to integrate the methods of analytical philosophy with those of the empirical sciences. Naturalism is a relatively recent development in philosophy and has its roots in the classic paper by W. V. Quine, “Two Dogmas of Empiricism”.²¹ It has been further developed by the modern pragmatist movement championed

¹⁹ For a good introductory level overview of philosophical methods, see Chris Daly, *An Introduction to Philosophical Methods* (Peterborough: Broadview Press, 2010). Daly notes at the outset that, unlike many other disciplines, “[w]hat methods and data should be used by philosophy is as controversial an issue as any other issue is in philosophy.” *Ibid.* at 11. However, Daly then goes on to describe a number of methods that are commonly used in philosophy, including conceptual analysis, thought experiments, intuitive “common sense”, and consideration of empirical scientific data. For a more extensive and technical treatment of the problem of method in Anglo-American analytic philosophy, see Hans-Johann Glock, *What is Analytic Philosophy?* (Cambridge: Cambridge University Press, 2008).

²⁰ See Matthew C. Haug, ed, *Philosophical Methods: The Armchair or the Laboratory?* (London: Routledge, 2014). I will be drawing from this collection of essays for my methodological discussion in this section.

²¹ W V Quine, “Two Dogmas of Empiricism” in W V Quine, *From a Logical Point of View* (New York: Harper & Row, 1953) 20.

by Richard Rorty.²² Briefly, naturalism rejects a principled division between *a priori* theoretical work and *a posteriori* empirical work. All knowledge, from mathematics to history, is seen as subject to the same fundamental criteria for acceptance. By contrast, non-naturalism identifies a principled distinction between theoretical and empirical knowledge, and therefore different criteria for acceptance apply.²³

Without taking a final position on this debate, I am sympathetic to the notion that *a priori* methods should be treated with healthy skepticism and reduced to as small a sphere as possible. This position informs both the overall methodology in my thesis as well as my particular interpretation of pluralist moral theory. While conceptual analysis is unavoidable in moral theory, it is best undertaken with the understanding that such analysis is ultimately vulnerable to empirical criticism and paradigmatic shifts, and is nearly always, if not always, revisable in principle.²⁴

A recent work that engages with these difficulties in the context of legal theory is Jules Coleman's book, *The Practice of Principle*.²⁵ Coleman outlines an approach to moral and political philosophy in the context of tort law that is pragmatic and holistic. He advances a theory of torts that holds that tort law is essentially about corrective justice, and that the nature of corrective justice is itself defined, in part, by tort law. Other areas of discourse and

²² See e.g., Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979).

²³ For a good discussion see Jeffrey W. Roland, "On Naturalism in the Quinean Tradition" in Haug, *supra* note 20, at 43.

²⁴ Cf. Thomas Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1962).

²⁵ Jules Coleman, *The Practice of Principle: In Defense of a Pragmatist Approach to Legal Theory* (Oxford: Oxford University Press, 2003).

understanding such as moral theory, political philosophy, and social practices contribute, along with tort law, to a web of concepts that constitute the meaning of “corrective justice”.

Coleman acknowledges that at a normative level, there is a danger of circularity with his approach. This is the same potential for circularity that I pointed out above²⁶, transposed from the context of property to the context of torts. If tort law contributes to the definition of corrective justice, then it could be circular to use arguments about corrective justice to evaluate tort law. Coleman gets around this circularity by noting that corrective justice also takes its meaning from other human activities and areas of knowledge. These activities and disciplines, examined together with tort law, put what Coleman calls “normative pressure” on specific doctrines in tort law that do not clearly align with the overall theory of corrective justice embedded within the whole.

I have considerable sympathy for the approach Coleman is taking. However, I want to reiterate the need for caution. In my view, the early 20th century legal realists provided a very convincing deconstruction of the concept of property, demonstrating its constructed nature, its tendency to mask relationships of power, and its ability to muddy the waters of legal reasoning. To claim that property law as it has evolved in our legal system has inherent normative weight and is itself partly constitutive of justice is to risk importing unexamined assumptions about the nature of power and resource distribution into moral theory through the “back door”. In delving into the moral justifications of property law, it is exactly these unexamined assumptions that need to be examined. By-and-large, this examination must be based on extra-legal

²⁶ See discussion *supra*.

considerations in order to avoid circularity and the entrenchment of historically-contingent legal norms under the guise of moral theory.

In this respect, I find Hanoch Dagan's refinements on normativity to be useful. As outlined above, Dagan takes the view that existing property law rights and doctrine are entitled to some normative weight. This is not because they arise from any essential nature of property, but because they are likely to reflect generations of collective wisdom on the justice and usefulness of defining property rights in certain ways. This is a more precise way of expressing Coleman's idea of "normative pressure." At the same time, it allows for established doctrine to be overridden or contradicted by other concerns that have greater strength. In particular, any picture painted by traditional legal doctrine or theory should bend to results of moral theory that are grounded in a more sophisticated and complete understanding of human life and society than the understanding that prevailed during the historical development of that legal doctrine or theory.

Thus, a particular legal rule or approach needs to be examined in light of both related legal doctrine and extra-legal considerations. Isolated deviations of legal doctrine from normative theory probably indicates that the legal doctrine or concept is incorrect or unjust if the normative theory is otherwise defensible. A wide-spread pattern of disagreement, however, can lead in different directions. On the one hand, it could be considered evidence that the moral theory is likely flawed, or at least incomplete, and in need of bolstering or repair. On the other hand, it could also be evidence that there is something deeply misguided about the practices that are encapsulated in existing legal doctrine. Which it is will depend, I believe, on the strength of the extra-legal considerations underlying the moral theory. To assert otherwise is to court the charge of circularity that concerns Coleman, and to risk entrenching historically contingent legal norms within moral theory.

Avoiding the circularity problem in legal philosophy therefore requires consideration of many factors outside of the law itself. In this thesis, I focus somewhat narrowly on moral and political philosophy as the source of extra-legal knowledge. However, a fully developed theory of the nature and justification of property rights would also have to take into account insights across a much broader spectrum of disciplines, including psychology, history, economics, and anthropology. Here, my project is to focus on a small, but important, corner in the interconnected web of intellectual activity that surrounds property.

1.3 Method: Two-Stages

In the previous two sections, I identified legal realism as my perspective toward the nature of law and non-relativistic pragmatism as my philosophical approach to law and morality. In this last section, I specify more precisely the actual methods that I use in the rest of my thesis.

To talk meaningfully about property, it is important to identify what distinguishes property law from other kinds of law. Here, I will draw from Jeremy Waldron's analysis of property concepts.²⁷ Waldron takes a view that property is "a system of rules governing access to and control of material resources."²⁸ Waldron then defines a "material resource" to be "a material object capable of satisfying some human need or want".²⁹ Waldron realizes that this definition does not include incorporeal property, but he justifies his definition on the grounds that incorporeal property exists essentially as a vehicle through which society mediates access to material resources.³⁰

²⁷ Jeremy Waldron, *The Right to Private Property* (Oxford: Oxford University Press, 1988).

²⁸ *Ibid.* at 31.

²⁹ *Ibid.*

³⁰ *Ibid.* at 37.

I am uncertain about Waldron's move to confine property to material resources. While it does make things easier, in the sense that seeing material resources as property is relatively uncontroversial, it does leave out a large number of institutions commonly included under the umbrella of property. Moreover, I am not convinced that incorporeal property exists primarily as a vehicle to mediate access to material property. Certainly it is difficult to characterize things such as copyrights, IP addresses, and radio frequencies in this fashion. I would propose therefore to modify Waldron's definition of property to "a system of rules governing access to and control of resources capable of satisfying some human need or want." This serves to distinguish property rights from rights governing the relations between people that do not directly involve resources, such as human rights, civil rights, and procedural rights, while not leaving out non-material resources.

Admittedly, this definition leaves the term "resources" with a lot of work to do. Whether or not a human being, a chose in action, a job, or a right to vote counts as a "resource" capable of grounding a property right will depend on the worldview and moral compass of the person using the word and the social context that the person operates in. However, it would go too far afield from this thesis to engage in a long discussion of the appropriate subject-referents of property. I am hopeful that the intuitive connotations of the word "resource" can point to the appropriate social, political, and moral constraints for the concept. At the same time, I am mindful of the problem that the concept of property is fluid, culturally relative, can change over time, and can be affected by the very moral theories and approaches used to justify property in the first place. As with the relationship between moral theory and law, there is a complicated interplay at work.

In addition, I adopt Waldron's categorization of property regimes into private property, common property, and collective property.³¹ Briefly, a private property system is one that attaches a single individual's name to each item of property and gives that person control of the resource. A common property system is one that allows multiple owners for a resource and prescribes rules governing equal and direct access to the resource for each owner. A collective property system is one that allows multiple owners for a resource and requires that access to the resource be mediated through the interests of the owners as a collective, normally through some sort of democratic decision-making process.

My focus in this thesis is on private property. Private property forms the backbone of the modern property system in the common law world, and is the basic "organizing idea" of our property system.³² However, the position I take regarding the nature of property and its justification lends itself to some fluidity. In discussing private property systems I touch tangentially on common and collective property systems as well.

Also, it is important to note that my focus is not on the "right to property" in a strict sense, but on systems of property rights more generally. In his book, Waldron discusses the ambiguity in the phrase "right to property" and sets out four possible different meanings.³³ My discussion of property incorporates all of those meanings, and potentially more, as necessitated by the context. I am not defending one particular interpretation or view of any "right to property." Rather, my discussion is at a more general level, addressing the property law regime as a whole.

³¹ *Ibid.* at 37-42.

³² Cf Waldron, *ibid.* at 42. Interestingly, Waldron notes that originally the common law system was based on a collective property system, and has only in later centuries evolved toward a private one. *Ibid.* at 35.

³³ *Ibid.* at 16-24.

I adopt what I informally think of as a “sandwich” approach to theorizing. As the top slice, I attempt to outline, understand, and justify pluralist moral theory on theoretical grounds. I do this by using traditional tools of philosophical analysis to compare pluralist moral theory with other theories and by using deductive reasoning, conceptual comparison, intuitive insight, real and hypothetical examples, cultural analysis, and empirical observations from related disciplines. In this first stage, I try to paint a general picture showing why pluralist moral theory is a strong contender for the basis from which property institutions should be understood, analyzed, and evaluated.

As the bottom slice, I analyze the legal doctrine of a particular area of property law in some detail. I have chosen condominium law as the case study because it foregrounds the tensions between the community and the individual in property law. Condominium as a form of property also contains connections between property rights and sovereign power. Moreover, as a relatively new form of property in the common law world, it is comparatively understudied and thus ripe for investigation.

The “sandwich” approach attempts to integrate both “top-down” theoretical analysis and “bottom up” doctrinal analysis. In doing so, it grounds theory in the “data” of a particular area of property law doctrine, but also brings in high-level and extra-legal considerations into the interpretation of that data. The result, I hope, is the middle of the sandwich: an analysis that is neither too attached to the specifics of a particular property form to be useful as a general theory, nor so abstract as to be merely speculative. This analysis incorporates the pragmatic approach described above, taking existing doctrine as informative but not dispositive of normative questions.

My analysis does not focus on a small number of high-profile, unusual property law cases and use them to question the foundations of property theory. While that approach has tremendous value, my thesis does something different. I am interested in investigating how a theory fares when compared against the everyday life of a particular property form.

To begin the investigation, I start with a description of condominium, showing how it involves fundamental deviations from the traditional conception of property embodied in the paradigmatic example of fee simple ownership outside condominium. I then follow this with a detailed summary of three main philosophical approaches to private property: utilitarian, deontological, and pluralist. Finally, I return to a detailed exposition of particular issues that arise in condominium law, drawing from both statutory frameworks and court cases.

Chapter 2: Happiness and Rights

I begin this chapter by describing the two dominant traditions of moral theory used to analyze property in the literature: utilitarian and deontological. I then discuss one theorist who might take issue with this division, and explain why I think this division is nevertheless an appropriate way to categorize many moral theories. Finally, I point out some of the major critiques brought against these theories in the context of property. My aim is not to provide a comprehensive description of the utilitarian and deontological traditions, but to prepare the ground for the exposition of pluralist property theory in the next chapter.

2.1 Utilitarianism

Utilitarian theories are based on the idea that there is one privileged metric that alone has intrinsic moral value. In some theories, this metric manifests as a state of affairs in the experience of an individual. Subjective states such as happiness or preference-satisfaction are sometimes considered to be the privileged metric.¹ In other theories, a more objective state of affairs such as welfare or wealth is postulated as the metric.² In either case, a utilitarian moral

¹ See e.g. James Rachels, *The Elements of Moral Philosophy* (New York: McGraw-Hill, 1986) at 81. In describing utilitarianism, he states that “[i]n deciding what to do, we should, therefore, ask what course of conduct would promote the greatest amount of happiness for all those who would be affected. Morality requires that we do what is best from that point of view.” See also Gregory Alexander & Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge University Press: New York, 2012) at 11: “Utilitarianism is a consequentialist moral philosophy, that is, one that judges the rightness or wrongness of actions or rules or institutions by the goodness and badness of the consequences they bring about. Utilitarianism assess the goodness or badness of consequences in terms of their tendency to maximize utility or welfare.”

² Richard Posner distinguishes his take on morality and economics from traditional utilitarianism by adopting “wealth” as the appropriate metric, rather than “happiness” or “preference satisfaction.” See Richard Posner, “Utilitarianism, economics, and legal theory” in *The Economic Structure of the Law: The Collected Economic Essays of Richard Posner*, vol 1 (Cheltenham: Edward Elger Publishing, 2000) at 140.

theory requires society to take whatever actions and prescribe whatever rules will maximize the amount of the privileged metric. A term commonly used to indicate a utilitarian metric regardless of its specific content is “utility.” I adopt that term.

In its purest forms, utilitarianism is additive. The utility of each individual is summed to determine total utility. There is no allowance for synergistic effects, where the total amount of utility in a group can be greater than the sum of the utility of the individuals in the group. Another way of saying this is that groups of individuals cannot have utility independently of or in addition to the utility of its members.³ In this sense, while utilitarianism is concerned about promoting overall utility in a society, it remains essentially individualistic. I adopt the term “aggregative” as a useful way of describing this characteristic.

Utilitarian theory is also commonly described as being “consequentialist.”⁴ This term indicates that utilitarianism determines the moral value of an action, rule, or system solely by reference to the *consequences* of that action, rule or system on the aggregate amount of utility. By contrast, other moral theories, such as many deontological theories, place a greater or exclusive moral weight on the *nature* of an action, rule, or system – for example by its symbolic power, its religious necessity, or its constitutive function.

³ So for example, in a community of two, the total utility in the community is equal to the utility of each member added together, and nothing more. If each member has a utility of 2, then the total utility is 4; if one member enjoys a utility of 4 and the other suffers a utility of 0, the total utility of the community is still 4. A purely utilitarian theory sees these situations as morally equivalent.

⁴ The Oxford Dictionary of Philosophy states that utilitarianism “is a form of consequentialism, in which the relevant consequences are identified in terms of amounts of happiness.” Simon Blackburn, ed, *The Oxford Dictionary of Philosophy*, 2d revised ed (Oxford: Oxford University Press, 2008) (online; entry for “utilitarianism”)

Utilitarianism has its roots in the political philosophies of Jeremy Bentham and John Stuart Mill.⁵ In the modern property theory context, utilitarianism is expressed primarily through the lens of law and economics.⁶ In the theories used by this movement, models of rational behavior and human interaction used in economics are applied to legal doctrine, either in a descriptive mode (to try and explain why the law is the way it is) or in a normative mode (to justify existing legal doctrine or make recommendations for change). The law and economics movement tends to favour property systems that are predominantly private and allow for a high degree of alienability. According to these theories, such property systems are the most likely to lead to the greatest amount of overall wealth or preference satisfaction.

Richard Posner is widely known as one of the architects and champions of the law and economics tradition. While Posner notes that economists can take either “wealth” or “preference satisfaction” as the measure of utility, Posner advocates strongly for using “wealth” as the appropriate metric.⁷ Posner adopts wealth as the metric because it is easier to measure objectively than preference satisfaction and because, in his view, maximizing wealth is less likely to justify coercive, non-consensual redistributive measures than maximizing the satisfaction of people’s preferences. In this way, he argues, wealth maximization tends to more

⁵ For pivotal examples of their work in the area of property theory see Jeremy Bentham, “Security and Equality of Property”, in CB Macpherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1978) 39 (originally published in *Principles of the Civil Code*, 1830 (English translation)), and John Stuart Mill, “Of Property”, in *ibid.* 75 (originally published in *Principles of Political Economy with Some of Their Applications to Social Philosophy*, seventh edition 1871).

⁶ “Thoroughgoing and systematic *utilitarian* analyses of property are largely a product of the twentieth-century movement known as Law and Economics.” Gregory Alexander & Eduardo Peñalver, *An Introduction to Property Theory* (New York: Cambridge University Press, 2012) at 18. The Oxford Dictionary of Philosophy also notes that “utilitarianism is, in effect, the view of life presupposed in most modern political and economic planning, when it is supposed that happiness is measured in economic terms.” Blackburn, *supra* note 4.

⁷ Posner, *supra* note 2.

closely adhere to generally-accepted intuitions concerning morally acceptable actions.⁸ This overarching principle also supports a robust, individualistic vision of property in which every conceivable resource is privatized and freely alienable, as it is the ability to transfer rights and resources in the market that leads ultimately to the greatest possible total wealth.⁹ Posner elegantly summarizes his perspective in the following passage:

The wealth-maximization principle accommodates, with elegant simplicity, the competing impulses of our moral nature. The system I have sketched of property rights, actual markets, and hypothetical markets provides foundation and accommodation both of individual rights and of the material prosperity upon which, in the modern world, the happiness of most people depends. Because the individual cannot prosper in a market economy without understanding and appealing to the needs and wants of others, and because the cultivation of altruism promotes the effective operation of markets, the market economy regulated in accordance with the wealth-maximization principle also fosters empathy and benevolence, yet without destroying individuality.¹⁰

Another common argument for a private property system on consequentialist grounds is the “Tragedy of the Commons.”¹¹ According to this story, a resource that is left open to all as common property will end up over-utilized and prematurely depleted. Because the benefits of use extend to the individual user, while the costs are spread out among all the potential users of the resource, each individual will take too much and not leave enough behind for others. It might be possible to convert the resource to collective property, controlling its use through public regulation. However, in most circumstances such a regulatory regime will be very costly to implement and enforce and, because it lacks a market mechanism, will not maximize the

⁸ *Ibid.*

⁹ Posner is well-known for his controversial position that both body parts and human babies should be freely saleable: see *ibid.* at 175 for a summary of his views on this point.

¹⁰ *Ibid.* at 173.

¹¹ Garrett Hardin, “Tragedy of the Commons” (1968) 162 *Science* 1243.

wealth or preference satisfactions of potential users. On the other hand, converting the resource to private property ensures that each individual owner internalizes the costs and benefits of using their share of the resource. Free alienability then ensures that resources will be transferred through the market until the preference-maximizing distribution is reached.

To finish the exposition of utilitarian approach to property it is worth identifying two leading papers that use law and economics as a means of developing a moral theory of property rights. The first is Harold Demsetz' "Toward a Theory of Property Rights."¹² In this classic work, Demsetz advances the view that property forms exist primarily as a way of ensuring that the costs of any particular action are "internalized" in the sense that they are borne by someone with access to the property system and the ability to negotiate regarding the exercise of that action. Costs that result from some action, but which are not borne by an actor within the system, are "externalities."¹³ Demsetz follows "tragedy of the commons" reasoning, along with some other general considerations of rational economic behavior and the effectiveness of collective action, to conclude that a private property system primarily consisting of individual ownership is the system that will best maximize utility.

The other paper is "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," authored by Guido Calabresi and A. Douglas Melamed.¹⁴ While the main focus of the paper is an attempt to "harmonize" property theory with other legal areas, the authors also

¹² Harold Demsetz, "Toward a Theory of Property Rights" (1967) 57 American Economic Review 347.

¹³ The classic example of an externality is the cost imposed on the collective when an individual takes an unowned resource from the commons, such as fish from the ocean or fresh water from a lake. The individual receives the benefit of the resource taken, but the cost is born collectively by all the other potential appropriators of the resource. Due to high transaction costs of collective action, bargaining between the individual beneficiary and the collective is effectively impossible, and so the cost of appropriation is externalized.

¹⁴ Guido Calabresi & A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral" (1972) 85 Harvard L Rev 1089.

describe a justification for property law and entitlement systems. Calabresi and Melamed classify justifications for property rights into three types: efficiency justifications, distributional justifications, and “other” justifications. Efficiency justifications arise from law and economics and are defined in terms of preference satisfaction. Calabresi and Melamed also recognize that distributional concerns are morally relevant, and they allow that, even if market mechanisms lead to an efficient outcome, the initial distribution of entitlements will have an effect on the relative wealth and ownership patterns and that might be a cause for concern. They do not, however, provide any substantive analysis of how and why a distribution of resources might be a matter of moral concern, preferring to frame their discussion in terms of the distributional preferences of society as a whole. Finally, they mention a category of “other” justifications, noting that there might be something other than efficiency and distribution that could have moral significance. In the end, however, although Calabresi and Melamed seem to allow for factors outside of efficiency to play a role in the justification of a property system, they do not specify what those factors are in detail, and end up adopting a utilitarian, law and economics perspective.

2.2 Deontology

Where utilitarian theories ground all moral reasoning about property in a one-dimensional metric, deontological theories ground all moral reasoning about property in a privileged rule or set of rules about how individuals ought to behave. In the case of property, this is most often expressed in terms of a privileged moral right or set of rights that command respect from others

and impose restraints on their behaviour.¹⁵ Moral decision making, according to such theories, must take into consideration these rights as its primary basis. For most such theories, rights are individualistic. Only a person has rights; collectives do not have rights per se, although the recognition of the rights of individuals may give rights to collective obligations or privileges.¹⁶ Moreover, the consequences of particular actions, rules or systems on the aggregate utility or welfare of individuals are of either secondary or of no importance. A potential change in a property rights may lead to an overall increase in aggregate utility, but if that change violates the rights of some of the parties in the system, it cannot be justified.

In *The Right to Private Property*, Jeremy Waldron defines a “rights-based” moral theory as follows:

[A]n argument for private property is *right-based* just in case it takes some individual’s interest (or the interests of some or all individuals severally) as a sufficient justification for holding others (usually governments) to be under a duty to create, secure, maintain, or respect an institution of private property.¹⁷

As Waldron acknowledges, this definition makes the concept of “interest” pivotal. What counts as a legitimate interest worthy of moral consideration, and the exact nature of the relationship between “objective” interests and merely “subjective” preferences, will depend upon the

¹⁵ It is also possible to frame deontological moral theories in terms of duties rather than rights. Some duty-based theories could also be framed in a way that is more communitarian and therefore could fit into the framework of pluralist moral theory that I outline in the next Chapter. In any case, duty-based theories have not played a significant role in modern theorizing about property, and so for this thesis I will treat deontological theories and right-based theories as essentially equivalent. See generally the discussion in Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 64 et seq.

¹⁶ Although it is possible to craft a deontological theory that does give rights to collectives or even to non-human entities, such theories have not played a major role in the traditional discussions about property theory, and many of them are similar to pluralist value theories in any event: see e.g. Will Kymlicka, *Liberalism, Community and Culture* (New York: Oxford University Press, 1989) for a theory that could be interpreted as a deontological theory based in community rights.

¹⁷ Waldron, *supra* note 15, at 87.

particular deontological theory. Nevertheless, I adopt this definition as a useful characterization of rights-based theories.¹⁸ In particular, I agree with Waldron that this definition helpfully distinguishes right-based theories from utilitarian theories, as “[u]tilitarian arguments do not count as rights-based because they do not usually regard individual interests taken one-by-one as political justifications for anything.”¹⁹

To illustrate right-based theories further, I outline some of the more important of such theories that are often used in the property context. I cannot do justice to any of these theories in such a brief space, however, and summarize them here primarily as a way of setting up the later discussion of the common critiques of deontological theories and of the exposition of pluralist moral theory.

Perhaps the most famous rights-based theory in the property arena is John Locke’s labour theory.²⁰ Locke attempts to derive a general justification for rights to private property from the idea that ownership arises automatically from the control a person has over his or her own body. If a person labours on a previously unowned resource, then that person’s labour is “mixed” with the resource, giving him or her a natural right to control the resource and prevent others from appropriating it. Locke’s theory requires that untouched resources be considered owned in common by humanity in general, or at least by the local community of individuals who

¹⁸ Waldron also carefully distinguishes theories or arguments that are right-based from theories that are duty-based and theories that are goal-based. Although it is not crystal clear from his text, it appears that he ends up taking rights-based theories as the most important; in any case, he devotes the book to right-based theories and not duty- or goal-based theories. It would go well beyond the scope of this thesis to analyze the differences between right-based, duty-based, and goal-based moral theories in detail. I believe the categorization of theories into utilitarian, deontological, and pluralist is more effective.

¹⁹ Waldron, *supra* note 15, at 89.

²⁰ For the central passage expressing this theory, see John Locke, “Of Property” in C B Macpherson, ed, *Property: Mainstream and Critical Positions* (Toronto: University of Toronto Press, 1988) at 15 (originally chapter V of Locke’s *Second Treatise of Government*).

potentially have access to the resource, as opposed being either owned collectively or being in a state of ownership limbo. Locke grounds the “in common” character of original resources in both divine command and in the general right of a person to take unowned resources for his or her subsistence. Locke also postulated a famous “proviso,” requiring that appropriations from the commons be such that there is “enough, and as good left in common for others.”²¹ Locke’s theory is regarded as highly influential in the development of the common law in the late colonial era, especially in the United States, and still informs libertarian and popular conceptions of rights to private property.²²

Another deontological approach that has had a major impact on property law is that of Immanuel Kant.²³ Whereas Locke treats the justification for acquisition of private property as identical to the justification for the need for private property, Kant separates them. Kant’s moral philosophy is centred on the primacy of individual freedom. He builds his entire moral and political system on the idea that an individual’s freedom should be as broad as possible while allowing for similar freedom for others.²⁴ Private property is thus a derivative right that arises because private use and control of resources is necessary for an individual to fully enjoy freedom. A system of government that did not permit private property would therefore be immoral for Kant. However, the bare need for resources in order to fully enjoy freedom does not

²¹ *Ibid.* at 18.

²² See the discussion of Locke and libertarianism in Gregory Alexander & Eduardo Peñalver, *supra* note 6, at 35 et seq.

²³ This brief summary of Kant’s view is based largely on Chapter 4 of Gregory Alexander & Eduardo Peñalver, *supra* note 6, at 70.

²⁴ This is one version of Kant’s well-known categorical imperative. In “The Doctrine of Right”, Kant expresses the principle as follows: “Any action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law.” Immanuel Kant, “The Doctrine of Right” in Immanuel Kant, *The Metaphysics of Morals*, translated by Mary Gregor (New York: Cambridge University Press, 1996) at 6:230.

justify any particular distribution of resources among individuals. Nor can an individual acquire the right to a specific resource by a unilateral action, because such a unilateral action interferes with the potential freedom of others to acquire that resource. Instead, the acquisition of specific private property rights has to take place within a state system of laws to which each individual consents, either implicitly or explicitly.

There are also some influential modern theorists working in the deontological tradition. One is Robert Nozick. In *Anarchy, State and Utopia*, Nozick outlines a libertarian political theory that deals extensively with property rights.²⁵ Like Kant, Nozick prioritizes individual freedom. In particular, Nozick's focus is on historical entitlement and on how interference with existing entitlements jeopardizes freedom. Nozick's theory of entitlement distills down to the idea that, as long as the initial acquisition of a resource as private property was just, and as long as there has been no coercion or fraud in the successive transfer of the property, then the current entitlements of the owner with respect to the resource are morally justified. By his own admission, however, as a theory of private property Nozick's account is incomplete. As Waldron points out, Nozick does not provide any account of the justice of the initial acquisition of private property, and he merely hints at certain aspects of the justice of subsequent transfers.²⁶

Another modern deontological theorist whose work touches on private property is John Rawls. In *A Theory of Justice*, Rawls, like Kant, attempts to derive basic principles of justice from individual freedom.²⁷ However, for Rawls, the freedom that is most important is not the historically contingent and often unequal freedoms that people actually have in a given society.

²⁵ Robert Nozick, *Anarchy, State and Utopia* (New York: Basic Books, 1974)

²⁶ Waldron, *supra* note 15, at 254.

²⁷ John Rawls, *A Theory of Justice* (Oxford: Oxford University Press, 1971).

Instead, what is primary is the freedom to consent in a hypothetical “original position” in which the citizens of a society must agree to rules of justice without knowing what their particular personalities, preferences, talents, or endowments would be in the actual world. Rawls argues that, if placed in this original position, all persons would agree to two principles: first, similarly to Kant, that each person is to have rights “equal to the most extensive basic liberty compatible with a similar liberty for others”²⁸; and second, that any inequality must be arranged so that the inequality is to the benefit of the least well-off in society under conditions that ensure equality of opportunity. While Rawls is not directly concerned with providing a justification for private property in particular, his two fundamental principles place constraints on the design of any private property system and may justify some degree of redistribution.

Before moving on, it is important to discuss Georg Hegel. Hegel presents a theory of private property that is integrated with his general theories of society and the state. Hegel’s perspective on property is often presented as a “personality” theory, involving the idea that ownership of private property is necessary for an individual’s personal development.²⁹ In his extended critique of rights-based theories, Waldron takes pains to explain his categorization of Hegelian theory as rights-based. However, he does note that such a categorization is “likely to be controversial” and “may seem odd.”³⁰ Given the context of Waldron’s project, I can understand why he thought of Hegel’s account as rights-based. Waldron’s book was written at a time when neo-Aristotelean ethics had not yet emerged as a developed alternative to either deontology or utilitarianism, and there are many ways in which Hegel’s theory focuses on

²⁸ *Ibid.* at 60.

²⁹ See e.g., Gregory Alexander & Eduardo Peñalver, *supra* note 6, at 57; Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993) at 44.

³⁰ Waldron, *supra* note 15, at 343.

individual interests in a way that resonates with rights-based theories. However, as Waldron acknowledges, his theory “has none of the ‘absolutist’ spirit usually associated with rights-talk” and grants a moral ontological status to the community that is at odds with an individual rights approach. In this thesis, I treat Hegel, as well as his spiritual successor, Margaret Jane Radin, as falling in the neo-Aristotelean, pluralist ethics tradition. I explain why in detail when returning to this tradition later.³¹

2.3 Merger?

The conceptual division of these traditions into utilitarianism and deontology is fairly widely accepted. In *The Right to Private Property*, Jeremy Waldron discusses rights-based approaches to private property at length, and occasionally contrasts such approaches with utilitarianism. However, he never mentions any other possible approaches to moral theory in relation to property, and even describes Aristotle as an early version of a utilitarian approach.³² In their editorial introduction to a collection of essays on the relationship between property and community, Gregory Alexander and Eduardo Peñalver characterize two “dominant” approaches to property in contemporary scholarship: utilitarian and “liberal contractarianism.” While they do not use the terms “deontological” or “rights-based,” their use of the phrase “liberal contractarianism” covers similar ground, referring in particular to theories based on individual liberty as the fundamental subject of moral concern. Alexander and Peñalver thus appear to be invoking the dominant subset of what I am calling deontological theories: those for which

³¹ See discussion *infra*, ch 3.

³² See Waldron, *supra* note 15, at 6-7.

freedom provides the privileged value. Similarly, Margaret Jane Radin, in setting out the basis of her personhood theory of property, describes “the most prevalent traditional lines of liberal property theory: the Lockean labour-desert theory, which focuses on individual autonomy, [and] the utilitarian theory, which focuses on welfare maximization.”³³ Again we see the same basic division: rights-based/deontological/autonomy theories on one side, and utilitarian theories on the other.³⁴

However, one prominent property theorist has rejected this two-fold division. Carol Rose argues instead that these two approaches converge.³⁵ Her analysis appears as a critique of a theory put forward by Stephen Munzer.³⁶ In an earlier article, Munzer had sketched the outline of a pluralist theory of a sort in which property serves three incommensurable values: preference satisfaction, justice and equality, and desert. Munzer appears to be attempting a synthesis of utilitarian and deontological approaches. The incorporation of “preference satisfaction” is clearly utilitarian. By “justice and equality,” Munzer is referring to Rawlsian deontological ideas about constraints on the distribution of resources,³⁷ and by “desert” Munzer is getting at something like the Lockean theory, recasting it as a theory of property as a reward for labour.³⁸ In Munzer’s view, all three of these values must be taken into account in any justification of private property, even though they are supported by different ethical considerations and may conflict with each other.

³³ Radin, *supra* note 29, at 35.

³⁴ See also Eric Claeys, “Virtue and Rights in American Property Law” (2008-2009) 94 Cornell L Rev 889 at 894 (“Until fairly recently, most normative scholarship on practical philosophy could be sorted out into two competing camps – “deontology” and “consequentialism.”). Radin, properly in my view, presents her theory as a third alternative. I explore her ideas in more detail in Chapter 3.

³⁵ Carol Rose, *Property and Persuasion* (Boulder: Westview Press, 1994).

³⁶ *Ibid.* at 51.

³⁷ *Ibid.* at 55.

³⁸ *Ibid.* at 57.

Rose argues that these three values are not incommensurable at all, but are reducible to preference satisfaction. In doing so, she implicitly rejects the division I outlined above between utilitarian and deontological theories. Rose reduces Munzer's "justice or fairness" value to preference satisfaction by invoking the diminishing marginal utility of wealth. Drawing from law and economics theory, Rose argues that, as people get richer, additional wealth satisfies their preferences less easily. Conversely, poor people obtain a much higher level of preference satisfaction from additional wealth. For example, providing a homeless person with a small apartment to live in will likely increase that person's preference satisfaction tremendously, while providing a multi-millionaire with the same apartment will likely not satisfy any preferences, or at the most will satisfy a preference for increasing net worth. Because of this, Rose argues, any serious preference-satisfaction theory must incorporate the Rawlsian injunction to ensure that all inequalities work to the advantage of the least well-off, and require progressive redistribution of basic resources to meet fundamental human needs.³⁹ Furthermore, preference-satisfaction also leads to the same limits on property takings and redistribution that might be suggested by a "justice or fairness" model. Too much redistribution would lead to the thwarting of reasonable expectations, and thus to "demoralization" and underinvestment in the economy by those with resources. Both "justice or fairness" and maximizing preferences through wealth creation thus require similar limits on government takings without compensation.⁴⁰

Turning to "desert", Rose observes that not all labour is deserving of compensation; rather, "the labour that gets rewarded is the labour that produces goods or services that people

³⁹ *Ibid.* at 55-56.

⁴⁰ *Ibid.* at 56.

want.”⁴¹ Desert is therefore linked directly with preference satisfaction. A person only “deserves” property as a reward for labour if that labour was exercised to satisfy someone’s preferences.

Rose’s analysis is interesting here because it highlights how, under certain assumptions, the results predicted by utilitarian and deontological property theories could be the same. However, it does not support the strong conclusion that these theories are therefore reducible to one another, or are so similar that they ought to be treated as the same type of theory. Fundamentally, the *reasons* given for supporting their results are very different, even when those results are similar. Utilitarians have no truck with the inherent value of labour, freedom, or any other deontological concern; all can be overridden if necessary to increase the maximization of utility. If under the right conditions this happens to increase freedom, or reward deserving labour, that is fine, but increasing freedom and rewarding labour are not reasons for adopting any particular action. Conversely, deontologists are not ultimately concerned with maximizing utility, however defined. Following Kant, they may be interested in maximizing freedom, but any preference satisfaction is an incidental effect – it is the freedom itself that must be maximized, not the satisfaction of preferences through the exercise of freedom. Similarly, Rawls does not derive his principles of justice from any notion of preference satisfaction, particularly in the here and now. He is concerned with what free agents in his original position would agree to, and he does not conclude that they would agree to maximize aggregate utility.

The differences become more readily apparent if we question some of Rose’s assumptions. Not all deontologists would agree with them. Regarding labour, the idea that

⁴¹ *Ibid.* at 57.

labour deserves a reward only by virtue of satisfying the preferences of others is not found in Locke. Locke's labour theory derives from the right of an individual to seek subsistence and control of one's body and its creations. Nozick's theory of historical entitlement rests on a notion of desert that does not even reference labour, let alone satisfaction of preferences. Regarding the notion of the diminishing marginal utility of wealth, it is not clear that it leads directly to a Rawlsian principle of redistribution, nor to any other redistributive principle of justice that might arise from deontological theory. The degree to which the diminishing utility exists, and its exact role in the actual shaping of people's preferences, are both complex empirical issues. There is no reason to believe *a priori* that they correspond with any particular rights-based principle. Finally, regarding expectations for property ownership and "demoralization", Rose herself admits that such expectations are culturally relative and socially constructed. As an example, she describes the possibility of an "obligatory potlatch" economy, in which anyone who accumulates a significant amount of wealth is required to give it away. In such a society, expectations around property ownership and the possibility of "demoralization" could play out very differently, and there is no particular reason to expect that rights-based and utilitarian justifications for ownership would lead to in the same direction.

