

# Person, Place or Thing? Property and the Structuring of Social Relations

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## 1. Introduction

Property law and theory has long been entangled in debates regarding persons and things, including debates regarding what kinds of things can be the object of property rights and what it means to be the subject of property rights. In this paper I will argue that, in addition to persons and things, property is also about *places*. These places are where people interact with one another in a variety of relationships that are not captured by traditional accounts of property. For example, as the owner of my home I am in “relation” with all other individuals who are obligated to stay off my front garden. But my ability to exclude others also helps to facilitate more direct social relations: I could also invite you inside for dinner. I will argue that understanding property-as-place is crucial to understanding the full range of social relations that are at stake in many property debates.

My argument is that traditional accounts of property— whether based in law and economics, rights-based theories, or Radin’s influential personhood analysis— characterize the objects of property as “things” and do not appreciate that they are sometimes also “places.” This influences the types of social relations seen to be created and affected by rights in relation to these things. In general, these are indirect social relations created by the obligations *everyone* has to respect my property rights; as we property professors like to say, property rights are “good against the world.” However, if we recognize that the objects of property are also sometimes “places” then we can also understand the significance of property rights for the creation and facilitation of various forms of *direct* social interactions that occur in those places.

My analysis focuses on the rights of access to three types of places—private, public, and privately-owned but publicly-used – and the role these access rights play in facilitating social interactions. As I will argue, this focus can change how we think about a number of specific legal questions such as the scope of the right to exclude and the evaluation of the nature of the community interests in the context of land redevelopment and expropriation.

## 2. Persons and Things

As every student in first year property law is taught, property rights are not about *things* but are instead about the juridical relations between *persons*. Accordingly, my right to exclude you from my home is not primarily about a relationship I have with my home but rather the relationship I have with you, who are under an obligation to exclude yourself.<sup>1</sup> Sometimes theorists also use the idea of social relations as a label for the broader societal effects and power relations that result from private property regimes.<sup>2</sup>

Nonetheless, despite a legal conception of property as that of rights that imply relationships between people, the “object” of such rights—things—remains important for understanding the nature of these relationships. This is most clearly the case if we look at the work of property theorists like Radin. According to Radin’s influential “personhood” thesis, the person-thing relationship can be constitutive of us as selves, “closely bound up with personhood.” Such constitutive objects, which she labels “personal property”, include “a wedding ring, a portrait, an heirloom, or a house.” In contrast, “fungible property” refers to objects that are “perfectly replaceable with other goods of equal market value.”<sup>3</sup> This distinction between personal and fungible property underpins further arguments regarding the types of obligations (and therefore relationships) that should attach to one type of object but not the other.<sup>4</sup>

Although Radin makes the person-thing relationship an explicit—indeed central—part of her property theory, other accounts of property depend at least in part upon different conceptions of “things” in order to provide the normative justification for property and the relations implied by it. For example, economic accounts of property focus on advocating for a bundle of rights that will properly internalize benefits and minimize externalities so that the market can allocate scarce resources to their most highly valued uses.<sup>5</sup> Implicit in this is the idea that social welfare is maximized if things are put to their most valued uses, which in turn depends upon a relationship between use and welfare. While much of the normative force of this view therefore comes from the idea of maximizing social welfare, it nonetheless rests upon an idea of the object of property (things) as “resources” that need to be allocated.

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<sup>1</sup> Indeed, C.B. Macpherson calls this a “political relation” since it involves state enforcement. See “The Meaning of Property” in C.B. Macpherson, ed., *Introduction to Property: Mainstream and Critical Positions*. (Toronto: University of Toronto Press, 1978)1 at 4.

<sup>2</sup> See Stephen R. Munzer, “Property as Social Relations” in Stephen R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge, 2001)36 at 36, discussing the legal realist critique and others. See also David Lametti, “The Concept of Property: Relations through Objects of Social Wealth” (2003) 53 U.T.L.J. 325 where Lametti develops an account of property informed by virtue ethics but still sees the main social implication of property as distributional.

<sup>3</sup> Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993) at 37. Now she suggests that it might have been better to label these “constitutive” and “fungible” property. See *Reinterpreting Property* at 2.

<sup>4</sup> Radin, *ibid.*, examines rent control and takings law in detail.

<sup>5</sup> See, e.g., Michael J. Trebilcock, “An Introduction to Law and Economics” (1997) 23(1) *Monash U.L.Rev.* 124.

This idea of the object of property as important economic resources also underpins a lot of scholarship that has been quite critical of the common law of property. For example, a number of American legal realists have sought to expose clearly the social relations at the heart of property law and court decisions regarding property rights.<sup>6</sup> Nonetheless, the social relations that are most salient on these accounts are the social inequalities and power relations exacerbated by the differential allocations of resources supported by property jurisprudence. The social relations at issue, therefore, are shaped by the idea of property as resources.

Rights-based accounts of property are ultimately based upon the fact that our ability to carry out projects requires some control over external things in the world. For example, Kantian arguments hold that property rights secure the external means for carrying out our purposes in the world.<sup>7</sup> This view, in turn, depends upon an idea of the object of property (things) as “objects of choice.” Some versions of rights-based accounts also make scarcity of such objects a central feature. For example, Penner argues that the right to exclude in fact protects a right to use a thing when we consider that actually using things takes place in a social setting of scarcity.<sup>8</sup>

All of these theories therefore rely upon some version of the “things” in relation to which we can constrain other people’s behavior. Economists and their critics characterize things as resources, rights-based accounts characterize things as objects of choice, and Radin’s personhood account characterizes things as objects of self-investment.<sup>9</sup> What I will argue in the following section is that these accounts have overlooked another way of thinking about the object of property rights: instead of “things” they are also sometimes “places.” I will argue that once we appreciate this, we can see how property rights affect social relations in a much more direct manner than is traditionally understood.

