

*In positing a relationship between property and personhood, Margaret Jane Radin introduced an influential critique of traditional property theory, including law and economics. In this essay I propose an alternative account of the 'personhood' intuition, focusing on real property. This account of personhood focuses on the objective features of individual capacities for direct social relations rather than on the subjective relationship between a particular individual and a thing or place. Places like the home are significant for individual identity because rights of access provide the individual with control over the direct social relations that occur there. I further argue that maintaining this focus on the direct social relations fostered by rights of access to places can help us understand the nature of community interests in relation to certain kinds of public places and provide a basis for arguing for limitations to traditional property doctrines such as expropriation and trespass.*

*Key words:* property law/personhood/property theory/place/community

### I Introduction

By positing a relationship between property and 'personhood,' Margaret Jane Radin introduced a highly influential critique of the law and economics approach to property rights.<sup>1</sup> What the economic approach ignores, she argued, is that the person–thing relationship can be constitutive of us as selves. Far from the fungible goods presupposed by economics, some objects are instead 'bound up with personhood because they are part of the way we constitute ourselves as continuing personal entities

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1 Margaret Jane Radin, 'Property and Personhood' (1982) 34 *Stan.L.Rev.* 957; reprinted in Margaret Jane Radin, *Reinterpreting Property* (Chicago: University of Chicago Press, 1993) 35 [Radin, *Reinterpreting Property*]. For a summary of the economic approach see Michael J. Trebilcock, 'An Introduction to Law and Economics' (1997) 23 *Monash U.L.Rev.* 124 [Trebilcock, 'Introduction']; Michael J. Trebilcock & Paul-Erik Veel, 'Property Rights and Development: The Contingent Case for Formalization' (University of Toronto Legal Studies Research Paper No. 08-10, 2008) [unpublished], online: Social Science Research Network <<http://ssrn.com/abstract=1084571>>.

in the world,' and they should be treated differently by the law.<sup>2</sup> Although the economic approach to property was her main target, Radin also took aim at the idea of persons as 'abstract, disembodied rational units' common to many traditional rights-based accounts; 'personhood' involves a considerably thicker notion of self.<sup>3</sup> In this essay I agree that there is an important relationship between property rights and our constitution as selves, but I provide an alternative account of this relationship. Focusing on real property, I argue that the reason that some property rights with respect to places play a constitutive role in identity formation relates to the control they provide over the direct social relations that occur in those places. What is constitutive of the self, therefore, is not a person–thing relationship but relationships with other people.

In rethinking 'personhood' claims in this manner, I have four major aims and one major caveat. The caveat is that I am not making the strong claim that Radin is wrong in her account. Instead, in this short essay I am offering an alternative basis for thinking about the personhood thesis that, I argue, has four distinctive features. The first is to situate the personhood insight within a theoretical framework that grounds the normative significance of property rights, and limits to those rights, in terms of relations between persons rather than relations between persons and things. The second is to show that we can argue for the legal significance of the personhood intuition by focusing on the way in which property rights are connected to the objective capacity for identity formation rather than by focusing on more subjective inquiries into the actual emotional and psychological ties between a particular individual and a particular place. The third is to show that such an account can illuminate the way in which rights of access to public spaces are important for the development of some types of community. The fourth is to show that my approach can help to articulate a unique set of concerns that fall under what J.W. Harris has called the 'domination-potential' of ownership.<sup>4</sup> Taken together, these features provide a different normative basis and focus for Radin's personhood intuition and, therefore, an alternative framework for justifying the limitation of traditional property rights as articulated by both economic and rights-based theories.

## II *Persons, things, and indirect social relations*

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 means that I have a

2 Radin, *Reinterpreting Property*, supra note 1 at 37.

3 Ibid. at 81.

4 J.W. Harris, *Property and Justice* (Oxford: Oxford University Press, 1996) at 265.

relation with you, who are under an obligation to exclude yourself.<sup>5</sup> Nonetheless, it is important to note that the social relations at issue are *indirect* social relations implied by the idea of rights in general – the kind of relations that follow from the fact that others have an obligation to respect property rights. 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>6</sup> Such accounts also rely on this same idea of indirect social relations, but extend the analysis of these relations to the systemic effects of the recognition and implementation of property rights.