In the next section of this chapter, I explore the differences between utilitarian and deontological theories, and highlight some examples where they diverge on questions of private property. Before getting there, however, I want to discuss where Rose is headed. Rose's goal is to contrast "liberal" philosophical views on property with a conception of "property as propriety." Under this view, property is not seen primarily "as a set of tradeable and ultimately interchangeable goods"; rather, property is "associated with different kinds of roles" in society

and “carrie[s] with it some measure of governing authority.”⁴² The property system is integrated with the political and social hierarchy, allocating to various actors in society their “proper” place and role. The connection of this idea to a feudal order is clear, and Rose notes that “property as propriety” was a common understanding before the seventeenth and eighteenth centuries, but was never completely abandoned. She describes how the notion passed through a “republican” period in the United States in which private property was seen as a device to promote virtue and independence of citizens and incorporated duties to the larger community for the sake of the common good. Rose then describes how “property as propriety” has influenced both the modern American law of takings and some modern “welfarist” theorists such as Charles Reich and Cass Sunstein.⁴³

In the end, Rose ends up sketching the outlines of an approach to property that is similar to the approaches taken by pluralist moral theory. “Property as propriety” is a systemic view of property as constitutive of social relations and reconciling the needs of the individual with that of the greater social order. Rather than focusing on aggregate individual welfare, or on individual interests, Rose turns to the effects of property relations on the entire social order, and leaves room for that order to have ontological moral weight. In discussing welfare entitlements, for example, she indicates that “[m]any who support welfare may well do so out of a sense that poverty (and perhaps great wealth too) is a kind of disorder in the republic” and that “the disorder of poverty brings scandal and disgrace to our community and that the station of propertied persons obliges them to do something to remedy the situation.”⁴⁴ Such statements

⁴² *Ibid.* at 59.

⁴³ *Ibid.* at 63.

⁴⁴ *Ibid.* at 64.

invoke a conception of society as a whole subject to a “disorder” and points to responsibilities of property owners that derive from their “station.” As discussed below, this conception fits with the neo-Aristotelean, pluralist view of property. So, while I disagree with Rose’s characterization of utilitarian and deontological approaches to property as being essentially the same, I agree with the direction of her analysis.⁴⁵

2.4 The Problem of Expropriation

The utilitarian and deontological traditions in western liberal philosophy provide a rich variety of tools for discussing, evaluating, and justifying private property rights. It is thus reasonable to ask, why look elsewhere? What could a pluralist property theory offer that these other theories lack?

In this section, I briefly describe the main analytic problems that property rights present for these theories. While traditions in both camps have generated complex and sophisticated means of addressing these problems, I argue that such resolutions tend to have an *ad hoc* character that stands in tension with the overall thrust of the underlying theory. By contrast, pluralist moral theory provides a framework and structure that avoids these problems without the need for complex adjustments.

I use the example of expropriation as a focus for highlighting the long-standing, central critiques of both moral traditions. The power of expropriation is an ancient sovereign power

⁴⁵ See also Gregory S. Alexander, *Commodity and Propriety: Competing Visions of Property in American Legal Thought 1776-1970* (Chicago: University of Chicago Press, 1997) at 385, predicting a resurgence of a civic conception of property, as a complement or alternative to a commodity conception.

widely recognized across different times, cultures, and legal systems.⁴⁶ It allows governments to expropriate private property from citizens in order to use the property for the public good, and normally requires the payment of just compensation to the owner. Expropriation is a central feature of virtually every private property legal system, and yet, neither utilitarian nor deontological theories present clear, simple, and direct justifications for it.

2.4.1 Utilitarianism

Utilitarianism “has long been criticized for a willingness to trade on individual well-being in order to enhance aggregate utility.”⁴⁷ Utilitarianism does not ascribe any moral inherent worth or value to individuals; the only thing that has value is utility. Consequently, utilitarian theories struggle with situations where a large sacrifice on the part of a small number of people will dramatically increase the utility of the majority. If an action decreases one person’s utility, but increases the utility of others by a greater amount, then that action is morally justified or even required. This remains true even if the decrease in the first person’s utility leads to horrific consequences, such as the person’s death, torture, or enslavement.

⁴⁶ In this regard, see Susan Reynolds, *Studies in Legal History: Before Eminent Domain: Toward a History of Expropriation of Land for the Common Good* (Chapel Hill: University of North Carolina Press, 2010). Reynolds traces the history of expropriation in detail in medieval Europe through to 1800, showing the adoption of the doctrine from Roman law and its prevalence throughout the continent, and the restrictions that the property must be taken for a public purpose and with payment of compensation. Reynolds also canvasses anthropological evidence for the use of expropriation in Africa, China, India and the Middle East throughout history. My own research paper from LAW 312 found that 86% of currently active constitutions grant the power of expropriation to the government, including all current active constitutions of communist governments and most of the constitutions in civil, common, and sharia law countries. As well, countries such as Canada and the UK have expropriation as part of their general legal doctrines, even though the power is not expressly contained in a written constitution. Jason Leslie, “A Survey of Constitutional Property Rights” (2013) [unpublished, archived at University of British Columbia, Faculty of Law].

⁴⁷ Gregory Alexander & Eduardo Peñalver, *supra* note 6, at 31.

In the context of expropriation, utilitarian theories readily justify the taking of private property for public use. If the decrease in utility caused to the owner by the taking is outweighed by the increase in utility for others, then the action accords with utilitarianism's goal of maximizing welfare. However, utilitarianism does not provide clear support for providing the original owner with compensation, nor does it support the standard limitation of the exercise of expropriation to a public purpose. Consider, for example, evicting a small number of home owners on large lots in order to build an efficient, state-of-the-art industrial complex that provides well-paying jobs to thousands.⁴⁸ The aggregate welfare of the affected individuals is clearly increased, even if the industrial park is entirely in private hands. Furthermore, maximizing utility may not even require giving the former homeowners compensation. If the money that would be used to provide compensation could be used by the state to provide a service that generates more utility than the compensation would provide, then utilitarian theory provides no reason to compensate. But this result contradicts widespread intuitions about the fairness of expropriation and the need to compensate to the former owners, regardless of how the state might otherwise spend the money.

While it is possible to fiddle and tweak the edges of utilitarian theory to justify the standard limits on expropriation of public purpose and compensation, it does not come easily.

Three prominent approaches are offered in the law and economics literature: concerns about

⁴⁸ Cf. the controversial decision of the United States Supreme Court in *Kelo v City of London*, 545 US 469 (2005) (upholding as constitutional the use of expropriation to transfer privately-owned residential land to a private developers in order to obtain economic benefits).

“owner demoralization,” concerns about the incentives of state actors, and concerns stemming from public choice theory.⁴⁹

The “owner demoralization” theory states that compensation is required because, without it, former owners would suffer disutility from a taking that would outweigh the overall increase in utility caused by the taking.⁵⁰ The demoralization is said to come not just from the loss of the value of the property, but also from the sense of being mistreated and from the subsequent disincentive to invest in further private property holdings, thus leading to instability in the property system. However, such “demoralization” effects are an empirical matter, and there is no *a priori* reason to think that the disutility caused by these effects will outweigh the increase in aggregate utility caused by the uncompensated taking. As noted by Alexander and Peñalver, the determination of demoralization costs “is likely to be extremely sensitive to context” and “may even be open to treating different types of owners (and even different types of property) differently for takings purposes.”⁵¹ And as Carol Rose has noted, the amount of “demoralization” resulting from a taking is relative to culture, depending on prevailing understandings of private property and acceptance of the need to sacrifice for the common good.⁵²

The “state actor” and “public choice” theories focus on the effects of the compensation requirement on the political process itself.⁵³ The “state actor” theory holds that, without a

⁴⁹ I have adopted this grouping of the approaches from Alexander and Peñalver, *supra* note 6, at 162. Alexander and Peñalver note that these attempts “share the feature of asserting a connection between the failure to compensate landowners and the generation of some quantum of disutility that would not exist upon the payment of compensation.” *Ibid.*

⁵⁰ See especially Frank I. Michelman, “Property, Utility and Fairness: Comments on the Ethical Foundations of ‘Just Compensation’ Law,” 80 *Harvard L Rev* 1165 (1967).

⁵¹ *Ibid.* at 164.

⁵² Rose, *supra* note 35, at 56.

⁵³ See Richard A. Posner, *Economic Analysis of Law*, 6th ed (New York: Aspen Publishers, 2003) at 57.

compensation requirement, the state will more readily expropriate and thus treat private property like a commons, leading to overregulation and overexploitation of resources. The “public choice” theories focus on the lobbying efforts of property owners, claiming that without a compensation requirement, property owners will try “too hard” to block utility-enhancing takings, resulting in lower overall aggregate utility. However, like the demoralization theory, both state actor and public choice theories are subject to context and to empirical variation – there is no *a priori* reason to assume that compensation will always be utility-maximizing, and so the need for compensation would need to be determined case-by-case.⁵⁴ Further, as Alexander and Peñalver point out, these approaches rely on a “rational economic actor” model of *political* behavior, a position that is both highly controversial and also subject to empirical verification.⁵⁵

Utilitarianism uses much *post hoc* justification in struggling to explain existing practices of expropriation. Moreover, these justifications are empirically vulnerable. In any given case, the demoralization, state actor, or public choice costs may not, in fact, outweigh the utility gains from a failure to compensate. In these cases, utilitarianism has no further tools to explain why compensation may nevertheless seem morally justified. Finally, none of these justifications successfully explains why expropriation should be limited to public purposes. A theorist who takes utilitarian moral theory seriously has to accept that the public purpose requirement is either not justifiable, or is meaningless.

⁵⁴ See Daryl J Levinson, “Making Government Pay” (2000) 67 U Chi L Rev 345 at 357 (presenting empirical evidence that government actors do not respond to price incentives in the same manner that a private firm does).

⁵⁵ Alexander and Peñalver, *supra* note 6, at 165.

2.4.2 Deontology

Because of their emphasis on individual interests and rights, deontological theories encounter problems that are the converse of those encountered by utilitarian theories. In a right-based paradigm, it is difficult to justify actions that require some sort of sacrifice by an individual, even if relatively trivial, in order to advance the common good. Deontologists can easily be forced into a dilemma. On one side, if they take a strong, absolutist approach to moral rights, they cannot allow for any action, rule, or system that derogates from those rights, regardless of the consequences for other people, other human interests, or society as a whole. On the other side, if they allow for some exceptions to their privileged right, they implicitly allow for other considerations besides that privileged right to have moral weight. If this is conceded, then a purely deontological approach is abandoned.

While utilitarian theories struggle to place appropriate limits on expropriation, deontological theories have difficulty justifying the use of the power at all. If a person is entitled to their property on the basis of a labour, freedom, or some other rights theory, then it is difficult to provide a justification for the state to take that property without consent, even on payment of fair compensation.⁵⁶ There is little room for the “public good” to tread on the sanctity of private property in such theories. Any ability of a government to expropriate property must somehow be justified by the same considerations that underlie the existence of the private property rights in the first place; otherwise, the theory is no longer strictly deontological, but involves holistic and systemic considerations as well.

⁵⁶ In Calabresi and Melamed’s terms, expropriation is a conversion of a property rule to a liability rule, thus removing one of the basic rights of property that a deontological theory would want to protect: control over alienation. See Calabresi & Melamed, *supra* note 14.

Some deontological theories simply deny the power of expropriation. Nozick's theory is one of them. In Nozick's view, private property rights are sacrosanct, and derive their justification from an original acquisition mechanism (which he does not provide) followed by consensual transfers of title that involve no force or fraud. Because expropriation involves acquiring property without the consent of the owner, it is a form of force, and cannot be morally justified.

Other deontological approaches are not so absolute. In particular, any deontological theory that depends on universal consent to private property rights leaves a door open for a justification of expropriation. Kantian theory provides an example. In Kant's system, the right to private property is a derivative right, essential for the exercise of personal freedom. However, there is no moral basis for any specific form or distribution of private property entitlements. Instead, the particulars of any private property system derive from social contract theory, in which the citizens of society consent, either implicitly or explicitly, to a property regime. Presumably, a need to recognize a power of expropriation could arise as part of the bargain entered into by the citizens. The state provides protection generally for private property rights, and in return for such protection, citizens agree to an expropriation power. A similar reading of Locke's labour theory is also possible. As explained by Jeremy Waldron, Locke can be interpreted "as holding a view similar to Kant's: that the property rights acquired in the state of nature are provisional and require eventual ratification by the laws of civil society."⁵⁷ Such a view is consistent with Locke's writings on the arising of the state, as well as his statements

⁵⁷ Waldron, *supra* note 15, at 234.

regarding the development of currency and the ability to accumulate wealth in a developed social system.⁵⁸

However, the contractarian justification for expropriation is limited. If the deontological interests that drive rights-based theories are to have any substantial meaning, then they must place limits on the ability of a social contract to restrict such rights. As Waldron puts it, “the requirement of positive ratification does not involve any possibility of abrogation or substantial derogation” from pre-political, “natural” property rights.⁵⁹ Waldron attributes to Kant the view that civil society may set terms dictating the further acquisition of private property once the society is formed, but cannot justify redistribution of any rights that have already been acquired.⁶⁰

However, even without taking such a strong view it is still hard to see how natural and individualistic rights to property allow for expropriation. A doctrine of expropriation grounded in deontological theory has to take, as its primary consideration, the impact of expropriation on the interests of the individual owners that are meant to be protected by the institution of private property. For Lockean labour theories, this suggests preventing any expropriation that interferes with the ability of property owners to benefit from the fruits of their labour, or that of their ancestors in title. For Kant, this suggests disallowing any expropriation that treats the property owners as means, rather than ends, and interferes unduly with the exercise of their freedom. Either case is likely to lead to very strict requirements for expropriation. Moreover, such an approach would move the focus of the takings analysis from the purposes to which the property

⁵⁸ See Locke, *supra* note 20, at 26-27; Alexander and Peñalver, *supra* note 6, at 42-43.

⁵⁹ Waldron, *supra* note 15, at 234.

⁶⁰ *Ibid.*

will be put and the fairness of the compensation to the effect of the expropriation on the interests of the owners themselves without regard to the broader social impacts. Any suggestion that a “public purpose” could override an owner’s interest in the property, or that the needs of the community need to be balanced or weighed in some way against the interests of the owners, takes the analysis away from a rights-based approach.

In this chapter, I have outlined property theory in the utilitarian and deontological traditions, and shown how the doctrine of expropriation poses challenges for both. In the next chapter, I turn to the pluralist tradition, outline its strengths and weaknesses, and examine whether it can fare better in addressing problems such as expropriation.

Chapter 3: The Pluralist Approach

I begin by outlining the general characteristics of what I mean by a pluralist theory and showing how they arise from modern treatments of value ethics. Then, I canvass several property theorists who provide examples of pluralist theories. Finally, I address the effectiveness of pluralist theories by reviewing some of their strengths and weaknesses and suggesting two ways to bolster their potential.

3.1 Overview of Pluralist Moral Theory

The distinguishing feature of pluralist theories is that, unlike utilitarian and deontological approaches, pluralist theories do not attempt to identify a fixed or single value to underlie all moral reasoning. Instead, pluralist theories accept that moral questions are irreducibly complex, and involve an open-ended set of human values that are sensitive to context and potentially revisable. Rather than seeking to find a single formula that can resolve all moral issues, pluralist theory sets up a framework within which moral questions can be identified and debated. It envisions moral discourse as an ongoing conversation and a process of discovery rather than as the application of eternally fixed principles.

However, pluralist theory need neither collapse into moral relativism, nor adopt the idea that morality is nothing more than politics and posturing of interest groups. The theory can take seriously the idea that there are objective limits to moral reasoning that apply universally. At the same time, pluralist theory can recognize that moral questions sometimes involve complex interactions of incommensurable human values that may not always have one fixed, objectively verifiable answer.

I attempt here to provide a description of the key elements of a pluralist moral theory. In keeping with the pluralist spirit of the discussion, I do not claim that all pluralist theories have all of these elements, nor do I specify a list of necessary and sufficient conditions for a theory to be a pluralist theory. Instead, like Waldron's approach to the concept of private property, I take the view that pluralist moral theory is a concept of which many conceptions are possible. There are no absolute defining conditions. Rather, there are a constellation of conceptions which bear a "family resemblance" to one another.¹

With that caveat, these are the four features that I consider to be characteristic of pluralist theories:

1. Reference to an umbrella concept such as "human flourishing" or another similar idea to describe the overall purpose of a moral system;
2. Incorporation of an open-ended and revisable list of incommensurable human "values" that both constitute and promote human flourishing;
3. Recognition of the interdependence of individuals and community, to the point that the interests of the community as a whole carry moral weight in addition to that of the individuals in the community; and
4. Adoption of a context-oriented, "practical reason" approach to moral questions that involves a low level of abstraction and a high sensitivity to particular circumstances.

¹ Cf. Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) at 49. Waldron takes the notion of "family resemblance" from Wittgenstein. See Ludwig Wittgenstein, *Philosophical Investigations*, translated by G E M Anscombe (Oxford: Basil Blackwell, 1974) at 32 et seq.

I briefly discuss each of these characteristics in turn, and then turn to an exposition of several different theories of property from the pluralist tradition.

3.1.1 Human Flourishing

The notion of “human flourishing” is usually traced to Aristotle.² The phrase is a translation of the ancient Greek term “eudaimonia,” postulated by Aristotle to be the ultimate end of the good life.³ While the term is sometimes translated as “happiness” or some other indicator of subjective well-being, commentators generally have stated that this is too narrow to capture Aristotle’s meaning. Rather than referring to a subjective mood or experience, the term “eudaimonia” captures an overall objective state of harmony and can be applied not only to individuals but to entire communities and to society as a whole.⁴

Where utility is “thin,” resting primarily on subjective states of individuals, human flourishing is “thick” and involves a complex matrix of both objective and subjective, and both individualistic and collective considerations.⁵ In this conception, human flourishing does not

² See e.g., Roger Crisp and Michael Slote, eds, *Virtue Ethics* (Oxford: Oxford University Press, 1997) at 2 (“[T]he ancient greek philosopher, Aristotle... has been the main source of inspiration for modern virtue ethicists.”); Martha Nussbaum, “Capabilities as Fundamental Entitlements: Sen and Social Justice” (2003) 9 *Feminist Economics* 33, at 54 (stating that her vision of pluralist ethics, a “capabilities” approach, “need[s] to adopt a political conception of the person that is more Aristotelean than Kantian”); Gregory S Alexander and Eduardo Peñalver, *An Introduction to Property Theory* (Cambridge University Press: New York, 2012) at 80 (stating that pluralist value ethics “draws inspiration from the political and moral theories of Aristotle and Thomas Aquinas. Though it departs in significant ways from those classical theories, enough debt to Aristotle remains that we will sometimes refer to the theory simply as ‘Aristotelean’.”)

³ Pluralist theory is sometimes referred to as “eudaimonic” theory.

⁴ Alexander & Peñalver, *supra* note 2, at 81. See also Stephen Carden, *Virtue Ethics: Dewey and MacIntyre* (New York: Continuum, 2006) at 80 (“Aristotle conceived of the virtues as means to and constitutive of human flourishing; that is, given the nature of man, the virtues are the key to the good life, or *eudaimonia*.”).

⁵ In comparing the theories of two prominent early modern philosophers working in the value ethics tradition, Alastair MacIntyre and John Dewey, Stephen Carden notes that “Dewey and MacIntyre come to much the same conclusion about human flourishing – that the virtues are constitutive of the good life, both for the individual and the community, since these are ultimately inseparable.”) *Ibid.* at 101.

reduce to a single metric or capture one specific aspect of human life.⁶ In fact, as used by pluralist theories, “human flourishing” is not so much a unitary concept as a rhetorical device to point the mind towards an intuitive conception of “the good”. It is meant to appeal to something deep in human nature; to that which gives rise to the spiritual impulse, to humanitarian compassion, and to the general sense that there is a meaning to human life that is rich, multi-dimensional, and can never be reduced to a complete intellectual description.⁷ As such, while philosophers can invoke human flourishing as a basis for moral argument and can spend time theorizing about its contents and implications, at some level it must be taken as axiomatic.

Human flourishing can be interpreted as an absolute or relative concept. In its absolute form, as originally conceived by Aristotle, human flourishing provides an objective backdrop against which to evaluate any human being and any human society.⁸ In its relative form, as conceived by some modern theorists, human flourishing does not have an objective content that applies to all persons and all societies, but instead is relative to culture.⁹ As I explain in more detail in a later section, I tend to support a narrow version of the absolutist view, under which

⁶ In fact at least one value ethics theorist even rejects the notion of human flourishing as a useful concept at all, preferring an approach that is fundamentally pluralist and does not have a unifying umbrella concept. See Christine Swanton, *Virtue Ethics: A Pluralist View* (Oxford: Oxford University Press, 2003). However, Swanton acknowledges that “[i]n modern virtue ethics, which is largely inspired by Aristotle, the dominant account of what makes a trait a virtue is eudaimonism.” *Ibid.* at 77.

⁷ Alexander & Peñalver note that “[f]lourishing is an irreducibly complex concept that is constituted by numerous plural and incommensurable goods.” *Supra* note 2, at 81. They also point out that “Aristotle recognized that there is disagreement about what constitutes happiness (flourishing), and he dismisses several plausible candidates, including pleasure.” *Ibid.* MacIntyre with some religious overtones, posits human flourishing as the goal of human existence or the reason for its being, while Dewey ties the notion of human flourishing to a complex biological and evolutionary process of growth. Carden, *supra* note 4 at 98-101. For an interesting take on value ethics that uses the analogy of physical health to provide a basis for understanding human flourishing, see Sam Harris, *The Moral Landscape: how science can determine moral values* (New York: Free Press, 2010).

⁸ Alexander & Peñalver, *supra* note 2.

⁹ Eduardo Peñalver is a pluralist property theorist who has expressed sympathies with the relativist approach: See Eduardo Peñalver, “Land Virtues” (2009) 94 Cornell L Rev 821 at 866 (adopting a view consonant with the cultural relativism of Alasdair MacIntyre).

there is a wide latitude for cultural variation set within objective limits to the appropriate range of behaviours and institutions that are compatible with human flourishing. However, it is possible to take either approach.

3.1.2 Values

Reasoning directly from “human flourishing” to any particular result is impossible. Instead, moral reasoning in the pluralist tradition is mediated by reference to specific “values” (sometimes called “virtues”) that capture a specific dimension of human flourishing and render it more precise in a given context. For this reason, pluralist moral theories are often referred to as “value ethics” (or “virtue ethics”).

No single value can encapsulate all of human flourishing. Moreover, values are incommensurable: they cannot be reduced to or defined in terms of one another, nor can they be placed in a fixed hierarchy. This is the crux of the pluralist critique of both utilitarianism and deontology. Following its Aristotelean roots, virtue theorists generally maintain that ethical reasoning, and thus the values, arise from the practice of ethical behavior and use of the values within a specific context of taking action and making moral decisions.¹⁰ The need for a contextual approach that incorporates the complexities of human life takes a front seat in their reasoning, as exemplified in the following passage from Dewey:

A moral philosophy which should frankly recognize the impossibility of reducing all the elements in moral situations to a single commensurable principle, which should recognize that each human being has to make the best adjustment he can among forces which are genuinely disparate, would throw light upon actual predicaments of conduct and help

¹⁰ See e.g. Stephan Carden, *supra* note 4 at 60-64, comparing MacIntyre’s and Dewey’s rejections for both consequentialist and deontological theories as being too inflexible and “rule-based.”

individuals in making a juster estimate of the force of each competing factor... In taking attention away from rigid rules and standards it would lead me to attend more fully to the concrete elements entering into the situations in which they have to act.¹¹

In adopting a value ethics approach based on Martha Nussbaum's conception of human capabilities, Alexander and Peñalver note that "the values underlying these capabilities are plural and incommensurable" and that it is not possible to adequately compensate for a lack of any value by an excess of another value.¹² In discussing property specifically, Hanoch Dagan follows an observation made by Isaiah Berlin that "human life is replete with competing values that cannot be reconciled and with legitimate wishes that cannot be truly satisfied. Because some values intrinsically conflict and because we cannot have everything we want, explains Berlin, '[t]he need to choose, to sacrifice some ultimate values to others, turns out to be a permanent characteristic of the human predicament'."¹³

Additionally, the list of values is open-ended. Pluralist theorists do not expect to find a final list of values that exhaust the possibilities of moral consideration. Instead, they rely on the guidance of the "human flourishing" concept to help identify the values that come into play in any particular situation, and remain open to adding, refining, and developing those values as needed. In his description of Dewey's ethics, Stephan Carden notes that for him, "[v]alues are objects or events that have been judged worthy of pursuit or avoidance; thus they too are dependent on the conditions leading to and resulting from objects or events to be enjoyed. None

¹¹ John Dewey, "Three independent factors in morals" in Boydston, ed *The Later Works of John Dewey: 1925-1953*, vol 5 (Chicago: Southern Illinois University Press, 2008) at 288.

¹² Alexander & Peñalver, *supra* note 2, at 90.

¹³ Hanoch Dagan, *Property: Values and Institutions* (Oxford: Oxford University Press, 2011) at 71, quoting Isaiah Berlin, *Four Essays on Liberty* (London: Oxford University Press, 1969) at 1-li.

is universal or eternal, for each is a result of particular temporal conditions.”¹⁴ This enables legal traditions based in a pluralist notion of ethics to remain flexible and evolve over time.

According to Dagan, “law is ‘a going institution’; it is, in John Dewey’s words, ‘a social process, not something that can be done or happen at a certain date.’ As a going institution, law is structured to be an ‘endless process of testing and retesting’; thus understood, law is a great human laboratory continuously seeking improvement.”¹⁵

3.1.3 Interdependence

Alexander and Peñalver note that Aristotle made the following famous statement seven times: “a human being is by nature a political animal.”¹⁶ What Aristotle meant by this, and what most pluralist theorists agree with, is that human beings are not fundamentally atomistic creatures.¹⁷ People need to belong in a society in order to secure their own well-being, to develop a sense of identity and purpose, and to grow into mature and conscientious moral actors. In a very deep sense, people and communities are interdependent. A community obviously cannot exist without people, but at the same time, people cannot exist, except in a very rudimentary and coarse way,

¹⁴ Carden, *supra* note 4, at 53. See also, Martha Nussbaum, *supra* note 2, at 41, describing her proposed list of capacities as values as being “open ended,” anticipating the need to “undergo further modification”; Gregory Alexander, “The Social-Obligation Norm in American Property Law” (2008-2009) 94 Cornell L Rev 745 at 765, noting that “[t]here is ample room for robust debate about exactly what capacities are the crucial components of human flourishing.”

¹⁵ Dagan, *supra* note 13 at xxi, quoting John Dewey, “My Philosophy of Law” in Julius Rosenthal Foundation for General Law, *My philosophy of law; credos of sixteen American scholars, published under the direction of the Julius Rosenthal foundation, Northwestern university* (Boston: Boston Law Book, 1941) at 73, 77.

¹⁶ Alexander & Peñalver, *supra* note 2, at 80.

¹⁷ Alexander and Peñalver expand on Aristotle’s conception as follows: “Empirically, part of his meaning is that humans are social creatures and that we characteristically choose to live with others... Aristotle also meant that we have a deeper need to be part of a political community within which we experience richer and more complete lives than are available to us either alone or within small family units.” *Ibid.* at 80.

without a community. How people develop, how they perceive themselves, and how they set their goals, desires, and preferences will all be heavily influenced by the society that they are embedded in. Communities are not just made of people; people are made of communities.

Stephen Carden demonstrates how this understanding of the self as a social being underlies the pluralist ethics of both John Dewey and Alastair MacIntyre:

For Dewey, the self is a confluence of activities taken up through its environment, especially its social environment. The self for MacIntyre is not isolated from society either, but immersed within it. It does not choose to engage in society or enter into a contract to accept its laws; rather, he says that the self is born within society and is constituted by recognition of pre-existing social relationships and the formation of new ones. The idea of the self as an independent substance that stands behind activity to control it is not held by either MacIntyre or Dewey; both philosophers agree that such a conception is illusory and damaging to healthy social relationships.¹⁸

Because of this interdependence, pluralist moral theory sees individual and collective interests not as primarily in conflict, but as mutually reinforcing. As noted by Alexander and Peñalver, “living within a particular sort of society, a web of particular kinds of social relationships, is a necessary condition for humans to be able to develop the distinctively human capacities that allow us to flourish.”¹⁹ The community does not exist solely as an instrument to advance the aims of the individuals within it.²⁰ Instead, the health and flourishing of the community as a whole is itself a matter of direct moral concern.²¹ Furthermore, the cultivation of values can only

¹⁸ Carden, *supra* note 4, at 81.

¹⁹ Alexander and Peñalver, *supra* note 2, at 88.

²⁰ Carden concludes that for both MacIntyre and Dewey, “the virtues are constitutive of the good life, both for the individual and for the community, since these are ultimately inseparable.” Carden, *supra* note 4, at 101. See also Alexander, *supra* note 14, at 761 (“Community is constitutive of human flourishing in a very deep sense; perhaps community even comprises humanity (as that term is used by many understandings)”).

²¹ See also Martha Nussbaum, who argues that “[t]o the extent that rights are used in defining social justice, we should not grant that a *society* is just unless the capabilities have been effectively achieved”

happen in a functioning society. Individuals are not born ready to act virtuously and enter into a social contract for their mutual self-promotion. Rather, an individual must be educated so that moral sensibilities, the faculty of reason, and virtuous action can be cultivated.²² It is therefore part of the moral project to see that individuals are shaped properly, in ways that promote values and lead to human flourishing at both the individual and collective levels.

3.1.4 Practical Reason

The last piece of the pluralist puzzle is the Aristotlean notion of “practical reason.” Moral pluralism is a-formulaic. The application of values to moral questions cannot be reduced to a simple rule or set of rules that will resolve all potential cases. As Stephen Carden explains in his analysis of MacIntyre and Dewey:

This runs counter to many modern ethical theories, whether classified as deontological or consequentialist, which begin from a focus on the individual and tend to emphasize theory over practice. Not so for MacIntyre and Dewey, who begin by focusing on organized community activities in the pursuit of common goods and who seek the ground for morality in human practices rather than in universal principles of thought.²³

The identification of values and their proper application involves a complex process of reasoning that attempts to balance, reconcile, and promote relevant values in a particular context. The goal

(emphasis added) and “[t]o secure a capability to a citizen it is not enough to create a sphere of non-interference: the public conception must design the material and institutional environment so that it provides the requisite affirmative support for all the relevant capabilities.” Nussbaum, *supra* note 2, at 37, 55.

²² “Human flourishing unfolds over the course of a person’s lifetime as, supported by those around her, she gradually acquires the requisite skills and resources for living well. The virtues necessary for flourishing are not genetically endowed talents. They are dispositions that one acquires over time through careful cultivation, nurturing, support from families, friends, and communities.” Alexander and Peñalver, *supra* note 2, at 82.

²³ Carden, *supra* note 4, at 57.

is not to identify one basic principle, but “to identify a framework for describing human flourishing that, as Martha Nussbaum puts it, ‘allows for a great deal of latitude for diversity, but one that also sets up some general benchmarks’ for evaluating the practices that prevail within a given society as either conducive to or inconsistent with the achievement of the well-lived life.”²⁴ While there may be certain regularities that can be expressed as general rules of thumb,²⁵ there is no expectation that broad rules of moral conduct can be applied mechanically across a wide variety of situations.

3.2 Pluralist Theory and Property Theory

In this section, I briefly trace the history of pluralist theory in regard to property. I start with the classical theories of Aristotle and Thomas Aquinas, turn briefly to Georg Hegel, and then canvass a few modern theorists working in the pluralist tradition including Gregory Alexander and Eduardo Peñalver, Joseph Singer, Hanoch Dagan, and Margaret Radin.

As noted above, the origin of pluralist theories is usually traced to Aristotle. For him, the ultimate aim of human life was indeed “flourishing”, or eudaimonia. In Aristotle’s view, eudaimonia could only be achieved within the context of a fully-functioning society.²⁶ Unlike many of the moral and political theories that have been popular in the centuries since the

²⁴ Alexander and Peñalver, *supra* note 2, at 88-89, quoting Martha Nussbaum, *Women and Human Development* (New York: Cambridge University Press, 2000) at 50-5.

²⁵ Alexander argues that there are “multiple ways to reconcile support of rules, or at least rule-like norms, with a relatively robust conception of the social-obligation norm” in his particular version of pluralist property theory in the property law context. Gregory S. Alexander, “Reply: The Complex Core of Property” (2008-2009) 94 Cornell L Rev 1063 at 1064. See also Hanoch Dagan, who shows how a pluralist view of property could be used to justify a version of the *numerus clausus* principle despite the lack of a unitary underlying moral formula. Dagan, *supra* note 13, at 31-35.

²⁶ Alexander and Peñalver, *supra* note 2, at 81.

European enlightenment, Aristotle did not take the individual as morally prior to society; instead, individual and society must be considered together as an interacting moral system.

Further, Aristotle maintained that eudaimonia is an irreducibly complex concept, and could be achieved only through the development and interaction of several faculties, which he called “virtues”, manifested both at the level of individual behaviour and in social organization. In keeping with the empirical and anti-essentialist nature of much of Aristotle’s philosophy, he conceived of the values not as abstract ideals or inherent qualities of human existence, but as “acquired, stabled dispositions to engage in certain characteristic modes of behaviour conducive to human flourishing.”²⁷ The values are learned and cultivated by individuals over a lifetime and passed down through education and culture as both an aspect and consequence of the exercise of “practical reason”. They depend for their very existence on both this faculty of practical reason in educated individuals and on the presence of a complex social system.

The “virtues” as described by Aristotle are more than just goals to be attained or factors to be weighed in the balance of moral, political, and legal decision-making. They are constitutive of a fully functioning, moral human being and of a moral society, and act as internal constraints on the right actions and right intentions of a human life. Acting in accordance with the virtues is proper for both consequentialist reasons and for deontological reasons. On the consequentialist level, virtuous behaviour is more likely than non-virtuous behaviour to result in human flourishing. On the deontological level, engaging in virtuous behaviour also constitutes moral action in-and-of-itself regardless of the specific consequences of the action.²⁸

²⁷ Alexander and Peñalver, *supra* note 2, at 82.

²⁸ *Ibid.*

Aristotle used his conception of pluralist moral theory to prescribe a particular regime of property rights. In the *Politics* Aristotle identifies justice, generosity, and moderation as important virtues to take into account in addressing property, and recommends a system where capital (primarily productive land) is mostly owned privately while the fruits of capital (primarily goods for consumption) are mostly shared communally. He also recommends keeping some communal land available for civic purposes. For him, this particular blend of property rights promotes stewardship of scarce productive resources. It also allows for generosity to be developed by enabling voluntary gifts and transfers of property between citizens which would be impossible in a strictly communal system. At the same time, his scheme promotes distributive justice by ensuring that all people have access to food and the necessities of life.²⁹

In mediaeval Europe, Thomas Aquinas further developed the Aristotelean theory of virtue ethics and embedded it in a Christian context.³⁰ Regarding property, Aquinas emphasized the relationship between natural law as ordained by God and ascertained by reason, and the positive law developed by human beings as a means to apply and refine the more abstract natural law. In Aquinas, eudaimonia or “human flourishing” acquired an explicitly religious and teleological meaning, constituting the glorification of God through the promotion of harmony and righteousness in individuals and in the social order.

Aquinas, unlike some of the church fathers in his day, allowed for the accumulation of privately held property and for potentially large disparities in wealth. The morally important

²⁹ *Ibid.* at 84.

³⁰ This discussion of Aquinas is based on David Lametti’s analysis from David Lametti, “The Objects of Virtue” in Gregory Alexander & Eduardo Peñalver, eds, *Property and Community* (Oxford: Oxford University Press, 2010) at 1, as well as Alexander & Peñalver’s discussion in Alexander & Peñalver, *supra* note 2, at 84-86.

aspect of property holdings was not in its distribution, but in the virtuous acts and character of those holding their property and performing roles appropriate to their abilities and station. As explained by David Lametti, “the lives of the rich magnanimous landowner and the poor mendicant friar could both be virtuous according to the respective means of each.”³¹ For Aquinas, however, the law regulating private property was largely the positive, human made law, and so was ultimately subservient to the dictates of the divine, natural law. Thus private property was held provisionally, not as a natural right, and was subject to limits in its exercise and to obligations owed to others. In particular, duties of charity and liberality constrained the accumulation of wealth and put wealthy owners in a position of stewardship. In the extreme, the needs of others could even justify what would otherwise be theft: “It is not theft, properly speaking, to take secretly and use another’s property in case of extreme need: because that which he takes for the support of his life becomes his own property by reason of that need.”³²

Aquinas’ treatment of value ethics and property shows how a pluralist theory can take a religious character, and also resonates with Carol Rose’s discussion of the concept of “property as propriety.”³³ As well, it provides a bridge between the classical conception of virtue ethics and the development of the modern versions of pluralist moral theory.