It is important to note that this idea of property-as-place is not meant to be itself the basis for a theory of property capable of supplanting these other accounts. In fact, it is my view that most traditional accounts of property could be modified to deal with the idea of property-as-place—although proposing such modifications is not my project here.

What does it mean for property rights to help structure direct social relations? The following sections will deal with this question in detail. However, at its most basic the argument is that individuals—in addition to whatever else we might want to say about them—are social and spatial selves.<sup>10</sup> That is, individuals are immersed in relationships with other people and these relationships, at least in part, occur in places. Therefore, the

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<sup>6</sup> See, for e.g., Morris R. Cohen, “Property and Sovereignty” (1927) 35 Cornell Law Rev. 12; F.S. Cohen, “Transcendental Nonsense and The Functional Approach” (1935) 35 Colum. L. Rev. 809.

<sup>7</sup> Arthur Ripstein, *Force and Freedom*, (Harvard University Press, 2009). See, esp., Chapter 4, “Private Rights II: Property.”

<sup>8</sup> J.E. Penner, *The Idea of Property in Law* (Oxford University Press, 1997) at 71ff.

<sup>9</sup> Radin, *supra* note 3 at 81: “Personal property describes specific categories in the external world in which holders can become justifiably self-invested, so that their individuality and selfhood become intertwined with a particular object.”

<sup>10</sup> We are also temporal selves, but a discussion of the implications of this is beyond the scope of the present paper.

rights associated with how physical places in the world may be accessed and used have an impact on the kinds of social relationships that can develop and flourish. These are not the indirect social relationships generally discussed in property law whereby property rights holders are in relation to non-specific others in the world, but direct social relationships—friendships, family and intimate relations, neighbourhood acquaintances and others.

### 3. Persons and Places

#### (a) Private Spaces: The Home

Radin argues that her thesis regarding the relationship between property and personhood can account for the centrality of the image of the sanctity of the home in American law in a manner that eludes both economic and rights-based accounts. In the remarks that follow, I will argue that she is right to argue for the constitutive connection between self and home. However, I will also argue that this is not solely because of a special self-object relationship that is formed, whereby the self becomes invested in the unique object that is the home. Rather, I will argue that this constitutive connection can only be properly appreciated in general when we view the home as a “place” rather than as a “thing,” a view that is implicit but not developed in Radin’s work.

One view of the sanctity of the home in many liberal legal traditions, particularly those with a rights-based focus, is that individuals need a place free from the interference of others if they are to have sufficient liberty. However, for Radin, this does not fully explain the legal phenomenon. She argues:

It is not just that liberty needs some sanctuary and the home is a logical one to choose because of social consensus. There is also the feeling that it would be an insult for the state to invade one’s home, because it is the scene of one’s history and future, one’s life and growth. In other words, one embodies or constitutes oneself there. The home is affirmatively part of oneself—property for personhood—and not just the agreed-on locale for protection from outside interference.<sup>11</sup>

There is, she insists, a special relationship we have with our home. We can not simply trade it for some other type of arrangement that provides us with freedom from interference. Our homes, in many instances, are not simply a fungible “place” but become intrinsically linked to our particular identities.<sup>12</sup>

Evaluating Radin’s claim requires an examination of the idea of why freedom from interference is so important and closely linked to the home. In fact, I will argue that many

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<sup>11</sup> Radin, *supra* note 4 at 57.

<sup>12</sup> Although treating it as a thing seems entirely appropriate when putting it up for sale.

different values are at stake which, once separated, provide a clearer view of why the home is in fact “the scene of one’s history and future, one’s life and growth” but in a way that does not depend upon the idea of self-constitution in relation to a thing.

Having a place free from the interference of others protects a number of different, albeit closely connected, interests. The most obvious is that it protects individuals from physical interference with their projects. Here the home is not just a “thing,” or the raw material of our various projects, but is a place that is the *location* of different activities—for many, their most important activities.<sup>13</sup> My interest in having such a place free from the interference of others might be simply that any use you might make of my space can potentially disturb the uses that I am making of that space. You might, for example, move something important or knock something over. You might argue that your temporary use of my space has no actual effect on any project of mine. Even if this is true, I might change my mind regarding my projects and your current use might cause problems for some of these future uses. Moreover, having many of these activities occur in the same place over time leads to the formation of personal habits and memories that many people experience as constitutive in the manner that Radin describes. A shift in emphasis from “thing” to “place” can therefore highlight the fact that part of the dynamic Radin describes results from the fact that the home is not an “object” of self-investment but a “location” in which so many of our important activities occur.

However, interference from others also has a *social* dimension that goes beyond the fact that you must respect my desire to be free of physical interference from you. This social dimension is clearer if we look at two related, but distinct concepts: solitude and privacy. Consider first the interest in solitude. Even if I am certain that my neighbour will not interfere with the physical aspects of my home, and my projects within the home, I still might want to be “free” of her presence for purely social reasons: I do not want another person around with whom I would have to interact. Solitude provides freedom from social interactions and the distractions that arise from them. As some have pointed out, solitude develops as a value for many people who participate in occupations requiring “more than normal concentration.”<sup>14</sup> But most of us—especially introverts—can also appreciate the general importance of having some respite from the demands of social interaction, even when not engaged in such occupations.