Even if property rights, as rights, imply indirect social relations, there remains the problem of determining the basis for property rights in the first place. Here the idea of social relations also plays a key role in a number of accounts. In this regard we can draw a distinction between theories that view the person–thing relation as the normative basis for property rights and theories that view social relations as the normative basis for property rights. A few examples can make this distinction clearer.

Many traditional rights-based accounts of property ground property rights in person–thing relations. The two best-known versions of this are those of Hegel and Locke, whereby property rights arise from the unilateral actions of incorporating one’s will in a thing (Hegel) or mixing one’s labour with a thing (Locke).<sup>7</sup> The basis for the right and, correlatively, the basis for the obligation of others to respect that right are rooted in the relation between an individual and an object. Radin’s personhood account of property draws from this tradition to argue that the self-constitutive relation between persons and some things should affect the nature of the rights and obligations we recognize in relation to those things. Again, the normative basis for such rights claims is a

5 Indeed, C.B. Macpherson calls this a ‘political relation,’ since it involves state enforcement. See C.B. Macpherson, ‘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.

6 For an overview of such approaches see Stephen R. Munzer, ‘Property as Social Relations’ in Stephen R. Munzer, ed., *New Essays in the Legal and Political Theory of Property* (Cambridge: Cambridge University Press, 2001) 36 (discussing the legal realist critique and others). See, e.g., Morris R. Cohen, ‘Property and Sovereignty’ (1927) 35 *Cornell L.Rev.* 12; F.S. Cohen, ‘Transcendental Nonsense and the Functional Approach’ (1935) 35 *Colum.L.Rev.* 809. See also David Lametti, ‘The Concept of Property: Relations through Objects of Social Wealth’ (2003) 53 *U.T.L.J.* 325; Lametti develops an account of property informed by virtue ethics but still sees the main social implication of property as distributional.

7 G.W.F. Hegel, *Philosophy of Right*, trans. by T.M. Knox (Oxford: Oxford University Press, 1967); John Locke, *Second Treatise of Government*, ed. by C.B. Macpherson (Indianapolis: Hackett, 1980).

unilateral person–thing relation, even though the recognition of such rights then implies social relations with respect to that thing.

In contrast, a variety of property theories argue that the normative basis of property rights in fact lies in an understanding of relations between persons rather than in features of a person–thing relation. This is perhaps clearest in theoretical work that explicitly employs the ‘bundle of rights’ metaphor and seeks to break down the concept of ownership into a series of bilateral relations.<sup>8</sup> In terms of traditional rights-based accounts of property, Kant’s stands out in terms of grounding rights purely in terms of social relations. As he argues, ‘possession is nothing other than a relation of a person to persons,’ a relation that is grounded in the idea of the equal freedom of purposive individuals.<sup>9</sup> The normative basis for economic accounts of property can also be understood in terms of social relations rather than person–thing relations. The basic economic view is that property rights are necessary in order to internalize benefits and minimize externalities in relation to things so that the market can allocate scarce resources to their most highly valued uses.<sup>10</sup> Implicit in this view is the idea that social welfare is maximized if things are put to their most valued uses. The normative force of this view, therefore, comes from the idea of maximizing social welfare. This, like Kant’s account of equal freedom, is a particular idea of justice with respect to social relations.

My argument regarding property rights and social relations responds to the two different ways of thinking about social relations and property just outlined. First, I argue that in addition to the indirect social relations implied by the idea of rights, property theory should also recognize the way in which property rights help to structure *direct* social relations. Although the following sections will deal with what this means in detail, 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>11</sup>

8 Much of this work draws on the work of Wesley Newcomb Hohfeld, *Fundamental Legal Concepts as Applied in Judicial Reasoning*, ed. by David Campbell & Phillip Thomas (Aldershot, UK: Ashgate, 2001) at 75, and A.M. Honoré, ‘Ownership’ in A.G. Guest, ed., *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press, 1961) 107. See also Thomas C. Grey, ‘The Disintegration of Property’ in J.R. Pennock & J.W. Chapman, eds., *Nomos XXII: Property* (New York: New York University Press, 1980) 69; Joseph Singer, ‘The Reliance Interest in Property’ (1988) 40 *Stan.L.Rev.* 611 [Singer, ‘Reliance Interest’]; and the work cited in note 6 *supra*.