The first modern theory that can be fairly characterized as a pluralist moral theory is the philosophy of Georg Hegel. Hegel’s theories are notoriously dense and complex. I attempt only a very cursory exposition of them here, to show their pluralist character and further illustrate the development of such theories from antiquity into the modern era.

³¹ David Lametti, *ibid.* at 31.

³² Thomas Aquinas, *Summa Theologica*, translated by Fathers of the English Dominican Province (Westminster, MD: Christian Classics, 1981) at article 7.

³³ See the discussion of Rose *supra*, ch 4.

Hegel's theory of property fits into his greater theories of political and moral development. Like Kant, Hegel is concerned about individual freedom, and treating persons as ends in themselves rather than as objects. However, Hegel takes his analysis in a very different direction from Kant. Kant's moral focus remains squarely on the individual, and his theory of the state and the institution of private property is grounded in social contract and consent. For Hegel, however, the relationship between the individual and the state is more organic and involves the moral development of human beings over time within communities. As Waldron explains:

Hegel did not believe that there was ultimately any distinction between the collective interest of a community and the individual interests of the members of that community. That the goals of the community to which he belongs should be pursued and realized – *that* is the ultimate interest of each individual.

...
Hegel's theory is a developmental theory. He denies that individuals are born *ready* for the ethical community in which rights and collective goals come together. This is something that they must grow up into. Part of that growth... is the establishment of a clear sense of oneself as a person, that is, as an individual rights-bearer. It is at this stage that property is taken to be important.³⁴

Hegel presents a nuanced theory of how private property is important for ethical development. In brief summary, Hegel maintains that for individual moral development, a person must develop his or her free will by allowing that will to grow beyond mere inner subjective experience and “embody” that will in the external world. This embodiment requires identification with and control over resources external to the self, thus turning those resources into that person's property. In this way, “[t]hrough the (seemingly) simple process of

³⁴ Waldron, *supra* note 1, at 347-48.

possessing, controlling, and owning material goods, the individual subject transcends the initial stage at which her will is merely an aspect of her inner life, extending the will as an objective feature of the external world.”³⁵

However, development for Hegel does not stop there. At a certain stage, the individual interest in private property is transcended and subsumed into a higher, collective interest. Individual rights such as the right to property do not completely disappear, but become embedded in a greater social system, within which true freedom is achieved at both an individual and collective level. Interests in private property

are seen by Hegel only as necessary moments in a wider development of individuality which may, in its later stages, make the case for property or our concern about it appear trite and immature.

...

In the higher phases of individuals’ development, they will acquire interests justifying structures and institutions which may, to some extent, be incompatible with the demands of a right to property. In this case, there is no question of the right to property prevailing against or “trumping” these higher demands.³⁶

Hegel’s theory thus shares important characteristics with the model of pluralist moral theory that I am developing here. It sees a “greater good” as the main goal of moral theory. Hegel uses the term “freedom” to describe this goal, but he applies that term to both individuals and collectives, and uses it more in the sense of substantive empowerment than in the liberal sense of freedom from external constraints.³⁷ This expansive notion of freedom is thus Hegel’s analogue to “human flourishing”. Margaret Radin explains that for Hegel, “the properly developed state (in

³⁵ Alexander & Peñalver, *supra* note 2, at 61.

³⁶ Waldron, *supra* note 1, at 348-49.

³⁷ See Alexander & Peñalver, *supra* note 2, at 58 (explaining that it is commonplace for scholars to ascribe to Hegel a “positive” conception of liberty and to Kant a “negative” notion).

contrast to civil society) is an organic moral entity... and individuals within the state are subsumed into its community morality.”³⁸ Hegel also appears to be presaging Dagan’s idea of “property as institutions,” eschewing any formal essence to property and recognizing that the appropriate form property takes will depend on context. As Radin puts it, “Hegel seems to make property ‘private’ on the same level as the unit of autonomy that is embodying its will by holding it,”³⁹ concluding, for example, that family property ought to be treated as a form of common property because of the particular features and function of the family.

The one major way in which Hegel’s theory appears to deviate from other pluralist moral theories is in avoiding any reference to multiple values. This is perhaps because, following Kant before him, Hegel attempted to privilege “freedom” as the ultimately moral value and derive his entire moral theory from that one value. However, as noted earlier, I argue that Hegel’s expansive and positive notion of freedom is properly seen not as one value, but as a diffuse orientation analogous to human flourishing. From that perspective, Hegel’s theory has much more in common with pluralism than with either utilitarianism or deontology.

Turning to the modern era, two of the most outspoken proponents of value ethics in the field of property theory are Gregory Alexander and Edward Peñalver, his former student. Like many value ethics theorists, Alexander and Peñalver make “human flourishing” the primary guiding concept. Following Aristotle, they identify the ability to reason as central to the human experience and identity, and frame their definition of human flourishing around it, stating:

we can say that a flourishing human life is one that consists of rational and social activities expressing the human excellences or virtues and that such a life is supported by those external goods necessary for

³⁸ Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993) at 46.

³⁹ *Ibid.*

participation in such activities.... Human flourishing must include at least the capacity to make meaningful choices among alternative life horizons, to discern the salient differences among them, and to deliberate deeply about what is valuable with those available alternative choices.⁴⁰

Drawing heavily from work by Martha Nussbaum and Amartya Sen, Alexander and Peñalver argue that this definition of human flourishing leads to a “capabilities” approach to identifying the values. The “capabilities” approach holds that the purpose of a moral or political system is not directly to provide “possession of particular material goods, the satisfaction of particular subjective preferences, or even, without more, the possession of particular negative liberties.”⁴¹ Rather, “the well-lived life requires that one possess substantive powers – capabilities – to choose a life of human dignity.”⁴² A social system is thus moral if, and only if, it is organized so as to provide the means for all citizens to develop certain core capabilities.

Most recently, Alexander and Peñalver have identified four “capabilities” that they suggest are both uncontroversial and clearly linked to human flourishing. These four capabilities are: life, freedom, practical reason, and sociality.⁴³ Each capability is matched with a “value” of the same name. Thus, for example, the value of “life” requires that a system of property enable everyone to have the capability of “life”, viz., the ability to provide for their own material subsistence, or to have others provide those means. The value of “freedom” requires that the

⁴⁰ Alexander & Peñalver, *supra* note 2 at 88.

⁴¹ *Ibid.* at 89.

⁴² *Ibid.*

⁴³ *Ibid.* at 89-90. In an earlier piece, Peñalver identifies a different list of three values that he argued were particularly apposite for addressing the moral justification for the law of real property: industry, justice, and humility. See Eduardo M. Peñalver, “Land Virtues” (2008-2009) 94 Cornell L Rev 821, at 877-886. One of the strengths of the value ethics approach is that it is open-ended, so no list of values must be defined as “complete”. It is always possible to advocate for additions or changes to the list, or to provide a list with a different emphasis depending on the context under discussion. This open-endedness can also be a weakness, however, and invites the criticism that this school of theories is under-determinate. I will address this critique in more detail below.

system must provide each citizen with the capability of “freedom”, enabling each person to meaningfully understand, deliberate on, and make important life choices.

Alexander and Peñalver also make a strong connection between “capability” and “dependency”. No individual is capable of recognizing, cultivating and acting on their capabilities without help. The development and exercise of capabilities can only take place within a social system; indeed, “the facts of social dependence and interdependence prevent us from drawing clear lines between our individual well-being or flourishing, and that of others.”⁴⁴ This dependency is so strong that it prevents any complete analysis of the moral obligations of property from relying solely on the notion of reciprocity. In their view, property owners do not owe duties to others, or to the greater community, for the reason that in the long-run they are likely to receive as much or more than they have given. Even if that is likely to be true in many cases, the real justification for property duties is that the existence of a community and its mutual obligations is required for the development of the capacities, the fulfilment of the values, and human flourishing. Property owners owe the community not because they will ultimately get as much or more back from it, but because the community is part of their very existence and identity. Without community, flourishing is impossible.

Given the complexity of the underlying theory and the need to consider several, incommensurable values and capabilities, it is not surprising that Alexander and Peñalver’s scheme does not lead simply and directly to particular policy or doctrinal recommendations for the law of property. The authors do predict that the theory will lead to the need for some forms of redistributive measures, for the state to provide certain fundamental services (such as

⁴⁴ Alexander and Peñalver, *supra* note 2, at 91.

education), and for limits on the rights of property holders to use their property in ways that harm others or the environment. At the same time, they predict that empirical evidence regarding the way a modern, industrialized economy works will likely justify widespread use of regulated market mechanisms. The key point, however, is that “the discussion about how to allocate responsibilities among private communities, the market, and various state actors does not proceed through the lens of private property rights in the first instance, but, rather, through pragmatic discussions about which allocations will best foster opportunities for a society’s members to flourish.”⁴⁵ Thus, Alexander and Peñalver’s approach is sympathetic to the core ideas of legal realism. Property law needs to be evaluated and shaped in light of how it promotes the values and capacities necessary for human flourishing, incorporating empirical evidence about how the law works in practice and a functional approach to determining whether a particular property right is helpful or not. Property law is thus not an end in itself, as it often is portrayed by deontological theories. Similarly to the consequentialist outlook, property law is seen as an instrument.

Alexander’s and Peñalver’s work has contributed a great deal to the development of value ethics in the context of property law, and I draw heavily on their ideas when I set out my approach. However, before getting there, it will be useful to briefly canvass the work of two other theorists who have been working in this area--Joseph Singer and Hanoch Dagan--and to provide a few comments about how Margaret Radin’s “personhood” theory of property fits in with pluralist theory.

⁴⁵ *Ibid.* at 97.

Joseph Singer has written widely in legal theory and property law. His intellectual roots are firmly in the traditions of legal realism and critical legal studies.⁴⁶ In recent work he has taken an interest in pluralist moral theories, and has outlined a version that he calls the “democratic model” of property law.⁴⁷ It emphasizes two particular aspects of pluralism. First, Singer highlights the interconnected, systems-based character of property law as conceived by these traditions: “The democratic approach to property understands property not merely [as] an individual right but [as] a *social system*.”⁴⁸ Property law does much more than simply allocate resources and describe the bounds of an owner’s autonomy; it also *defines* social relationships between individuals and within groups. This leads to Singer’s second point: that property law necessarily entails and embodies moral and political judgments about the appropriate composition and scope of legal relationships involving control of resources. On a pluralist conception, property law is not about finding the best means to satisfy pre-existing individual preferences. As he explains, “[w]e do not take preferences merely as given, partly because some preferences are illegitimate in a democracy and partly because preferences are shaped by law and custom.”⁴⁹ Instead, a value-ethics approach requires us to make judgments about which values are worth promoting and how best to do so. This requires a normative conception of how society should operate, which Singer identifies as “a free and democratic society”. His notion of a “free and democratic society” leads him to provide his own particular list of candidates for fundamental values: autonomy, mobility, widespread distribution of property, freedom of

⁴⁶ See e.g. Joseph Singer, “Legal Realism Now”, Book Review of *Legal Realism at Yale: 1927-1960* by Laura Kalman, (1988) 76 Cal L Rev 465.

⁴⁷ Joseph Singer, “Democratic Estates: Property Law in a Free and Democratic Society” (2008-2009) 94 Cornell L. Rev. 1009.

⁴⁸ *Ibid.* at 1049.

⁴⁹ *Ibid.* at 1053.

contract limited by minimum economic and social standards, support for persons in need, and a balance between stability and change.

Singer also describes another important aspect of pluralist theory that is mentioned but not developed by Alexander and Peñalver: the ability to include not only a plurality of fundamental values, but also a plurality of methods for normative reasoning. While both Alexander and Peñalver appear to allow that insights from law and economics and personality theory could operate within a pluralist framework, Singer goes on to list several more philosophical tools that could operate within his “democratic model”, including “Rawlsian theory, narrative and literary theory, deontological theory, historical analysis, balancing of interests, virtue ethics, elaboration of human values, deconstruction, and rhetorical theory.”⁵⁰ Singer is developing a model for reasoning about property law that is pluralist on many levels.

A third modern take on pluralist moral theory in the realm of property law is that of Hanoch Dagan.⁵¹ In brief, Dagan calls his approach to property “property as institutions.” Adopting wholesale the realist critique of the concept of property, Dagan maintains that property is an historically contingent, context-dependent legal device used to mediate relationships in society that control power over resources. Thus, the appropriate distribution and form of property rights will depend on the type of resource at issue, the social relations involved in distributing and using the resource, and the various underlying moral considerations at stake. The different forms, or “institutions” of property, can and should be crafted to assist individuals,

⁵⁰ *Ibid.* at 1055.

⁵¹ See the earlier discussion *supra* ch 1.

working separately and in community, by “identifying the human values underlying the existing property forms and designing governance regimes to promote them.”⁵²

Rather than “human flourishing” as a benchmark, Dagan argues “we must rely on the vague notion of promoting optimality to capture the complex ways in which the law can facilitate human values.”⁵³ And while rejecting a full-blown “flourishing” theory, he notes that any realist approach “must resort to property law’s material effect on people’s behaviour, to its expressive and constitutive impact, and to the intricate interdependence of the two effects.”⁵⁴ Nevertheless, even though it is morally permissible, and perhaps mandatory in some cases, to revise and reshape property distribution and entitlement to better serve human values, it is still appropriate to take existing property law as a default and as an appropriate starting point for moral analysis. Existing property forms are likely to encapsulate and reflect justice and wisdom. While society is not prevented from making changes to property institutions in order to better reflect fundamental values, the burden of proof is on those who advocate for such changes, and their arguments should be focused on the specifics of the property form at issue.

Although Dagan advocates for a pluralist model that uses the idea of “human values,” he does not identify with the Aristotelian perspective. In particular, he criticizes the Aristotelian idea that the community is central to moral analysis. He is skeptical of any theory which does not consider the individual’s interests to be inherently separate from community, as he is concerned about the sacrifice of individual rights in the name of community. Moreover, he

⁵² Dagan, *supra* note 13, at 29.

⁵³ *Ibid.*

⁵⁴ *Ibid.*

worries that a community-based theory will jeopardize not only individual interests, but the health of the community itself:

The failure of... neo-Aristotlean [theories] is, I will now claim... its marginalization of personal independence by celebrating virtuous communities without ensuring proper legal safeguards for their members' independence paradoxically risks undermining the community's good.⁵⁵

The crux of his argument is that in order to be respectful of personal autonomy and freedom, all communities must allow for a liberal commitment to “free exit”.⁵⁶ While it is legitimate to impose some barriers to exit in order to ensure that decisions are not made hastily and that individuals pay some recognition to the good that a community has provided to them, in principle everyone should have means to exit the community if they so choose. If this is not possible, then there is a risk of abuse within the community of the stronger elements over the weaker. But unfortunately for the neo-Aristotelians, the availability of “liberal exit” undermines any conception of ethics that considers community to be a primary moral good divorced from long-term individual gain. If people are free to leave when a community no longer suits their interests, then there will be an upper bound on what a community will be able to ask from property owners, and this upper bound will roughly approximate long-term reciprocal advantage to the individual. Thus, we are forced to return to a consideration of the individual as the primary source of moral rights and duties.

Dagan offers a pluralist theory that recognizes the instrumentality of property law and its embeddedness within a communal social structure while retaining an essential individualism.

⁵⁵ *Ibid.* at 66.

⁵⁶ *Ibid.* at 67-68.

Where neo-Aristotelian theory tends to emphasize the community as having a moral status tightly bound up with the individual, Dagan shows that a value ethics theory can also be based on a view that is fundamentally individualist.

Before moving on, I want to address Dagan's critique of the communitarian aspects of pluralist theory. While I am sympathetic to Dagan's interest in preserving liberal exit and his concern about the community overriding individual interests, I think his understanding of communitarianism is flawed. Liberal exit is an important aspect for any existing community. However, at a slightly higher level of abstraction, exit from the community is impossible. The communitarian insight contained in many versions of pluralist theory is that human beings are, by their very nature, communal. The state, society, and communities that people are part of are, in a strong sense, *constitutive* of who those people are. Human beings have little or no control over which society and which sub-communities of that society they grow up in. Their worldviews, conceptual schemes, self-understandings, and ways of being are all heavily influenced and shaped by those communities. It is not possible to build a moral theory that takes into account the actual experience of living human beings by starting with the idea that individuals exist as a nexus of freedom, preferences, or some other quality *independently of or prior to* any community. To put it another way, the interdependence of individual and community requires that both flourish. Upon achieving some level of maturity, a person may be able to leave a specific community, and to choose membership in other communities that her or she can access. However, a person cannot choose to be without community entirely.

The communitarian insights in pluralist theory therefore do not depend on people being "locked into" any particular community. Morality in the pluralist conception recognizes both individual and community interests, and attempts to reconcile them as much as possible. The

capacity to leave a particular community may well be necessary, as Dagan recognizes, for the flourishing of both individuals and the community itself.⁵⁷ However, people are, of necessity, “locked in” to belonging to some community or other. Community is as much part of them as they are of it. For this reason, tying moral principles to individuals and their needs and interests fails to capture the full picture, risks ignoring the systemic effects and emergent properties of social systems, and jeopardizes the possibility of achieving true human flourishing.

Finally, Margaret Jane Radin built on Hegelian insights about the nature of individuals and their relationship to worldly resources to develop a “personhood” theory of property.⁵⁸ Under her scheme, property can assume two different roles for its owner that exist along a continuum. On one side property can play a “fungible” role, under which its worth to its owner is largely instrumental. Such property can be readily substituted for other, similar property without any significant consequences to its owner. Money is a form of property that is always fungible. One dollar is as good as another. Other examples could include trivial personal items and liquid investments. On the other side, property can play a “personal” role, under which the owner’s very identity and sense of self is invested in the property. When property is personal, it takes on a special status in relation to its owner, and cannot be meaningfully substituted with other items or resources. A person’s home is likely to be personal in this sense. Requiring that person to move, even to a home that has a higher market value, could disrupt that person’s life, causing hard feelings and a loss of autonomy and dignity.

⁵⁷ *Ibid.* at 66-69.

⁵⁸ See generally Radin, *supra* note 38, at 35 et seq.

Radin's theory is not intended to be a complete theory of property, though possibly it could be developed into one along lines similar to Hegel.⁵⁹ Radin's primary goal was to show how concerns about personhood are and should be taken into account in reasoning about property. Radin does, however, explicitly acknowledge a role for individualist and communitarian conceptions of personhood. While "for the sake of simplicity" she gravitates toward a pre-social, individualistic conception of personhood in her writings, she is also sensitive to the communitarian concerns, and "on occasion attempt[s] to pay attention to the role of groups both as constituted by persons and as constitutive of persons."⁶⁰ By her own admission, then, Radin's theory incorporates both individualistic and communitarian perspectives on personhood.

I argue that Radin's observations on the relationship between personal identity and property can be accommodated within the pluralist framework. Pluralism attempts to accommodate both individual and community interests, and so is sensitive to both aspects of personal identity. Personhood itself could be seen as one of the values that promotes human flourishing. Alternatively, values such as autonomy, bodily integrity, freedom of expression, human dignity, stability, and others could be seen as supporting the need to consider the personhood aspect of property as part of the greater moral calculus. Either way, the open-ended nature of the values in pluralist theory allows for Radin's concerns to be taken into account.

⁵⁹ See *ibid.* at 36:

⁶⁰ *Ibid.* at 40.

3.3 Evaluating Pluralism

In this section, I suggest two ways in which pluralist theory could be strengthened, and show how pluralist theory overcomes the symmetrical problems posed by utilitarian and deontological theories outlined above. Also, I note a few areas in which pluralist theories are vulnerable to criticism, and suggest ways that the criticisms could be addressed.

3.3.1 Bolstering Pluralism

Having canvassed a number of important thinkers in the field of pluralist moral theory and property law, I now turn towards building on these ideas and addressing some of their critiques. My take on pluralist value theory relies on the work of Alexander and Peñalver but also incorporates other considerations and suggests some important changes. I start by highlighting what I perceive to be two of the most important strengths of this ethics approach – the commitment to plural values and the sensitivity to a systems-oriented approach – and showing how each strength can be expanded upon and rendered more precise.

As discussed above, the pluralist view rejects the idea that moral decision-making can be reduced to a single guiding idea or principle. Even if one accepts that a social system should promote “human flourishing”, that goal subsumes a number of values. Each of those values acts as a moral dimension or factor that must be taken into account when puzzling over concrete problems and situations. And, importantly, none of these values can be reduced to, or substituted for, any of the others.

Critics of the value ethics approach could argue that rather than being a strength, pluralism is a weakness because plural theories are essentially indeterminate. The purpose of a theory, after all, is to *explain*. Whether in the natural sciences, social sciences, or humanities, a

theory is only useful if it can take disparate phenomena and tie them together with a generalized abstraction. The concept of “gravity”, for example, is powerful because it enables us to summarily explain and predict various events that seem unconnected on the surface: an apple falling, the moon circling the earth, or a helium balloon floating. By taking a pluralist approach, we risk losing this power to explain. A pluralist approach in physics, for example, could lead us to conclude that apples, the moon, and helium balloons move the way they do because there is a balance of apple-ness, moon-ness, and helium-ness that causes them to behave that way. This may be roughly true on a superficial level, but it does not explain much, and we will not be able to use the “theory” to help predict, say, the trajectory of water coming out of a hose. It is precisely the ability of physics to “privilege” the concept of gravity and to show how it applies across multiples contexts that gives it power.

The problem is further compounded by the fact that pluralist theory is “open-ended” about the lists of values. No one is claiming that they have found “the” one fixed set of values that can explain all moral theory. Indeed many theorists working in this area maintain that such a list is unobtainable, even in principle, because of the open-ended and context-dependent nature of the notion of “human flourishing”. However, this begs the question of what guides our selection of values to include, as well as the question of how we determine the weight and content of each value in its application to particular cases.⁶¹

I consider this to be a central puzzle that pluralist theorists must address in order to offer a coherent alternative to deontology and utilitarianism. My suggestion for how to resolve this

⁶¹ Alexander and Peñalver recognize the problem of indeterminacy, but only in its aspect of how to weigh and assess together values that are incommensurable by definition. See their discussion in Alexander and Peñalver, *supra* note 2, at 97-101. I consider this to be a narrower problem than indeterminacy in general and I will discuss it in more detail below in the section on “Incommensurability”.

problem has two stages. First, we must recognize that pluralist theory does not offer a “solution” to problems in property theory in the same sense that deontological and utilitarian theories offer solutions. Instead, pluralist theory is proposing a *framework* within which to structure to arguments about property law. As the “pluralist” label might suggest, the theory is not intended to be a one-size-fits-all solution to any property law issue that might arise. Instead, it determines the boundaries of rational debate and appropriate ways of reasoning about property.

The second stage takes this idea further and postulates that the values are selected, evaluated, and applied with respect to deeper, more objective criteria. The key here is that these criteria do not arise solely out of the level of legal or moral theory. Instead, they arise out of disciplines that look more directly at the nature of human existence on individual and community levels. These disciplines include psychology, cognitive science, sociology, anthropology, history, and economics. To talk about human flourishing (or any of its alternatives) without direct reference to these foundational empirical disciplines is, in my opinion, to remain disconnected from the reality of the human experience.

A similar project is already underway with respect to utilitarian theory. Empirical studies in economics are, at root, empirical studies in utilitarianism. Research in the fields of behavioural economics and game theory, in particular, are helping economists to understand not only how people bargain and exchange in relation to their preferences, but also how people define and understand their preferences. Victoria Nourse and Gregory Shaffer suggest that the “rational-actor” model used by classical economics is gradually giving way to models of “limited rationality,” grounded in observations about how people actually behave and using results from

experimental psychology and cognitive science.⁶² Such empirical work has direct implications for utilitarian theory. If people are not rational preference-maximizers, then that undercuts the utilitarian claim that the goal of a moral system is to maximize preferences. Or, in the alternative, it suggests that preferences, welfare, and people's sense of justice and appropriate behaviour have a much more complex relationship than utilitarianism assumes.

Regarding pluralist moral theory, I suggest that similar empirical projects could help to inform the selection of values themselves and the institutions and rules that could help promote those values. The difference from traditional economic research would be in the range of variables to be measured. Instead of considering only a narrow list of indicators such as preference satisfaction and willingness to pay, pluralists would be interested in human development and a variety of measures of health and well-being. Further, they would be interested in looking at determinants of social and collective health. Literacy rates, public health outcomes, corruption indicators, and many other variables could be measured, and their relationship to various legal and institutional regimes studied.

The values, in this conception, are mediating factors between empirical disciplines and the construction of legal norms. This mediating function works two ways. On the one hand, selection and definition of the values takes place informed by empirical, extra-legal and extra-philosophical insights. On the other hand, philosophical and legal considerations shape and interpret the findings from the empirical disciplines. Pluralist reasoning thus involves an iterative, historically-embedded process that focuses over time on increasingly better ways of

⁶² Victoria Nourse & Gregory Shaffer, "Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?" (2009-2010) 95 Cornell L Rev 61 at 76-77.

identifying and applying the values as both a reflection of actual lived human experience and a means of interpreting that experience in moral terms.

A cluster of values such as the one proposed by Alexander and Peñalver (life, freedom, practical reason, and sociality) would thus need to be justified and interpreted with reference to empirical disciplines. Take “freedom” as an example. What psychological benefit does freedom provide to fully-functioning adults in society? What is the impact of different types and degrees of freedom on human development and happiness? What are the systemic impacts of allowing certain types of freedoms under various social, legal, and economic conditions? Are there cognitive levels at which the concept of “freedom” no longer even applies, and if so, what other values do we need to look at when analyzing the impacts of law on behaviour at this level? Investigations such as these ensure that the values do not become dogmatic, formalistic slogans but remain rich, living concepts that evaluated and refined through both scientific and philosophical discourse.

In short, expecting a relatively simple moral theory to provide definite answers to all problems in the theory of property, as many utilitarian and deontological accounts purport to do, is naïve at best, dangerous at worst. The incompleteness of both can be overcome with plural methods and values to address property law problems, while an explicit connection to relevant empirical disciplines can bring heightened objectivity in framing the acceptable parameters for debate and evaluating proposed solutions to concrete issues.

The second aspect of value ethics theory that I emphasize is its systems-oriented approach. While not unique in this respect, I argue that, particularly in its Aristotelian form, pluralism more easily incorporates a holistic view of the institution of property than its rivals.

Both deontological and consequentialist approaches are capable of seeing property law as a social system. However, because both types of theories take the individual as morally primary, they see the social system as instrumental. For deontologists, the question is what social and legal system will best safeguard the individual moral rights embodied in property. Some traditions would also consider what system will best promote or enhance these individual rights. The system itself, however, has no rights. For utilitarians, the question is what social and legal system will lead to the greatest increase or amount of aggregate happiness or utility. Overall utility is calculated simply by adding up the utility of each individual in the system. The system, per se, does not have any utility.

The pluralist approach rejects the sharp division between individual and community, and proponents argue the deontological and utilitarian approaches are misguided because it is impossible, even in theory, to talk either about individual rights as being prior to community or to talk about the welfare of individuals as distinct from the welfare of a community. This is because, at both ontological and moral levels, individuals are inextricably bound up in their communities. People are who they are in part *because* of the communities that they are embedded in, and they have rights and duties that are defined by and only make sense in the context of a community. Thus, the community itself has ontological and moral status. In a sense, the community itself has rights and duties, and it has utility or happiness. The rights and well-being of the individuals and community considered as an organic whole *are* what constitute “human flourishing.”

By recognizing that individual and community are so interconnected, pluralist ethics focuses on the interaction between the individual and the community. When a legal order defines and delimits property rights, the pluralist view recognizes that this process is a part of

defining the very nature of the self, affecting how people see and think about one another and how they define and interpret moral categories. It also recognizes that the process is constitutive of the nature of the community and its relationship to the resources at its disposal. With this approach, we can talk directly about whether a community or society as a whole is flourishing and whether it is being served by a particular set of property rules. We can also talk directly about owners' duties to the community with respect to their property holdings without needing to tie it in with individual advantage, reciprocity, or immediate impacts on identifiable individuals.

A good example to illustrate this basic insight is the historical rise of intellectual property in the form of patents and copyrights. As a species of property, patents and copyrights simply *did not exist* until the rise of mercantilism in Europe in the 15th and 16th centuries.⁶³ This absence was not necessary; in theory, any organized society could have come up with either concept and designed a legal regime to create and enforce such rights. However, the invention of the printing press and the dramatic increase in inventive activity during the early years of industrialization provided the impetus that lead to the development of these two new types of private property.⁶⁴

⁶³ In *Intellectual Property in Canada*, David Vaver traces the origins of modern patents to a Venetian decree of 1474, and the beginning of modern copyright to the eighteenth century London book trade. David Vaver, *Intellectual Property in Canada* (Ontario: Irwin Law, 1997) at 1. Christopher May and Susan Sell come to a similar conclusion in their detailed summary of the "pre-history" of intellectual property in Chapter 3 of *Intellectual Property Rights: A Critical History*. While there were some antecedents of patent and copyright thinking in the Greek and Roman worlds, they were generally piecemeal and focused on ensuring the that identity of the author or inventor was preserved, rather than on creating or protecting any economic rights. Christopher May & Susan K Sell, *Intellectual Property Rights: A Critical History* (London: Lynne Rienner Publishing, 2006). Indeed an early attempt to secure recognition of a common law of copyright was rejected by the English Courts: see *Donaldson v Beckett* (1774) 1 ER 837 (HL). Trademarks however have a much longer history, dating back to the marking of livestock in agrarian societies. May and Sell, *ibid.* at 44-45. Unlike patents and copyrights, common law in trademarks still exists alongside the Trademark Act in Canada in the form of the tort of "passing off" *Trade-marks Act*, RSC 1985, c. T-13, s. 7; for a well-known case see e.g. *Orkin Exterminating Co Inc v Pestco Co*, (1985) 50 OR 2d 726 (ONCA).

⁶⁴ Christopher May and Susan K. Sell, *ibid.* at 58-71. May and Sell also describe how, although in Asia forms of mechanical printing were developed a bit earlier than in Europe, no concept of intellectual property similar to either copyright or patent arose there. *Ibid.* at 71-73.

The creation of these new property forms did more than just create new legal rights and obligations. They also, over time, changed the public's perception of the relationship between expressive works, applied ideas, individuals, and the community. Stuart Banner describes how the term "intellectual property" originally had a quite different meaning from how it is used now.⁶⁵ In the middle of the 18th century, the term did not refer to private property, but to the collective social inheritance of human knowledge and education. However, by the beginning of the 19th century it began to refer to a cluster of several different types of private property rights, and by the end of that century the newer meaning had eclipsed the old. What before had been considered a collective good had gradually transformed into individual, private property, driven by the legal regimes that first created these rights. Along with the shift in public consciousness came a shift in moral concepts and the nature of the individual. A work of art was now an "extension" of the self of the artist; substantial copying of that work, theft.⁶⁶

Both deontological and utilitarian approaches must justify the creation of copyrights and patents in a-temporal, culturally neutral terms, linking those rights to individualistic ends. Rights-based theories may claim that the lack of intellectual property laws until the Industrial Revolution had been a serious moral defect of all legal systems all along, as the reasons for claiming property rights in expressive works and inventions would have been on par with the

⁶⁵ Stuart Banner, *American Property: A History of How, Why, and What We Own* (Cambridge: Harvard University Press, 2011).

⁶⁶ See e.g., David Fagundes, "Explaining the Persistent Myth of Property Absolutism" in *The Public Nature of Private Property* (Surrey: Ashgate, 2011) 13 at 20 ("Copyright and patent owners invoke the sanctity of their property when seeking ever broader ownership rights, refer even to licit uses of their works and inventions as "theft."). Moral rights in copyright are often justified on the grounds that a work is an extension of the self of the author. See e.g. David Vaver, *supra* note 63 at 87-88 (Moral rights are "based on the idea that the author's work is an extension of the author and that any assault on it is as much an attack on the author as a physical assault.").

reasons for claiming more traditional property rights such as those in land and chattels.⁶⁷

Utilitarian theories attempt to justify intellectual property laws primarily in economic terms, claiming that such rights are necessary to provide the optimal incentive for individuals to do productive intellectual work in the arts and sciences.⁶⁸

Pluralist theories allow a broader view. While not ignoring rights-based or economic concerns, these theories can see the development of private property regimes such as intellectual property as an historically contingent, cultural- phenomenon whose progression impacts the nature of the human experience at both individual and collective levels. On intellectual property rights, Alexander and Peñalver explain that the “human flourishing approach to intellectual property differs from other approaches primarily in terms of the range of interests it deems relevant to decisions about how to structure intellectual property.”⁶⁹ Included in that broader range is the “connection between intellectual property law and the creation of a particular type of cultural framework helpful for fostering human flourishing.”⁷⁰ In considering this cultural framework, attention must be paid to the role of intellectual property in cultivating practical

⁶⁷ This point has the greatest force against rights-based theories, such as Locke's, that require specific property rights to enure in individuals. A more abstract rights-based theory, such as Kant's, that require the existence of a property system generally, but do not have strong consequences for the specific content of those rights, could more easily accommodate the development of new property rights without seeing their prior absence as a moral defect.

⁶⁸ Michael Spence provides a pithy summary of the philosophical justifications offered for intellectual property rights from both the deontological and utilitarian traditions in chapter 2 of his book, *Intellectual Property*. A survey of these justifications reveals that they revolve around a-historical considerations such as rights of creation, desert, autonomy, personhood, and unjust enrichment, on the deontological side, and the provision of appropriate incentives to create and disseminate, on the utilitarian side. While there may be some room in the utilitarian view to argue that the appropriate mechanisms to provide optimal incentives could be tied to particular times, places, and social contexts, the general utilitarian framework suggests that intellectual property rights should be recognized as soon as the appropriate economic conditions for them arise. See Michael Spence, *Intellectual Property* (Oxford: Oxford University Press, 2007).

⁶⁹ Alexander and Peñalver, *supra* note 2 at 200.

⁷⁰ *Ibid.* at 201.

reason and in providing meaning, structure and content to specific communities (both “real” and “virtual”). This role could be used to justify limits on intellectual property rights “to ensure that human beings enjoy adequate access to the products of... innovation, both cultural and material”⁷¹ that may not be supported by utilitarian or deontological approaches.⁷²

3.3.2 Strengths and Weaknesses

When it comes to resolving moral conflicts between individual and community, there are benefits to taking a pluralist approach. Pluralist theory renders moot many of the most intractable problems of traditional moral theories that attempt to articulate a single, master principle. As noted earlier, utilitarian theories struggle with situations where a large sacrifice on the part of a small number of people will dramatically increase the happiness or welfare of the majority. Conversely, deontological theories flounder in situations where a relatively modest sacrifice of an individual’s interest will provide tremendous benefits to the collective. These problems are apparent in the justifications for expropriation. While utilitarian approaches cannot easily justify any limits on the power, including the classic limits of public purpose and just compensation, right-based theories cannot easily allow the power to be exercised at all, even within the classic limitations. So, why is expropriation recognized in virtually all societies, and why is it nearly always subject to the limits of public purpose and just compensation?

⁷¹ *Ibid.* at 202.

⁷² One way in which a pluralist theory could help to understand copyrights in Canada is in making sense of the “balance of interests” approach taken by the Supreme Court of Canada to copyright laws, in which the interests of the greater community in accessing and using copyrighted material is considered an integral part in determining the scope of those rights. See e.g. *Théberge v Galerie d'Art du Petit Champlain inc*, 2002 SCC 34; *CCH Canadian Ltd v Law Society of Upper Canada*, 2004 SCC 13.

Pluralist ethics can point to several values that are involved in an expropriation. Aggregate welfare of the individuals in the community may be one important value, but stability and predictability, personal identification with a particular parcel of land, and protections against arbitrary exercise of state power are also important. In addition, collective concerns such as the design of a neighbourhood, the need for environmental protection, and the need for an efficient infrastructure can all play a role. In Alexander and Peñalver's view, this wide range of interests supported by the pluralist approach "explains why the state may legitimately demand some sacrifice from individuals... while not totally subordinating individual interests."⁷³ As well, "[i]n its focus on human flourishing through development of requisite capacities, the theory also provides room for accommodating non-fungible attachments to certain assets worthy of respect and legal recognition."⁷⁴

But pluralist ethics goes beyond simply observing the tension between the individual and the state and vaguely suggesting that the classical restrictions on expropriation strike a good balance. The "practical reason" element of pluralist theory encourages theorists to remain skeptical of simple blanket rules that are meant to apply to a wide variety of situations. The "public purpose" and "fair compensation" requirements make a good rule of thumb, or an appropriate starting point, in the pluralist analysis of takings. As Alexander and Peñalver explain, the "public purpose" requirement supports the use of expropriation when it advances the need to develop infrastructure in the community, without which individuals would not be able to develop their capacities and live flourishing lives. "Each of us depends on the continued

⁷³ Alexander and Peñalver, *supra* note 2, at 177.