Another way that freedom from the interference of others engages social relations more directly is in protecting privacy. Although one of the more popular judicial characterizations of the right to privacy is “the right to be left alone,”<sup>15</sup> this both risks narrowing privacy to a kind of solitude as well as broadening it to include many more general autonomy interests.<sup>16</sup> We can instead understand privacy in terms of protection

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<sup>13</sup> Some important projects might even be to make one’s home the kind of place you want as a location for other activities—such as a renovation project to create a tranquil home office for your next writing project. Some people might think their work is most important, in which case an office or studio might have this function.

<sup>14</sup> Diana Webb, *Privacy and Solitude* (Continuum International Publishing Group, 2008).

<sup>15</sup> Samuel Warren and Louis D. Brandeis, “The Right to Privacy” (1890) *Harv. L. Rev.* 193 at 193.

<sup>16</sup> See, for e.g., Lisa M. Austin, “Privacy and the Question of Technology” (2003) 22 *Law & Philosophy* 119; Daniel J. Solove, *Understanding Privacy* (Cambridge, Mass.: Harvard University Press, 2008) at 15ff.

from interference with the audience of our social interactions.<sup>17</sup> Indeed, as one historical study points out:

Although in the nineteenth century the family became almost synonymous with private life, earlier it had been one of the obstacles to an individual's freedom to live as he pleased among friends and confederates of his own choosing. . . . Such relations were free and pleasant, devoid of the formality required of public officials and of the discipline enforced by the family. Richelet (1679) defines the word *privé* as meaning not only "familiar" but also something like the English "at home": he is most *privé* here, he is most *privé* with Mr. So-and-so, are the examples he gives. Clearly there was a connection in people's minds between the familiarity of freely chosen social relations and the concept of privacy. Thus privacy did not require isolation, retreat, or protective walls. It was defined primarily by the ability to choose freely the company with whom one spent time not devoted to routine business and chores. Whether feminine or scholarly, amical or juvenile, secret or open, these freely chosen societies permitted a convivial intimacy that family life appears to have inhibited.

Thus, "the private" in the modern sense was defined by its distance from both the *res publica* and the family order. It was also defined by freedom from the collective constraints of custom.<sup>18</sup>

The idea of privacy therefore has a deep connection to the ability to choose one's social relations, free from social constraints. This has become closely connected to the idea of social withdrawal, and freedom from interference, because under such conditions one is free from social surveillance and therefore also from the pressure of social norms.<sup>19</sup> However, we can also understand it in terms of providing us with the capacity to choose the terms of our social interactions—specifically the audience of those interactions.

The right to exclude clearly protects privacy in this sense, for it provides the rightful possessor with the ability to control the kinds of social relations that take place within the home. I determine who can enter and on what conditions. When there, I can relate to that person on terms that are relatively free of considerations of "what others might think," since they are not able to either directly observe or interfere with the interactions in that space.

This idea of control over social relations can help us understand why sometimes the home as the "scene" of my life is worthy of protection and sometimes it is not. Even Radin does not assert that because an object is tied up with our personhood that the law should respect this. After all, "one should not invest oneself *in the wrong way or to too great an extent* in external objects."<sup>20</sup> Consider, for example, the case of a teenager living in her parents' home and being granted no control over the social relations that take place there due to a controlling parental attitude and deep value conflicts. This home is the "scene"

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<sup>17</sup> For a fuller treatment of the relationship between privacy and identity see Lisa M. Austin, "Privacy and the Private Law: The Dilemma of Justification" McGill L.J. *forthcoming*.

<sup>18</sup> Roger Chartier, "Introduction: Community, State, and Family: Trajectories and Tensions" in Roger Chartier, ed., *A History of Private Life: Passions of the Renaissance* (Harvard University Press, 1989) at 400.

<sup>19</sup> Ferdinand Schoeman, *Privacy and Social Freedom* (Cambridge: Cambridge University Press, 1992).

<sup>20</sup> Radin, *supra* note 3 at 38, emphasis in original.

of that teenager's life and is so in a deeply constitutive manner. However, it is questionable whether the connection to liberal values such as autonomy or human flourishing are present. The difference is not in the quality of social relationships so much as who is entitled to control access to the space, and therefore have some control over the types of relationships that might unfold. In this way, control plays an important role in our capacity to choose relationships quite apart from the question of whether these relationships even in fact develop, let alone whether they develop in ways that turn out to be constitutive of our identity.

This is not to say that the right to exclude is necessary in order to have the kinds of intimate relationships one associates with the home. Historical studies point to the fact of, for example, family structures under conditions of extreme crowding or even slavery.<sup>21</sup> However, having a home that permits the kind of control that I am pointing to permits a particular kind of structure of relations that are deeply connected to liberal ideals of individuality and autonomy – that these relationships be chosen and permitted to be enacted in a space free of social surveillance. This is not about controlling access to a particular thing in order to determine how it is to be used. Rather, it is about having authority over a particular space in order to have authority over the relations possible within that space. These are not the relations implied by the obligations others have to respect your decisions with respect to how a particular resource is used but are *direct* social relations: friends, colleagues, lovers. What is important is the way in which control over space permits certain kinds of control over social relationships.

Property rights are often distinguished from other legal rights—such as contractual rights—because they are said to be good against the world instead of dependent upon the existence of a particular relationship between the parties. While property rights-holders are said to be in relation to those others who must respect their property rights, the particularities of their identities are irrelevant to these duties. Nonetheless, an analysis of property as place shows that this “in rem” or impersonal aspect of property rights plays an important role in fostering the possibilities of particular relationships.