9 Immanuel Kant, *Metaphysics of Morals*, trans. by Mary Gregor (Cambridge: Cambridge University Press, 1996) at 268. For an explanation of this position see Arthur Ripstein, *Force and Freedom: Kant’s Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009) at c. 4.

10 Trebilcock, ‘Introduction,’ *supra* note 1.

11 We are also temporal selves, but a discussion of the implications of this is beyond the scope of the present essay.

That is, individuals are immersed in relationships with other people, and these relationships, at least in part, occur in places; therefore, the 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 implied by the idea of rights and discussed above but direct social relationships – friendships, family and intimate relations, neighbourhood acquaintances, and others.<sup>12</sup>

Second, once we understand the relationship between property rights in relation to places and the direct social relations that occur in those places, we can recast Radin's personhood insight in terms of self-constitutive relationships between persons rather than in terms of self-constitutive relationships between persons and things. The benefit of doing so is not simply a theoretical realignment of personhood concerns with normative accounts that focus primarily on person–person rather than person–thing relations. I will also show how my account shifts the focus of the personhood insight away from an individual's subjective emotional or psychological connection to a thing and toward an objective account of the role played by property rights in relation to an individual's abstract capacity for identity formation. My account also provides an alternative basis for understanding the relationship between place and the constitution of community and for understanding why some forms of property – what I call privately owned but publicly used property – can raise unique domination concerns.

### III *Persons, places, and direct social relations*

#### A IDENTITY AND THE HOME

Radin argues that her thesis on 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 contend 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, we can also view the home as a place that facilitates relationships, rather than as a thing in which one becomes self-invested. The control over these relationships that property rights in the home provide is

12 For different accounts of how property rights facilitate social relations see J.E. Penner, *The Idea of Property in Law* (Oxford: Clarendon Press, 1997) at 74; Eduardo M. Peñalver, 'Property as Entrance' (2005) 91 Va.L.Rev. 1889.

important – although not determinative – to the individual rights holder’s capacity for identity formation.

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. For Radin, however, 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>13</sup>

There is, she insists, a special relationship we have with our home. We cannot 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>14</sup>

There are many different values at stake in Radin’s claim. Once separated, they provide a clearer view of why the home is, in fact, ‘the scene of one’s history and future, one’s life and growth.’ Significantly, I will argue that this does not necessarily depend upon the idea of a psychological or emotional attachment to the home, or on some other self-constituting subjective 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 a place that is the *location* of different projects that are important to self-constitution.<sup>15</sup> Furthermore, even if I am certain that another individual will not interfere with my projects within my home, I may still 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

13 Radin, *Reinterpreting Property*, supra note 1 at 57.

14 Although treating one’s home as a thing seems entirely appropriate when putting it up for sale.

15 Robert Ellickson is sensitive to some of these concerns in his work. See, e.g., Robert C. Ellickson, ‘Property in Land’ (1993) 102 Yale L.J. 1315; Robert C. Ellickson, *The Household: Informal Order Around the Hearth* (Princeton, NJ: Princeton University Press, 2008) [Ellickson, *Household*].

people who participate in occupations requiring ‘more than normal concentration.’<sup>16</sup> These physical and social aspects of exclusion are important to the possibility of engaging in projects that might play a role in self-constitution, but, alone, they do not show why the home should be treated any differently from other places. Artists engage in important projects in studios, academics undertake important projects in labs and offices, and there are many other examples of this type. The ability to exclude is important to such projects, and such projects are often important to aspects of identity, but these projects do not take place in the home.