⁷⁴ *Ibid.*

effectiveness of this infrastructure, and that dependence requires that we bear some responsibility for maintaining it,” including the risk that some of our property could be taken from us without our express consent.⁷⁵ However, the requirement of “just compensation” places limits on the sacrifice we could be called to make. Compensation protects at least part of the value that a person derives from the ownership of the expropriated property, thus ensuring that their ability to flourish as an individual is not unduly compromised by the taking.

However, under the pluralist approach there is room to adjust takings to accommodate context, and to address concerns such as those taken up by Radin in the personality theory of property. For Radin, the traditional expropriation rule is lacking because it leaves no room for consideration of the character of the property for the individual owner. Whether the property is fungible (such as a purely speculative investment), personal (a home that has been in the family for generations), or somewhere in between plays no role in the traditional test. Thus courts, sensing the potential for injustice in the traditional rule, try to bend that rule to accommodate personhood concerns. As Radin explains:

Homeownership carries greater moral weight in the legal system than does ownership of vacant land held for investment. The differing strength of holders’ claims greatly complicates the takings issue. Exactly what has been taken, and from whom, matters. Even where legal doctrines do not take account of this, the pattern of decisions does.⁷⁶

Pluralist moral theory, unlike its deontological and utilitarian rivals, provides a coherent framework in which to explain equitable deviations from legal doctrine. If a pattern of decision making distorts traditional rules on takings, then perhaps there are some expropriations where

⁷⁵ *Ibid.*

⁷⁶ Radin, *supra* note 38, at 154.

the values that promote human flourishing need to be revisited, and the doctrine needs to be updated. This is no surprise. Pluralist theory does not anticipate one formula that can rule all of takings law. Under pluralism, dilemmas of the type posed by takings do not lead to philosophical contortions with attempts to bring the law of expropriation under a unitary concept. Instead, these dilemmas become keys to identifying important human values that need to work together to promote justice.

Pluralist moral theory has its weak spots. I have already noted one of the major problems with pluralist theory: the potential lack of explanatory power. I suggested that one answer to this problem was to recognize pluralist ethics as a “framework” theory, rather than a “solution” theory, and that the framework could be integrated with epistemology and empirical sciences. Here, I focus on two other potentially significant problems: the relationship between law and morality, and the problem of indeterminacy.

Some commentators see the need to maintain the distinction between law and morality as a fundamental weakness of the pluralist approach. In responding to Alexander and Peñalver, Henry Smith emphasizes the “core and periphery” structure of conventional property law, with the property owner as a “gatekeeper” whose core right is to exclude non-owners from access to the property and to specify the terms on which non-owners may gain access. On the periphery, there may be circumstances where the owner’s right to exclude is curtailed by the needs of others, but there is a general presumption that an owner will be entitled to force others to “keep off”. While sympathetic to the basic idea of using the property law system to promote human flourishing, Smith doubts the feasibility of tying property rights and duties directly to moral considerations, especially if those moral considerations contain a robust, substantive vision of human flourishing. Smith notes that “the whole point of the basic exclusion mechanism is to

avoid having to delineate rights directly in terms of... interests.”⁷⁷ He predicts that the need for property law to take into account “basic problems of implementation such as information and complexity” requires deference to an owner’s presumptive right to exclude that can be overridden only when there is specific, demonstrable need for it. Further, he argues that “[t]o expect every application of property law or every owner’s exercise of her rights to pass some societal test – whether it be wealth maximization or flourishing of the community’s members – is to commit the fallacy of division, of inferring that parts of a whole share the properties of the whole”⁷⁸ and that “as emergent properties, stability and coordination cannot be simply added as a balancing factor to the *ex post* mix.”⁷⁹

Eric Claeys summarizes Smith’s critique as observing that “property law promotes both individual goods and social welfare by *avoiding* pursuing first-order goals, and by instead vesting owners with autonomy as a second-order means by which owners may pursue those first-order goals.”⁸⁰ Claeys extends the critique by emphasizing another aspect of the dangers of merging law and morality: the threat to liberal pluralism and the possibility of state tyranny.⁸¹ In a pluralist, multicultural society that respects individual autonomy and incorporates the ideals of freedom of speech, religion, and conscience, it will be impossible to find universal agreement on what “human flourishing” means, and foolish to try and seek it. The result will be either the tyranny of a powerful interest group imposing its particular vision on others, or a never-ending battle of moral visions corrupted by the forces of politics.

⁷⁷ Henry Smith, “Mind the Gap: The Indirect Relationship between Ends and Means in American Property Law” (2008-2009) 94 Cornell L Rev 959 at 964.

⁷⁸ *Ibid.* at 970.

⁷⁹ *Ibid.*

⁸⁰ Eric Claeys, “Virtue and Rights in American Property Law” (2008-2009) 94 Cornell L Rev 889 at 917.

⁸¹ *Ibid.* at 923-924.

In my view, Smith's critique appears to be based on either a misunderstanding of the essential structure of the pluralist moral view, or is actually an *expression* of the view that he claims to be critiquing. In his response to Smith, Alexander starts to explain this misconception, noting that pluralist ethics "does not involve ad hoc analysis of the sort he describes" and that "[t]here are multiple ways to reconcile support of rules, or at least rule-like norms" with this approach.⁸² I would add that because value ethics is fundamentally holistic, it incorporates exactly the systems-theoretic approach that Smith describes. In focusing on human flourishing in the context of a whole society, value ethics does not infer that parts of the whole share the properties of the whole, nor does it consider emergent properties such as stability and coordination as ex-post balancing factors. If anything, it is deontological and utilitarian approaches that commit these fallacies. Instead, value ethics examines how the property institutions and rules that shape individual rights and obligations contribute to and ultimately constitute the whole. If, for example, "stability" and "coordination" are identified as values that promote human flourishing in certain contexts, then these values have to be taken into consideration when defining the individual rules regarding property rights and duties. If these rules appear to promote stability and coordination when seen from the perspective of individual property owners, but the emergent properties of the system do not embody those goals, then the pluralist approach requires re-examining those rules in light of their systemic effects. If it turns out that the "core of exclusion" rules that Smith describes best promotes human flourishing for individuals and for the whole community, taking into account both individual and systemic

⁸² Gregory Alexander, "Reply: The Complex Core of Property" (2009-2009) 94 Cornell L Rev 1063 at 1064.

effects, then we should adopt them. However, if they do not best promote human flourishing, then we may need to re-design the property system with other possibilities in mind.

In regard to Claeys' concerns about backpedaling on the liberal political project, I suggest that he is reading too much into the umbrella concept of human flourishing, and assumes that it needs to be stronger than necessary. Academics, politicians, and the legal profession can recognize that the legal system has a complex relationship with moral principles and with human flourishing itself while remaining within the pluralist ethical framework. This is why "human flourishing" is left deliberately vague and meditated through open-ended, revisable, and contestable values. The idea that certain values are privileged can be abused by political and legal actors to shut down discourse and promote a monolithic political vision, that leaves little room for dissent or the peaceful co-existence of different ways of life. However, such tyranny results not from pluralism, but from distortion of its central ideas. All theoretical frameworks can be twisted in the service of power. In the modern West, with its concentrations of private power and multi-party democratic systems, the danger from de-centralizing values and remaining agnostic about the good life is far greater than the danger of addressing moral questions directly, informed by science, reason and compassion. Identifying fundamental values still leaves room for multiple ways to interpret, implement, and live those values. Freedom to disagree and to continually debate, refine, and revise our common values is itself one of the values of pluralism.

The final weak point is the problem of indeterminacy. One of the cornerstones of pluralist moral theory is the use of incommensurable values that cannot be explained in terms of, or reduced to, any of the others. If they could be reduced to one fundamental value, then it would no longer be a pluralist theory; instead, it would be a form of utilitarianism or deontology,

with one privileged value that underpins others. However, the argument goes, this leads immediately to a problem. If values cannot be measured or traded-off against one another, then when values conflict there may be no way to make a principled ethical decision.⁸³ Conversely, if it is possible to make a principled determination, then that means that the values have been ranked, and therefore, they are commensurable.⁸⁴ Moreover, any exercise in which a decision-maker (such as a judge or policy-maker) actually makes a tradeoff *implicitly points* to some underlying measure of value that guided the decision.⁸⁵

Take, for example, a case of expropriation where a person's home is taken for a public park. If someone decides that the expropriation is justified, then they have implicitly determined that the public interest in the park outweighs the interest of the owner in remaining in the home. Whether or not decision makers express their decisions in terms of multiple values or factors – community health and harmony, public interest in easily accessible leisure, environmental health, personhood, privacy interests, etc. – they must have compared these values as they apply to the particular situation, and determined that some carried more weight than others, at least in

⁸³ For a relatively recent article outlining a sophisticated argument of this type, see Chris Kelly, "The impossibility of incommensurable values" (2008) 137 *Philos Stud* 137.

⁸⁴ The point is well explained by Anthony Mark Williams: "if two items are comparable, then by definition they are not incommensurable. There must be some covering consideration available for ranked items, which also allows us to compare them. If this were not so, the particular hierarchy of value would have to be arbitrary or unjustified." Anthony Mark Williams, "Comparing Incommensurables" (2011) 45 *J Value Enquiry* 267 at 268.

⁸⁵ Richard Epstein makes this point with a simple example. Suppose that someone has a choice of whether to work for another hour or quit work and attend a concert. Which is the right choice? A pluralist might argue that each choice represents following a different, incommensurable value, and so the decision is between two choices that cannot be meaningfully compared. However, by actually making the choice and acting on it – say, deciding to go to the concert – the person has now demonstrated that they consider one choice to be more valuable than the other. The person has implicitly "measured" each choice and given more weight to the values represented by the concert. Thus, the values represented by the two choices are, in fact, commensurable, and are measured by some metric (which utilitarians would call "utility"). Richard Epstein, "Are Values Incommensurable, or is Utility the Ruler of the World?" 1995 *Utah L Rev* 683 at 699.

this particular instance. A cost/benefit analysis of some sort has taken place. The very terms “outweigh” and “weight” imply some common unit of measure, and that common unit is the true value that underlies all the others.

Incommensurability may well be the largest problem faced by pluralist moral theory. As Alexander and Peñalver have noted, “philosophers working with pluralist conceptions of value have dedicated entire books to explaining how rational choice is possible in the face of plural and incommensurable values.”⁸⁶ Here, I merely summarize a few points that suggest possible ways to manage the problem.

One possibility is to declare that this is not a problem. Alexander and Peñalver observe that some pluralists treat “the possibility of irreducible conflict among plural values as an attractive feature of pluralist theory, rather than a bug.”⁸⁷ A response along these lines would fall in the intellectual tradition of Critical Legal Studies. Perhaps the search for a fully coherent theory is itself a mistake, and the best a moral theory can do is describe some useful features of moral reasoning while recognizing that ultimately morality, and law, are primarily about the exercise of power. In this conception, there are many moral decisions that simply have no clear answer, and when somebody is forced to decide them they must act to some extent on their own underlying biases and preferences that have no objective justification. Acting morally involves simply recognizing the inescapable conflict. Rather than looking for a right answer, “[t]he better response is to recognize the competing moral claims, to feel them pressing upon you at the moment you act.”⁸⁸

⁸⁶ Alexander & Peñalver, *supra* note 2, at 98.

⁸⁷ *Ibid.* at 99.

⁸⁸ Singer, *supra* note 46, at 537.

I would consider such a position to be a nihilist one, to be taken only as a last resort. Maybe there are some moral dilemmas that just do not have an answer. However, it does not follow that we should stop searching. I prefer the approach attributed by Alexander and Peñalver to Charles Taylor, to whom they ascribe the notion of “complementarity”: “an understanding of [the] relative contributions to the various values in the overall scheme of justice that the choice in question reflects.”⁸⁹ From this perspective, the proper metaphor is not one of competition or balance; instead, as best as possible, the values are “reconciled,” and that choice which sees the values best working together and reinforcing one another is the preferred choice. To return to the expropriation example, the decision maker’s task is to “reconcile” the values at stake in the best way possible. The owner’s attachment to the property and the community’s interest in the park, are expressed in terms of the underlying moral values at stake – personal autonomy, personal identity, privacy, stability, community health, ecological health, economic efficiency, community identity, and others. The decision maker also recognizes that a single value can point in different directions, depending on the circumstances. Perhaps a community flourishes in its identity as an old neighbourhood with roots going back many generations, in which case the value of personal identity in the home squares with the value of community identity, and the home should be preserved. Or perhaps an owner has become overly attached to the house to point of pathology and refuses to leave from pure stubbornness, in which case the value of mental health might coincide with the health of the community and economic efficiency and the home should be taken (with appropriate compensation and, perhaps, a process to address

⁸⁹ Alexander & Peñalver, *supra* note 2, at 101.

the social and health needs of the owner). In any case, as the full context of the fact situation is distilled and deliberated, a way to best reconcile the values at stake may become apparent.⁹⁰

⁹⁰ A sophisticated version of this idea is found in Swanton, *supra* note 6. Swanton rejects the idea that the mind and reasoning operate with a set of discrete rules, and instead recognize and process highly (and perhaps irreducibly) complex patterns. Swanton argues for a conception of “virtues as prototypes,” in which a virtue is a “framework of broad constraints” which are then applied to specific situations by the mind as part of a highly complex, pattern-recognition function. See Swanton, *ibid.* at 275-285.

Chapter 4: Condominium

The modern condominium is a relatively new form of property ownership.¹ While there have been other attempts to create estates in land that are divided vertically as well as horizontally, so that multiple owners could own something akin to a fee simple in only one floor or one unit of a building, condominium has by and large been the most successful. In major urban centres in Canada, the condo is a central feature of residential ownership.² A recent poll suggests that condominium is the second-most sought after form of home ownership in Ontario, after detached fee simple housing.³ In a recent scholarly article, Harris canvasses the increasing popularity of the condominium in Vancouver.⁴ The reason for the popularity of the form in residential housing is generally thought to be density. Condominium provides a way to own property in a form that is similar to a traditional fee simple outside condominium, but suitable for a high-density environment and more affordable than a detached home. It thus provides an ability for individuals to own a home and live in a dense urban or suburban neighbourhood without the transience of renting and with more flexibility than membership in a cooperative. By contrast to

¹ Condominium legislation swept across Canada, the United States, and a number of other common law jurisdiction in the 1960's. See Douglas Harris, "Condominium and the City: The Rise of Property in Vancouver" (2011) 36 Law & Soc Inquiry 694 at 695. Many accounts trace the arrival of condominium into the common law world from civil law countries in Europe and Latin America through Puerto Rico: see e.g. Robert Natelson, *Law of Property Owners Associations* (Boston: Little, Brown & Co., 1989) at 26-32; Audrey Loeb, *Condominium Law and Administration*, 2nd ed (Toronto: Carswell, 1989) at 1-1.

² For an analysis of the prevalence of condominium in Vancouver, see Harris, *supra* note 1. For Toronto, see Gillad Rosen & Alan Walks, "Castles in Toronto's Sky: Condo-ism as Urban Transformation" (2014) 37 Journal of Urban Affairs 289 at 289, noting that "Toronto has experienced a tremendous surge in condominium development over the last 40 years and especially during the last decade." See also Leslie Kern, "Selling the 'scary city': gendering freedom, fear and condominium development in the neoliberal city" (2010) 11 Social and Cultural Geography 209.

³ "Condos Rank as Second Most Popular Real Estate Choice for Prospective Ontarian Home Buyers," Ipsos Reid (10 July 2014) online: Ipsos Reid (<http://www.ipsos-na.com/>) (28% of prospective homebuyers are looking for "condominiums or apartments").

⁴ *Supra*, note 1.

coop membership, each condominium unit can be financed independently and usually can be freely sold without input from the other members of the complex.

Condominium solves a number of legal hurdles that made it difficult to subdivide title within a single lot or building under the common law. Most importantly, condominium law provides a way to deal with the problem of positive covenants. Having more than one unit in a building requires legal obligations between the owners to provide for the maintenance and repair of both the building itself and any areas commonly shared and used by the owners. While it is possible to use contracts, deeds and covenants to create appropriate rights and duties, any covenant requiring positive actions or payments from a unit owner for the benefit of the others would not “run with the land” under common law. Therefore, it was difficult to create a legal structure that would be stable through successors in title to individual units, and thus to create a viable market for the sale and financing of such units.⁵ Condominium resolves this issue by imposing statutory duties on owners of condo units, mediated by and enforced through a strata corporation that represents the owners of all units in the complex.

4.1 Details of the Condominium Form

Condominium subdivides land into individually-owned “units” and collectively-owned “common areas.”⁶ A developer wishing to create a new condominium must first obtain

⁵ For a detailed discussion of the “positive covenant” problem see Dennis Pavlich, *Condominium Law in British Columbia* (Vancouver: Butterworths, 1983) 19-24. Interestingly, in Ireland, England and Scotland, a “common law” approach using deeds and covenants has been prevalent, and condominium legislation similar to other jurisdictions has not historically been used. However, many of the problems identified by Pavlich have arisen, and all three jurisdictions have recently enacted reforms that bring their systems closer to a condominium structure. For an overview see Cornelius van der Merwe, *European Condominium Law* (Cambridge: Cambridge University Press, 2015) at 42-47.

⁶ My doctrinal analysis in Chapter 5 focuses on the law of British Columbia and Ontario, and I explain this choice in more detail in the last section of this chapter. In Ontario, “condominium” is used in the

government approval in a manner akin to obtaining approval for a regular subdivision.⁷ Once obtained, the developer then files a “declaration” with the land title office setting out the terms of the subdivision of the land. The declaration acts as a sort-of “constitution” for the condominium development. It defines the “type” of development the condominium will be,⁸ outlines the dimensions of each unit and of the common areas, sets out a schedule used to determine the contributions of each unit for the maintenance of the common areas, and provides basic rules and restrictions governing the complex.⁹ The declaration also defines any “limited common property”¹⁰ or exclusive use areas¹¹ in the complex. These areas are portions of the common property that are designated for the exclusive use of one or more individual unit owners, but are not formally part of those owners’ individual legal titles.

Once the declaration is filed, the individual units are created and a condominium corporation is formed. Initially, the developer is the owner of all the individual units and the common property, and is the sole member of the condominium corporation. When a purchaser buys an individual unit, that person obtains three things:

Condominium Act (“CA”) to describe the general property form, “declaration” describes the basic document that creates the condominium, and “condominium corporation” describes the entity that represents the owners and administers the property. B.C.’s legislation is the *Strata Property Act* (“SPA”), and it uses “strata”, “strata plan” and “strata corporation”, respectively. For most purposes these terms are equivalent and I will use them interchangeably unless the context requires otherwise.

⁷ See e.g., Loeb, *supra* note 1 at 2-1 to 2-4.

⁸ For example, in BC there are two basic types of strata plans, regular or “building” strata plans and bare land strata plans. See Mike Mangan, *The Condominium Manual: A Comprehensive Guide to the Strata Property Act* (Vancouver: BC Real Estate Association, 2010) at 15; *Strata Property Act*, SBC 1998, c 43 s 1 (“bare land strata plan”). In Ontario, there are several different classes of condominiums, including “common elements condominiums” and “vacant land condominiums.” See *Condominium Act*, SO 1998, c 19 ss 138-144, 155-163.

⁹ See *Condominium Act*, SO 1998, c 19 s 7; *Strata Property Act*, SBC 1998, c 43 s 244 et seq.

¹⁰ *Strata Property Act* SBC 1998 c 43 ss 1 (“limited common property”), 73-77.

¹¹ *Condominium Act*, RO 1998 c 19 s 7(2)(f). Unlike the BC legislation, the Ontario Act does not have a specifically defined term for exclusive use areas, but it still uses the concept in a similar fashion.

- title to the individual unit as defined in the declaration;¹²
- an undivided interest in the common property of the condominium along with an obligation to contribute to its maintenance; and
- membership in the condominium corporation.¹³

These three items come as a package and cannot be separated. Although creatures of statute, the legislation provides that both individual condominium units and common areas are real property for all relevant purposes.¹⁴ Ownership of a unit also comes with restrictions and duties specified by the relevant statute, in the declaration, and in valid rules and bylaws that are passed from time to time by the condominium corporation. Courts have an active role in overseeing the governance of the condominium, as rules, bylaws, and decisions of the corporation may be found invalid if they are unreasonable or significantly unfair.¹⁵ Finally, voting rights in the corporation are generally fixed by statute at one vote per unit.¹⁶

In Ontario, the declaration may also contain certain restrictions that help to define the nature of the development. In particular, a declaration may contain “conditions or restrictions with respect to gifts, leases and sales of the units and common interests”¹⁷ and “conditions or

¹² Normally this would be title in fee simple. However, there are provisions for leasehold condominiums as well. See e.g. *Strata Property Act*, SBC 1998 c 43 part 12 (leasehold strata plans).

¹³ *Strata Title Act*, SBC 1998 c 43 s 2; *Condominium Act*, RO 1998, s 11

¹⁴ In Ontario, this is clear from the wording of *Condominium Act*, SO 1998 c 19 s 10. In BC, this result follows from the wording of s 239 of the *Strata Property Act*, SBC 1998 c 43, which states that “[I]and may be subdivided into 2 or more strata lots by the deposit of a strata plan in a land title office.” By implication, a strata lot is legally considered “land.”

¹⁵ *Strata Property Act*, SBC 1998 c 43 s 164; *Condominium Act*, SO 1998 c 19 ss 56, 58, 135.

¹⁶ *Condominium Act*, SO 1998 c 19 s 51; *Strata Property Act*, SBC 1998 c 43 s 53. In BC, an exception may be made for non-residential units, which may have a voting entitlement of less or more than one vote per unit as specified in the strata plan by a Schedule of Voting Rights. *Ibid.* ss 247-48, 264.

¹⁷ *Condominium Act*, SO 1998 c 19 s 7(4)(c).

restrictions with respect to the occupation and use of the units or common elements.”¹⁸ In BC, there is no statutory authority for such restrictions in the strata plan. Instead, the *Strata Title Act* permits restrictions to be enacted in the strata bylaws regarding leasing¹⁹ and “for the control, management, maintenance, use and enjoyment” of strata lots and common property.²⁰ The BC legislation also specifically permits bylaws to be enacted regarding age and pet restrictions, subject to certain limitations.²¹ The BC Act specifically prohibits any restrictions on selling, mortgaging, or otherwise transferring title to units.²²

The corporation has the responsibility for managing the common property, maintaining and repairing the common property and in some cases individual units, and obtaining necessary insurance. The corporation also collects levies from unit owners, enacts and enforces policies and bylaws, and manages the financial affairs of the complex. The day-to-day affairs of the corporation are run by a council elected by the owners of the individual units.

Major decisions must be put to a vote of the individual unit owners, and require majority, super-majority, or unanimous approval, depending on the type of decision. The default requirement in both provinces is a majority vote, unless the legislation or declaration specifies otherwise.²³ Passing bylaws and making regular decisions on maintenance and expenses generally requires a majority vote. Examples of decisions that require a supermajority vote in both jurisdictions include making substantial changes to the common elements of the

¹⁸ *Condominium Act*, SO 1998 c 19 s 7(4)(b).

¹⁹ *Strata Property Act* SBC 1998 c 43 Part 8.

²⁰ *Strata Property Act* SBC 1998 c 43 ss 119(2).

²¹ *Strata Property Act* SBC 1998 c 43 s 123.

²² *Strata Property Act* SBC 1998 c 43 ss 121(1)(c).

²³ *Strata Property Act* SBC 1998 c 43 s 50; *Condominium Act*, SO 1998 c 19 s 53.

condominium complex²⁴ and amalgamating two condominium developments into one.²⁵ In Ontario, decisions to amend the declaration²⁶ or terminate the condominium complex²⁷ require only a supermajority vote, while in BC such decisions require a unanimous vote.²⁸ In BC, designating a common area as “limited common property” or removing that designation by way of resolution is possible with a supermajority vote,²⁹ but amending such a designation if contained in the strata plan requires a unanimous vote.³⁰

As a separate legal entity, the condominium corporation has the power to sue and be sued, as well as to enter into contracts, both with unit owners and with third parties. Additionally, under some circumstances a condominium corporation has the power to bring an action on behalf of the members of the condominium corporation. In Ontario this action can be taken as a regular decision of the condominium corporation³¹; in B.C, the action can only be taken on a $\frac{3}{4}$ supermajority vote of all the owners who will be represented in the lawsuit.³²

A condominium complex can be terminated either by consent of the owners or on application to court. For a consent termination, the Ontario legislation requires an 8/10 supermajority vote.³³ In BC, the vote must be unanimous,³⁴ though a recent report by the British

²⁴ *Condominium Act*, SO 1998 c 19 s 97(4) (2/3 majority vote); *Strata Title Act*, SBC 1998 c 43 s 71 (3/4 majority vote).

²⁵ *Condominium Act*, SO 1998 c 19 s 120 (9/10 majority vote); *Strata Title Act*, SBC 1998 c 43 s 269 (3/4 majority vote).

²⁶ *Condominium Act*, SO 1998 c 19 s 107 (8/10 or 9/10 majority vote depending on the nature of the amendment).

²⁷ *Condominium Act*, SO 1998 c 19 s 122 (8/10 majority vote of both owners and anyone who has a claim registered against property in the complex).

²⁸ *Strata Title Act*, SBC 1998 c 43 s 269 and s 272 et seq.

²⁹ *Strata Title Act*, SBC 1998 c 43 s 74.

³⁰ *Strata Title Act*, SBC 1998 c 43 s 257.

³¹ *Condominium Act*, SO 1998 c 19 s 23.

³² *Strata Title Act*, SBC 1998 c 43 s 171-172.

³³ *Condominium Act*, SO 1998 c 19 s 122.

³⁴ *Strata Title Act*, SBC 1998 c 43 s 269 and s 272 et seq.

Columbia Law Institute recommends revising this criterion to an 8/10 supermajority vote.³⁵ Once terminated, the BC legislation specifically provides that the former owners become tenants in common of the property and assets formerly subject to the strata plan,³⁶ though on a court-ordered termination the court has the power to vary this provision.³⁷ In Ontario, the legislation specifies that on termination the assets of the corporation remaining after all debts and claims are paid shall be distributed proportionally to the former unit owners.³⁸

The condominium regime attempts to resolve the challenges of multiple ownership by altering traditional fee simple property rights and amalgamating them with an organizational form that has some aspects of property co-ownership, some aspects of a business corporation, and some aspects of a municipal government. A strata lot comes with rights, duties and responsibilities that would not otherwise accompany fee simple title. The purchaser of a condominium unit becomes a member of a legal community that can impose duties, levy taxes, restrict the owner's behavior, and impinge to some extent on the integrity of the lot. In return, however, the owner gets a say in the running of the complex through his or her voting rights.

³⁵ British Columbia Law Institute, *Report on Terminating a Strata* (Vancouver: British Columbia Law Institute, 2015).

³⁶ *Strata Title Act*, SBC 1998 c 43 s 272.

³⁷ *Strata Title Act*, SBC 1998 c 43 s 285.

³⁸ *Condominium Act*, SO 1998 c 19 s 129. The courts have held that this implies that on termination the former unit owners become tenants in common over the property: see *Royal Insurance Co of Canada v Middlesex Condominium Corp No 173* (1998), 37 OR (3d) 139.

4.2 Condominium and the Realist Approach

Although the focus of my analysis will be on the application of moral theory to condominium, I pause here to make some observations about the implications of condominium law on the controversies between property law realists and formalists.

I argue that the very existence and success of condominium is a challenge for property essentialists. On the surface, condominium legislation appears to do what property realists claim: define a particular type of property interest as a “bundle of rights”. The legislation creates the form, defines its parameters, and specifies its limits. Moreover, the rights and duties created are not limited to those traditionally associated with private property, but also include governance rights and duties that are normally associated with civil society. On its face, the condominium form appears to refute theories of property essentialism and to provide a dramatic example of Morris Cohen’s observation that property and sovereignty should be considered together.³⁹

In response, property essentialists could make a couple of counter-arguments. First, they could argue that condominium is not a single, coherent property interest. Rather, only one element of the form is actually a property interest, namely, the ownership of the individual unit. Perhaps also the owner’s share of the common elements could be analyzed in property terms.

³⁹ Morris Cohen, “Property and Sovereignty” (1927) 13 Cornell Law Quarterly 8. For a detailed argument along similar lines, see J Peter Byrne, “The Public Nature of Property Rights and the Property Nature of Public Law” in *The Public Nature of Private Property* (Surrey: Ashgate Publishing, 2011) 1. Byrne argues that the legislative shaping of many property forms undermines the idea that property has an essential or fixed nature, especially one shaped by common law doctrine. He looks at two examples: the transformation of creditor’s secured interests into property rights through legislation and the development of detailed zoning restrictions to further define and property rights. He concludes that “[p]roperty measures, whatever their institutional form, should be evaluated on their capacities to enhance human welfare, including liberty and economic incentives, without tired rhetorical invocation of property rights.” *Ibid.* at 12.

However, the other elements of condominium “ownership,” such as voting rights, duties to pay property levies, and so on are not “property” rights and duties, but are coupled with the property by legislative fiat.

This line of reasoning falls flat because of its arbitrary character. As a matter of law and as a matter of common understanding, condominium ownership includes all the various rights and duties specified by law, including the three characteristics mentioned above: title to an individual unit, an interest in the common property along with an obligation to contribute to maintenance, and membership in the condominium corporation. For a theorist to claim that some of those rights and duties are not “really” part of the property interest because of some pre-conceived notion about the nature of property would be, I argue, to redefine the regular use of property language and concepts to fit the preferred theory. A property essentialist would need to justify, based on reasons external to condominium law, why the meaning of private property should be read in this restrictive fashion.

Second, it could be argued that condominium counts as a type of private property because, despite the mixed character of its rights and duties, it still meets the essential test for what property is. Thomas Merrill could maintain that individual unit entitlement is private property because it still carries a general right to exclude others from the unit;⁴⁰ Larissa Katz could maintain that the entitlement is private property because the owner is setting the agenda for the resource.⁴¹ However, if the condominium legislation altered the nature of individual

⁴⁰ Thomas Merrill, “Property and the Right to Exclude” (1998) 77 Neb L Rev 730.

⁴¹ Larissa Katz, “Exclusion and Exclusivity in Property Law” (2008) 58 UTLJ 275.

entitlement so much that the essential characteristics were lost, it would then cease to be a form of private property.

This defense of essentialism shows how the mere existence and viability of a complex property form such as condominium does not refute formalism. However, the more that legislatures tinker with the edges of private property, and the more they merge governance and community interests with private property rights, the less persuasive the essentialist position becomes. Of particular interest here is the existence in Ontario of the “common elements condominium,” in which “common elements” are created but the land is not divided into individual units.⁴² The resulting form is a complex species of co-ownership that overrides the common law rules on co-tenancy and replaces it with a condominium structure. Is the result a form of private property? For a formalist, this would be a complex question. For a realist, the question is moot. The rights and duties are created as described by the legislation and the case law interpreting it. Trying to classify the resulting structure as property or not, or as private or not, is pointless. Attempting to derive further legal consequences from such a classification would be wrong-headed. From the realist point of view, it is better to skip the classification question entirely, and go straight to the human interests being addressed by the legal form. I attempt to begin this task in the next section.

4.3 The Meaning of Condo

The realist approach involves reading beyond the bare legislative scheme and asking what the law intends to accomplish and how it does so. As noted previously, one clear and generally

⁴² *Condominium Act*, SO 1998 s 138.

accepted purpose of condominium legislation is to provide a means for people to purchase a home affordably in an area with high population density.⁴³ However, other purposes are less clear and potentially controversial. For example, condominium is available not just for residential purposes, but also for purely commercial developments and for mixed-used complexes. As well, condominium can be used to subdivide bare land without the need for units to share physical structure, and in Ontario, it is possible to create a condominium complex that has only common elements and no individual units.⁴⁴ The availability of such forms suggests that the purpose is not just to provide for cheap home ownership in cities, but to provide a flexible form of private land-use planning generally.⁴⁵ In realist terms, condominium is a structured and limited delegation of powers, some traditionally private and some traditionally public, to developers and unit owners acting within a quasi-democratic institution.

In this sense, condominium represents an example of the interplay between property and sovereignty. As noted earlier, the declaration created by the developer acts as a “constitution” for the development by defining the individual and common titles, setting a schedule for expense contributions and voting rights, and creating the condominium corporation. Once formed, the

⁴³ See e.g. Loeb, *supra* at 1-1, noting that the condominium form became popular “in response to the combined pressure of increasing land values and diminishing urban space.”

⁴⁴ *Condominium Act*, SO 1998, c 19 ss 138-144, 155-163 (“common elements condominiums” and “vacant land condominiums”).

⁴⁵ In his early overview of condominium law, Robert Natelson lauds the power of condominium to move land use planning from public to private. Noting that “[m]odern land owners have needs that have not been fulfilled by municipal governments or by traditional ownership forms,” he concludes that condominium enables people “to enter the widest possible range of consensual relationships” and so “best meet their own needs... and in the course of doing so... deliberately or inadvertently assist others in meeting theirs.” He claims that “nearly everyone acknowledges that, on balance, the results have been excellent.” Natelson, *supra* note 1. More recent commentators have noted that condominium, along with “common interest” communities outside condominium that involve governance of common areas, have given developers and private homeowner’s associations control over aspects of community planning that traditionally were left to municipal bodies. See e.g. Evan MacKenzie, “Common-interest housing in the communities of tomorrow” (2010) 14 Housing Policy Debate 203 at 207.

corporation has powers similar to those of a municipal government. The corporation raises money through a taxation power; maintains and repairs the common property in a manner similar to public infrastructure; and regulates the conduct of members and the use of property by enacting rules and amendments similar to ordinances and zoning regulations. Like a municipal body, the condominium corporation is not a body of “original jurisdiction,” but is instead delegated limited powers by a superior authority (in this case, the developer acting under the authority of the enabling legislation), and the exercise of its powers are subject to review by the courts.

However, the limited scope of condominium sets it apart from a municipal body in several important ways. Most importantly, voting rights in a condominium corporation are limited to unit owners, whereas in a municipality, voting rights are generally extended to residents, or to citizens who are residents.⁴⁶ Additionally, local governments are not subject to the same level of judicial oversight as condominium corporations.⁴⁷ Functionally, where a local government has a relatively low bar to entry, a condominium complex has a high bar for entry. To gain voting rights in a local government, a citizen need only move to the jurisdiction and live there for a brief time. To gain voting rights in a condominium, however, one must purchase a unit.⁴⁸ Given the general differences in size and access to voting, municipalities tend to be much

⁴⁶ For a detailed analysis comparing the different voting structures in condominiums and local governments see Robert Ellickson, “Cities and Homeowners Associations” (1982) 130 U Penn L Rev 1519 at 1539 et seq. Of course, municipal voting by all residents is a modern phenomenon and traditionally voting has usually been restricted to property owners. See the discussion in *ibid*.

⁴⁷ Unlike local governments, the actions and bylaws of condominium corporations are subject to judicial review for “reasonableness” or “significant unfairness”: see *Strata Property Act*, SBC 1998 c 43 s 164; *Condominium Act*, SO 1998 c 19 ss 56, 58. In some cases, the corporate law remedy of oppression is also available. These concepts are discussed in detail *infra* ch 5.

⁴⁸ There is a sense in which voting rights in a condominium are broader than those in a municipality, as where municipal voters must be citizens of the country, condominium owners need not be.

larger and composed of heterogeneous groups with different social and economic backgrounds. Condominium complexes, in contrast, tend to be much smaller, and the purchase requirement tends to ensure a rough social and economic equality among the owners.

Another way of seeing condominium is as a microcosm of a society as a whole. Like a state or nation, a condominium body consists of a number of people who have some political and economic stake in the group, working together in a situation of mutual interdependency. Condominium is particularly interesting because it brings the interdependent nature of property ownership to the foreground in a way that may be less obvious for a nation-state. In residential condominium especially, neighbours are literally keeping an eye on each other, and making collective decisions on such intimate issues as whether children, pets, or cigarette smoking will be permitted, both in common areas and in individual units. A similar process happens in society as a whole, however, when collective decisions are made about criminalizing behavior, regulating uses of private property, or setting up public services that require financial contributions from the public. In both cases, a political body is making decisions that affect the liberties and property rights of its constituents, and demanding financial contributions from them. Condominium thus provides a focused example to highlight the issues arising from the definition and assertion of private property rights in society more generally.