A number of things follow from this account of property as place which should be of interest to property theory more generally. First, this account shows that there is at least one aspect of the allocation of property rights that does not depend upon a condition of scarcity as its starting point. The idea that scarcity is a necessary condition for property is ubiquitous. As Harris states,

If a particular resource is not scarce, or ceases to be scarce, allocation mechanisms do not have to be invented or kept in being. Where a resource really is abundant, it will normally be pointless to carve out parcels of exclusivity through the operation of trespassory rules .... In that sense, it is normally a necessary condition of a resource being subjected to a property institution that it be scarce and hence an item of social wealth.<sup>22</sup>

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<sup>21</sup> See Roger Chartier, ed., *A History of Private Life: Passions of the Renaissance* (Harvard University Press, 1989) for numerous examples.

<sup>22</sup> J.W. Harris, *Property and Justice* (Oxford, 1996) at 24.

In contrast, my account of property-as-place suggests that concerns regarding access to places would arise irrespective of conditions of scarcity. Even if resources are not scarce, and there is no competition for housing, for example, there will still be social interactions, raising the question of who has authority over access to certain kinds of spaces. This is not competition to drive each other out of spaces in order to protect individual projects in relation to things, but the establishment of conditions for interaction within these spaces. Nor is it a question of the allocation of material resources, although it is a question of the allocation of authority and how this shapes the relations between self, family, and the broader community. Therefore, instead of simply a world of scarce objects, this suggests that we should also conceive of the realm of real property as concerned with the spaces in which we interact.

Second, this account of property as place can help understand why the right to exclude is given stronger protection than some particular use-rights. Underkuffler points out that the law does not protect all property rights in the same manner. For example, regulations on use are permitted with greater frequency than incursions on exclusion.<sup>23</sup> If we understand the significance of property as place—that it provides owners with control over the types of relationships that occur as well as their conditions—then we can also understand limits on the right to exclude as potentially involving the forcing of particular relationships upon property owners.<sup>24</sup> The law is justifiably wary of permitting this, for the interests in solitude and privacy fostered by such control are important for the constitution of the liberal self. Moreover, the common law is generally wary of forcing particular relationships on individuals, as can be seen in contract law’s reluctance to enforce specific performance in the context of contracts for services. In contrast, regulating the use of a place might affect one or more possible projects of an individual but does not involve the forcing of particular relationships.

Finally, this account highlights another important element to examine when looking at the distributional effects of property rights. In addition to concerns arising from the distribution of “resources”, the allocation of property rights is important because of the way in which they distribute authority over places in a manner that affects the kinds of social relationships that can occur in these spaces. Rather than helping to create “haves” and “have-nots” in terms of wealth and material resources, these distributional effects can create disparities in terms of the ability of individuals to control their social interactions and therefore their social identities.

### **(b) Public Spaces: Sidewalks, Parks and Playgrounds**

While a focus on the right to exclude can help to bring out the way in which property rights are connected to direct social relations, this focus on individual interests risks

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<sup>23</sup> Laura S. Underkuffler, *The Idea of Property: Its Meaning and Power* (Oxford University Press, 2003) at 85ff. Not all of the distinctions noted by Underkuffler can be accommodated within this framework.

<sup>24</sup> I use the term “owners” for simplicity. In fact, the individual who has the right to exclude is the rightful possessor—the owner may be someone different, as in the case of a landlord.

obscuring the more communal dimensions at stake once we shift from thinking about “things” to “places.” This section takes up this theme by shifting from individual homes to the nature of neighbourhoods. By “neighbourhood” I mean a kind of location-based community, made up of members who live in close physical proximity to one another. There are, of course, many other types of communities that do not depend upon any kind of physical location—internet communities of all sorts but also special interest groups that might coalesce around a particular issue but for whom questions of location are largely independent of their formation. My argument is that access to public spaces is an important condition for both creating and sustaining certain kinds of neighbourhood communities. This insight might be important in a number of legal contexts, but the one I will examine here is expropriation and how to identify the losses involved that go beyond the mere market value of individual houses.

Many authors looking to ground some kind of community interest in particular locations have turned to Radin’s work for inspiration. For example, Joseph Singer has argued that where relationships of mutual dependence have arisen with respect to particular assets, a group’s “reliance interest” might justify the recognition of some form of property rights in relation to such assets, depending upon a complex weighing of competing interests.<sup>25</sup> Notably, he uses Radin’s work to articulate the nature of the “non-fungible” interests of the vulnerable group he is interested in—workers about to be displaced from the source of their livelihood due to plant closings.<sup>26</sup> Legal geographer Nick Blomley has used Radin’s work to articulate a community-based interests in relation to Vancouver’s Downtown Eastside, where “area activists invoke a sense of collective moral ‘investment’ in the landscape[.]”<sup>27</sup>

In order to distinguish my concerns regarding property as place from these “collectivized” versions of Radin’s thesis, it is important to clarify the different ways that a community might be deeply connected to a particular place as well as the different roles that “public” spaces rather than “private” spaces might play in relation to the forming and sustaining of such communities. To do this, I outline three different types of parent communities that can form in relation to a school. The school may be a “public” school in that all children living within a particular location are entitled to attend but it is not “public” in the property sense of all citizens having a right of access to the school grounds and building. Indeed, schools have the right to control such access in order to protect students and many do so with elaborate sign-in procedures for visitors.<sup>28</sup> The school is therefore better characterized as publicly-owned private property. In contrast, “public” property is property to which the general public has a right of access such as sidewalks, roads and parks.<sup>29</sup>

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<sup>25</sup> Joseph Singer, “The Reliance Interest in Property” (1988) 40 *Stan. L. Rev.* 611.