Instead of a location for projects, the home, for many people, is important to individual identity because it is the location of important social relationships. Most individuals do not live alone but share their home with important others such as family members.<sup>17</sup> Moreover, rights of exclusion with respect to the home permit an owner to control the types of social interactions that take place there with individuals who are not residents. Exclusion does not simply allow owners to keep people out; it also allows them to invite people in. Property rights provide individuals with the ability to extend hospitality and to foster a number of important social relationships with family and friends. While it is true that the fact that the private dwelling plays such a central social function is a feature of North American culture and social life, this does not diminish its importance in this respect for individuals living within such a context.<sup>18</sup>

Indeed, control over direct social relationships in the home is connected to the idea of the privacy of one’s home. Although one of the more popular judicial characterizations of the right to privacy is ‘the right to be left alone,’<sup>19</sup> this risks both narrowing privacy to a kind of solitude and broadening it to include many more general autonomy interests.<sup>20</sup> We can instead understand privacy in terms of protection from

16 Diana Webb, *Privacy and Solitude* (London: Continuum International, 2008). However, 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.

17 Ellickson, *Household*, supra note 15.

18 For a wonderful overview of different cultural expressions of privacy see Philippe Ariès & George Duby, eds., *A History of Private Life*, 5 vols. (Cambridge, MA: Harvard University Press, 1987).

19 Samuel Warren & Louis D. Brandeis, ‘The Right to Privacy’ (1890) Harv.L.Rev. 193 at 193.

20 See, e.g., Lisa M. Austin, ‘Privacy and the Question of Technology’ (2003) 22 Law & Phil. 119; Daniel J. Solove, *Understanding Privacy* (Cambridge, MA: Harvard University Press, 2008) at 15ff.

interference with other participants in our social interactions.<sup>21</sup> 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>22</sup>

Consequently, the idea of privacy 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 of freedom from interference, because under such conditions one is free from social surveillance and therefore also from the pressure of social norms.<sup>23</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 participants in and 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 those

21 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 in 2010].

22 Roger Chartier, 'Introduction: Community, State, and Family: Trajectories and Tensions' in Roger Chartier, ed., *A History of Private Life: Passions of the Renaissance* (Cambridge, MA: Harvard University Press, 1989) at 400.

23 Ferdinand Schoeman, *Privacy and Social Freedom* (Cambridge: Cambridge University Press, 1992).

others are not able either to observe directly or to interfere with the interactions in that space.<sup>24</sup>

We can say, therefore, that the home is the ‘scene’ of one’s life because it is the location of important projects and social relations. These projects and social relations are constitutive of identity, and can be constitutive in this sense quite independently of one’s subjective relationship with the home. At the same time, many people remain in their home for a long time, and this stability of location can lead to the creation of memories in relation to the projects and social relations that have taken place over time in a particular location. People can become psychologically and emotionally attached to their home because of the important memories that they associate with it. However, even if we accept the idea that the preservation of important memories is important to individual self-constitution in some manner, such preservation has uncertain implications for property rights. For example, the loss of place does not necessarily lead to the loss of memories associated with that place – although it does seem true that the preservation of memory is to some extent tied up with certain material things, such as photos and mementoes.<sup>25</sup> The point here is that on my account the normative underpinning for the special status that we ascribe to the home, and its connection to individual identity, is primarily its role as the location, sometimes over a long period, of important projects and direct social relationships.

Understanding the home in the manner I have proposed can show why the law can recognize that it has an important relationship to individual identity without requiring an inquiry into the actual subjective quality of that relationship for any particular person. Radin, in contrasting her view with more abstract notions of the self in liberal theory, argues that ‘[p]ersonal property is important precisely because its holder could not be the *particular* person she is without it.’<sup>26</sup> My alternative account of the personhood intuition instead retains a normative focus on the abstract self and argues that property can be important for one’s *capacity* for identity formation, especially once we understand the self as social and identity as tied up with important social relationships that can be

24 Harris argues that most of Radin’s claims regarding dwellings are better understood in terms of privacy and that truly plausible personhood claims are quite rare. Harris, *Property and Justice*, supra note 4 at 223 and n. 35.

25 Indeed, Radin, *Reinterpreting Property*, supra note 1 at 42, acknowledges that many of the items we ‘unhesitatingly consider personal,’ such as photos and heirlooms, are ‘connected with memory and the continuity of self through memory.’ A discussion of such items is beyond the scope of this essay, which focuses on real property rather than chattels.