Of course, as with the comparison to municipal governments, there are limits to the analogy with a whole society or state. Importantly, membership in a condominium complex is more voluntary than membership in a society or nation state. Joining a condominium complex involves “signing on” to the declaration, bylaws, and other rules in force at the time of purchase and acquiescing to the power of the condominium corporation to make changes to those rules. This observation lends stronger support to a social-contract analysis of condominium rights and

duties than to a whole society. Additionally, it is much easier to exit a condominium complex than it is to exit a society. Leaving a complex simply means selling a unit, whereas leaving a society means moving to another country. Moreover, it is not realistically possible to leave society altogether; all but the most dedicated hermits have to live in a community in order to survive. In contrast, one can opt out of the condo system, preferring stand-alone property ownership, renting, cooperative housing, or some other alternative.

For the purposes of moral property theory, one of the most interesting questions about the purpose of condominium is whether a condominium complex necessarily constitutes a moral or social *community*, as opposed to a mere association of convenience. Gregory Alexander explores this issue at some length, drawing on contractarian and communitarian political theory to distinguish between two different types of “intentional groups”: voluntary associations and communities.⁴⁹ Voluntary associations are contractual arrangements between people forming a group to advance their own individual agendas; communities are formed to pursue goals that transcend their individual members to advance the needs of the group. As Alexander explains:

Individuals become members of voluntary associations exclusively through contract, and they do so for instrumental purposes. The sense of detachment within voluntary associations makes it appropriate to characterize them as mere aggregations of self-seeking individuals. By contrast, members of communities are drawn together by shared visions that constitute for each of them their personal identity.⁵⁰

Alexander does not claim that all groups fall neatly into one type or the other. Instead, most exhibit some characteristics of both, and may change over time:

⁴⁹ Gregory Alexander, “Dilemmas of Group Autonomy: Residential Associations and Community” (1989-1990) 75 Cornell L Rev 1.

⁵⁰ *Ibid.* at 26.

In practice, groups commonly have characteristics of both so that categorizing them as one or the other sometimes is difficult. Similarly, a group's character can change over time, beginning as a voluntary association but evolving into a community or vice versa. For communitarians, the crucial question is whether social relationships within the group are based on more than an instrumental convergence of individual ends – on reciprocal empathy.⁵¹

These two types of community correspond with different approaches to moral theory. On the one hand, the voluntary association model corresponds with both deontological and utilitarian approaches. As I will explain in detail in the next chapter, both of these approaches consider the individual to be morally primary. To the extent that the greater community is considered, it is only as a means to advance the moral rights and needs of their members. On the other hand, the community model corresponds to the pluralist approach, under which both the individual and the community are entitled to moral weight because individuals and communities are necessarily interdependent. Part of the power of the pluralist approach, however, is that it can accept that in limited situations, a group could meet the requirements of a voluntary association and be solely a means to address the moral rights and needs of its members. Both deontological and utilitarian approaches are confined to seeing all groups as fundamentally voluntary associations only. There is no room in such approaches for communities in the strong moral sense, because all moral justification must ultimately be traced back to individuals alone.

For condominium, then, one of the factors to consider is whether legislatures and courts treat them as voluntary associations only, or whether there is also some irreducible element of community involved. Here I note that Alexander concludes that condominium exhibits

⁵¹ *Ibid.*

characteristics of both. His conclusions are based partly on considerations of political theory and partly on anecdotal evidence. He relies heavily on Frances Fitzgerald's account of Sun City Center, an age-segregated residential development in Florida.⁵² Fitzgerald found that the residents of Sun City Center came together for their shared values and stage in life, regularly socialized together, and "exhibit[ed] a deep sense of belonging there and belonging with each other."⁵³ Alexander concludes from such examples that some residential associations "are best understood as a type of constitutive group, that is, a community."⁵⁴ Moreover, he concludes that the residential association is not, as contractarians would have it, a purely voluntary organization. He writes:

The concept of a constitutive group implies an element of involuntariness. What binds the group together is a shared characteristic that is unchosen, or chosen only in a weak sense, such as cultural identity... Fitzgerald's account suggests the possibility that the residents of Sun City Center experience the need to live together with other older adults who have made the same life-style choices. Voluntariness and involuntariness are combined in the constitution of such groups.⁵⁵

In a similar way, other characteristics of people who find themselves in a condominium complex may suggest that the choice to move there may only be voluntary in a limited sense.

Condominium may be chosen as an option because of a personal or cultural attachment to a particular neighbourhood where a detached freehold lot is not affordable. Condominium may be chosen because of cultural, family, or economic pressure to own instead of rent. Finally, condominium may be chosen because it provides amenities such as freedom from young

⁵² Frances Fitzgerald, *Cities on a Hill: A Journey Through Contemporary American Cultures* (New York: Simon & Schuster, 1986).

⁵³ Alexander, *supra* note 49 at 41.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

children, cigarette smoke, pets, or other aspects of social life that are welcome for some people but anathema to others. While both deontological and utilitarian theories would treat such preferences as freely chosen, or at least idiosyncratic and in need of no further analysis, pluralist moral theories understand that such preferences are formed, at least in part, by an individual's development within a society and its various communities, and are neither simply given nor freely chosen. The choice to live in condominium may result from the impact of cultural and social influences on an individual's development.

Chapter 5: The Philosopher and the Condominium

There are many possible ways to approach condominium law and the moral assumptions within it. In this chapter I focus on doctrinal developments in British Columbia and Ontario, and in doing so I pay particular attention to the legal construction of relationships between owners within condominium developments and to the nature of their property interests.

In terms of jurisdictional choice, B.C. and Ontario have based their statutory condominium regimes on developments in Australia and the United States, respectively.¹ As a result, they are not only Canada's largest common law jurisdictions, but they also represent something of the diversity of approaches to condominium within the common-law world.

Condominium constructs a particular set of legal relations between owners in a development. Drawing on the metaphor of condominium as a microcosm of society, I am interested in analyzing how legal doctrine treats the concept of private property as between unit holders in a condominium complex. In particular, I analyze whether living and using space in a high density area, which involves relationships of interdependence between property owners, brings out the communitarian aspects of ownership in ways that pose challenges to both the deontological and utilitarian perspectives. If either individualist approach can properly accommodate condominium, then that may reduce the explanatory power and normative force of

¹ Dennis Pavlich, *Condominium Law in British Columbia* (Vancouver: Butterworths, 1983) at 31. The origins of the statutes are reflected in their basic terminology. The use of the term "strata" in B.C. derives from the New South Wales legislation that it is based on: see Cathy Sherry, "How Indefeasible is Your Strata Title? Unresolved Problems in Strata and Community Title" (2009) 21 Bond L Rev 159 for a recent detailed discussion. The use of the terms "condominium" and "declaration" in the Ontario legislation derive from the standard American terminology: see e.g. *Uniform Condominium Act* (1980) (adopted by 14 states as of 2014 and used by many others in drafting their condominium legislation).

pluralist theory; but if pluralist theory is able to give additional or better insights into property ownership over the alternatives, then condominium is likely to reveal that.

My focus is on relations between owners within condominium. Although of considerable potential interest to moral theory, I do not analyze the implications of condominium for urban planning, home ownership, or the economic structure of society as a whole.² Even within the realm of an individual development, there are many relationships that I do not engage in this thesis in detail. They include the interaction and conflicts between unit owners and the condominium developer. While there are certainly lessons to be drawn regarding the nature of ownership from such conflicts, they involve additional layers of complexity. The ability of a developer to set the original terms on which condominium is formed, as well as their position as the original seller of all the lots in a development, places them in an asymmetrical power position with respect to purchasers and also gives them a large role in the relationship between a particular complex and the greater community. Again, while there are likely important lessons to be learned about the nature of property from this situation, it is beyond the scope of this project to analyze them in detail.³

² For examples of this work, see Ross Thomas, "Ungating Suburbia: Property Rights, Political Participation and Common Interest Communities" (2012) 22 Cornell J L & Pub Pol'y 205 (arguing that common interest communities have a "right" to be diverse and heterogeneous); Evan MacKenzie, "Common-interest housing in the communities of tomorrow" (2010) 14 Housing Policy Debate 203 (outlining eight ways to analyze the rise of common interest communities and their broader social impacts); Leslie Kern, "Selling the 'scary city': gendering freedom, fear and condominium development in the neoliberal city" (2010) 11 Social & Cultural Geography 209 (arguing that developers play on gendered fears regarding safety to promote neighbourhood privatization and increased securitization in the urban core); David E Grassmick, "Minding the Neighbour's Business: Just How Far can Condominium Owners' Associations Go in Deciding Who Can Move into the Building" [2002] U Ill L Rev 185 (arguing for restrictions on restrictions on leasing in order to provide for greater access to housing for underprivileged groups).

³ For examples of work focusing on the relationship between developers and purchasers, see Paula A Franzese & Steven Siegel, "Trust and Community: The Common Interest Community as Metaphor and Paradox" (2007) 42 Mo L Rev 1111 (arguing that developers make critical decisions on developments before purchasers are able to have input, leading to conflicts); Patrick A Randolph, Jr, "Changing the

Finally, I focus my doctrinal analysis on the issues that arise in relation to the “property” side of condo membership. In keeping with my original definition, modified slightly from that of Jeremy Waldron, of property as “a system of rules governing access to and control of resources capable of satisfying some human need or want,” I define this “property” side as issues regarding the use and management of space and materials.⁴ This “property” aspect stands in contrast to the “corporate” side of condominium law, which concerns itself with the governance of the condominium corporation, voting, collective decision-making, and procedural remedies. Here I have put aside cases that deal solely with governance issues without any property implications. However, given the intimate nature of condominium, in practice it is not possible to separate these two issues, and some of the court cases and statutory provisions that I review deal with both together.

5.1 Three Perspectives

The three general moral theories of property involve different perspectives on the condominium form, what condominium ownership means, how ownership ought to be regulated, and how disputes between owners ought to be resolved. In this section, I briefly discuss the implications of each perspective in turn.

The very concept of the condominium raises problems for the utilitarian view. In fact, utilitarianism is generally uncomfortable with any institution that relies on democratic means to

Rules: Should Courts Limit the Power of Common Interest Communities to Alter Unit Owners' Privileges in the Face of Vested Expectations” (1997-1998) 38 Santa Clara L Rev 1081 (exploring how to reconcile the expectations created by developers for purchasers with the ability of a common interest community to govern and change rules in response to developing community needs).

⁴ See discussion *supra*, ch 1.

determine, allocate, and define individual entitlements.⁵ This is because, according to utilitarian theory, whatever legal rule or structure maximizes aggregate utility is what should be adopted. Coercive government mechanisms should be limited to those situations in which restricting the ability of individuals to bargain freely over their rights and duties will somehow increase overall utility. Classic examples involve those regarding “market failure” caused by high transaction costs or lack of access to information.⁶ The utilitarian perspective, particularly as it is used in law and economics, leads to the view from public choice theory⁷ that a coercive regulatory process governed through voting procedures provides opportunities for members of the group to

⁵ Richard Posner, “The Economic Approach to Law” in *The Economic Structure of the Law: The Collected Economic Essays of Richard A Posner* vol 1 (Cheltenham, Edward Elgar Publishing, 2000) 35 at 45, exemplifies this skepticism in the following passage:

Were the legal system systematically and effectively designed to maximize economic efficiency, the role of normative economic analysis would be very small. In fact what one observes is areas of the law that seem to have a powerful and consistent economic logic – for example, most common-law fields – and others that seem quite perverse from an economic standpoint – in particular, many statutory fields... So long as there remain important areas of the legal system that are not organized in accordance with the requirements of efficiency, the economist can play an important role in suggesting changes designed to increase the efficiency of the system.

This passage appears to prefer law that is made by a single expert, such as a judge or an economist, over the “perverse” economic logic often found in statutes passed by a democratic body. However, Posner does add the caveat that “[o]f course, it is not for the economist *qua* economist, to say whether efficiency should override other values in the event of a conflict.” *Ibid*.

⁶ In more technical terms, classic law and economics starts with the observation from microeconomic theory that a completely open and unregulated market will lead automatically to an equilibrium that is fully utility-maximizing. The role of government is thus to secure a completely free market through clear rules of ownership. Governmental intervention in the market itself is then justified primarily when there is “market failure” because the free market mechanism breaks down due to externalities or high transaction costs. See e.g. Robert Cooter & Thomas Ulen, *Law and Economics* 3d ed (New York: Addison Wesley Longman, 2000) at 39 -43.

⁷ Public choice theory started with the publication of James M Buchanan & Gordon Tullock, *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (Ann Arbor: University of Michigan Press, 1962). In the *Encyclopedia of Governance*, S. Amadae notes that public choice theory attempts to use economic analysis to understand the behaviour of collective decision-making bodies, and “incorporates the impossibility theorem, holding that if one starts with individuals’ preferences, it is impossible to achieve any collective expression of the public good or public interest.” Amadae, S “Public choice theory” in M Bevir, ed, *Encyclopedia of governance*. (Thousand Oaks, CA: SAGE Publications, 2007) at 766.

strategize by enacting measures that enhance their personal welfare while lowering the aggregate utility of the group overall.⁸ Utilitarians also tend to be skeptical about the costs of democratic mechanisms as a whole, maintaining that at small scales such as the condominium, such costs outweigh any possible utility gains from the resulting decisions.⁹

One commentator in this tradition, Henry Hansmann, has gone so far as to argue that the condominium is a viable real estate institution primarily because of the rental tax subsidy that adheres to any property owner who lives in their home.¹⁰ Hansmann concludes that “without a tax subsidy, cooperatives and condominiums might compete poorly with rental in the market for residential apartments and, at least outside of jurisdictions with rent control, might today have a relatively insignificant market share.”¹¹ Hansmann suggests that it would be more efficient to organize apartment units as rentals, and if someone wants to invest in high-density real estate they will be better off purchasing a share in a corporation that runs a rental unit in a building that they have no personal connection too than they would be in purchasing their own residential condominium unit.¹²

⁸ In the specific context of condominium, Henry Hansmann notes that because the interests of unit owners may diverge, “there will be substantial room for outcomes that do not maximize the aggregate surplus of the occupants. This might occur, for example, when the preferences of the median member are different from those of the mean, or when an unrepresentative coalition achieves dominance in collective decision because their opportunity cost of time is low or because they are otherwise strategically positioned to dominate the decision-making process.” Henry Hansmann, “Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice” (1991) 20 J Leg Stud 25 at 34.

⁹ Hansmann, *ibid.* at 34-36.

¹⁰ The subsidy exists because an owner does not pay tax on the value of the housing service “provided” by their home, while a renter does. For a detailed explanation see Hansmann, *ibid.* at 40, footnote 39.

¹¹ *Ibid.* at 68.

¹² *Ibid.* at 36. Hansmann asks the reader to “imagine two identical apartment buildings. Rather than organizing both buildings as cooperatives or condominiums, it might be more efficient to organize them both on a conventional rental basis and have the occupants of one building collectively own the other building through a corporation in which they invest. The nature of the occupants’ investments will be similar either way, but the latter arrangement may involve lower costs of governance.”

Other utilitarian commentators have emphasized judicial oversight of condominium decision-making and expressed approval for an active role for the bench in rejecting decisions that do not maximize aggregate utility in the complex. Robert Natelson reviews some of the American decisions from the early decades of condominium's rise to prominence and argues that the courts were for the most part invalidating the democratic decisions of condominium corporations unless they were "Pareto-superior", i.e., resulting in a situation that makes no one worse-off and at least one person better-off.¹³ Natelson's conclusion here differs from the conclusion I draw later from the cases that I examine, and it is not always clear whether Natelson is being descriptive or prescriptive in his discussion. His conclusion also differs from that of Robert Ellickson in an article published nearly a decade earlier, "Cities and Homeowner Associations."¹⁴ Ellickson discusses several cases in which the courts uphold decisions made by democratically by condominium corporations that were not "Pareto-superior" and may even have decreased net aggregate utility in the complex. Ellickson argues that such decisions are not justifiable. His remedy is to prescribe a "takings" rule, under which condominium corporations should be required to compensate unit owners for decisions that do not accord with the owner's preferences or which decrease the value of the owner's units.¹⁵ However, to my knowledge, such a takings rule has never been seriously discussed, let alone implemented, for condominium.

The deontological approach fares better for condominium than the utilitarian as a description of existing condominium doctrine. In particular, two ideas that flow from deontological theories work well with condominium: a contractarian approach to rights and

¹³ Robert Natelson, "Consent, Coercion, and "Reasonableness" in Private Law: The Special Case of the Property Owners Association" (1990) 51 Ohio St LJ 41 at 69-70.

¹⁴ Robert Ellickson, "Cities and Homeowners Associations" (1982) 130 U Penn L Rev 1519.

¹⁵ *Ibid.* at 1535-1539.

duties within the condominium complex, and a rigid approach to the substantive property rights of condo unit owners.

The contractarian aspect arises particularly in the formation of the condominium and the setting of initial responsibilities and entitlements on the purchase of a unit. As explained above, a condominium is formed when a developer subdivides land by means of a declaration. The declaration acts in some respects like a constitution for the condominium, creating and defining the individual units and common areas, and setting out schedules for contribution to common expenses. In Ontario, the declaration may also contain restrictions on leasing, residence, or behavior within the complex, and other items. Unlike rules and bylaws, which can be enacted and amended through regular voting procedures, the declaration is difficult to change once the condominium is up and running, as most changes require a supermajority vote or unanimous consent.

Under a deontological approach, a decision to purchase a condominium unit can be seen as a decision to enter into a “social contract” with the other unit owners in the complex under the terms provided in the declaration. The rights and duties that accompany the purchase then flow from what the purchaser “agreed to” in the declaration. Courts and legislatures adopting this approach tend to favour legal doctrines that make it difficult to make any changes to the declaration. They also consider the rights and duties of the unit holders to flow primarily from the declaration, and the resolution of disputes to center on interpreting the owners’ original agreement.

Some commentators suggest an approach focusing on protection of expectations. Patrick Randolph advocates for a legal regime that protects the expectations of purchasers in common

interest communities, including condominium.¹⁶ In his review of American case law, Randolph concludes that “the majority of cases... provide incomplete protection from change,”¹⁷ resulting in many title holders losing rights that they thought they had purchased. Randolph argues that “courts not generally inclined to overturn association decision-making should nevertheless provide protection for perceived vested expectations, while still permitting common interest associations to make their own decisions and to establish cooperative and uniformly controlled communities.”¹⁸ Recognizing that “[t]here is no basis to argue that purchasers of units within common interest communities have an expectation that there will be no changes at all,”¹⁹ Randolph proposes the following list of factors that a court should consider in determining whether to overturn a rule:

1. Does the change have a significant impact on the individual's use and enjoyment of the individual common interest investment?
2. Does the affected individual have reasonable opportunities to mitigate that impact?
3. Does evidence exist [sic] that the individual had reason to believe that the conditions existing at the time of investment could change?
4. Does the change affect the community generally, or only a few individuals?
5. Would injury to the community environment would [sic] result from recognizing a vested expectation in this individual?²⁰
6. Would injury to the autonomy of the community and its processes would [sic] result from recognizing the vested expectation?²¹

While this list contemplates balancing and consideration of the interests of the community, its focus is on the expectations of purchasers. Further, Randolph proposes that considerations of how

¹⁶ Randolph, *supra* note 3.

¹⁷ *Ibid.* at 1082.

¹⁸ *Ibid.*

¹⁹ *Ibid.* at 1126.

²⁰ *Ibid.* at 1130-1131.

²¹ *Ibid.* at 1130.

the rule was adopted – by the association board or by owner vote – and of what the rule affects – common property or individual units – should have no bearing on whether the rule is valid. By framing the analysis in terms of vested owner rights versus the community, Randolph recommends a scheme that has some pluralist overtones, but privileges owner expectations as the primary concern.

Terrell Lee presents a stricter approach.²² Lee argues for a rule that would vest use restrictions on individual units at the time of purchase. A board could “modify or suspend current use restrictions and affirmative covenants” in place at the time of purchase, but could not impose a “new covenant or restriction.”²³ If a board proposes to enact a modification that affects individual units, it holds the burden of proving that the modification is “reasonable” if challenged. Regarding the common areas, Lee proposes that owners who wish to challenge the modification must show that the change is unreasonable.²⁴ Finally, Lee advocates for new legislation to further protect expectations of purchasers, and proposes that “courts should resolve ambiguities and uncertainties in favor of the free and unrestricted use of property.”²⁵ Thus, while Randolph outlines an approach that is primarily deontological, but has some room for pluralist considerations, Lee takes an almost entirely deontological approach.

To complement the contractarian analysis, a deontological approach can also resort directly to substantive ideas about the nature of property rights. Following these lines, courts and legislatures can import rules and doctrines from other forms of property directly into the

²² Terrell R Lee, “In Search of the Middle Ground: Protect the Existing Rights of Prior Purchasers in Common Interest Communities” (2006-2007) Penn St L Rev 759.

²³ *Ibid.* at 776.

²⁴ *Ibid.* at 777.

²⁵ *Ibid.*

condominium context without further analysis. Any adjustments to property doctrine that might help to accommodate the particularities of condominium should be done sparingly, if at all, and only to the extent necessary to protect property rights. On this view, appeals to the needs of a community or to maximizing aggregate welfare are irrelevant.

As with utilitarianism, the deontological approach supports a high degree of judicial oversight over the democratic decision-making process. Randolph and Lee contend that this approach encourages judges to vest a unit owner's rights at the time of purchase as much as possible. Any decision of the condominium corporation should be set aside if it interferes with the traditional property rights of the individual unit owners or otherwise upsets the status quo in the complex and is not clearly authorized by the declaration. Cathy Sherry, in a recent article critiquing the development of strata title doctrine in New South Wales, suggests a deontological approach would reject any means by which the community may "expropriate" property rights of an individual unit holder by way of a bylaw.²⁶

It might be possible to justify a more expansive role for bylaws and community decision-making by arguing that a purchaser agrees to abide by whatever bylaws are validly enacted in the future by the condominium corporation. However, this challenges traditional notions about the meaning of contractual obligations, as it requires a purchaser to be bound by terms that are highly uncertain and difficult to predict. Furthermore, it does not square with the realities of the statutory regime, which subjects bylaws to an objective reasonableness requirement.

Pluralist moral theory works differently than utilitarian and deontological approaches. Where the latter attempt to provide strict rules or formulae to determine the "best" or "correct"

²⁶ Sherry, *supra* note 1.

decision in any given case, the pluralist approach provides an overall framework for moral discussion. Rather than privileging any particular value, rule, or metric, pluralist moral theory expects that there will be multiple, incommensurable values at play in any given moral situation, and that the best moral decision (if there is one) will be that which reconciles or balances the various interests. The theory will also consider the interests of both individuals and the community as deserving of moral weight.

In the context of condominium, pluralist moral theory anticipates a careful and complex weighing, balancing and reconciling of the interests of individual unit holders, the condominium complex as a whole, and possibly of various sub-groups within the condominium. While such a theory could value utility, contractual freedom and obligation, and the potential wisdom to be found in traditional property institutions, it would not be confined to such considerations. Additional values such as community harmony, adaptation to changes over time, collective purposes and intentions, and personhood considerations have a role to play. Using Alexander's distinction, a pluralist approach would consider condominium to be a blend of "voluntary association" and "community" elements, with pliable property concepts that are susceptible to adjustment depending on the context.

Additionally, pluralist moral theory would support a weaker standard of judicial review for condominium corporation decisions. Under the pluralist model, enacting a new rule or resolving a dispute engages a complex process of reconciling disparate values rather than seeking for the one "correct" solution. The deliberative, democratic, and community-based process of discussion and voting, when it works well, is conducive to this process. Rather than being seen as a game which individuals attempt to rig in their favour, or a forum through which the mob can trample on the entrenched rights of others, the democratic process is a good way to

take a “first crack” at resolving issues by taking the interests and needs of all interested parties into account through voting and dialogue. The courts need only intervene when the system breaks down and some important value or perspective has been sidelined or overpowered by the majority.

5.2 Case Analysis

In this section I analyze a series of relatively recent court decisions in Ontario and British Columbia regarding condominium. I focus on decisions where the courts consider the use of space or other resources in a condominium complex – viz., the “property” side of condominium. However, I also address a number of cases that involve issues of governance – the “corporate” side of condominium – where those issues overlap substantially with property issues. While most cases are at the appellate level, I also consider a number of trial court decisions. The survey is not intended to be comprehensive, but it is based on a careful review of the major condominium cases from BC and Ontario in the past 20 years that consider the nature of property in condominium. In addition to the case review, I also analyze statutory provisions that have generated some controversy and which can be seen as adopting a particular philosophical approach to condominium.

I have organized the court cases according to subject matter. I start with the subject areas in which the courts are mostly likely to use deontological approaches in analyzing the legal issues and gradually move to areas in which the courts are most likely to use pluralist approaches. Based on my review, it is rare for the courts to use a utilitarian or law-and-economics perspective, but I point out the few situations where a decision or legislative provision may be interpreted as adopting such an approach.

5.2.1 Enforcement of Common Property Rights

Recent court of appeal decisions from Ontario and BC suggest that the courts take a deontological approach when dealing with what appears a fairly narrow legal issue: the right of an individual unit owner to seek legal redress with respect to rights in common property. As the language of these decisions shows, this issue reveals a deep conflict between community and individualistic approaches to property, and resolves them in favour of an individual, rights-based approach.

The issue first arose in BC in *Hamilton v Ball*,²⁷ a “leaky condo” case in which a group of individual owners sued another group of owners in the same complex. The first group claimed that the second group had engaged in improper conduct in attempting to arrange for repairs and renovation of the building. The plaintiffs originally attempted to bring a lawsuit in the name of the strata corporation itself. However, they were unable to obtain the $\frac{3}{4}$ membership vote necessary under section 171 of the *Strata Property Act* to authorize the corporation to bring a lawsuit on behalf of all the members.²⁸ Instead, the plaintiffs commenced an action, as co-owners of the common areas in the strata, seeking compensation for the damages that the second group of owners had caused to their individual interests in that common property.

The defendants applied to have the action dismissed on the grounds s. 171 provided the only vehicle for bringing an action in respect of the strata’s common property. The chambers judge, taking a pluralist approach, agreed:

²⁷ 2006 BCCA 243.

²⁸ SBC 1998, c 43.

... the entire scheme of the Strata Property Act is based on the fact that strata properties involve collective as well as individual rights. There are interconnecting rights and obligations which the legislature has determined must be exercised or recognized in a specific manner, and have set the requirement of a three-quarter majority of persons who are not intended to be defendants in the action.

It must be assumed, as the legislature has assumed, that reasonable people protecting their own interests and acting collectively are in the best position to make a decision as to whether or not a certain course of action is warranted given the risks and potential benefits of that course of action. In this case the plaintiffs having been unable to persuade their fellow owners to pursue this course of action against some of their former or present fellow owners must abide, in my view, by the decision made.²⁹

In this view, the role of section 171 is to reconcile collective and individual interests. The strata is the sole representative of the collective interests, and the common property is part of those collective interests. An individual owner can influence the collective decision-making process through voting and other political means, but cannot unilaterally take charge of an issue that fundamentally affects the whole complex by commencing litigation. The chambers judge also cited earlier cases that applied the rule in *Foss v Harbottle*³⁰ to strata corporations, perceiving individual units owners as legally separate from the strata as a whole.

The court of appeal disagreed. Noting that the common property in a strata is owned in common by the individual owners, and not by the strata corporation, the court concluded that *Foss v Harbottle* was inapplicable.³¹ Further, the court held that, even though collective ownership of common areas is “a type of property unknown to the common law”, it nevertheless

²⁹ *Hamilton v Ball* (10 November 2003), Vancouver S012351 (SC) at paras 25-26.

³⁰ (1843), 67 ER 189 (establishing that a corporate shareholder cannot sue individually for a wrong done to the company).

³¹ 2006 BCCA 243 at para 26.

carried with it the individual right to sue for damage to the common property “as a common law incident of the ownership of property.”³² Only very clear language in the SPA could remove such a “common law incident,” and section 171 was not clear enough. Instead of replacing the individual right to sue with a collective one, section 171 simply added the possibility of using the strata corporation as a representative body for the individual owners’ interests, if the $\frac{3}{4}$ vote threshold could be met.

Different concerns motivated each of these decisions. The chambers judge was concerned with the collective resolution of contentious issues within the corporation, and saw the $\frac{3}{4}$ voting rule as a means to promote harmony within the community by blocking divisive court action without the support of a supermajority of owners. On the other hand, the court of appeal focused on the entitlement of individual owners, without considering either the integrity or well-being of the collective or whether the rights traditionally adhering to common property should be modified or curtailed in the condominium context.

This case also exemplifies the tension that recurs in the condominium cases between “traditional” rights of property and the “new” property arrangements embedded in the condominium. Cases that take the approach of the trial court adopt a remedial and contextual approach to interpreting the rights in a condominium which are, at root, creations of a statutory scheme. This approach resonates with pluralist moral theory because it involves attempts to balance the various interests at play in a condominium complex in light of the legislation and its detailed enumeration of rights and duties. Cases that take the approach of the appeal court adopt a more mechanical approach, importing property concepts (and sometimes corporate law

³² 2006 BCCA 243 at para 27.

concepts) directly from other areas of law without tailoring them to condominium. This approach resonates more with deontological property theory, focusing on the expectations that the parties bring to a conflict based in property or contractual norms and emphasizing owner's rights, often at the expense of collective interests.

That said, the Ontario Court of Appeal came to a more nuanced conclusion in *1420041 Ontario Inc. v. 1 King West Inc.*,³³ where a similar issue arose regarding the right of an individual owner to sue regarding common areas. In that case, a company purchased several commercial units in a condominium complex while it was still under construction, and obtained contractual commitments from the developer to alter the design specifications of the individual units and some of the adjoining common areas as part of the purchase agreement. When the developer failed to meet those commitments, the company sued for specific performance. The developer claimed that the unit owner could not bring an individual claim relating to the common areas, citing section 23 of the *Condominium Act*.³⁴ Similarly to s. 171 of the SPA, s. 23 authorizes a condominium corporation to bring legal proceedings on behalf of the condominium owners; however, it does not require a $\frac{3}{4}$ membership vote to authorize the action.

The Court of Appeal found for the unit owner, though on narrower grounds than those used by the BC court:

What s. 23 is designed to do, in my opinion, is to empower a condominium corporation to bring an action where there is a "common" condominium issue to be addressed -- where, as Rosenberg J.A. put it in Wellington [at p. 19 O.R.], "the real injury is to the owners as a group rather than to any individual" (emphasis added). Such a remedy, broad as it is, is not inconsistent with the right of an individual unit owner to pursue contractual or other claims that are unique to the owner's unit,

³³ 2012 ONCA 249. ("*1 King West*")

³⁴ SO 1998, c 19.

including those touching on common elements that immediately pertain to the unit and that do not concern the owners as a group. Indeed, such a right complements the class action-like remedy provided by s. 23(1).³⁵

On the surface, this decision resembles the BC Court of Appeal holding in *Hamilton*. The court found that the provision *allowing* a condominium corporation to sue regarding the common areas did not *prevent* the individual owner from bringing a similar action. However, unlike in *Hamilton*, the court was influenced by the fact that the common elements at issue “immediately pertained” to the individual units and the owner was suing for specific performance rather than damages. It left the door open for a future case to decide that a claim cannot be brought by an individual owner if “the real injury is to the owners as a group.”

Although it may seem like a mere procedural point, this issue has significant implications for the view of the nature of property in a condominium. Curtailing the right of an individual owner to sue regarding common property, either absolutely or when the “real injury is to the owners as a group,” promotes communal stewardship and decision-making for the common property over the piecemeal interests of individuals in the complex. It places responsibility for the common areas squarely at the community level and recognizes that decisions about taking legal action have an impact on the social and financial integrity of the condominium complex. Such an approach is justified under a pluralist theory, with its need to consider both individual and community interests in determining property rights. It struggles, however, under a deontological rights-based approach, as under that approach any abrogation of an individual property right to a collective interest, such as a right to bring legal action, becomes questionable.

³⁵ 2012 ONCA 249 at para 21.

5.2.2 Restrictions on Leasing

Leasing restrictions also bring out contrasting theoretical approaches to property within condominium. As the following discussion shows, the ability to lease property to third parties has often been construed by the courts as a traditional incident of property ownership, and the cases have frequently interpreted condominium legislation generously in favour of the individual unit holder who wants to lease. At the same time, there has been a push by many condominium owners to allow for restrictions on leasing of units. Lessors are often seen as less invested in the community of the condominium and responsible for additional costs, while investor-owners are portrayed as being distant from the complex and having interests at odds with those of owner-occupiers.³⁶ Recent developments in both case law and legislation have favoured more openness toward leasing restrictions, reflecting a move away from rights-based considerations toward a more communitarian regime.

The classic case on leasing restrictions in Ontario is *Re Peel Condominium Corporation No. 11 and Caroe*.³⁷ In *Caroe*, the condominium's declaration restricted occupancy of each unit to the owner and his or her family and prohibited taking in boarders. Several unit owners leased out a unit to another family for use as a residence. The condominium board attempted to evict the tenants and obtain an order prohibiting the owners from leasing the units. The court held that

³⁶ Randy Lippert discusses this perception among condominium owners and other interested parties and summarizes this widely-held view as follows: "By their mere presence renters call into doubt the condominium ideal, which is premised on *owners* sharing and governing common spaces together in a stable 'community.' Renters are a discursive affront to the possibility of the condominium due to their assumed disregard for the nobility of home ownership and lack of care for property." Randy Lippert, "Governing Condominiums and Renters with Legal Knowledge Flows and External Institutions" (2012) 34 *Law & Pol'y* 263 at 268.

³⁷ (1974), 4 OR (2d) 543 (High Ct).

“[o]ne of the fundamental incidents of ownership is the right to alienate the property that one owns,”³⁸ tracing the origin of this idea to the Imperial Statute of Quia Emptores in 1290.³⁹ The *Condominium Act* in force at that time provided that a declaration could contain “provisions respecting the occupation and use of the units and common elements.”⁴⁰ However, the court determined that this language was not clear enough to permit a declaration to contain restrictions on leasing an individual unit.

It is surprising that the court did not refer to another subsection in the statute that deals specifically with restrictions on leasing. The current section provides that the declaration may contain “conditions or restrictions with respect to gifts, leases and sales of the units and common interests.”⁴¹ It is unclear why this section was not addressed by the court. In any event, the court’s narrow interpretation highlights the difference between a deontological view and a pluralist one. On a rights-based view of property, restrictions on alienation or leasing are difficult to justify because they restrict the power and freedom of property owners. Only a strong contractarian view could support such restrictions, as long as the owner had full knowledge of the restriction on leasing when purchasing the unit and a clear understanding of its implications. However, the court in *Caroe* appears to have rejected this contractarian option, holding that the declaration of a condominium complex could not validly create restrictions on leasing.

³⁸ *Ibid.*

³⁹ 18 Edw. I.

⁴⁰ *Condominium Act*, RSO 1970, c 77, s 3(2)(c).

⁴¹ SO 1998, c 19, s. 7(2)(c).

A pluralist view of property allows greater scope for leasing restrictions.⁴² Arguably, restrictions on leasing could contribute to community health and well-being by leading to greater residential stability and a thus greater sense of investment in the community.⁴³ It also makes it less likely that a condominium corporation will have to deal with absentee investor-owners when making decisions. At the same time, restricting rentals has a negative impact on the individual owners in a complex, reducing their options. Allowing rentals could also contribute to the community in meaningful ways, for example by bringing people into the community from a socio-economic, racial or cultural background who otherwise may not be able to afford to live there. On a pluralist approach, these various factors could be balanced in the context of a particular condominium complex, and a solution to the leasing issue can be tailored to that complex, rather than the one-size-fits-all situation suggested by the deontological approach in *Caroe*.

More recently, the courts in Ontario appear to be moving more towards such a nuanced, context-sensitive approach regarding restrictions on short-term leasing. In *Skyline Executive Properties Inc. v. Metro Toronto Condominium Corp. No. 1280*,⁴⁴ a condominium declaration provided that each unit in the complex shall be used only as a single family dwelling unit. The condominium corporation enacted rules prohibiting the leasing of units for an initial period of less than one year. Other rules were enacted regarding minimum occupancy periods. Skyline

⁴² As explained earlier, this thesis is restricted to considering the “internal” issues of condominium. The fairness or justice of condominium leasing restrictions in the context of the greater society is a more complex question, and concerns about access to affordable housing and community composition could justify limits on leasing restrictions from a pluralist perspective. For a detailed analysis, see Grassmick, *supra* note 2.

⁴³ But see Lippert, *supra* note 36, discussing how negative attitudes towards condominium renters has turned them into a type of “other” in condominium governance.