<sup>26</sup> *Ibid.* at 662. However, Singer does make other arguments, especially in the context of replying to possible economic arguments against his position.

<sup>27</sup> Nicholas Blomley, “Landscapes of Property” in Nicholas Blomley, David Delaney, and Richard T. Ford, eds., *The Legal Geographies Reader* (Oxford: Blackwell Publishers, 2001) at 123.

<sup>28</sup> For e.g., under Ontario’s *Education Act*, RSO 1990, Ch. E.2, property is vested in the school board. See ss. 192 and 193.

<sup>29</sup> CB Macpherson, *supra* note 1, calls this kind of property “common property” to distinguish it from “state property” where the state hold property in much the same manner as an individual or corporation would.

The first type of community, which I will call “aggregate community”, might form as follows. Suppose that your child attends a school where children are driven every day by a parent or care-giver. You drop your child at the door, and she enters the school alone. The only time you go to the school is for parent-teacher interviews and perhaps on concert nights, as a member of the audience. You are proud of your generous donation to a recent extensive fundraising campaign that raised enough money to build a green roof on the school, making it a leader in environmental education. You likely have a strong personal attachment to the school, not just because of its role in educating your child, but also because you identify with the environmental values that it now manifests in its built structure. Other parents likely also feel the same way. In this sense, you might speak of a community of parents. However, such a community is really an aggregate of highly individualistic experiences because the parents do not actually interact with one another. Moreover, although this community is centered around a particular place—the school—the parents themselves do not even need to physically enter the school to feel “invested” in it.

Contrast this aggregate community with a second type of community, which I will call “intentional community.” Instead of merely dropping off your child or providing a financial contribution to the school, you volunteer on the school’s environmental committee and are personally involved in the planning and implementation of the green roof. You, along with the other committee members, would form a very different kind of parent community. It is likely much smaller than the aggregate community and it is actively and intentionally engaged in doing something *together*. The experience being “shared” is more complex and genuinely intersubjective than simply “sharing” the experience of having your child attend a particular school or “sharing” the experience of providing a financial contribution or identifying with a particular result.<sup>30</sup> This community is more dependent on place for its formation and existence than the aggregate community, for the committee needs a place to meet and organize. However, this place need not be the school and could be any place that is convenient and from which they are entitled to exclude other non-group members during their meetings. If this community feels “connected” to the school because it is the focus of their activities even if not the locus of the community itself, then we might posit that this connection is more complex than in the aggregate community for it helps to sustain a group that is more dynamically intersubjective.

Contrast this with a third type of community, which I will call “casual community.” Suppose now that instead of driving your child to school you walk her to school on neighbourhood sidewalks. Moreover, once there you remain in the school yard—parents are invited to stay by school authorities—until the morning bell rings. In this context, a very different kind of parent community forms. It is a community that rests upon the casual, daily interactions that arise from meeting other parents on the way to school and in the school yard. This community is not necessarily intentional. For most it is incidental, a by-product of the task of getting the kids to school. It is also likely casual and might consist solely in saying hi to other kids and parents. However, it might form

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<sup>30</sup> Sociologists would say that it builds “social capital.”

the basis for much stronger forms of social networks. Note that this community is rooted to a particular place in a much different manner than the other two forms of community, for it depends upon using shared spaces for interaction. Both the aggregate and intentional community can form where there are basically different types of private spaces (the home and the school) connected by public roads where their “public” aspect holds no significance for social interaction since they are driven upon in “private” cars. In contrast, the casual community can only arise where publicly accessible spaces connect private spaces in a manner that leads to social interactions in those publicly accessible spaces, as a by-product of doing other things.

If we return to examine “collectivist” versions of Radin’s property-as-personhood thesis, we can see that they can account for both aggregate and intentional communities like the ones just described. However, they miss the importance of access to public spaces to the creation and maintenance of what I have been calling casual community.<sup>31</sup> This dynamic is crucial for understanding the role of community in the context of expropriation debates.

Suppose that the state sought to expropriate your home. What do you face losing? According to Radin, for most of us our homes are not a fungible good and so we face losing more than simply a valuable asset. However, a home is not an island but is linked—via sidewalks and roads—to other homes (neighbours), other areas (e.g. shopping districts) and other important “public” amenities (schools, parks, libraries, recreation centers). An individual therefore does not simply lose a home but also a place within a broader neighbourhood. We can understand the importance of this in economic terms (location, location, location). We can understand it in Radin’s terms in relation to one’s feeling of connection to a neighbourhood because it, like the home itself, has been the “site” of one’s life. But we can also understand it in terms of the social interactions that are nurtured by the public spaces that connect your home to others.