26 *Ibid.* at 45 [emphasis added]. Radin acknowledges that the law does not respect this relationship if an individual is self-invested in an object ‘*in the wrong way or to too great an extent*’: *ibid.* at 38.

fostered by control over the places in which these relationships unfold. Rights of access allow individuals to have some control over the type of relationships that might unfold, thereby playing an important role in our capacity to choose relationships. Protecting this capacity is important quite apart from the question of whether particular instances of these relationships in fact develop, let alone whether they develop in ways that turn out to be constitutive of our identity.

It is important not to conclude too much from this argument. While property rights may play an important role in the capacity for individual identity formation, there are other ways in which the law can protect this capacity. Given the close ties between the idea of choosing relationships and ideas of privacy, protecting privacy directly rather than through property rights is a clear option. A discussion of the relationship between property and privacy is beyond the scope of this essay, but the jurisprudence on privacy is full of examples recognizing the individual privacy rights of non-owners in relation to some places such as hotel rooms.<sup>27</sup>

Although identity concerns provide a fragile basis for justifying basic property entitlements, they can more easily play a role in justifying limitations on traditional property rights. By providing an alternative theoretical account of the personhood thesis, I hope to have made this justificatory task easier. Instead of importing considerations of a different nature to many (but not all) theories of property, my account places the personhood intuition within theories that ground basic property rights in social relations, and does so in a manner that focuses on objective capacities rather than actual subjective relationships. In this way, arguments that invoke personhood concerns to limit property rights can be presented within the same formal structure of concerns that justify basic property entitlements in the first place. This also makes the personhood intuition less vulnerable to criticisms regarding whether there is sufficient empirical evidence to support the claim that most individuals are in fact psychologically attached to their homes.<sup>28</sup>

The following section shows how this account of personhood and direct social relations can also help to illuminate the connection between access to public places and the formation of community, and speculates on how this might affect how we view expropriation rules. The subsequent section shows how the analysis of both individual and community interests of the type outlined in this paper demonstrates why privately owned but publicly used places, such as shopping malls,

27 *R. v. Wong*, [1990] 3 S.C.R. 36 (hotel room); *R. v. Dymnt*, [1988] 2 S.C.R. 417 (hospital); *R. v. Edwards*, [1996] 1 S.C.R. 128 (third-party premises).

28 See S.M. Stern, 'Residential Protection and the Legal Mythology of Home' (2009) 107 *Mich.L.Rev.* 1093 [Stern, 'Residential Protection']; D.B. Barros, (2009) 'Legal Questions for the Psychology of Home' 83 *Tul.L.Rev.* 645.

raise important domination concerns that might affect how we view legal rules regarding rights of exclusion. In both cases, the focus is not on providing a detailed analysis of the way in which any particular legal rule should change but, rather, on outlining a new justificatory basis for thinking about possible limitations to traditional property rules.

#### B COMMUNITIES AND PUBLIC SPACES

While a focus on the home and the right to exclude can help to bring out the way in which property rights are connected to direct social relations and individual identity, this focus on individual interests risks obscuring the more communal dimensions at stake once we shift to thinking about direct social relations. 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 may 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 a certain kind of neighbourhood community that I will call ‘casual community.’

Some authors looking to ground community interests in particular locations have turned to Radin’s work for inspiration. For example, legal geographer Nick Blomley has used Radin’s work to articulate community-based interests in relation to Vancouver’s Downtown Eastside, where ‘area activists invoke a sense of collective moral “investment” in the landscape.’<sup>29</sup> However, by replacing self-investment in objects with community investment in places, such versions of Radin’s thesis risk seeing community interests solely in terms of a kind of collective emotional attachment to a particular place. In addition, I argue that collective access to some places also fosters direct social relations that are important to the very forming and sustaining of community, irrespective of whether the resulting community has emotional or psychological ties to that place. My point is to show that there is a connection between property rights in relation to places and the kind of direct social relations that can occur in those places. Because of this, considerations related to such social relations should play a role in justificatory arguments regarding the limitations on some property rights. Although determining the strength of these considerations in particular contexts is beyond the scope of this essay, my position opens a potentially fruitful space for dialogue