⁴⁴ [2001] OJ no 3512 (QL) (Sup Ct).

purchased several units in the complex, started using them as part of its short-term hotel leasing business, and brought a court action to declare the leasing restriction and minimum occupancy rules invalid. Breaking from *Caroe*, the court did not analyze Skyline’s application in terms of the traditional incidents of ownership or fundamental rights of alienation. Instead, the court considered whether the restrictions on leasing were in conformity with the express provision in the declaration that the units were to be restricted single-family residential use, and deferred to the condominium corporation’s role in “balancing the private and communal interests of the unit holders.”⁴⁵ The court upheld the leasing restrictions.

A similar situation occurred in *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan*,⁴⁶ where an individual purchased several units in a condominium and then leased those units to a hotel company for use as short-term rentals. The condominium declaration did not prohibit leasing, but did specify that nearly all units in the complex, including all those at issue in the case, were to be used as “residential dwelling units.” The condominium corporation enacted a rule prohibiting any lease for fewer than 3 months, which was challenged by the individual lessor. Again, the court did not analyze the issue in terms of the traditional rights of property. Instead the court considered whether the rule was validly enacted under the *Condominium Act*, which requires that condominium rules must either “promote the safety, security or welfare of the owners and of the property and assets of the corporation”⁴⁷ or “prevent unreasonable interference with the use and enjoyment of the common elements, the units or the assets of the corporation”⁴⁸ and must also be “reasonable” and consistent with the Act, declaration, and

⁴⁵ *Ibid.* at para 16.

⁴⁶ [2001] OJ no 2785 (QL) (Sup Ct).

⁴⁷ SO 1998, c 19 s 58(1)(a).

⁴⁸ *Ibid.* s 58(1)(b).

bylaws.⁴⁹ The court held that the condominium corporation had demonstrated that the disruption caused by having short-term tenants cycle through the building justified taking action to restrict such leasing and that the condominium corporation was entitled to “considerable deference” in determining the appropriate rules for dealing with such disruptions.⁵⁰ Again, the court upheld the leasing restrictions.

Both of these decisions on short-term leasing follow an approach that resonates with a pluralist view. Rather than confining the analysis to the property rights of the individual unit owners, both courts considered the character of the condominium developments, the limited nature of challenged leasing restrictions, and the evidence put forward by the condominium corporations regarding the disruption, increased costs, and altered nature of the condominium community caused by the short-term rentals. The court also gave considerable deference to the condominium corporation and the results of the democratic, deliberative processes that lead to the leasing restrictions. Rather than seeing these restrictions as incursions on the narrow property rights of individual owners, the courts saw them as enhancing the value of the complex and enabling the owners to create the residential community contemplated in the declarations.

In British Columbia the courts were initially skeptical of restrictions on leasing in strata units. The Act in force before 1998 permitted a strata corporation to “limit” the number of units in the complex that could be leased.⁵¹ The courts held that the use of the word “limit” precluded an absolute restriction on leasing: at least one unit must be allowed to be let, or some procedure

⁴⁹ *Ibid.* s 58(2).

⁵⁰ [2001] OJ No 2785 (QL) at para 44.

⁵¹ *Condominium Act*, RSBC 1996, c 64.

must be in place that could enable an owner to lease a unit.⁵² The courts in these cases share the concerns of the Ontario court in *Caroe*: the statute should be interpreted to favour “traditional” rights of property, even when that may not be the most obvious reading of the legislation.

However, under the new *Strata Property Act* (1998) the BC legislature provided that a strata can prohibit all leasing of residential units,⁵³ subject to several narrow exemptions, including a hardship exemption,⁵⁴ an exemption for leasing to family members,⁵⁵ and grandparenting provisions for existing tenants when a new bylaw is passed.⁵⁶ The new regime in BC thus appears to be a rejection of the “property rights first” approach earlier taken by the courts. By expressly permitting prohibitions on most leasing activity, the legislature has enabled strata complexes to tailor the availability of leasing to the particular needs and desires of a majority of the owners in a complex. As noted above, such flexibility corresponds to a pluralist vision of property rights and the need to balance the interests of individual owners and the community as a whole.

The exemptions carved out by the legislature are also illustrative here. Each identifies a situation where the interests of the individual owner or tenant will outweigh the interest of the collective in maintaining stability in condominium residence through a leasing prohibition. The exemption for hardship recognizes that, in some circumstances, an owner may be forced to rent out their unit to make ends meet. The exemption is not automatic, but allows an owner to apply to a strata corporation for permission to lease, and while the corporation “must not unreasonably

⁵² For a detailed summary of these cases, see *Marshall v. Strata Plan No NW 2584* (1996), 27 BCLR (3d) 70 at paras 38-44.

⁵³ SBC 1998 c 43 s 141.

⁵⁴ *Ibid.* s 144.

⁵⁵ *Ibid.* s 142.

⁵⁶ *Ibid.* s 143.

refuse to grant an exemption,”⁵⁷ it may limit the duration.⁵⁸ The need to make an application, the deliberative process it invokes, and the specific provision that the exemption may be temporary suggest that, rather than being a blanket exemption, the hardship provision is meant to take place as part of a pluralist balancing of interests, with the needs of the community and the needs of the individual owner considered together.

The exemption for family members also involves a situation where the interests of individual owners are likely to outweigh the interests of the collective. Here, the exemption *is* automatic: no application process is required, and the strata corporation cannot refuse the rental.⁵⁹ Unlike the hardship exemption, where the balancing of interests is left to the strata corporation (within certain limits), the balancing of interests has been done by the legislature. However, the exemption is narrow and easily supported by reference to the value of family integrity and harmony. While rentals to third parties are likely to be primarily a financial investment, rentals to family members are likely to be motivated by more complex dynamics involving family stability, intergenerational wealth transfers, and continuity of asset ownership. The exemption for family members thus seems not to be motivated by a rights-based approach to property, but by a recognition that residences are often considered a “family asset” and that the use of a strata unit within a family should prevail over restrictions enacted by the relative strangers living within the complex.

Finally, the exemption for existing tenants allows an existing lease to continue indefinitely when a strata complex introduces leasing restrictions.⁶⁰ This exemption could be

⁵⁷ *Ibid.* ss 144(6).

⁵⁸ *Ibid.* ss 144(5).

⁵⁹ *Ibid.* ss 142(2).

⁶⁰ *Ibid.* ss 143(2).

justified either by a deontological approach or a pluralist approach, and is recognition of the importance of home.

5.2.3 Dissolution and Forced Alienation

One area that has led to special challenges in the context of condominium is that of the forced sale of units. In condominium disputes, this issue has arisen in two types of cases: applications for dissolution of an entire complex, and applications to force out individual unit holders.⁶¹

Although these situations have their differences, I will deal with them together as they share the common theme of involuntary sale as the primary challenge to traditional property reasoning.

From a deontological perspective, a forced sale constitutes a direct violation of the freedom and autonomy of the property owner. While not impossible to justify on deontological grounds, such an ability ought to be extremely limited and confined to cases where, on the whole, allowing forced sales enhances the rights of property and the freedom of owners generally. From a utilitarian perspective, forced sales would make sense primarily as a means to overcome a holdout problem that is blocking the ability of owners – or the public generally – to maximize utility. From a pluralist perspective, however, forced sales need to be considered in the entire context in which the ownership of the property occurs. For condominium, this requires considering both the particular situations of the individual owners and the health and viability of the complex as a going concern.

⁶¹ For a detailed discussion of the first issue, see Douglas C Harris & Nicole Gilewicz, “Dissolving Condominium, Private Takings, and the Nature of Property” in B Hoops et al, eds, *Context, Criteria, and Consequences of Expropriation* (The Hague: Eleven, Forthcoming 2015) and for the second, see Douglas C Harris, “Perfect Storms within Condominium: Eviction and Forced Sale Orders as Sanction and Remedy for Chronic Misconduct” (2015) [unpublished, archived at University of British Columbia, Faculty of Law].

I begin with condominium dissolution. As noted earlier,⁶² dissolving a condominium complex requires a 8/10 supermajority vote in Ontario and a unanimous vote in BC.⁶³ Interested parties can also apply to have the condominium dissolved by court order if the applicable voting threshold is not met. Douglas Harris and Nicole Gilewicz have suggested that the difference between a supermajority requirement and a unanimity requirement for dissolution amounts to a difference between conceptions of condominium property.⁶⁴ On the one hand, a supermajority rule “constructs property to protect its exchange value for the owner as investor” as it protects the right to be compensated for a sale of the property, but does not provide an individual owner a veto over the sale.⁶⁵ On the other hand, a unanimity rule “protect[s] the interest itself for the owner, usually as resident or occupant,” as it does provide a veto.⁶⁶ The supermajority rule thus resonates with the utilitarian goal of maximizing utility or wealth and permitting coercive transactions to overcome holdouts, while the unanimity rule fits best with a deontological conception that promotes the freedom and rights of the individual property owner. All jurisdictions, whether operating under a supermajority or unanimity rule allow unit owners to apply for a court-ordered dissolution of a complex when the voting threshold is not met. This opens the door for courts to take a context-based, pluralist approach to the dissolution of the condominium that balances many factors and considers both the interests and wishes of the individual owners along with the interests of the complex as a whole.

⁶² See discussion *supra* ch 2.

⁶³ *Condominium Act*, SO 1998 c 19 s 122; *Strata Title Act*, SBC 1998 c 43 s 269 and s 272 et seq.

⁶⁴ *Supra* note 61.

⁶⁵ *Ibid.* at p. 41.

⁶⁶ *Ibid.*

In this regard, *Royal Insurance Co of Canada v Middlesex Condominium Corporation No. 173*,⁶⁷ is particularly instructive. *Royal* involved a poorly-planned mixed-use condominium with both residential and commercial units. The Royal Insurance Company of Canada, having taken over the vast majority of the units through foreclosure proceedings, came up with a reorganization plan to split the complex into two separate condominiums, one with all the residential units, and one with all the commercial units, and to conduct a number of necessary repairs and renovations. Nine of the 51 remaining residential owners rejected the plan and insisted on being bought out if the reorganization proceeded.

Royal brought an application to court to dissolve the condominium and to create the two new proposed condominiums under its reorganization plan. It relied on section 46 (now section 128) of the *Condominium Act*, which authorizes the court to dissolve a condominium complex if the termination “would be just and equitable” and to include in the termination order “all provisions that it considers appropriate in the circumstances.”⁶⁸ By proceeding this way, Royal attempted to circumvent the general rule that, upon termination of a condominium, the entire property is converted into a tenancy in common owned by all the current owners of units in the complex.

The trial judge refused the order. The court held that Royal must proceed under then section 38, which allowed a condominium corporation to make changes to the common elements or the property of the corporation on an 80% majority vote of the owners, but entitled dissenting

⁶⁷ (1998), 37 OR (3d) 139 (ONCA).

⁶⁸ SO 1998 c 19.

owners to be bought out of their units.⁶⁹ On appeal, the majority held that the relief sought by Royal was not authorized by section 46. They also held section 38 was inapplicable as it only applied to a condominium as a going concern and not to an application for termination. The majority's reasoning is narrow and grounded in concerns about "forc[ing] the objecting respondents to become unit owners in one of these new condominiums."⁷⁰ The court reasoned that such power to alter the property rights of the individual owners would require clearer legislative authority than the residual power to make supplementary orders on dissolution found in (then) subsection 46(3).

The dissent took a broader view. It looked carefully at the realities and underlying interests at play, and noted that the plan devised by Royal was reasonable, better than the status quo, and had the potential to turn the health and value of the condominium complex around:

Because of the fairly recent development of the condominium concept, no body of law has developed around the problems which will inevitably become increasingly frequent and diversified as facts warranting termination arise. With considerable foresight, the legislation has provided the court with a very broad discretion under s. 46(3) to act as it considers appropriate in the wide variety of fact situations which could arise on termination. The order requested in this case is clearly in the interest of all owners, and it would be unfortunate for all if a very small number of dissenters could frustrate the carrying out of a beneficial proposal endorsed by almost all of the unit owners.⁷¹

Without court approval, Royal and the 43 individual owners who supported the plan had two options: buy out the dissenters in a situation where they were likely to attempt to extort greater

⁶⁹ Former section 38 has since been replaced with a more complex set of rules for making changes to common elements – see SO 1998, c 19 ss 97-98. Interestingly, the right of objectors to be bought out has been removed.

⁷⁰ *Royal Insurance*, 37 OR (3d) 139 at 146-47 .

⁷¹ *Ibid.* at 145-146.

than fair market value for their units, or apply for a classic dissolution after which the entire property would be in the hands of the previous owners as tenants in common. As the dissenting judge understood, neither of these alternatives were fair or realistic.

Applying the different moral theories, it is clear that the judges in the majority were firmly grounded in deontological concerns. For them, ordering the holdout owners into the restructuring plan would be forcing them to accept a change in their property rights without their consent. The majority was not prepared to allow such a change without a clear statutory mandate: the residual power to order “all provisions that it considers appropriate in the circumstances” under subsection 46(3) was not clear enough to support this change. Regardless of the merits of the proposed reorganization, and even if it would likely increase the value of the owners’ units, the logic of property rights required the court to uphold the ability of the holdout owners to refuse reorganization regardless of the impact on the other owners.

In contrast, the dissent looked beyond the bare logic of “property” to consider what made sense for the development as a whole and the individual owners. Considering that the condominium form was a relatively new development that marked a significant change from common law estates, the dissent was willing to accept that the termination provisions allowed broad leeway to fashion remedies that were sensitive to context and did not necessarily adhere to traditional, rights-based notions about property. Despite the fact that the termination order would change the property rights of the owners, the dissent sanctioned the reorganization plan as being in the best interests of the entire complex.

The dissent in *Royal* can be understood as embracing either a pluralist or utilitarian perspective. From the utilitarian standpoint, this case presented a classic holdout dilemma, in which a small minority of interested parties attempted to hold up a process that would likely

increase the aggregate utility of the community members. Requiring the holdouts to conform to the restructuring plan would likely be the most efficient way of moving on. From a pluralist standpoint, the case demonstrates a situation where asserting rights under a traditional “property rule” was unlikely to promote the overall flourishing of the community, but rather stood in its way. Unless the holdout owners could demonstrate some objective human value that needed to be protected by withholding their consent, and that outweighed or countered the interests of the other owners in protecting their investment and getting the complex to function properly, the interests of the other individuals and the greater community should have prevailed.

Royal involved an unusual situation and a unique and creative reorganization plan. More commonly, issues regarding dissolution arise when some, but not all, of the owners in a complex want to take advantage of an offer from a developer to purchase the entire property at once. Often, such offers are for a greater sum than what would likely be realized on individual sales of the units. Harris and Gilewicz suggest that these cases pit the “owner as investor,” interested in realizing the greatest economic benefit of the property, against the “owner as resident,” interested in protecting the integrity of their home and the neighbourhood.

Two recent cases from BC present an instructive contrast in this regard: *Mowat v Dudas*⁷² and *McRae v Seymour Village Management, Inc.*⁷³ These cases involved the rare “common law” condominium, formed not under condominium legislation but through a complex series of covenants and other restrictions registered on the property title. In practice, the complexes were run similarly to statutory condominium, with common areas managed by a central corporation in

⁷² 2012 BCSC 454.

⁷³ 2014 BCSC 714.

which each individual has a membership. The dispute in both cases involved a proposal arranged by a group of owners to sell the entire complex to a single developer for an amount that was likely in excess of the amount that could be obtained if each unit was sold individually.

The earlier case is *Mowat*, which concerned Cypress Gardens, a complex in North Vancouver with 177 units situated on 9.5 acres. Polygon, a development company, approached the owners of Cypress Garden with an offer to buy the entire complex for a sum that Polygon claimed was greater than the aggregate market value of the separate units. Some of the owners agreed to the sale, but a substantial number refused. A group of owners interested in the deal brought an application under the *Partition of Property Act*⁷⁴ for an order forcing the sale of the entire property.

In court, the petitioners claimed that a majority of the unit owners were in favour of the sale; however, the court held that on the evidence, only the owners of 54 of the 177 units wanted the sale – less than 1/3 of the total. Further, a large number of the owners in the complex vigorously opposed the sale, and offered many different reasons for their opposition. While the petitioners claimed that the complex was in a state of disrepair and that the owners could not afford the necessary renovations, the respondents claimed that a credible plan was in place to finance and undertake the repairs. Many respondents also questioned whether the proposed sale price was adequate, and wanted to see a democratic resolution to the issue rather than a court-ordered sale. Other owners opposed the sale because of their attachment to the community in the complex, because they were elderly or disabled and did not want to go through the effort and expense of moving, because they had small children who would be displaced by a move, and

⁷⁴ RSBC 1996, c 347.

because the amount offered would not enable them to easily buy replacement housing that would enable them to stay in North Vancouver in close proximity to schools and workplaces. Additionally, owners with outstanding mortgages argued that they would have to pay heavy mortgage penalties in the event of a sale.

The court refused to grant the order for sale. Orders under the *Partition of Property Act* are discretionary and enable judges to consider a wide range of factors in determining whether an order is just and appropriate under the circumstances.⁷⁵ In its reasons, the court considered a combination of factors, some of which have deontological overtones and some of which are more pluralist. On the deontological side, the court considered that when most of the owners purchased their units, they did not understand the difference between a “common law” condominium and a statutory condominium, and likely expected that dissolution or sale of the entire complex would have to follow a democratic procedure such as the process laid out in the *Strata Property Act* rather than through the traditional law of partition of sale of co-owned property.⁷⁶ Purchasers would have assumed that they were buying a piece of real estate that could not just disappear under a court application by their neighbours.⁷⁷ On the pluralist side, the court considered the many interests of the individuals opposed to the sale, and found they had a variety of legitimate reasons for not agreeing to the sale. In particular, the court recognized the hardship in breaking up friendship networks, the problem of leaving families in a position where they would have difficulty finding a replacement home, and the special needs of the elderly and

⁷⁵ *Mowat*, 2012 BCSC 454 at paras 141-46.

⁷⁶ Under the current Act, cancellation of a strata plan requires unanimous consent from all the owners. See SBC 1998 c 43 s 272.

⁷⁷ On this point, the court seems to be misguided. There is a mechanism for court-ordered dissolution under the *Strata Property Act* that is similar to an application for partition and sale under the *Partition of Property Act* – see SBC 1996 c 43 s 284.

disabled people in the complex. Finally, the court noted that well under half of the owners were in favour of the sale, and it seemed unfair to displace the large majority of the owners in the complex against their will.

While there are some deontological concerns in the court's reasoning – especially regarding the expectations of the unit purchaser regarding the means of dissolution – the main thrust of the decision is a pluralist balancing act, considering the many different factors put forward by the parties and seeing the complex not merely as a collection of property rights but as a community with families, elderly people, and people with illnesses and disabilities. In part this is a function of the *Partition of Property Act* and the discretionary nature of the remedy it affords. However, under this discretionary power the court may focus on the reasonable expectations of the parties, or on the best way for the owners to secure a financial benefit from their investment. It chose not to do so, and instead considered the individual circumstances of the opposed owners along with their connections to the community in Cypress Gardens and to North Vancouver generally.

McRae provides a useful contrast to *Mowat*. *McRae* involved a very similar application under the *Partition of Property Act*, brought by owners of units who wanted to sell the complex to a developer for a significant premium above the individual market value of the units. The petitioning owners were concerned that the complex was in a state of disrepair and that the owners had not been able to agree on raising the funds necessary for renovations. They wanted to sell their units for the developer's premium. The objecting respondents cited reasons similar to those raised in *Mowat*: connection to the community, hardship from being forced to move, and concerns that similar housing could not be purchased for the price being offered by the developer.

However, there was one major difference between the situation in *Mowat* and that in *McRae*. While in *Mowat* the majority of owners were opposed to the sale, in *McRae* over 90% of the owners were in favour of the sale. This, combined with the evidence that the complex needed substantial renovations that the owners were not able to agree upon, enabled the court to distinguish the case from *Mowat*.⁷⁸ The court found that under the circumstances, the interests of the large majority of owners who wanted to realize as much as possible on their investments and purchase new homes could not fairly be blocked by the handful who would wanted to stay.

It is tempting to see these two cases as representing the two approaches described by Harris and Gilewicz: *Mowat* protecting the interests of the owners as residents, and *McRae* protecting the interests of owners as investors. However, a careful reading of the cases reveals that there is more going on here. The main difference between the two cases is the percentage of owners who supported the sale. If the goal were absolute protection of the owners as residents, then the detailed analysis of the individual owner's situations in *Mowat* would be unnecessary: the mere fact that unanimity could not be achieved should be the end of the matter, and the application should have been summarily dismissed. Similarly with *McRae*: if the goal were simply to promote the investment value of the properties, then the raw percentage of willing owners would not be a determining factor; rather, the court should have been focused on the question of whether a sale of the whole complex would provide the best return on the owners' investments. By making the percentage of owners who agree to the sale the main concern, the courts lean towards a pluralist moral view of property, and in particular, towards deference to the

⁷⁸ 2014 BCSC 714 at para 40.

democratic will of the large majority of owners and their vision of the community in the complex.

Perhaps the most informative test of the correct theory to apply in these situations would come in a case where there is only a simple majority in favour of a sale, and not a super-majority. In such a case, the court would not have an overwhelming mandate from the owners as to whether or not the property should be sold, but rather, two substantial factions of owners with different positions. The factors that would be considered by the court on such an application, and in particular the factors that the court would consider to be the most important or relevant, could give even greater insight into whether the courts take a truly pluralist approach.

In both *Mowat* and *McRae*, the legislative voting threshold for voluntary dissolution of a condominium was not in issue because both developments were “common law condominium.” Interestingly, in the result both decisions came to the same result that would obtain under the Ontario provisions on voluntary termination in the condominium legislation, which require an 80% supermajority vote. A recent British Columbia Law Institute report questioned the unanimity requirement for termination of a strata, noting that it is “out of step with trends in strata legislation across Canada and elsewhere.”⁷⁹ The report recommends amending the *Strata Title Act* to require only an 80% supermajority vote, citing fairness to the majority of unit owners as a major concern:

[I]t is possible to question the fairness of requiring unanimous consent of the owners to termination of a strata. Maintaining a unanimous consent requirement holds out the possibility—maybe even the likelihood—that an overwhelming majority of owners will be thwarted by a minority, which may be as small as one owner.⁸⁰

⁷⁹ British Columbia Law Institute, *Report on Terminating a Strata* (Vancouver: British Columbia Law Institute, 2015) at 54.

⁸⁰ *Ibid.*

According to the authors of the report, the recommendation to reduce the voting threshold was “strongly supported by respondents to the consultation paper.”⁸¹ When read in conjunction with the court cases, this could be interpreted as a shift away from a deontological, rights-based approach and towards a pluralist framework. It should be noted, however, that the report recommends that all voluntary dissolutions be subject to court approval, in part as a means of protecting dissenters against an unfair sale.⁸² If the recommendation is adopted by the legislature, it is uncertain how it would be applied by the courts.

I turn now to the issue of forced sale of individual units. In “Perfect Storms within Condominium: Eviction and Forced Sale Orders as Sanction and Remedy for Chronic Misconduct”,⁸³ Douglas Harris describes how in recent years courts in both Ontario and BC have ordered a sale of a unit in a condominium complex where the owner of the unit engages in repeated, disruptive conduct that interferes with the ability of other residents to live peacefully in the property, and where the owner refuses to comply with court orders enjoining the conduct. As Harris notes, such orders are at odds with the commonly held perception that individual condominium titles are “as robust as those outside condominium, such that the owner of a freehold interest within condominium could ‘never be evicted’.”⁸⁴ The fact that courts are increasingly willing to order such evictions is an indication that they see condominium titles as different from other freehold titles: in extreme cases, an owner can be dispossessed of their

⁸¹ *Ibid.* at 55.

⁸² *Ibid.* at 79 et seq.

⁸³ *Supra* note 58.

⁸⁴ *Ibid.* at 3, quoting Pavlich, *supra* note 1 at 2.

property in order to promote community cohesion and to enhance the value and rights of the other unit owners.

A typical case involving this issue is *The Owners Strata Plan LMS 2768 v Jordison*.⁸⁵ In that case, the Jordison family had repeatedly violated their strata's code of conduct over several years, disrupting their neighbours' lives by using obscene language and gestures, spitting at people, and making unreasonably loud noises. Despite many warnings, fines, and meetings imploring the Jordisons to stop their behaviour, the violations continued. As a last resort, the strata corporation filed a court application to force the Jordison's to sell their unit and for an injunction prohibiting their disruptive conduct. The corporation's first application was granted at the trial level.⁸⁶ On appeal, the injunction prohibiting the conduct was upheld, but the order forcing a sale was overturned.⁸⁷ After the Jordison's conduct continued for several more months, the strata corporation applied again for an order forcing them to sell their unit and move out. This time the order for sale was granted at the trial level and upheld on appeal.⁸⁸

As the *Strata Property Act* does not contain an explicit provision for such a forced sale, the strata corporation relied on section 173, which allows a court to order an owner or tenant of a strata unit to comply with the bylaws of the strata and to make "any other orders it considers necessary to give effect to" the order for compliance.⁸⁹ The Jordison family opposed the application for a forced sale, arguing that clearer statutory language is required for the court to divest them of a property right. In an interesting counterpoint to the reasoning of the majority in

⁸⁵ 2013 BCCA 484.

⁸⁶ 2012 BCSC 31.

⁸⁷ 2012 BCCA 303.

⁸⁸ 2013 BCSC 487; 2013 BCCA 484.

⁸⁹ SBC 1996, c 43 s 173(c).

Royal, the court of appeal concluded that the nature of strata title and the realities of dense community living gave the court wide latitude in fashioning appropriate remedies. The court explained:

A large and liberal interpretation of s. 173(c) should empower the court to provide an effective remedy. The competing private property interest which supports strict interpretation must, in my opinion, yield to the rights and duties of the collective as embodied in the bylaws and enforceable by court order. The old adage “a man’s home is his castle” is subordinated by the exigencies of modern living in a condominium setting.⁹⁰

Due to the recalcitrance of the Jordison’s and the likely ineffectiveness of traditional remedies for contempt, the court held that forcing the Jordison’s to sell their unit and move was appropriate.

The court’s reasoning here was expressly pluralist, referring to the “rights... of the collective as embodied in the bylaws” as well as the individual interests of the other owners in the quiet enjoyment of their title. The deontological, rights-based notion of property as a “castle” was explicitly rejected in favour of the need to consider the interests of the collective and the other individual owners in the complex. On the specific facts of this case, the fact that the Jordisons’s owned their unit and lived there had to be considered along with their chronically disruptive and disrespectful conduct and the nature of living in close quarters and sharing the common areas with others in the complex. Ownership, in this context, did not guarantee continued possession of the unit regardless of the egregiousness of the owner’s conduct.

⁹⁰ *Jordison*, 2013 BCCA 484 at para 25.

They may, however, be more nuanced ways of interpreting this decision along deontological or utilitarian lines. A deontological argument could be made along contractarian lines, for example, that the Jordison's had agreed, implicitly or explicitly, to a condition that they could be forced out of the complex for chronic misbehavior. Alternatively, an argument could be made that the property rights and reasonable expectations of the other owners somehow "trumped" the Jordison's property rights, as in this case the only way to ensure maximum possible freedom for all the property owners and the ability to enjoy their property rights was to deprive the Jordison's of theirs. From the utilitarian perspective, one could argue that forcibly removing the Jordison's raised the overall utility in the complex. On this view, the Jordison's refusal to abate their conduct is functionally equivalent to a "holdout." Peace and quiet in the complex was likely to be worth "more" to the other owners than the right to behave disruptively was worth to the Jordison's, and so utility was increased by ordering the Jordison's to sell their home. As Harris has observed, although the possibility of a forced sale could be interpreted as diminishing property rights in condominium, it can also be seen as enhancing those rights, as the remaining homeowners now have a valuable right: to kick someone out of the complex in cases of extreme behavior.⁹¹ This could make condominium units more valuable, and thus lead to an increase in overall social wealth. Despite the availability of these alternative explanations, the court in *Jordison* did not use them, and spoke in terms of the "rights and duties of the collective." Seemingly, the court was willing to ascribe a personhood and moral consideration to the complex as a collective, and not just as a collection of individual interests – a pluralist move.

⁹¹ Harris, *supra* note 61, at 16.

In his paper, Harris provides several more examples of courts ordering a forced sale of a condominium unit as a remedy or sanction for contempt of court.⁹² Most of these decisions focus on the details of the egregious conduct and not the underlying theory of property that might support the remedy of forced sales, and one decision focuses on forced sale as a remedy for contempt of court, justifying it as necessary to ensure respect for the court's orders.⁹³ In two decisions the courts do refer to the needs of the community and the fact that the behavior of the respondents poses an unfair disturbance to the community as a whole.⁹⁴ However, a more detailed justification for the availability of forced sale orders from the perspective of moral property theory remains to be developed in the cases.

A final point on forced sales. Harris observes that in most of the cases of forced sales of individual units, mental illness is a factor in the disruptive behavior.⁹⁵ This raises another set of considerations. Whether and to what extent the presence of mental illness should be considered as a factor in these cases is an open question, one that requires considering both the nature of condominium life and the provision of mental health services to the general public. Here, I pause to note that the pluralist view of property can take these factors into account, as the mental health of a disruptive unit owner, the ability for them to find alternative housing, and the consequences of requiring the other unit owners to bear with the disruptive behavior are all factors that can enter a pluralist analysis. For both the utilitarian and deontological perspectives,

⁹² *Ibid.* See *Metropolitan Toronto Condominium Corporation No. 747 v Korolekh*, 2010 ONSC 4448; *Waterloo North Condominium v. Webb*, 2011 ONSC 2365; *York Condominium Corporation No. 82 v. Singh*, 2013 ONSC 2066; *Peel Condominium Corp. No. 304 v. Hirsi*, 2014 ONSC 346; *York Condominium Corporation No. 301 v. James*, 2014 ONSC 2638; *Carleton Condominium Corporation No. 348 v. Chevalier*, 2014 ONSC 3859; *Bea v. The Owners, Strata Plan LMS 2138*, 2015 BCCA 31.

⁹³ *Bea*, 2015 BCCA 31.

⁹⁴ *Korolekh*, 2010 ONSC 4448 at para 88; *Chevalier*, 2014 ONSC 3859 at para 22.

⁹⁵ Harris, *supra* note 58.

however, with their emphasis on protecting vested rights and wealth-maximization, respectively, it is more difficult to see how they can deal with both the individual and social dimensions of mental illness in the context of condominium ownership.

5.2.4 Individual Units – Conduct and Occupancy

Many condominium conflicts involve issues that directly affect the rights and responsibilities of individual owners with respect to their own units. Ownership of a unit is the closest thing in condominium to ownership in the classic sense, and in fact, the device of condominium is often lauded as a mechanism to enable people to purchase a home with property rights similar to those in a solitary fee simple lot. It might therefore be expected that court decisions and legislative provisions are most likely to rely on traditional notions of property ownership and deontological perspectives on the rights of property in this context. However, the legal disputes tell a different story. While rights-based approaches are not absent, they often are supplemented with or superseded by communitarian concerns that resonate more with a pluralist approach.

The issue is further complicated by the fact that it is often impossible to separate out behavior that affects only an individual unit from behavior that also affects other units or the common areas. The close quarters of most condominium living means that behavior that might be considered a strictly “private” matter in a detached dwelling on a large lot becomes a matter of public concern in a condo. In “How Property can Create, Maintain, or Destroy Community,” Amnon Lehavi notes that what he calls “Planned Use Communities”, which includes condominium as well as other forms of structured collective ownership such as homeowner’s associations and cooperatives, often impose rules that limit “activities which are not regularly prohibited by general private law,” such as restrictions on pet ownership, restrictions on outside

display or storage of unsightly items, and restrictions on smoking within individual units.⁹⁶ In the United States, issues have also arisen with respect to the use of religious symbols on publically visible portions of private units, and using a common areas of a complex such as a meeting room for religious purposes.⁹⁷ American courts have also upheld the ability of a condominium board limit the free-speech rights of unit owners, such as restrictions on displaying signs or leafletting.⁹⁸ One commentator has described this situation as “government for the nice,” in which the controlling boards of common-interest communities impose detailed and restrictive limits on the private activities of the people living within their purview, thus leading to a homogenization of identity and behavior and a rejection of anyone who does not fit the particular vision of the “nice” homeowner adopted by the board.⁹⁹

In Canada, one issue that has received some attention is the subject of age restrictions and family status. Limiting residence in a condominium to a specific age group or type of family enables the owners of the complex to determine the character of the community. The most common restrictions are minimum ages (usually set at a retirement age), restricting residency to a single family, and prohibitions on children. However, age and family restrictions are also potentially subject to human rights concerns, as age and family status have both been recognized as a potential ground of discrimination in human rights law.¹⁰⁰

⁹⁶ Anmon Lehavi, “How Property can Create, Maintain, or Destroy Community” (2009) 10 *Theoretical Inq L* 43 at 71.

⁹⁷ See Angela C Carmella, “Religion-Free Environments in Common Interest Communities” (2010-2011) 38 *Pepp L Rev* 57.

⁹⁸ See Adrienne Iwamoto Suarez, “Covenants, Conditions and Restrictions – On Free Speech? First Amendment Rights in Common Interest Communities” (2006) 40 *Real Prop, Prob & Tr J* 729.

⁹⁹ Paula A Franzese, “Privatization and Its Discontents: Common Interest Communities and the Rise of Government for ‘the Nice’” (2005) 37 *The Urban Lawyer* 335.

¹⁰⁰ In BC, age and family status are prohibited grounds for discrimination for leasing property, but not for the sale of property. *Human Rights Code*, RSBC 1996 c 210, ss 9-10. The Ontario human rights legislation prohibits discrimination on the grounds of age or family status in providing accommodation,

In Ontario, the leading case on this issue is *Nipissing Condominium Corporation No. 4 v. Kilfoyl*.¹⁰¹ In that case, the condominium's declaration restricted occupancy of each unit to a "one family residence", and defined "family" to mean "a social unit consisting of parent(s) and their children, whether natural or adopted and includes other relatives if living with the primary group." The bylaws specified that all occupants of any unit must be related to one another. However, several unit holders rented out their units to groups of unrelated students. The condominium corporation brought an action to force the unit holders to end the tenancies and allow only single families to live in their units.

The trial judge held for the corporation, and the court of appeal affirmed. Neither supplied a detailed analysis of the human rights issue, simply stating that the restriction to single-family occupancy "does not infringe any grounds listed in section 2(1) of the Human Rights Code based on the facts of this case"¹⁰² and that "the occupancy provision does not infringe any ground listed in s. 2(1) of the Human Rights Code."¹⁰³ However, the trial judge did set out a rationale for upholding the restriction on rights-based, contractarian grounds, in a passage that was cited with approval by the court of appeal:

NCC No. 4 is a condominium project geared toward families living in their individual units in the project and sharing communal responsibility for the common areas. The peaceful use and enjoyment by each family of its own unit ought not be breached by the actions of any individual who does not conform to the contractual obligation entered into in accordance with the Declaration when the condominium was purchased. The

without clearly distinguishing between leasing and purchasing. *Human Rights Code*, RSO 1990, c H-19 s 2. For detailed discussions of discrimination on the grounds of family status, see British Columbia Law Institute, *Human Rights and Family Responsibilities: Family Status Discrimination under Human Rights Law in British Columbia and Canada* (Vancouver: BLCI, 2012) and Ontario Human Rights Commission, *The cost of caring: Report on the consultation on discrimination on the basis of family status* (Toronto: Ontario Human Rights Commission, 2006).

¹⁰¹ 2010 ONCA 217, aff'ing 2009 CanLII 46654 (ONSC).

¹⁰² 2009 CanLII 46654 at para 31.

¹⁰³ 2010 ONCA 217 at para 6.

condominium project is unique in that individual families have their privacy protected within their own units but at the same time are required to live by rules of the community as they pertain to the common areas used by all members of the individual condominium project.¹⁰⁴

This passage neatly summarizes the contractarian justification for restrictions on occupancy and use of units based on a condominium's declaration. However, it also avers to the pluralist idea of being "required to live by rules of the community," and it specifically overrides the deontological perspective that an owner's right to do as he or she pleases with property should be construed as widely as possible. The same result could thus be justified on either pluralist or deontological grounds.

In B.C., the issue of age restrictions is determined by statute. Section 123(1.1) of the *Strata Property Act* specifically empowers a strata to pass an age restriction bylaw, subject to a provision that exempts anyone who was living in the strata at the time the bylaw was passed and who continues to live there. This provision was applied in "*The Owners*", *Strata Plan NW 499 v. Louis*¹⁰⁵ without comment from the court on human rights implications and without any human rights challenge from the parties. An earlier case decided before the enactment of s 123(1.1) upheld a bylaw restricting occupancy to people 55 years of age or older on the grounds that the B.C. *Human Rights Act* at the time provided an age discrimination exemption for rental units offered only to people 55 years of age or older.¹⁰⁶ Clearly the appropriateness of age restrictions for condominium ownership is generally recognized in the law, regardless of the precise justification for it.