As Jane Jacobs points out in *The Death and Life of Great American Cities*, robust street neighbourhoods permit city inhabitants to connect with a diverse array of others. Moreover, these connections do not need to lead to more intimate forms of relationships. As she describes:

it is possible in a city street neighborhood to know all kinds of people without unwelcome entanglements, without boredom, necessity for excuses, explanations, fears of giving offense, embarrassments respecting impositions or commitments, and all such paraphernalia of obligations which can accompany less limited relationships. It is possible to be on excellent sidewalk terms with people who are very different from oneself, and even, as time passes, on familiar public terms

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<sup>31</sup> For example, Blomley argues that the collective “investment” in Vancouver’s Downtown Eastside has occurred through “histories of copresent *use and habitation*” as well as “locally *produced* through collective action and political struggle.” This use is not about the use of public spaces creating community but the fact that “generations of people ... have lived there, died there, suffered there, loved there, survived there.” It is “produced” because activists have successfully organized for a number of neighbourhood improvements. (*Supra* note 27 at 124.)

with them. Such relationships can, and do, endure for many years, for decades; they could never have formed without that line [between city public world and the world of privacy], much less endured. They form precisely because they are by-the-way to people's normal public sorties.<sup>32</sup>

The kinds of neighbourly relationships that will flourish in different neighbourhoods depends, in part, on the nature of the public space connecting the various private homes. For some, to move location is to lose social connections that cannot be maintained in a new form. For example, if I leave my neighbourhood, it is true that I can continue to visit my neighbours. But we can't have the same relationship—the largely cordial street relationship where we greet each other daily, exchange house keys, complain about the new recycling bins, and watch the children on the street learn to walk, ride bikes, and learn to skateboard. It is an informal, daily set of relationships that are quite satisfying but which cannot continue in the same manner if the demand is now that someone intentionally visit, come inside for coffee, share details of their lives on another level. A loss of one's home is therefore also a loss of the kinds of relationships and social networks made possible by the features of that particular location that provide the location for social interactions.

This analysis of the importance of public spaces can also help to explain what is lost when an entire community faces dislocation due to redevelopment. Numerous theorists have attempted to explain the nature of the community costs that attach to the destruction of certain neighbourhoods or neighbourhood spaces. For example, Underkuffler points to the political costs associated with the neighbourhood redevelopment at issue in the controversial Kelo case, arguing that property provides the “material basis” for social and political participation.<sup>33</sup> Blomley speculates that historical patterns of use and occupation should ground community rights to urban places, particularly in socially disadvantaged neighbourhoods such as Vancouver's Lower Eastside.<sup>34</sup> Lehari points to the need to create incentives for individuals to invest time and effort into making what he calls “local public goods” successful.<sup>35</sup>

My account suggests that the interest that needs to be taken into account is not general political involvement, potential incentive effects, or the honouring of a kind of long-standing connection to, and investment in, place. All of these, depending on the context, may be of some importance. But what they are missing is an appreciation of the fact that neighbourhoods—and many of their public spaces such as parks—are the locus of informal social networks that often cannot be easily reproduced in a new location and are therefore often destroyed by redevelopment plans. Noting this does not mean endorsing the existence of such networks as always leading to a robust community, or one that could be considered positively according to various measures. The point is simply that

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<sup>32</sup> Jane Jacobs, *The Death and Life of Great American Cities* (Vintage Books, 1992), pp. 62-65.

<sup>33</sup> Laura S. Underkuffler, “Kelo's Moral Failure” (2006) 15 Wm. & Mary Bill Rts. J. 378.

<sup>34</sup> Blomley, *supra* note 27; Nicholas Blomley, “Enclosure, Common Right and the Property of the Poor” (2008) 17 *Social Legal Studies* 311.

<sup>35</sup> Amnon Lehari, “Property Rights and Local Public Goods: Toward a Better Future for Urban Communities” (2004) 36 *Urb. Law* 1.

the nature of the social interactions that occur in a neighbourhood has to be a part of any discussion of what is lost when a neighbourhood is redeveloped in some way—these relations are intrinsically linked to the spaces that are taken.

Take, for example, one of Canada’s most notorious community displacements—the destruction of the Africville neighbourhood in Halifax in the late 1960’s. Africville was considered a “slum” by many. As a predominantly black community isolated from the rest of Halifax, it became an increasing embarrassment to the city as well as the focus of liberal-welfare concerns prompted by the poverty and segregation of its inhabitants.<sup>36</sup> As a result, residents were relocated and the settlement was razed. Although this decision was widely supported at the time, it is now almost universally condemned as a mistake.<sup>37</sup>

This negative judgment of the Africville relocation is complex for many reasons. One is that the “slum” conditions decried by so many were largely the result of years of neglect from the city— not only did it become a location for the city’s open garbage dump, but Africville residents themselves did not receive basic services such as electricity, water, sewerage, or police protection. Therefore one could make the claim that the community did not need to be razed, it simply needed to be provided with services.<sup>38</sup> Another reason is that many of the relocation promises of better housing and economic opportunities failed to materialize for many former residents. One could therefore also make the claim that the problem with the relocation was in how it was carried out and not in its basic premise. However, there is a persistent sense in accounts of the relocation that its wrongfulness lay, at least in part, in the fact that nobody appreciated the community interest at stake. As Clairmont and Magill argue, even if the relocation had been more successful in terms of “better housing, social programs and enhanced life opportunities”, for “Africvilleans that price would still have been high in terms of identity, social and physical resources, and sense of belonging.”<sup>39</sup> Indeed, they also note that “[t]ypically, the relocates profiting most significantly from liberal-welfare relocation programs have been the politically active, mobility-oriented residents least committed to and dependent upon neighbourhood associations.”<sup>40</sup>

Although the sense of community that was lost has many sources—including strong kinship ties, and a long shared history as a racial minority group—I want to argue that it also had a basis in the location of Africville and the “public” aspects of its space. In this regard, a number of interesting themes recur in the recollections of former residents.<sup>41</sup>

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<sup>36</sup> There have been many claims that the community was razed because the city of Halifax desired the land for industrial development. Such claims are largely debunked by Clairmont and Magill’s careful study. See Donald J. Clairmont and Dennis William Magill, *Africville: The Life and Death of a Canadian Black Community*, 3<sup>rd</sup> edition, (Toronto: Canadian Scholar’s Press, 1999) at 135 ff. In fact, the land is now Seaview Memorial Park.