29 Nicholas Blomley, ‘Landscapes of Property’ in Nicholas Blomley, David Delaney, & Richard T. Ford, eds., *The Legal Geographies Reader* (Oxford: Blackwell, 2001) 118 at 123.

between property theory and other disciplines that have explored the relationship between the individual, communities, and place.<sup>30</sup>

Returning to the example of the home as a starting point, we can argue that the loss of one's home also involves the loss of one's place within a broader neighbourhood. We can understand the importance of this in Radin's terms in relation to one's subjective 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 direct 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 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>31</sup>

The kinds of neighbourly relationships that will flourish in different neighbourhoods depend, in part, on the nature of the public space connecting the various private homes. For some, to move locations 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 and thereby maintain our social relationship. But we cannot have the *same* relationship – the largely cordial street

30 This includes sociological work on social networks and, in particular, informal networks. See Robert D. Putnam, *Bowling Alone* (New York: Simon & Schuster, 2000) at 93ff. It also includes work from phenomenology, urban planning, architecture, and psychology. See Henri Lefebvre, *The Production of Space*, trans. by Donald Nicholson-Smith (Oxford: Blackwell, 1991); Donald Appleyard, *Livable Streets* (Berkeley: University of California Press, 1981); Amos Rappoport, *Human Aspects of Urban Form: Towards a Man-Environment Approach to Urban Form and Design* (Oxford: Pergamon Press, 1977); D. Cantor, *The Psychology of Places* (London: Architectural Press, 1977). See also the social science literature cited in Stern, 'Residential Protection,' supra note 28.

31 Jane Jacobs, *The Death and Life of Great American Cities* (New York: Vintage, 1992) at 62–5 [Jacobs, *Death and Life*].

relationship in which 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 skateboard. It is an informal, daily set of relationships that are quite satisfying but that 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 particular relationships and social networks that depend on the casual interaction made possible by the features of that particular location.

It is true that an individual can form new casual relationships and networks in new locations, so long as those locations have the kinds of public spaces connecting private spaces that make these relationships possible. However, success at this can be highly dependent on the nature of the neighbourhood in relation to one's stage of life. For example, if you are forced to move after your children have grown and the most important public space in both your old and your new neighbourhood is the local playground, then it will be difficult to form equivalent casual social relationships when the basis for doing so – taking your children to the playground – is no longer a central focus of your life. Exchanging sidewalk pleasantries on the way to the corner store is different if that is your only exchange with your neighbour than if it is situated within a shared history of playground interactions.

This account of public spaces and neighbourhoods also provides the basis for understanding how the very existence of a community might depend on access to public space. To understand how, consider the different ways in which we might describe a community of parents in relation to a particular school. Parents might feel 'invested' in the school for a variety of reasons. They might appreciate the role that it plays in educating their children, they might enjoy attending school plays and sports events, and they might even actively participate by volunteering for a variety of activities. All of these ways of connecting to the school can be articulated within a community-based version of Radin's personhood thesis. However, if we look at the idea of direct social relations that occur in public places, then we can also identify a different kind of parent community formed in relation to the school. Suppose that you walk your child to school on neighbourhood sidewalks and, once there, remain in the schoolyard 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 schoolyard. 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 may consist solely in saying 'Hi' to other kids and parents. However, it might form the basis for, or otherwise contribute to, much stronger forms of social

networks and social capital. Note that this community is rooted to a particular place because it depends upon using shared spaces for interaction. The casual community can arise only 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.

This analysis of the importance of public spaces can help to explain what is lost when an entire community faces dislocation as a result of 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, Laura 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>32</sup> Nicholas 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>33</sup> Amnon Lehavi points to the need to create incentives for individuals to invest time and effort into making what he calls 'local public commons' successful.<sup>34</sup>

General political involvement, potential incentive effects, or the honouring of a kind of longstanding connection to, and investment in, place may all be of some importance, depending on the context. 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 may not be easily reproduced in a new location and can therefore be vulnerable to destruction by redevelopment plans. Noting this does not mean endorsing the existence of such networks as always leading to either a robust community or one that could be considered positively according to various measures. The point is simply that the nature of the social interactions that occur in a neighbourhood should 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 of Halifax in the late 1960s. Africville was considered a 'slum' by many. As a

32 *Kelo v. City of New London*, 545 U.S. 469 (2005); Laura S. Underkuffler, 'Kelo's Moral Failure' (2006) 15 Wm. & Mary Bill Rts.J. 378.