¹⁰⁴ 2009 CanLII 46654 at para 29.

¹⁰⁵ 2009 BCCA 54.

¹⁰⁶ *Marshall v. Strata Plan No. NW 2584* (1996), 27 BCLR (3d) 70 (SC).

Pets are another controversial issue.¹⁰⁷ A pet dispute led to the Ontario Court of Appeal decision in *York Condominium #382 v. Dvorchik*,¹⁰⁸ an opinion that is often cited in Ontario regarding the appropriate level of deference courts should afford to condominium corporations when reviewing bylaws and rules. The dispute involved a challenge to a rule that prohibited pets weighing over 25 lbs. The trial court overturned the rule on the grounds that it was not “reasonable” as required by then section 29 (now section 58) of the CA.¹⁰⁹ The judge found the bylaw to be unreasonable because no evidence was offered to the condominium corporation or the court to show that pets above 25 lbs. posed a threat to other occupants in the building or caused more of a nuisance than smaller pets.

The Court of Appeal overturned the trial court and set out the following description of the role of a condominium corporation in regulating the use and occupancy of units and the standard of review to be applied by courts on review:

A board of directors of a condominium corporation derives its authority to make rules under s. 29 of the Condominium Act. Section 29(1) entitles the board to make rules for "the safety, security or welfare of the owners and of the property" or "for the purpose of preventing unreasonable interference with the use and enjoyment of the common elements and of the other units." The only limitation on the nature of these rules, is set out in s. 29(2) which states that the rules be "reasonable" and "consistent" with the Condominium Act.

The condominium board was not obliged to hear evidence in reaching its conclusion that larger pets be prohibited. In making its rules, the board is not performing a judicial role, and no judicialization should be attributed either to its function or its process. In an application brought under s. 49(1), a court should not substitute its own opinion about the propriety of a rule enacted by a condominium board unless the rule is clearly

¹⁰⁷ Some condominium boards in the United States have gone so far as to set restrictions on overweight pets on the kinds of pets that are permitted in a complex, and on the kinds of permissible doghouses and birdhouses. See Franzese, *supra* note 96 at 340.

¹⁰⁸ 1997 CanLII 1074 (ONCA)

¹⁰⁹ A similar reasonableness requirement applies to bylaws. See SO 1998 c 19 s 58.

unreasonable or contrary to the legislative scheme. In the absence of such unreasonableness, deference should be paid to rules deemed appropriate by a board charged with responsibility for balancing the private and communal interests of the unit owners.¹¹⁰

With this passage, the court of appeal provided wide latitude for condominium corporations to set rules and bylaws dealing with conduct, use and occupancy in a complex. The court also endorsed an approach that balances the “private and communal interests” of the unit owners and places the primary responsibility for doing so on the condominium corporation and its board. Moreover, the court cautioned against “judicialization” of the board’s function. It is not up to the board to come up with the one, “correct” result, or risk being overturned on judicial review. As explained earlier in this thesis, the idea that there is one proper result to be found is to be expected under either a utilitarian or deontological approach, but not under a pluralist one. Deference to a condominium board’s choice of rule from a range of reasonable options is primarily supported by a pluralist theory of property in the condominium context, and is less amenable to deontological or utilitarian interpretation.

On the specific facts of the case, the court of appeal noted that the condominium complex was a large one with several hundred units and over a thousand residents. It was reasonable for the condominium board to take the position that large pets could be more disruptive to the community than smaller ones, even without concrete empirical evidence. In effect, the court implied that it was up to the condominium corporation and its board to consider the needs and desires of different groups of individual owners and to set the tone of the community as a whole

¹¹⁰ 1997 CanLII 1074 at paras 4-5.

through rules that restrict what might otherwise be the traditional incidents of property ownership.

A recent case demonstrates that the Ontario courts continue to uphold pet bylaws and to use them as a classic example of the difference between ownership in condominium and other property. In *Muskoka Condominium Corporation No. 39 v Kreutzweiser*,¹¹¹ the court upheld a bylaw restricting owners to one pet per unit and requiring that pets be leashed while in the common areas:

The owner of a condominium unit does not have a classic freehold. He or she is not at liberty to deal with property in the same manner as the owner of a single family residential dwelling might be. The nature of a condominium is that in return for the advantages gained through common ownership of certain elements some degree of control over what can be done with those common elements is given up. The details of what is given up are set out in the condominium declaration and its bylaws and rules.¹¹²

In BC, a similar conclusion was reached by the court of appeal in *The Owners, Strata Plan NW498 v Pederson*.¹¹³ In that case, an owner attempted to have a “no pets” bylaw overturned by arguing that the power of the strata corporation to regulate the use of individual units was limited to situations that would constitute a nuisance under the common law. In effect, the owner was attempting to jettison any characterization of condominium as a community in which traditional notions about property rights needed to be altered or abandoned. The court rejected this argument, noting that bylaws would be redundant if they needed to confirm the law of nuisance, as each individual owner already has the right to bring a common law nuisance claim against

¹¹¹ 2010 ONSC 2463

¹¹² *Ibid.* at para 8.

¹¹³ 1999 BCCA 224

others.¹¹⁴ The implication is that condominium contemplates the alteration of traditional property rights in a democratic manner through the declaration, bylaws, and rules.

A related area regarding rights of owners in their individual units is that of privacy. At least one court decision seems to imply that rights of privacy are not as strong in a condominium unit as they might be in a freestanding single lot. In *Chan v Toronto Standard Condominium Corporation No. 1834*,¹¹⁵ the condominium's declaration provided that all owners may be required to provide keys to all locks on the doors to or within their units to the condominium corporation. The owner in this case installed additional locks on her exterior door and refused to provide keys to the corporation, claiming that the corporation staff had been trespassing in her unit. The court granted the corporation an order requiring the owner to remove the additional locks. It should be emphasized that in this case, the lock restriction was contained in the declaration and was not directly challenged by the unit owner. It is unclear whether a similar rule would withstand the reasonableness test applied to condominium bylaws or rules.

5.2.5 Common Property

Perhaps unsurprisingly, there are numerous court cases dealing with disputes over the use, maintenance, and development of common property. While there are clear boundaries in strata plans between individual units and commonly owned areas, in practice what takes place in common areas has a direct impact on the use and enjoyment of individual units. As well, the designation of "limited common property" or "exclusive use areas" results in a hybrid sub-parcel

¹¹⁴ *Ibid.* at para 14.

¹¹⁵ 2011 ONSC 108, aff'd 2012 ONCA 312.

within a complex under which individual and collective ownership concepts are mixed. Disputes regarding common areas thus often put individual owners against each other, or a small group of owners against the collective.

In addressing disputes over common areas, the courts have largely favoured approaches that are pluralist and defer to the condominium corporation and its democratic process. There are, however, notable exceptions that take a deontological approach, normally on contractarian grounds. This section will explore three types of disputes: disputes regarding structural elements, disputes over limited common property, and disputes regarding the use of common areas.

I begin with disputes over structural elements. Most complexes incorporate building structures that are part of the common property. The design of such elements can have a major effect on the experience of both the common areas and individual units within the condo. Often, these features have different impacts on different owners, depending on where their units are located in the complex and how the complex is designed. In theory, the individual purchase price of a condominium lot should reflect the advantages or disadvantages of that particular lot within the complex. If that is the case, then difference between lots should be of no particular concern, on either deontological “you got what you bargained for” grounds, or utilitarian “your cost-benefit situation is efficient” grounds. However, given the close-quarters living in many condominium complexes, lack of full fore-knowledge on the part of buyers, the possibility of mistakes, and the fact that condominium complexes are constantly changing, the legal and moral situation tends to be more complicated than that.

In *Sterloff v Strata Plan VR 2613*,¹¹⁶ a dispute arose over the use of parking garage doors. The complex was a large, mixed-use commercial and residential development with a large underground parking area underneath that could be accessed through doors from the east or west. The units immediately above the east door were residential; the units immediately above the west door were all commercial, but there were residential units on floors further above. Both doors were heavy, industrial-grade parking garage doors that were not intended for use in residences.

Sterloff, an owner of one of the units over the east door, complained about the noise when the door was used, particularly at night. The door had been out-of-service when he purchased his unit, so he was caught by surprise when the door came back into operation. Sterloff requested that the condominium corporation replace the door with a lighter, residential door, at a cost of at least \$12,500. The corporation refused, and instead made some minor structural adjustments and restricted use of the east door to prevent entering (but not leaving) the parking lot through it at night. These steps reduced, but did not eliminate the noise, and caused an increased use of the west door, leading to complaints from residents above it.

The court rejected Sterloff's claim that the corporation's decision was a refusal to meet its duty to repair and maintain the common areas. Instead, the court characterized the issue as a dispute over how to meet that obligation. While acknowledging that the corporation's decision inconvenienced Sterloff, it held that the proper forum for resolving the dispute was the democratic process within the condominium, stating:

Pursuant to its bylaws, the strata corporation must control, manage and administer the common property for the benefit of all owners. It seems to me that in carrying out that mandate, the corporation, among other

¹¹⁶ 1994 CanLII 1011 (BCSC).

things, must endeavour to accomplish the greatest good for the greatest number.

...

It seems to me that if the court is to become involved in the particulars of how that obligation is to be fulfilled, then rights and privileges of other members of the corporation may be affected, and accordingly, each member of the corporation should be a party to the proceeding. In my view, the particulars of the method of performance of the obligation are more appropriately defined in a meeting of the corporation, not on an application for a mandatory injunction.¹¹⁷

The court's statement that the corporation "must endeavour to accomplish the greatest good for the greatest number" appears on the surface to be a utilitarian approach. However, the judge never considered the costs and benefits of different garage door renovation schemes as part of an effort to determine which scheme lead to the greatest overall aggregate benefit. Instead, the court deferred to the decision made by the condominium corporation in its democratic process of balancing the different interests within the complex. Such an approach has the greatest affinity with pluralist moral theory.

The scope and meaning of the "greatest good for the greatest number" test from *Sterloff* was addressed in detail by both the concurring and dissenting opinions in *Dollan v The Owners, Strata Plan BCS 1589*,¹¹⁸. This case is particularly interesting because the judgment of the trial court and those of the concurring and dissenting judges on the court of appeal provide clear examples of the utilitarian, deontological, and pluralist approaches.¹¹⁹

Dollan involved a dispute in a new condominium complex regarding windows. Based on the marketing materials used by the developer, the purchasers of "01" units in the complex

¹¹⁷ *Ibid.* at 11-12.

¹¹⁸ 2012 BCCA 44.

¹¹⁹ The second concurring court of appeal decision did not engage in a detailed analysis, so it is impossible to discern which approach was being taken.

believed that their units would have a sweeping view of Vancouver's False Creek. However, those windows also opened onto the windows of the "02" units in the complex, situated below the "01" units. During construction, the developer changed the windows in the "01" units to an opaque "spandrel" style. When the purchasers of the "01" units took possession, they sought approval from the condominium corporation to change the windows to clear glass.

Renovations to the exterior windows were a "significant change" to a common area of the condominium. As such, under section 71 of the *Strata Property Act* they required the approval of a $\frac{3}{4}$ majority of the units in the complex. A vote was held, and the application was rejected by a vote of 19 in favour and 54 against. Unsatisfied, two of the "01" unit owners sued the strata corporation under section 164, claiming that the decision was "significantly unfair."

The trial judge adopted a utilitarian approach and agreed with the "01" unit holders. Adopting the "greatest good for the greatest number" language from *Sterloff*, the court held that the strata had a duty to make a decision that reflected a proper cost/benefit analysis. In the current situation, the "01" owners had been deprived of a valuable view of False Creek, in exchange for greater privacy for the "02" owners. However, the privacy of the "02" owners could be protected simply by installing blinds on their windows, a relatively cheap measure. Thus, the overall "cost" of keeping the windows as is was much greater than the overall "cost" of converting the windows to clear glass. The strata was therefore required to make the change.

On appeal, both concurring opinions and the dissent rejected the application of the "greatest good for the greatest number" test as the appropriate test for measuring "significant unfairness." All opinions also rejected the argument that the scope of judicial review for significant unfairness under section 164 should be limited to procedural concerns alone, and concluded that the section authorized a substantive review of a decision even if the process

followed by the corporation was fair and democratic. However, the similarities between the opinions ended there. In a fairly dramatic move, the first concurring opinion adopted the corporate law test for shareholder oppression as the test to be applied under section 164. This test focuses on the “reasonable expectations” of the parties to the dispute. As expressed by judge, the test has two parts:

1. Examined objectively, does the evidence support the asserted reasonable expectations of the petitioner?
2. Does the evidence establish that the reasonable expectation of the petitioner was violated by action that was significantly unfair?¹²⁰

The concurring judge concluded that, based on the marketing materials, the 01 unit purchasers had a reasonable expectation that they were purchasing units with a clear window and a view of False Creek. Because of this reasonable expectation, it was “significantly unfair” for the “02” unit owners to use their majority voting rights to deprive the “01” unit holders of their expectations. Presumably, this view of False Creek would have been reflected in the purchase price of the units, and so by depriving them of the view, the “02” unit holders were depriving the “01” owners of a property right that they had paid for. In the concurring judge’s opinion, the strata did not have the power to refuse to grant this right to the minority owners through the democratic process.

The second concurring opinion also found in favour of the 01 unit owners, but did not engage in a detailed discussion about the meaning of “significantly unfair” under section 164. The judge simply stated that, on these particular facts, the decision was unfair to those unit

¹²⁰ *Ibid.* at para 30.

owners because “the continuing burden of an impaired view [was] a disproportionate imposition on the interests of the respondents.”¹²¹

The dissenting judge took a pluralist approach. In the dissent’s view, the focus of the analysis should not be on the reasonable expectations of the “01” unit holders, but on reconciling the interests in the strata as a going concern through the democratic process. The issue of the “01” unit holders was properly a matter to be settled between those owners and the developer.

As the dissent explained:

Under s. 71 of the Act, the respondents’ request to change the spandrel window to a vision window required a 3/4 vote of the owners. The change however created privacy concerns for other owners and would have changed the external appearance of the building between the 11th and 27th floors. In declining the respondents’ request, the strata corporation chose to maintain the status quo of the building design. It was under no obligation to remedy the developer’s defect; it was only obliged to weigh the competing interests of all affected owners, including concerns about views, privacy, and the exterior appearance of the building, and to make a decision that was not significantly unfair to the respondents. That obligation was met, in my view, by putting the respondents’ request before all the owners for a 3/4 vote and then giving effect to the outcome of that vote.¹²²

This passage displays the two common themes of pluralist approaches to property rights and fairness in the condominium law context: the need to weigh and consider multiple values and interests, and deference to the democratic process. Effectively, the dissent refused to convert the contractual expectations of the 01 unit purchasers into an *in rem* “property right” enforceable against the world, and instead placed a priority on the need for balancing and community integrity in a condominium development.

¹²¹ *Ibid.* at para 46.

¹²² *Ibid.* at para 64.

Although the first concurring opinion in *Dollan* takes a deontological approach, the second concurring opinion takes no particular philosophical approach, and the dissenting opinion makes arguments in line with many other court cases regarding the meaning of “significantly unfair” in the condominium context. As well, the first concurring opinion makes several dramatic judicial innovations by applying the corporate shareholder oppression test and elevating the status of purchaser’s expectation to “in rem” property rights. The precedential value of *Dollan* is thus uncertain, and it remains to be seen whether later cases will adopt the concurring or the dissenting approach.

Ontario’s legislation specifically authorizes an “owner, a corporation, a declarant or a mortgagee of a unit owner” of a condo unit to bring an action for conduct that “is or threatens to be oppressive or unfairly prejudicial to the applicant or unfairly disregards the interests of the applicant.”¹²³ This oppression remedy is separate from the provisions permitting a party to bring an action to strike down a condominium rule or bylaw for being unreasonable. In *McKinstry v. York Condominium Corp. No. 472*,¹²⁴ the Ontario Superior Court of Justice held that this provision incorporated the shareholder oppression remedy from corporate law, stating:

Stakeholders may apply to protect their legitimate expectations from conduct that is unlawful or without authority, and even from conduct that may be technically authorized and ostensibly legal. The only prerequisite to the court's jurisdiction to fashion a remedy is that the conduct must be or threaten to be oppressive or unfairly prejudicial to the applicant, or unfairly disregard the interests of the applicant.... It must be remembered that the section protects legitimate expectations and not individual wish lists, and that the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets.¹²⁵

¹²³ *Condominium Act*, RO 1998 c 19 s 135.

¹²⁴ (2003) 68 OR (3d) 557.

¹²⁵ 68 OR (3d) at para 33.

The court's description of the oppression remedy in *McKinstry* appears to be more flexible than that adopted by the BC Court of Appeal in *Dollan*. While the Ontario court acknowledged that the oppression remedy is based on protecting "legitimate expectations," it also specified that those expectations must be balanced against the corporation's interest in the welfare and governance of the condominium. On the facts of that case, the court held that the owners of a unit who had been prohibited from proceeding with renovations to their unit by the corporation were not entitled to an oppression remedy. The decision was held not to be oppressive even though the owners were already halfway through the renovations when the decision was made, had received assent from the building manager to do the renovations, and had relied on the fact that interior walls were not specified in the declaration as an indication that interior renovations would normally be allowed. The court found that the interests of the corporation in noise control between units and its concerns that the renovated unit would put the owner's living room beneath the bedroom of the unit above were sufficient to support the corporation's decision.

McKinstry has been frequently cited by the Ontario courts in subsequent cases involving an action for oppression under section 135.¹²⁶ The Ontario Court of Appeal has also confirmed that the oppression remedy in section 135 is "similar" to the oppression remedy from corporate law, but did not analyze the provision in detail, in *Metropolitan Toronto Condominium Corporation No. 1272 v. Beach Development (Phase II) Corporation*.¹²⁷ It remains to be seen whether the Ontario courts will interpret the oppression remedy in the strict, deontological

¹²⁶ See e.g., *Durham Condominium Corporation No 90 v Moore*, 2010 ONSC 5301; *1240233 Ontario Inc v York Region Condominium Corporation #852*, 57 BLR (4th) 88.

¹²⁷ 2011 ONCA 667. The court of appeal upheld the lower court's decision denying a finding of oppression in that case.

fashion applied by the concurring opinion in *Dollan*, or whether it will take a more flexible, pluralist approach as suggested by *McKinstry*.

Another source of conflict within condominium complexes has been the regulation and use of limited common property. In B.C., a strata plan may designate a parcel of common property as “limited common property.” Such a parcel remains formally a part of the common property owned in common by all owners in the complex, but is reserved for the use and enjoyment of one or several of the individual unit owners.¹²⁸ In Ontario, a declaration may provide that certain areas of common property are reserved for the exclusive use of one of more individual owners.¹²⁹ Questions regarding the nature of such “mixed interest” parcels have arisen occasionally and form another example of the tension between deontological approaches and pluralist approaches in the cases.

Gentis v. The Owners provides a useful illustration of the conflicts that arise.¹³⁰ In this case, the first owner of a strata lot negotiated with the developer to convert an area adjacent the unit into a deck. The area was also the rooftop of a unit below, and was in addition to another full deck and a half deck adjoining the unit. All units in the complex had 2 such decks. The developer informed the first owner that permission from the strata council would need to be obtained if the arrangement were to be continued. Although it appears that the first owner did get grudging consent from the strata council, the consent was not permanent and was subject to the continuing agreement of the owners of the unit below. After a number of years, the original

¹²⁸ See *Strata Property Act* SBC 1998 c 43 ss 1 (“limited common property”), 73-77.

¹²⁹ *Condominium Act*, RO 1998 c 19 s 7(2)(f).

¹³⁰ 2003 BCSC 120. As luck would have it, my paternal grandparents owned a unit in this complex during the 1970’s and 80’s, so I am familiar with the development.

owner entered into a formal leasing arrangement with the strata for the use of the rooftop as a deck which stipulated that the strata would review the situation upon sale of the unit.

Eventually, the first owner sold the unit to the Gentis. The Gentis were informed that the use of the deck was not guaranteed and would be reviewed by the strata. Upon this review, the strata council resolved to limit the Gentis' access to the rooftop and effectively prevent them from using the area as a deck. The Gentis then requested that the strata council designate the area as "limited common property" for their benefit. This required approval of $\frac{3}{4}$ of the unit owners.¹³¹ When that vote went against the Gentis, 51 votes opposed and 14 in favour, the Gentis applied for a court order granting them permission to use the rooftop as a deck, claiming that the decision refusing to designate the area as "limited common property" was "significantly unfair" under section 164 of the SPA.

The court rejected the Gentis' argument that the rooftop had been de facto converted into limited common property and that a right of use had accompanied their purchase of the unit. It noted that "significantly unfair" conduct generally indicates oppressive conduct that is "burdensome, harsh, wrongful, lacking in probity or fair dealing, or has been done in bad faith," or unfairly prejudicial conduct that is "unjust and unequitable."¹³² Regarding the meaning of "significantly", the court stated:

Strata Corporations must often utilize discretion in making decisions which affect various owners or tenants. At times, the Corporation's duty to act in the best interests of all owners is in conflict with the interests of a particular owner, or group of owners. Consequently, the modifying term indicates that court should only interfere with the use of this

¹³¹ It is unclear from the court decision which provision governing the designation of limited common property was in effect at the time. The current provision is section 74 and it requires a $\frac{3}{4}$ vote of the owners. SBC 1998 c 43.

¹³² 2003 BCSC 120 at para 27, quoting *Strata Plan VR 1767 v. Seven Estate Ltd*, 2002 BCSC 381 at para 47.

discretion if it is exercised oppressively, as defined above, or in a fashion that transcends beyond mere prejudice or trifling unfairness.¹³³

A court owes deference to the results of the complex balancing process that a strata corporation must go through to resolve these kinds of disputes.

In applying the test for “significant unfairness” to the facts of this case, the court stated:

There is no evidence before me that the Council has acted in bad faith, or in a harsh, burdensome, or wrongful manner. Rather, the Council appears to have taken into consideration many factors and reached a decision in accord with its duties to act in the best interests of all tenants and owners. The Council took into account the impact of the continued use of the Deck on the suite below, the possibility that other tenants might demand similar treatment insofar as deck-space is concerned, potential changes in property value, and the potential impact on the nature and character of the strata community. Each of these factors is clearly a legitimate consideration.¹³⁴

The thrust of the court’s analysis was pluralist. A utilitarian analysis would have required the court to do a cost/benefit calculation, and to replace its judgment for that of the strata council if necessary to ensure that utility was maximized in the complex. The court clearly did not do so here, speaking of the need to defer to the strata council’s balancing of the various interests at play. A deontological approach to this problem would have lead to the conclusion that the Gentis had no right to the deck. As the court noted, the Gentis were fully aware of the uncertain status of the deck when they purchased the unit. They had no reasonable expectation to the future use of the deck, and that would have been reflected in the purchase price. Moreover, allowing them to use the deck could well frustrate the reasonable expectations of other owners in

¹³³ *Ibid.* at para 28.

¹³⁴ *Ibid.* at para 30.

the complex, particularly the owners of the unit below the deck, that the use of the deck was likely to be rescinded once the unit was sold.

However, the court did not confine its reasoning to a cost-benefit analysis, nor did it focus on the reasonable expectations of the parties. Instead, the court deferred to the democratic process of the strata council. The court also reviewed the considerations taken into account by the strata council, and noted that they were all appropriate factors to consider. These factors went beyond a cost/benefit analysis or consideration of expectations and property rights. The Council considered the impact of the continuing use of the deck on the community as a whole, including the effect on property values, the fairness to other unit owners who did not have access to a third deck, and the difficulty of dealing with requests from other owners to create similar arrangements in their units. These factors fall under the values of community stability and a sense of egalitarian fairness within the community – factors that make the most sense under a pluralist approach.

Gentis involved the question of whether it was “significantly unfair” for a strata to refuse to designate a common area as limited common property, either formally or informally. Cases where a parcel has already been so designated tend to place more emphasis on the individual rights of the owner. For example, in *The Owners, Strata Plan NW 243 v. Hansen*,¹³⁵ the court rejected a strata corporation’s attempt to prevent owners from installing hot tubs on their enclosed decks. While the decks were delineated in the strata plan as common areas of the strata complex, in practice each deck was assigned for the exclusive use and benefit of the adjoining unit, and were hidden from public view by walls and fences. The court did not engage in a

¹³⁵ 1996 CanLII 2957 (BCSC)

detailed legal analysis, simply noting that there was no evidence that the hot tubs were impacting other units or the common areas or that they presented any risk of injury or damage to common property. The court also held that a new bylaw prohibiting hot tubs could not apply retroactively, effectively grandparenting in the existing hot tubs. The court did not consider whether the bylaw was valid with respect to future hot tubs.

Similarly, in *Wentworth Condominium Corporation No. 198 v. McMahon*,¹³⁶ the Ontario Court of Appeal applied a rights-based approach in determining whether the installation of a hot tub in a back yard that was common property designated for the exclusive use of one unit was an “addition, alteration or improvement to the common elements,” requiring approval from the condominium corporation under section 98(1) of the CA. While the court did engage in some textual analysis, analyzing in tortured depth the precise meaning of the three words “addition”, “alteration”, and “improvement”, the decision came down to a consideration of what result would “strike[] the appropriate balance between the rights of individual owners and the rights of the owners collectively speaking through their board of directors.”¹³⁷ The court did not provide a coherent test for determining this balance, but found that installing a hot tub was similar to placing a barbeque or picnic table in a back yard and so was within the property rights of the individual owner. In contrast, the court speculated “an owner could not hope to store scores of disused and ugly tires, or ugly rusting equipment or vehicles, or a giant ugly billboard of the New York Yankees World Series team on his patio without obtaining the approval of the board of directors of the condominium corporation.”¹³⁸ It appears the court sought to determine the

¹³⁶ 2009 ONCA 870.

¹³⁷ *Ibid.* at para 28.

¹³⁸ *Ibid.* at para 31.

impact that the owner's use would have on the other owners in the condominium corporation, in a manner analogous to the common law concept of nuisance. As discussed earlier, such an approach has the greatest affinity with a deontological theory of property rights.¹³⁹

An earlier case from Ontario, *Carleton Condominium Corp. No. 279 v Rochon*,¹⁴⁰ dealt with the issue of satellite dish placement. In their purchase and sale agreement, the Rochons managed to obtain a clause from the developer entitling them to place a satellite dish on the roof of the complex, and the developer arranged for approval of the dish in its capacity as the original controller of the corporation's board of directors. However, the condominium declaration designated the roof as common property, and nothing in that declaration specifically authorized placement of a satellite dish on the roof by individual unit holders. The *Condominium Act* in force at the time required board approval for any "substantial additions, alterations or improvements" to the common property of the condominium, and the initial rules and bylaws registered by the developer specified that the board shall conclusively determine whether a proposed addition, alteration or improvement is substantial.

The court held that the developer's approval of the satellite dish was void and that the board could order the removal of the dish. On the surface, the court's reasoning was contractarian. The court noted that the individual purchasers of the units were not put on notice of the developer's deal with the Rochons because that arrangement was not reflected in the declaration. When they purchased their units, they understood that any additions to common areas such as satellite dishes would require approval of the duly elected board. However, such

¹³⁹ See discussion *supra*.

¹⁴⁰ (1987), 59 OR (2d) 545 (CA).

contractarian concerns could also operate the other way; the court could have held that the Rochons were entitled to the benefit of their bargain with the developer, as the developer approved the satellite dish in its capacity as the first controller of the board of directors. Arguably, the purchasers of other units should have known that the developer was in control of the corporation at the time of first sale, and that they took their units subject to arrangements negotiated with the developer with other purchasers. If they wanted specific guarantees from the developer regarding the common areas, or if they wanted their own special deal, they were entitled to seek it. In my view, the case therefore turns not just on contractarian considerations but also on a view of the condominium as a democratically-controlled community under which the owners acting collectively are empowered to make decision regarding the common areas. The complex is not a series of bargains made between individuals and the developer; it is instead a community in which all owners are expected to abide by the same rules on grounds of fairness and equality.

Similarly, individual unit owners cannot trump the interests of the collective through the use of special arrangements or traditional property devices. In *Toronto Standard Condominium Corporation No. 1633 v. Baghai Development Limited*,¹⁴¹ the owner of a commercial condominium unit leased the unit as a retail store, and included a term in the lease that permitted the tenant to display merchandise in front of the store on the common property of the complex. However, the declaration prohibited the use of the common areas for anything except access to individual units unless permission was obtained from the condominium corporation. Over several years, the unit owner negotiated with the corporation's board of directors for the

¹⁴¹ 2012 ONCA 417.

appropriate permission. Twice, the owner and the board agreed informally to allow the tenant to use the sidewalk for its store displays, but subject to several conditions including limits on the size and placement of sidewalk signs and a prohibition against leaving boxes and crates on the sidewalk. However, these agreements were only between the owner and representatives from the condominium corporation, and were never ratified by the condominium board. After the tenant violated the terms of the informal agreement repeatedly, the condominium board ordered the owner to remove the displays and merchandise from the common areas. The owner applied to court, arguing that the terms of the lease should prevail over the prohibition in the declaration and that the condominium board's failure to ratify the agreement constituted "oppressive conduct" under section 135 of the *Condominium Act*.

Both the trial court and the court of appeal held otherwise. The trial court found that the condominium board had never entered into a binding agreement with the owner. Further, the owner's tenant had repeatedly breached the terms of their informal arrangement, which explained why the condominium board was reluctant to continue the arrangement and formalize it in a binding agreement. Thus, the conduct did not unfairly thwart the reasonable expectations of the owner regarding the use of the common area. Even though the unit owner was also an owner in common of the common areas of the condominium complex, that did not entitle the owner to lease the common areas in contravention of the declaration.

Baghai Development illustrates judicial approval of an informal process within condominium to determine the use of common areas in a complex on an ongoing basis. The trial court described the arrangement as a "compromise to accommodate a valued tenant" that was "clearly an arrangement that was subject to termination if Rabba [the tenant] did not maintain its

stands in a neat condition or if Rabba placed anything on the common element sidewalk.”¹⁴²

This flexible approach has been recommended by some American commentators in the context of *enforcing* rules, rather than *waiving* rules. In “Trust and Community: The Common Interest Community as Metaphor and Paradox,” Paula Franzese and Steven Siegel argue that overreliance on detailed rules and their strict enforcement in condominium can lead to injustice, noting that the “legal straightjacket of rules, in many cases, has led to confusion, misunderstanding, inefficiency and the abridgement in some instances of the personal autonomy of homeowners.”¹⁴³ Drawing on the analysis of the role of trust and social capital by Francis Fukuyama,¹⁴⁴ Franzese and Siegel argue that “[m]eaningful solutions reside not in overlegalizing, but in rebuilding social capital” and that the “virtuous – those that contribute to the formation of social capital – include reciprocal trust, a sense of duty to others, and cooperativeness.”¹⁴⁵ Similarly, John Kuzenski argues that courts should take a more flexible approach to condominium disputes and not automatically grant judgment in favour of a condominium board simply because they can demonstrate that a unit owner or resident has technically violated a condominium bylaw.¹⁴⁶

Just as a flexible approach can be taken to protect individual owners from zealous condominium boards, a similarly flexible approach can be taken to the negotiations over behaviour within condominium complexes. In *Baghai Development*, the court did not interpret

¹⁴² 2011 ONSC 2307 at para 42.

¹⁴³ Paula A Franzese and Steven Siegel, *supra* note 3 at 1112.

¹⁴⁴ Francis Fukuyama, *Trust: The Social Virtues and the Creation of Prosperity* (New York: Free Press, 1995).

¹⁴⁵ Franzese and Siegel, *supra* note 3 at 1152.

¹⁴⁶ John C Kuzenski, “Making Room at the Table: The Public Policy Dangers of Over-Reliance on Black-Letter Contract Terms in State Common Interest Community Law” 7 *Appalachian Journal of Law* 35.

the dealings between the owner and the condominium corporation as an attempt to form a binding contract, but as an informal process designed to reconcile the interests of the parties and try various arrangements on an ongoing basis. Such an organic approach, seeing condominium as a community navigating an evolving situation, resonates best with a pluralist approach to property. Whereas a deontological approach would look only at the rights and reasonable expectations of the parties, and a utilitarian approach would ask only which arrangement leads to the greatest utility or wealth, a pluralist approach asks directly about the values at play in the situation, considers the need to maintain trust and social capital in the community, and sanctions informal, temporary and evolving methods to handle conflicts that arise over the use of space in the complex.

Another area that has been the subject of disputes because of developer promises is the designation of parking spaces. In B.C., the leading case on this issue appears to be *Hill v. Strata Plan NW 2477 (Owners)*.¹⁴⁷ A limited number of parking stalls were available in the strata complex, enough for each unit to have one, but not two, designated stalls. In their contract of purchase and sale, the Hills obtained a promise from the developer to have two parking stalls designated for their use; however, the strata plan specified that each unit would be allocated only one stall. Using nominally contractarian reasoning similar to that applied in *Rochon*, the court concluded that developer side deals with purchasers were not binding on the strata corporation. However, as with *Rochon*, contractarian considerations cut both ways. Ultimately, it is the democratic control of the condominium and the equality of the owners' interests that is paramount:

¹⁴⁷ (1991), 81 DLR (4th) 720 (BCCA).

The strata council, once in place, is bound to control and manage all common properties for the benefit of all owners. The owner developer is in precisely that same position until the first annual general meeting.

The Condominium Act was enacted to govern the conduct of owner developers and Strata Councils in a flourishing condominium market. With the thousands of units already built and sold and the potential of many more thousands being built some element of control is essential. The statute must be complied with so the interests of all owner developers and purchasers of units will be protected.¹⁴⁸

Hill was decided under the old *Condominium Act*. Section 258 of the current SPA provides that a developer can amend the strata plan to designate parking stalls as limited common property, up to the date of the first annual general meeting of the strata council. In so doing the developer must “act honestly and in good faith with a view to the best interests of the strata corporation” and must “exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.” This provision appears to make some inroads on the holding in *Hill*, recognizing some need for flexibility in getting a strata up and running, and possibly adopting a more deontologically-oriented view of property rights in this particular context.

In Ontario, a similar issue was addressed in *Wellington Condominium Corp. v. Wallace*.¹⁴⁹ A complex consisted of a central manor house containing 3 units and 12 separate, detached homes, each an individual unit. All the units were assigned two covered parking spaces, and the detached houses each had a driveway that could accommodate 1 or 2 additional parking spaces. Three additional parking spots were adjacent to the manor house. The purchasers of the units in the manor house were told by the developer that they would be able to

¹⁴⁸ *Ibid.* at 728.

¹⁴⁹ (1998), 120 OAC 366.

use the three parking spots from time to time, and the unit owners started using them once they moved in. However, the condominium corporation soon passed a rule designating the three stops as “visitor parking” and prevented the three manor house unit owners from using them as regular parking stalls. The court upheld the visitor parking designation, noting that the promises from the developer did not create an estoppel and summarily stating that the rule was reasonable.

A frequently-cited BC case involving a dispute over the use of a common area is *Reid v. Strata Plan LMS 2503*.¹⁵⁰ In that case, one unit owner’s picture windows opened directly onto the entryways of two other units. Although the entryways were common property, the owners of those second two units were using them as front yards and for storage, placing patio furniture there and occasionally using the areas for recreation. The first unit owner claimed that this use of the common areas was disturbing and lowered the market value of his unit. A number of efforts were made to resolve the dispute, including a failed attempt by the first owner to have the common area designated as limited common property for his benefit, a written request by the strata council to clear all personal items off of the area, and a failed attempt to set up binding arbitration. Finally, the strata council passed a resolution requiring the second unit owners to remove all items from the entrance area except for a limited number of planters. Unsatisfied, the first owner brought an application to court, alleging that this last resolution was “significantly unfair” to him under section 164 of the *Strata Property Act* as it did not require the removal of all items.

The court explained the regime of common property governance in a strata as follows:

[T]he Strata Property Act allows a strata corporation to manage the common property in a condominium and, to some extent, decide on the

¹⁵⁰ 2003 BCCA 126.

use to be made of it. Owners have a say in the strata corporation's decisions through their right to vote on by-laws and resolutions at strata corporation meetings and through their representatives on council. If an owner feels that an action taken by the strata corporation or council is significantly unfair, the owner can go to court and seek an appropriate remedy. In this way, the courts act as a final check on the powers of the strata corporation.¹⁵¹

The court emphasized its reluctance to interfere with the decisions of a strata corporation regarding the use of common areas: “a court should not interfere with the actions of a strata council unless the actions result in something more than mere prejudice or trifling unfairness.”¹⁵² Without any detailed analysis of the question, the court determined that the resolution was not unfair under the circumstances. While it is hard to discern what notion of “fairness” the judge was invoking in this case, it is noteworthy that she did not refer to traditional concepts of nuisance law, and nor did she base any of her reasoning on the common ownership interest that the unit owners had in the common areas. It would have been a relatively simple matter for the court to analyze whether the use of the common area rose to the level of a nuisance, and thus allowed for a common law remedy to be imposed on the neighbours to abate the nuisance. Or, the court could have engaged in a cost benefit analysis, asking whether the solution arrived at by the strata council maximized the utility or property values of the various effected units. But the court did neither. The most plausible reading of the opinion is that the court accepted the strata council’s role in balancing and reconciling the various interests at play in the dispute, and accorded it deference.