<sup>37</sup> *Ibid.* at 279 ff.

<sup>38</sup> There were many different official rationales regarding why some of these services, such as water, could not be provided. These turned out to be false. *Ibid.* at 135 ff.

<sup>39</sup> *Ibid.* at 285 ff.

<sup>40</sup> *Ibid.* at 273.

<sup>41</sup> See Africville Genealogical Society, *The Spirit of Africville* (Formac Publishing Company Limited, Halifax 1992).

First, is the importance of the church, called by some “the living, breathing soul of our community,” and which functioned not only as a place of worship but as a place where important community meetings and activities were held.<sup>42</sup> Second, the childhood memories of former residents are full of references to open spaces where they could gather and play together, and of neighbours who collectively watched over the children and welcomed them in and out of their homes.<sup>43</sup> This was a community that had many spaces where people interacted socially and not just in highly structured ways such as through meetings of various organizations. Third, in speaking of the founding of the Africville Geneological Society, one of the founders noted that

[one of our leaders] wanted to bring back the unity we shared in the Africville community, the concern that was shown when trouble or disaster came to the community, the togetherness.

But it became harder after the relocation. Why did someone have to die or marry to bring us together? When did we get together, how often did we talk about Africville with one another and have a good laugh about some of the things, or even fill up because we missed it?<sup>44</sup>

When such a community becomes geographically dispersed, then the informal and casual connections between people that helps to tie a community together are also lost—there has to be an important occasion of some sort to bring people together at all in community rather than an important occasion (positive or negative) around which an already-existing community rallies. The geographic dispersal of the community is indeed the loss of the community.

### (c) Between Public and Private: Shopping Malls

As the European Court of Human Rights recently stated in *Appleby*, at common law “[a] private person’s ability to eject people from his land is generally unfettered and he does not have to justify his conduct or comply with any test of reasonableness.”<sup>45</sup> Using my approach of property as place, I want to show that there are three arguments that, taken together, indicate that this traditional common law position is suspect in the case of privately-owned but publicly-used land such as shopping malls. The first is that the function of such spaces in the lives of users is analogous to the interest in facilitating certain types of social interactions that I have identified above in relation to both public and private places. The second is that my analysis of the home suggests that an unfettered right to exclude protects one’s interest in control over direct social relations—an interest that is absent in the case of owners who have decided to use their property for the purposes of a shopping mall to which the public is invited. The third is that permitting

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<sup>42</sup> *Ibid.* See Charles R. Saunders (with the help of many others), “A Visit To Africville” Chapter 1 in *The Spirit of Africville*. When the “relocation” occurred, the church was razed early in the morning when nobody was around (at 88).

<sup>43</sup> This was no doubt intensified by the strong kinship ties between individuals. See Clairmont and Magill, *supra* note 36 at 45. The social structure also included many extended families, where a nephew or grandchild would live with an older couple (*Ibid.* at 62).

<sup>44</sup> Linda Mantley, as quote by Africville Geneological Society, *supra* note 41 at 92. It is interesting to note that the former residents now hold an annual three day reunion on the site.

<sup>45</sup> *Appleby and others v. United Kingdom*, [2003] ECHR 44306/98.

shopping mall owners such unfettered authority over the “public” spaces of their malls can have negative implications for civic relations within communities. Taken together, these reasons support the idea that shopping mall owners should have to meet a “reasonableness” requirement in relation to the exercise of the right to exclude.

The debate regarding public access to shopping malls is usually argued in relation to the speech interests of users.<sup>46</sup> If the speech at stake is related to a labour dispute, then this is sometimes also framed in terms of labour relations.<sup>47</sup> However, if we also think of property as a place where a variety of social relations take place then other user interests come to the fore.

Just like in the discussion of neighbourhood public spaces like sidewalks and parks, malls also foster a kind of exchange between individuals that is a by-product of their shopping. In fact, we can look at the features of most shopping malls—for e.g., benches and fountains—and assert that many of them also invite the public to come and sit and interact in a variety of ways, all designed to ensure that large numbers of the public have incentives to frequent the mall. The role that this plays in the creation of community can vary, depending on the relation between the mall and other types of public places. If it is the main destination in an area, then it can function much like a neighbourhood park, helping to create a community through facilitating informal social networks. But even if it is more like Toronto’s Eaton Centre—a destination for people who are otherwise significantly dispersed geographically—the social relations it fosters can be important. As Jane Jacobs notes, the interactions fostered by publicly accessible spaces are important because these often involve people with whom we do *not* want more intimate relationships.<sup>48</sup> Providing an alternative between intimate relationships and *no* relationships, such public spaces facilitate social relationship that can create familiarity and trust between diverse individuals and groups who would otherwise remain isolated from one another.

Another user interest is that publicly used spaces such as shopping malls can, paradoxically, provide some users with a place that functions in a similar way as a private home in relation to what I have been calling their privacy interest. Some groups, such as youth, do not have control over private dwellings and so do not have the opportunity to control social relations free of social surveillance. However, sometimes public spaces such as malls can also provide this if they are in large enough urban centres that youth are assured a kind of anonymity—not in relation to one another but in relation to the others in the mall. As Westin states, anonymity

occurs when the individual is in public places or performing public acts but still seeks, and finds, freedom from identification and surveillance. He may be riding a subway, attending a ball game, or walking the streets; he is among people and

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<sup>46</sup> This was the case in *Appleby, ibid.*, which dealt with environmental campaigners who sought the right to distribute literature at a privately-owned shopping mall. On the facts of the case, the court held that the applicants, although prevented from distributing literature within the mall, were not prevented from communicating their views through other means. Given this, there was no failure of any positive obligation to protect freedom of expression

<sup>47</sup> *Harrison v. Carswell*, [1976] 2 S.C.R. 200.