33 Blomley, 'Landscapes of Property,' supra note 29; Nicholas Blomley, 'Enclosure, Common Right and the Property of the Poor' (2008) 17 Soc. & Leg. Stud. 311.

34 Amnon Lehavi, 'Property Rights and Local Public Goods: Toward a Better Future for Urban Communities' (2004) 36 Urban Law 1. See also Amnon Lehavi, 'Mixing Property' (2008) 38 Seton Hall L.Rev. 137; Amnon Lehavi, 'How Property Can Create, Maintain, or Destroy Community' (2008) 10(1) Theor. Inq.L. 43.

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>35</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>36</sup>

This negative judgement 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 by the city – not only did the neighbourhood 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>37</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 Donald Clairmont and Dennis 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>38</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>39</sup>

Although the sense of community that was lost has many sources – including strong kinship ties, 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

35 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 & Dennis William Magill, *Africville: The Life and Death of a Canadian Black Community*, 3d ed. (Toronto: Canadian Scholar's Press, 1999) at 135ff [Clairmont & Magill, *Africville*]. In fact, the land is now Seaview Memorial Park.

36 *Ibid.* at 279ff.

37 There were many different official rationales for why some of these services, such as water, could not be provided; these turned out to be false. *Ibid.* at 135ff.

38 *Ibid.* at 285.

39 *Ibid.* at 273.

residents.<sup>40</sup> First is the importance of the church, called by some ‘the living, breathing soul of our community,’ which functioned not only as a place of worship but as a place where important community meetings and activities were held.<sup>41</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>42</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 Genealogical 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>43</sup>

When such a community becomes geographically dispersed, the informal and casual connections between people that help 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.

Identifying the fact that community relationships and social networks depend, in part, on the kinds of casual interactions made possible by access to public spaces does not imply that the law must always actively protect such places or such communities. However, it is an important consideration that the law is justified in taking into account when

40 See Africville Genealogical Society, *The Spirit of Africville* (Halifax: Formac Publishing, 1992).

41 See Charles R. Saunders (with the help of many others), ‘A Visit To Africville’ in Africville Genealogical Society, *The Spirit of Africville* (Halifax: Formac Publishing, 1992) 15. When the ‘relocation’ occurred, the church was razed early in the morning when nobody was around: *ibid.* at 88.

42 This was no doubt intensified by the strong kinship ties between individuals; see Clairmont & Magill, *Africville*, *supra* note 35 at 45. The social structure also included many extended families, for example, a nephew or grandchild living with an older couple: *ibid.* at 62.

43 Linda Mantley, quoted in Africville Genealogical Society, *The Spirit of Africville*, *supra* note 40 at 92. It is interesting to note that the former residents now hold an annual three-day reunion on the site.

determining limits to the scope of traditional property doctrine. For example, in contexts similar to Africville this argument might bolster social justice claims as to why some redevelopment efforts should not take place at all by highlighting the likely loss of community and exposing the fragility of any easy claim about the potential success of relocation. If the legal question is one regarding compensation for expropriation, this analysis suggests that payment to an individual for the fair market value of a home may not adequately measure either the individual's or the community's loss.<sup>44</sup> However, the main point of this discussion for this essay is not to make practical suggestions for particular legal rules but to make a broader theoretical point about property law: property rules regarding access to places have an impact on the type of community that can form and flourish in those places, and this impact should play a role in arguments about the scope of those rules.