¹⁵¹ *Ibid.* at para 23.

¹⁵² *Ibid.* at para 27.

A final series of cases dealing with the use of common areas involves the installation and maintenance of utilities. The B.C. and Ontario legislation provide that each unit and the common areas have reciprocal easements for the provision of utility services.¹⁵³ In B.C., the nature of this easement has been addressed recently in a pair of cases. The first is *Shaw Cablesystems Limited v. Concord Pacific Group Inc.*,¹⁵⁴ a case in which Shaw Cable argued that the easement prevented a strata corporation from choosing to deal with one cable company only and required it to allow Shaw to install its services if invited to do so by at least one owner. Shaw lost both in chambers and on appeal. In dismissing Shaw's claim the chambers judge adopted one of the strongest majoritarian approaches to condominium property interests to be found in the case law, stating:

Owning a strata lot and sharing ownership of the common property in a condominium development is a new system of owning property and has required the development of new mechanisms and procedures. Living in a strata development, as the Nova Scotia Court of Appeal stated [in 2475813 Nova Scotia Ltd. v. Rodgers, 2001 NSCA 12 at para. 5], combines many previously developed legal relationships. It is also something new. It may resemble living in a small community in earlier times. The council meeting of a strata corporation, while similar in some respects to a corporate annual general meeting, also resembles the town hall meeting of a small community. Stratas are small communities, with all the benefits and the potential problems that go with living in close collaboration with former strangers. In the circumstances, I believe the court should be slow to find absolute rights in individual owners that cannot be modified by the considered view of the majority of owners, controlled by judicial supervision where appropriate.¹⁵⁵

The court of appeal cited this passage and dismissed Shaw's appeal. In doing so, it noted that allowing more than one telecommunications provider access could cause problems and

¹⁵³ SBC 1998, c 43 s 69; SO 1998, c 19 s 12.

¹⁵⁴ 2008 BCCA 234.

¹⁵⁵ 2007 BCSC 1711 at para 10.

additional expense, and dismissed the idea that the easement created by section 69 was absolute. Instead, the court concluded that the easement must be construed in the light of its role in the strata regime and that it could be mediated through the democratic processes of the strata community, stating:

The s. 69(1)(b) easement does not provide a right that is the equivalent to trampling at will in a park. It does not provide joint ownership or occupation of the services and facilities. Nor does it give any of the proprietorship or possession rights of an owner. The unit owner enjoys those rights in common property through its co-tenancy and membership in the strata corporation and its ability to elect and direct the strata council. The strata corporation exercises those rights in accordance with the Act, and may install such facilities and services as it deems desirable on the common property. The unit owner is entitled to the enjoyment of those services and facilities that are reasonably necessary to his enjoyment of his unit. The individual unit owner has no absolute right to install services or facilities in the common property any more than he has the right to plant a tree in a common garden or pluck its fruit.

Any owner may enforce its rights to the reasonable use of the common property by application for approval by the strata council of whatever service the owner wishes, and this owner would have precisely the right to expect what the appellant suggests – a fair hearing that balances his interests with those of his co-tenants of the common property – and all the other rights he has under the Act and bylaws by way of process, including an action.¹⁵⁶

Both levels of court thus adopted a view of strata property that lies squarely within the pluralist approach. As with many other issues in condominium, the interests of individual owners, groups of owners, and the strata as a whole are to be balanced through a collaborative process. If the strata council determines that granting a monopoly to one service provider is in the best interests

¹⁵⁶ 2008 BCCA 234 at paras 37-38.

of the community, an individual owner does not have a unilateral right to override that determination based on traditional notions of property.

The other B.C. case dealing with the utility easement is *Nomani v. The Owners, Strata Plan LMS 3837*.¹⁵⁷ In that case, an individual unit owner in a large mixed-use complex argued that the section 69 easement entitled him to have free access to all utility areas, including utility corridors, electrical rooms and telephone operating rooms. The strata council maintained that it had the right to restrict access and to limit the number of people possessing keys.

The court of appeal agreed with the council and accepted that the easement was not absolute, noting that “[w]hile the dominant tenement may have a right to an easement, that right in all cases is limited by what is reasonably required to permit the benefit granted without imposing undue burden on the servient tenement.”¹⁵⁸ The court then went through all the areas to which the individual owner claimed a right of access, and asked two questions: 1) is the right of access requested by the owner “within the privilege granted each unit owner over the common property, i.e., is it a system or service within the meaning of those terms in section 69(1)(b) and is it provided ‘through or by means of facilities existing in the common property’?”; and 2) has the owner “established interference by the strata corporation as manager of the common facilities with his enjoyment of that privilege?” In the court’s view, only one of the rights of access claimed by the owner fell properly within the scope of the section 69 easement: the right to access the telecommunications room that held equipment for telephone and cable lines in the building. The court was “not persuaded the easement requires every owner to be provided with

¹⁵⁷ 2008 BCCA 236.

¹⁵⁸ *Ibid.* at para 24.

unrestricted access to the telephone switching system and equipment or to the Shaw Cablesystems equipment” and concluded that “if every owner is not entitled to unrestricted access, the extent to which access is reasonable is a decision to be made in the first instance by the servient owner, in this case the owners as tenants-in-common, whose decision-making authority is to be exercised in accordance with the Act.”¹⁵⁹

The analysis of the scope of the easement in both *Shaw Cablesystems* and *Nomani* rested on a consideration of what was “reasonable” under the circumstances. The courts took into account the nature of condominium and held that the community as a whole, acting through the strata council, was the primary forum for determining the scope of the easement. In making this ruling, the strata council was not bound to the concept of an easement at common law, and any property rights or expectations on the part of unit owners regarding the easements are subject to the decisions of the strata council on how to manage the strata complex. From the perspective of the community, the potential rights of access claimed by unit owners had to be considered against the need to maintain order and security in the building and make decisions at the collective level on how to best service the individual units. The courts did not engage in a deontological analysis of the expectations or property rights of the unit owners, and nor did they engage in a cost/benefit analysis. They left it to strata councils to consider the needs and interests of the complex and to balance the various interests at play.

Although I have not found any Ontario cases addressing that province’s version of the utility easement, there is one case dealing with a similar issue regarding the placement of

¹⁵⁹ *Ibid.* at para 32.

satellite dishes: *London Condominium Corporation No. 13 v. Awaraji*.¹⁶⁰ In that case, the declaration of the condominium prohibited the installation of a “television antennae, aerial, tower similar structure” except “for or in connection with a common television cable system.”¹⁶¹ An individual unit owner nevertheless installed two stand-alone satellite dishes on his patio. In upholding the condominium corporation’s order to the unit owner to remove the dishes, the court found it was reasonable for the condominium to have only one telecommunications system in the complex and for the corporation to prohibit the installation of competing systems. Again, the courts upheld the curtailing of traditional notions of property rights in favour of collective decision-making and regulation of individual interests.

The preceding review shows in detail how condominium cases and legislation can be understood in terms of three traditions of property theory: utilitarian, deontological, and pluralist. In the next chapter, I synthesize this review by highlighting trends and suggesting directions for further analysis. After this descriptive synthesis, I propose some tentative normative conclusions and set out possibilities for additional research that could lead to concrete recommendations for change.

¹⁶⁰ 2007 ONCA 154.

¹⁶¹ *Ibid.* at para 1.

Chapter 6: Conclusion

Ownership with condominium creates many challenges, and the review of legislative and judicial responses to these challenges in the preceding chapter displays the various approaches used by lawmakers in dealing with condominium. Over and over we see reference to the idea that the condominium, while being a form of property, is a new form that requires some softening or adjustment compared with fee simple ownership outside condominium. While the logic of property is engaged, especially as regards individual ownership within condominium, there are repeated references to the community of owners and to the need for that community to manage the complex and operate through the logic of common interests and democratic governance.

No one theory of property dominates. However, there are several trends. First, utilitarian and law and economics approaches have not gained much traction, either with legislatures or courts. This is hardly surprising. Utilitarian approaches to property rights, especially as interpreted in the law and economics tradition, sit uncomfortably with condominium. This tradition emphasizes free alienability of property and the allocation of resources through the market. By importing ideas of democratic governance into the management and regulation of property, condominium brings some uncertainty into the content of property rights, reduces the ability of condominium owners to bargain freely in exchanging those rights, and provides an opportunity for people to pursue their interests through a coercive regulatory mechanism.

Commentators such as Ellickson¹ and Hansmann² have remarked on the ease with which a condominium corporation can take actions that do not maximize utility and have suggested that

¹ Robert Ellickson, "Cities and Homeowners Associations" (1982) 130 U Penn L Rev 1519.

² Henry Hansmann, "Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice" (1991) 20 J Leg Stud 25.

the courts take an active role in reviewing condominium decisions to ensure that they do so. However, when overturning a condominium corporation's decision, the courts refer to the rights of property and the expectations of the parties, and do not conduct a wealth-maximizing, cost-benefit analysis. Decisions regarding the right to sue individually for damage to common areas are founded on common law rights of property, and either do not analyze whether such actions are utility-maximizing³ or simply consider whether the "real injury" is to an individual owner or to the community without a detailed analysis of utility concerns.⁴ In their article on forced sales in condominium, Harris and Gilewicz note that, while the court decisions in this area could be supported by an efficiency analysis, the language of their opinions "suggests there is more at stake in these conflicts than the efficient allocation of property interests" and that the interests of the owners in their homes "were not to be thought of primarily in terms of fungible, transferable objects of value, but rather as a means to secure autonomous and fulfilling lives embedded within community."⁵ Similarly, the court decisions on leasing restrictions either prohibit such restrictions on the basis that they are a traditional incident of property⁶ or defer to the democratic decision making process of the corporation.⁷ None involve a direct consideration of maximization or utility or value. This also applies to the cases regarding use and occupancy restrictions and common property.

³ *Hamilton v Ball*, 2006 BCCA 243.

⁴ *1420041 Ontario Inc. v. 1 King West Inc.*, 2012 ONCA 249.

⁵ Douglas C Harris & Nicole Gilewicz, "Dissolving Condominium, Private Takings, and the Nature of Property" in B Hoops et al, eds, *Context, Criteria, and Consequences of Expropriation* (The Hague: Eleven, Forthcoming 2015).

⁶ E.g., *Re Peel Condominium Corporation No. 11 and Caroe* (1974), 4 OR (2d) 543 (High Ct).

⁷ *Skyline Executive Properties Inc. v. Metro Toronto Condominium Corp. No. 1280*, [2001] OJ no 3512 (QL) (Sup Ct); *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan*, [2001] OJ no 2785 (QL) (Sup Ct).

Moreover, one of the major recommendations made by law and economic scholars is nowhere to be found. Ellickson has proposed a “takings” rule for the regulation of condominiums, under which any decision taken by the condominium corporation that decreases the economic value of a unit would give the owner of that unit a claim for compensation.⁸ Such a rule makes sense under utilitarian logic because it ensures that any decision made by the condominium would produce an increase in overall utility; if it did not, then the cost to compensate the “losing” owners would be high enough to deter the “winning” owners from enacting it. However, there are no provisions in either the BC or Ontario legislation to require or even permit a takings regime within condominium, and in the comprehensive reviews of both legislative regimes currently underway, there is no mention of a takings regime.⁹ It would appear that policy makers, the courts, and the public in general do not consider such a regime to be appropriate for condominium.

Second, there is a gradual trend away from deontological approaches toward pluralist approaches. This is especially true in the context of leasing restrictions and involuntary sales. In the case of leasing restrictions, the strict view originally endorsed in *Caroe*,¹⁰ which prohibited them outright, was modified by a pluralist approach that permits leasing restrictions resulting from reasonable deliberations by the condominium corporation.¹¹ In BC, the courts originally resisted restrictions on leasing and construed legislative language that permitted them strictly.

⁸ *Supra* note 1.

⁹ See discussion *infra*.

¹⁰ (1974), 4 OR (2d) 543 (High Ct).

¹¹ *Metropolitan Toronto Condominium Corp. No. 1170 v. Zeidan*, [2001] OJ no 2785 (QL) (Sup Ct); *Skyline Executive Properties Inc. v. Metro Toronto Condominium Corp. No. 1280*, [2001] OJ no 3512 (QL) (Sup Ct).

However, a legislative amendment clarified that restrictions on leasing were to be permissible, with a few detailed exceptions for hardship, family members, and existing tenants.¹²

For involuntary sales and dissolutions, the older position is represented by *Royal Insurance Co of Canada v Middlesex Condominium Corporation No. 173*,¹³ in which the Ontario Court of Appeal refused an innovative restructuring plan for a condominium on deontological grounds. However, at least in the case of evictions, the courts are coming to a more flexible view as represented by the forced sale in *Jordison*.¹⁴ In a forthcoming paper, Douglas Harris identifies 9 reported cases of forced eviction and sale in condominium in Canada between 2010 and 2015, with no reported cases before 2010, that stem from repeated disorderly and unacceptable conduct of residents in the complex or from use of a unit for an illegal purpose.¹⁵ Given the nature of close-quarters living in most condominium developments, courts will now expel owners in the extreme cases where they or their tenants are simply unable or unwilling to live in the complex without harassing their neighbours. Harris argues that this new remedy, which is not available at common law for a fee simple holding outside condominium, reflects the recognition by the courts that traditional understandings of property need to be adjusted in order to protect quiet enjoyment of title and community harmony in the condominium setting.

Regarding occupancy of individual units, restrictions on behavior, and use of common areas, the courts have largely used a pluralist approach. Although a few cases such as *Wentworth*

¹² See discussion *supra* ch 5.

¹³ (1998), 37 OR (3d) 139.

¹⁴ 2013 BCCA 484.

¹⁵ Douglas Harris, *Perfect Storms within Condominium: Eviction and Forced Sale Orders as Sanction and Remedy for Chronic Misconduct* (2015) [unpublished, archived at University of British Columbia, Faculty of Law].

*Condominium Corporation No. 198 v. McMahon*¹⁶ adopt a deontological approach, the majority follow pluralist reasoning, deferring to the resolution of condominium disputes as determined through the democratic process of the condominium corporation.

However, the courts have resisted pluralist approaches in two settings: determining rights to sue for damage to common areas, and applying the “oppression” remedy borrowed from corporate law. For these situations, the courts agree with commentators such as Randolph and Lee who advocate enhancing protection for the expectations of purchasers.¹⁷ In both Ontario and BC, the courts have interpreted the legislation to allow for an individual owner to sue for damage to common areas even if they cannot get approval from the condominium corporation to bring the suit in its name.¹⁸ In Ontario, this may be limited by a judicial caveat that an individual owner can bring a separate suit only where the damage to the common area has a particular impact on their unit. In BC, however, it appears that an individual owner or group of owners may start litigation concerning problems with the common property in general. This position is at odds with a pluralist approach, because it allows owners to bypass the democratic process with respect to disputes over the common areas, raising the stakes in a condominium dispute and making harmonious resolutions more difficult.

With regards to the oppression remedy, in Ontario its availability is enshrined in the legislative scheme.¹⁹ This remedy resonates with Randolph and Lee’s suggestion to protect the expectations of purchasers. While it is possible to interpret the oppression remedy as a flexible and balanced doctrine, responsive to context and to the need to harmonize various interests, the

¹⁶ 2009 ONCA 870.

¹⁷ See discussion *supra* ch 6.

¹⁸ *Hamilton v Ball*, 2006 BCCA 243; *1420041 Ontario Inc. v. 1 King West Inc.*, 2012 ONCA 249.

¹⁹ SO 1998, c 19 s 135.

remedy has a deontological flavor as it is premised on the thwarting of “reasonable expectations” and designed to block actions taken by a majority that would otherwise be lawful. The decisions from Ontario reviewed in this thesis have taken a more flexible approach and have refused to grant the remedy, instead deferring to the democratic processes in the condominium. However, the concurring opinion in *Dollan* in the BC Court of Appeal may be a harbinger of decisions to come if the remedy is interpreted in a stricter fashion. Additionally, as the remedy is not listed in the BC legislative scheme, it remains to be seen whether the courts will continue to use it or whether the legislature will add it to the *Strata Property Act*.

Third, a few of the cases canvassed demonstrate that there are divisions in the approaches that the courts are taking towards condominium. In particular, *Hamilton*, *Royal*, and *Dollan*, are three cases in which the judges took very different approaches. In *Hamilton*, the trial court was willing to find that individual owners could not bring an action regarding the common areas that concerned the complex as a whole, interpreting the BC legislation to permit only the strata corporation to bring such an action when authorized to do so under the statutory $\frac{3}{4}$ supermajority requirement. The trial judge emphasized the need to harmonize the collective interests in the condominium and allow the collective to determine how to enforce rights in the common area, while the Court of Appeal emphasized the traditional rights of property and the need for part-owners to bring legal action to protect their interests. In *Royal*, the majority on appeal emphasized the need to protect the entrenched property rights of owners on a proposed reorganization of the complex, while the dissent focused on the need to ensure the viability of the entire complex and to make adjustments from traditional property doctrine when necessary to make a condominium complex workable. And in *Dollan*, the trial judge, one concurring judge on appeal, and the dissenting judge on appeal took very different approaches to property rights of

owners in a strata, each inspired by a different conception of property: utilitarian, deontological, and pluralist. The fact that judges could take such different approaches to the same problem highlights the challenges that condominium raises for legal doctrines and philosophical approaches to property rights.

To this point, I have described what I see as a movement in the courts and the legislatures from a deontological to a pluralist approach when grappling with the issues that condominium ownership presents. I now turn to a more explicitly normative argument that pluralist approaches to condominium property law lead to better results. This is principally because condominium requires room for democratic action in the shaping of rights and obligations and in resolving disputes between rights holders. The case law reveals that while deontological (or utilitarian) approaches inhibit the ability of condominium corporations or reviewing courts to achieve solutions, pluralist reasoning accommodates the various interests at stake, provides a framework to find creative ways to move forward, and respects the outcome of the democratic process.

Cases where judges have described the implications of the different approaches to one particular situation are especially instructive. In *Hamilton v Ball*, the trial judge phrased it well when stating that “the entire scheme of the Strata Property Act is based on the fact that strata properties involve collective as well as individual rights.”²⁰ In applying this perspective to a contentious dispute regarding the repairs and maintenance of a “leaky condo” complex, the trial judge was concerned about the ability of one faction of unit owners to disrupt a difficult and costly democratic process through litigation. Requiring a $\frac{3}{4}$ majority of the owners to authorize

²⁰ 2006 BCCA 243 at para 25.

a lawsuit concerning the common areas means that a minority block of owners can prevent the action. From a deontological perspective, this can appear to be an unfair suppression of the property rights of owners in the common areas. However, from a pluralist perspective, this restriction encourages the resolution of disputes at the democratic level and prevents one block of owners from hijacking the process by bringing the dispute to the courts. Owners opposing court action have property interests in the common areas as well, and if no clear consensus exists for bringing a court action, then the supermajority rule prevents a tiny minority, or even a simple majority, from imposing the cost and acrimony of litigation on the rest. The deontological approach taken by the BC Court of Appeal precludes these considerations, concluding that the rights of property in the common areas give the power to any unit holder to unilaterally disrupt the democratic process.

The approach taken by the Ontario Court of Appeal in *1420041 Ontario Inc. v. 1 King West Inc.*,²¹ may strike a better balance here, by requiring that unilateral suits regarding common property be restricted to cases where one owner or group of owners are especially aggrieved by the particular interests in the common areas. This approach gives individuals the power to take action when their unique interests are affected while leaving general matters to be dealt with by the collective. Respect for the autonomy, privacy, and other values adhering to individuals are thus reconciled with the values of community cohesion and deliberative decision making.

Similar remarks apply to *Royal Insurance Co of Canada v Middlesex Condominium Corporation No. 173*.²² In that case, the majority of the Court of Appeal refused to allow a

²¹ 2012 ONCA 249.

²² (1998), 37 OR (3d) 139.

reorganization plan to move forward on the narrow grounds that it would alter the property rights of a small minority of unit holders without their consent. And yet, condominium contemplates precisely that, through the democratic process of amending the declaration and bylaws. While not all changes to property rights in a condominium need to be subject to democratic will, certainly some are. To confine the question in a case like *Royal* to “Does the proposed change alter property rights without consent?” limits the investigation and inappropriately ignores the democratic aspect. The better question is, “Does the proposed change represent a balanced and measured solution that adequately serves the interests of both the individual unit holders and the condominium as collective?”

Disputes such as these suggest how a pluralist moral approach could better help to resolve condominium issues, both in enacting legislation and policies and in interpreting the existing legislation and policies. From this perspective, the onus on the parties to a condominium dispute would be to put forward and justify the human values served by the institution of the condominium, and then to explain why their proposed course of action best reconciles those values. In a situation such as *Royal*, the insurance company and the majority owners can point to community harmony, commercial viability, and preservation of economic value to advance their claim that the *Condominium Act* should be interpreted to permit the restructuring. The minority owners can point to the values served by their position – possibly stability, maintenance of expectations, and autonomy. The court can then engage in an exercise of explicitly considering these values and make a decision that promotes the greatest justice under the circumstances.

The tension between deontological (or utilitarian) and pluralist approaches in condominium is reflected in Carol Rose's analysis of "crystal and mud" rules in property law.²³ Rose describes how economic thinking and property individualism have promoted a "crystal" idea of property, under which settled property rules and contractual expectations dominate. However, she notes that often an area of property law that begins with strict "crystal" rules gradually cracks under the pressure of actual disputes, so that courts inevitably begin to introduce some "mud" into the rules: post-hoc balancing exercises that soften the hard lines. In this way, property rules are rarely unbendable. Reasonable expectations and clear commitments give way to adjustments, exceptions, and redistribution of rights in order to do justice between the parties. Drawing on the work of Stewart MacCaulay,²⁴ Rose notes that this is particularly apparent in cases where the disputing parties are engaged in long-term relationships or as part of an enduring community:

In those communities, members tend to readjust for future complications, rather than drive hard bargains. Mud rules mimic a pattern of post hoc readjustments that people *would* make if they were in an ongoing relationship with one another.²⁵

Rose describes crystals and mud as a "matched pair."²⁶ While crystal rules are often useful as a starting point, particularly in dealings between strangers where certainty and limited possibilities can promote efficiency and confidence, some muddiness is also necessary in order to account for mistakes, imperfect understandings by the parties, and changing circumstances. Rose continues:

²³ Carol Rose, "Crystals and Mud in Property Law" (1988) 40 Stan L Rev 577.

²⁴ Stewart Macaulay, "Elegant Models, Empirical Pictures, and the Complexities of Contract", 11 Law & Soc'y Rev 507 (1977).

²⁵ Rose, *supra* note 23, at 602.

²⁶ *Ibid.*

It is indeed the element of ongoing social interactions that mud rules focus upon. They attempt to introduce an element of continuing dialogue among persons who acted as if they were ordering their affairs as strangers. When a court introduces ambiguity into the fixed rules that the parties initially adopted, it in effect reinstates the kind of weighing, balancing, and reconsidering that the parties might have undertaken if they had been in some longer term relationship with each other.²⁷

Under this analysis, the deontological model followed in some of the cases thus treats the parties as if they were arms-length strangers to a one-time transaction. Yet in condominium this will rarely be the case. A pluralist approach allows for the muddiness necessary within community, where property owners will be dealing with each other repeatedly, and possibly for decades; where the parties may not have been able to think through the long-term implications of their property rights upon purchase; and where unexpected changes in circumstances are likely to arise.

The way pluralist reasoning operates could also have an impact on the way expectations work in property law, and the understanding of what people are “buying into” when they purchase a condominium unit. While it is tempting to see a condominium community as a mere “community of convenience,” the disputes canvassed in this thesis reveal its more complex character. Here, the distinction drawn by Gregory Alexander between “voluntary association” and “communities,” becomes useful.²⁸ Condominium often involves living in close quarters and always involves collective stewardship of common areas. The potential for disputes and the need to work together in relatively intimate settings imply that a condominium is not solely a “voluntary association” in which individuals combine for instrumental reasons only. In a

²⁷ *Ibid.* at 608.

²⁸ Gregory Alexander, “Dilemmas of Group Autonomy: Residential Associations and Community” (1989-1990) 75 Cornell L Rev 1; see the discussion *supra* ch 4.

residential complex, they literally have to live with each other. Entering a residential condominium is therefore also entering into a community with some sense of shared purpose: to enable each unit owner to own, take care of, and enjoy a home in the complex.²⁹ When purchasing a unit, a person is entering a community and engaging with that shared purpose. As well, condominium development are going concerns that evolve over time. Fulfilling the purpose of sustaining a harmonious community may therefore require adjustments, mediated through democratic decision-making. A purchaser of a unit cannot reasonably adopt a full-fledged “property” expectation that all their rights will be frozen at the time of purchase.

In this respect, the application of the “oppression” remedy from corporate law requires particular care if it is to be imported into condominium. While the remedy for oppression began as a flexible and equitable one, having regard to oppressive and unfair conduct in general, courts in recent decades have narrowed its application to remedy the thwarting of objectively reasonable expectations.³⁰ An action for oppression now succeeds when a minority can demonstrate that they had objectively reasonable expectations regarding their purchase of property and those expectations have been violated by action of the majority owners that was significantly unfair.³¹ If condominium is to survive and flourish, then the qualifiers that the expectations be “reasonable” and that the violations be “significantly unfair” have a lot of work

²⁹ Commercial condominiums may more closely resemble a “voluntary association”, though that may depend on the character of the property and the businesses that are located there.

³⁰ Markus Koehnen, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004) at 84-88 (tracing the development of the “reasonable expectations” test for shareholder oppression to *Ebrahimi v Westbourne Galleries Ltd*, [1972] 2 All E R 492 (HL)). See also David S Morritt, Sonia L Bjorkquist & Allan D Coleman, *The Oppression Remedy*, loose-leaf (consulted on 10 September 2015) (Toronto: Thomson Reuters, 2014) Ch 3 at 3-2 (stating that “in considering applications made pursuant to the statutory oppression provisions, courts rely heavily on the evidence of shareholder expectations in determining whether conduct has been oppressive or unfairly prejudicial”).

³¹ *Dollan v The Owners, Strata Plan BCS 1589*, 2012 BCCA 44.

to do. In particular, as the Ontario court stated in *McKinstry*, “the court must balance the objectively reasonable expectations of the owner with the condominium board's ability to exercise judgment and secure the safety, security and welfare of all owners and the condominium's property and assets.”³² Both purchasers of units and courts need to understand that the expectations of purchasers are only one of many values to be considered.

One area for further research would be to analyse how the oppression remedy has been applied in the context of condominium, and to try and draw useful comparisons and contrasts with how the doctrine is used and justified in the context of corporate law. Of particular interest would be reasons for the evolution of oppression away from a broad and flexible remedy towards a basis in shareholder expectations, and a detailed consideration of whether and how those reasons would apply to condominium.

A short word here on developers. While I have chosen not to focus in particular on the issues that arise regarding the role of developers, many of the cases canvassed do spring from the particular problems that happen when a developer makes “side-deals” with individual unit holders that are not disclosed to other purchasers, or when the developer makes changes to the development during construction that are not reflected in the declaration or other purchaser disclosure documents. *Dollan* is an example of the latter. When purchasing a fee simple title outside condominium, any disputes between the seller and the purchaser regarding the state of the property are resolved between the two parties by way of an action for damages or specific performance. When purchasing a condo unit, however, such disputes may have impacts on the entire complex. Once a purchaser has bought a unit, remedying a defect such as the “spandrel”

³² *McKinstry v. York Condominium Corp. No. 472* (2003), 68 OR (3d) 557 at 566.

windows at issue in *Dollan* becomes a community affair. Taking a pluralist view, as the dissent did in that case, enables consideration of the impacts of correcting the defect on the rest of the owners in the complex – the additional expense of renovations, the uncertainty of being able to recover damages from the developer, and the impact of the resulting changes in the complex on the experience of life in the complex. Perhaps it is reasonable when purchasing a condo to expect that mistakes by the developer or contractor in construction may not lead to a remedy that is the same as if a fee simple lot outside condominium had been purchased. The nature of the community also needs to be considered.

Another area of law that might provide useful analogies or ideas for condominium is bankruptcy and corporate restructurings. In a bankruptcy, the usual rights of property are suspended and ownership of the bankrupt's assets vests temporarily in a trustee while those assets are liquidated or managed for the benefit of the creditors.³³ In a corporate restructuring under the *Companies' Creditors Arrangement Act*,³⁴ creditors' rights to execute on debts are suspended while the debtor and creditor negotiate a restructuring under court supervision, which can result in sweeping changes to the debtor corporation's legal structure, ownership, and debts.³⁵ When a complex proves to be commercially unviable, as in *Royal*, or where disputes lead to acrimony and an inability to run a complex properly, something along the lines of a restructuring might provide the best way forward. The dissent in *Royal* recognized this and was

³³ *Bankruptcy and Insolvency Act*, RSC 1985 c B-3; see generally L W Houlden, Geoffrey B Morawetz & Janis Pearl Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th ed rev, loose-leaf (Toronto: Carswell, 2005); Lazar Sarna, *Law of Bankruptcy and Insolvency in Canada*, revised ed, loose-leaf (Toronto: LexisNexis, 2005)

³⁴ *Companies' Creditors Arrangement Act*, RSC 1985 C-36.

³⁵ For a detailed overview see Janis Pearl Sarra, *Rescue: The Companies Creditors Arrangement Act*, 2nd ed (Toronto: Carswell, 2013).

willing to read a type of restructuring remedy into the residual powers offered by the statutory scheme on a condominium dissolution. Both BC and Ontario do provide for the court appointment of an “administrator” to manage the affairs of a complex in the event that the corporation cannot function.³⁶ However, these powers are limited and, in BC, the administrator may not take any action that normally requires a vote without first securing that vote.³⁷ Strengthening this approach by providing express legislative authority for a restructuring and establishing its limits could prove to be a very useful innovation in condominium law. Such an innovation would also promote a pluralist approach to condo, requiring highly contextual solutions that are arrived at through direct consideration of the various human values underlying the condominium.

Both BC and Ontario have recently undertaken reviews of their condominium legislation. In Ontario, the review process led to a “Stage Two solutions report” published in September 2013,³⁸ and after further consultation with the public, to a proposed *Protecting Condominium Owners Act*.³⁹ The Ontario review focused on five areas: consumer protection, financial management, dispute resolution, governance, and condominium management.⁴⁰ The review process was based on seven key “values” that were identified as “essential to building successful condo communities,”: well-being, fairness, informed community members and stakeholders,

³⁶ *Condominium Act*, RSO 1998 c 19 s 131; *Strata Property Act*, RSBC c43 s 174.

³⁷ *Strata Property Act*, SBC c 43 ss 174(7).

³⁸ Ontario, Public Policy Forum, *Growing Up: Ontario's Condominium Communities Enter a New Era (Condominium Act Review Stage Two Solutions Report)* (Ottawa: Public Policy Forum, 2013) (available online at http://www.ppforum.ca/sites/default/files/CONDO_ACT%20STAGE%202.pdf).

³⁹ Bill 106, *An Act to amend the Condominium Act, 1998, to enact the Condominium Management Services Act, 2015 and to amend other Acts with respect to condominiums*, 1st Sess, 41st Leg, Ontario, 2015 (first reading 27 May 2015).

⁴⁰ Public Policy Forum, *supra* note 38, at 5.

responsiveness, strong communities, financial sustainability and effective communication.⁴¹ The reviewers emphasized that “condos are much more than legal entities. They are *self-governing communities*.”⁴² Recognizing that condominium issues are “not just legal or technical” but “often... are about *relationships* between a varied and often disparate group of interests,”⁴³ the reviewers adopted “**an approach based on collaboration and compromise**.”⁴⁴ In the end, the recommendations in the report focused on consumer protection through disclosures to buyers, protecting against fraud in condominium governance, and dispute resolution mechanisms, rather than on property entitlements. In fact, the report says little about protecting property rights at all, preferring to focus on the need to address multiple values and to create viable condominium communities with long-term relationships between owners.

The proposed *Protecting Condominium Owners Act* largely follows the recommendations in the Stage Two solutions report.⁴⁵ The bill deals primarily with consumer disclosure and protection, transparency and efficiency in condominium governance, and the regulation and licensing of professional condominium managers. However, there is one change relevant to the issues in this thesis: the creation of a new “Condo Authority,” an arms-length administrative agency focused on education and dispute resolution. In particular, the proposed Condo Authority includes an administrative tribunal to adjudicate a variety of condominium disputes, including disputes regarding the enforcement of declarations, by-laws and rules. The tribunal

⁴¹ *Ibid.* at 15.

⁴² *Ibid.* at 10 (emphasis in original).

⁴³ *Ibid.* (emphasis in original).

⁴⁴ *Ibid.* (emphasis in original).

⁴⁵ For a useful overview of the bill, see Consumer Protection Ontario, “Proposed condo changes” (8 September 2015) online: Government of Ontario <<http://www.ontario.ca/page/proposed-condo-changes#section-1>>

would provide a cheaper and more informal process than going to court. As a means of promoting harmony through the quick and informal resolution of disputes, the tribunal is aligned with a pluralist vision of property in the condominium, rather than a strict, rule-based vision that places property rights first.

In BC, the review process by the British Columbia Law Institute (“BCLI”) is still ongoing. The Phase One report, published in November 2012, identifies seven areas to be examined in depth during Phase Two of the project: fundamental changes to stratas, complex stratas, leasehold stratas, common property, governance issues, insurance issues, and land-title issues.⁴⁶ As of this writing, the BCLI has published a report on only one of these areas, fundamental changes to stratas, discussed earlier in this thesis.⁴⁷ Fundamental changes, complex stratas, and common property are more likely to involve questions about the conception of property than the issues canvassed in the Ontario review. “Fundamental changes” refers to winding up and dissolution, amalgamations of strata complexes, and major changes to a strata plan. “Complex stratas” refers to multi-use strata complexes, which may have “residential, commercial, industrial, recreational, or other uses.”⁴⁸ The review of “common property” is to be focused on “perceived uncertainties in the legislation,” as “despite the essential importance of common property to stratas, there appear to remain some basic issues concerning its character that would benefit from clarification.”⁴⁹ The review of disputes over common areas earlier in this thesis supports this assertion. While the BCLI review process is still at an early stage, its

⁴⁶ British Columbia Law Institute, *Report on Strata Property Law: Phase One*, BCLI Report No 70 (Vancouver: BCLI, 2012)

⁴⁷ British Columbia Law Institute, *Report on Terminating a Strata* (Vancouver: British Columbia Law Institute, 2015). See the discussion of the report *supra*, Chapter 6.

⁴⁸ BCLI, *supra* note 46 at 20.

⁴⁹ *Ibid.* at 23.

findings and recommendations are likely to engage the question of how best to understand property rights in condominium.

Looking to the future, it is likely that condominium will continue to present new problems that challenge traditional notions of property. One topic making its way through the courts at present is cigarette smoking.⁵⁰ Many condominium corporations in both Ontario and BC have passed by-laws to prohibit smoking, not just in common areas or outdoor patios, but also inside individual units. Judicial pronouncements on whether such rules are “reasonable” or “significantly unfair” will arrive soon. Such cases will again require courts to consider the nature of property in condominium and the proper approach for resolving such disputes. A utilitarian approach requires a cost/benefit analysis; a deontological approach requires consideration of the rights of property and the reasonable expectations of owners upon purchase. A pluralist approach requires more, and would enable the courts to consider the full range of interests engaged in the dispute. For smoking, this would involve considering the impacts of smoking on the other owners in the complex, and the impacts on a smoking ban for those who want to smoke or are struggling with tobacco addiction. Further, a pluralist approach may not lead to a one-size-fits-all solution; perhaps the proximity of units, the structure of a complex’s ventilation system, and the general acceptance of smoking in the greater community are all factors to consider. The power of the pluralist approach is that it allows for the entire context of the matter to be taken into consideration, and a greater probing of the individual and communal interests at stake.

⁵⁰ “Smoker-rights battle heads to B.C. Supreme Court”, *CBC News* (7 September 2015) online: CBC News <<http://www.cbc.ca/news/canada/british-columbia/smoker-rights-battle-heads-to-b-c-supreme-court-1.3216557>>

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