<sup>48</sup> Jacobs, *supra* note 32.

knows that he is being observed; but unless he is a well-known celebrity, he does not expect to be personally identified and held to the full rules of behavior and role that would operate if he were known to those observing him. In this state the individual is able to merge into the “situational landscape.”<sup>49</sup>

Teenagers who need to break free of the authority of parents, for example, are often those who will “hang out” in the mall. The relatively anonymous public space provides freedom from some types of social norms. At the same time, there is evidence to suggest that diverse public spaces can help to consolidate other social norms. For example, the literature on mixed-income housing suggests that the social diversity fostered by such developments can increase the level of informal social control even where no actual interpersonal relationships across groups develop to a significant extent.<sup>50</sup>

While a mall might serve a “privacy” function for some individual users, it does not do so for owners.<sup>51</sup> This is another important reason why an unfettered right to exclude in this context bears critical scrutiny. For example, if the owner (or security guards on behalf of the owner) excludes a youth simply on the apprehension that they are likely to misbehave, or are of the sort that other customers would not like to be present, then the owner is not protecting a particular *use* of property but wants to ensure the *identity* of the users.<sup>52</sup> While we do permit individuals to do this with respect to their own home, I would argue that this is rooted in their interest regarding personal control over social relations, which is not present in the case of a shopping mall. Allowing its extension to the shopping mall context allows the shopping mall owner to have authority over the types of social relations that take place within the shopping mall in a manner that is not justified by her interest in the use of the space. What this suggests is that shopping mall owners should be able to exclude individuals who are interfering with the use of the space as a shopping mall. However, they should not be able to exclude individuals on the basis of who they are, or on the basis of an apprehension of what they might do. In other words, they do not have an absolute right to exclude; they have a right to exclude in order to protect the use of the place for the purposes that have been designated.

There is an economic argument that can be made by way of rebuttal. The argument is that unless shopping mall owners can have control over *who* shops at their sites then they

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<sup>49</sup> Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967) at 31.

<sup>50</sup> Mark L. Joseph, Roberts J. Chaskin and Henry S. Webber, “The Theoretical Basis for Addressing Poverty Through Mixed-Income Development” (2007) 42 *Urban Affairs Review* 369.

<sup>51</sup> This consideration formed an important part of the reasoning in Justice Laskin’s dissent in *Harrison v. Carswell*, *supra* note 47.

<sup>52</sup> There is potentially an interesting analogy with the “touch and concern” doctrine in relation to restrictive covenants in Canadian law. See *Noble et al. v. Alley* [1951] S.C.R. 64 where the Supreme Court of Canada held that racially-based restrictive covenants were invalid because they failed the “touch and concern” test by referring to the identity of users/owners rather than to any actual use of the land allegedly burdened. We can understand this in terms of the division between property and contract: successors in title to the owner of the servient tenement are not in any contractual relationship with the owner of the dominant tenement or any of his/her successors in title. In order to be obligated by the “burden” this has to obligate them as a property owner in relation to the owner of the dominant tenement as property owner and not because of something personal or idiosyncratic about them individually, such as discriminatory attitudes. According to this analysis (which needs more development) use lies with property and the identity of the user lies with contract.

cannot fully maximize their profits in relation to their property. For example, a well-heeled shopper might not want to shop in an area that also admits under-employed youth who congregate on its benches. But it is important to note that this argument regarding maximizing profits does not refer to any particular use itself but to *who* uses. It is therefore a claim to maximize profits by controlling the types of social interactions that occur in the mall and not the types of uses. This kind of social control can result in significant negative externalities. These externalities are not best understood in terms of economic costs but rather the civic costs that come from a decrease in the social diversity present in publicly used spaces, which may in fact turn out to also have negative economic consequences.<sup>53</sup>

The extent of such consequences might depend on the availability and nature of other publicly-accessible spaces that can play this function of fostering civic diversity. But here Singer's arguments regarding the reliance interests created by some property uses are apposite. The very success of privately-owned publicly-used spaces can contribute to the decline of publicly-owned publicly-used spaces as the public comes to rely on them in a variety of ways. Indeed, in some areas important public services are located in privately owned malls precisely because of their effectiveness as "public" spaces.<sup>54</sup>

## Conclusions

I have argued that property theory needs to overcome its emphasis on both persons and things in order to examine the significance of thinking about property in terms of places and the relationships that take place within those places. Property rights, just like the actual physical characteristics of these places, affect those relationships and have important consequences for both issues of individual identity and the nature of the civic sphere. More specifically, property-as-place bolsters arguments in favour of a strong right to exclude for homeowners but weakens similar claims by owners of shopping malls. Property-as-place also shows that when a home is expropriated by the state, the individual owner does not simply lose her house but also her place within a complex of social networks. When an entire community is redeveloped, this loss can be profound and difficult to compensate through the simple relocation of individuals.

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<sup>53</sup> Richard Florida makes economic arguments in favour of urban diversity in *Cities and the Creative Class* (New York: Routledge, 2005).

<sup>54</sup> Grey article on malls