#### C DOMINATION CONCERNS: PRIVATELY OWNED AND PUBLICLY USED PLACES

J.W. Harris has argued that the domination-potential of ownership is 'by far the most significant of the anti-property freedom arguments' and may, depending on a variety of contextual factors, justify property-limitation rules.<sup>45</sup> In this section I argue that the above discussions of individual identity and community formation can show why privately owned but publicly used places, such as shopping malls, raise this issue of domination-potential by allowing owners to control the direct social interactions that occur there. This concern provides the basis for my argument that the traditional common law right of exclusion should be tempered in this context by a requirement that the exercise of the right be 'reasonable.' However, as I outline below, the strength of this argument depends on a variety of contextual factors.

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>46</sup> Often arguments about the need to limit this traditional common law position in the context of publicly used places focus on the speech interests of users.<sup>47</sup> If the speech at stake is related to a labour dispute, then this is sometimes also framed in

44 See Gideon Parchomovsky & Peter Siegelman, 'Selling Mayberry: Communities and Individuals in Law and Economics' (2004) 92 Cal.L.Rev. 75, for several interesting suggestions.

45 Harris, *Property and Justice*, supra note 4 at 272, 275.

46 *Appleby and others v. United Kingdom*, [2003] E.C.H.R. 44306/98 [*Appleby*].

47 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

terms of labour relations.<sup>48</sup> However, if we also think of property rights as regulating access to places where a variety of direct social relations take place, then other user interests come to the fore.

Just as we saw 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 example, 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 for a small 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 engenders can be important. As 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>49</sup> Providing an alternative between intimate relationships and *no* relationships, such public spaces facilitate social relationships that can create familiarity and trust among diverse individuals and groups who would otherwise remain isolated from one another. Such civic benefits can even translate into economic benefits.<sup>50</sup>

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 privacy. 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. But 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 Alan 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

views through other means. Given this fact, there was no failure of any positive obligation to protect freedom of expression.

48 *Harrison v. Carswell*, [1976] 2 S.C.R. 200 [*Harrison*].

49 Jacobs, *Death and Life*, supra note 31.

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

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>51</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>52</sup>

While a mall may serve a 'privacy' function for some individual users, it does not do so for owners.<sup>53</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 acting on behalf of the owner) excludes a youth simply on the apprehension that he or she is likely to misbehave, or is 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. In fact, in permitting general public access the mall owner signals, in a very public way, that the particular identity of users does not matter in relation to using the space.<sup>54</sup> Economists would argue that unless shopping-mall owners can have control over *who* shops at their sites, they may not be able to fully

51 Alan F. Westin, *Privacy and Freedom* (New York: Atheneum, 1967) at 31.

52 Mark L. Joseph, Robert J. Chaskin, & Henry S. Webber, 'The Theoretical Basis for Addressing Poverty through Mixed-Income Development' (2007) 42 *Urban Affairs Review* 369.

53 This consideration formed an important part of the reasoning in Laskin J.'s dissent in *Harrison*, *supra* note 48.

54 There is potentially an interesting analogy with the 'touch and concern' doctrine in relation to restrictive covenants in Canadian law. See *Noble 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 or 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, 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.

maximize their profits in relation to their property. For example, a well-heeled shopper may 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 about maximizing profits refers not to any particular use itself, rather, but to *who* uses. It is therefore a claim to maximize profits by controlling the types of social interactions that occur in the mall, not the types of uses. This kind of social control can result in significant negative externalities of the kind outlined in relation to individual and community interests, and these need to be factored into the analysis.

For all of these reasons, allowing an unfettered right to exclude in the shopping-mall context allows the mall owner to have influence over the types of social relations that take place within the shopping mall. Depending on one's theory of property rights, this influence is not easily justified by her interest in the use of the space and can have detrimental effects on individual and community interests in those social relations. The extent of such negative consequences may depend on the availability and nature of other publicly accessible spaces that can fulfil such functions of fostering civic diversity and providing a kind of individual privacy. But here Joseph Singer's arguments regarding the reliance interests created by some property uses are apposite.<sup>55</sup> 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>56</sup> What this suggests is that where shopping malls serve important public-space functions, one could argue that owners should be able to exclude only those individuals who are interfering with the *use* of the space as a shopping mall; 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 should have not an absolute right to exclude but, rather, a right to exclude in order to protect the use of the place for the purposes that have been designated.

#### IV *Conclusions*

Radin's critique of the economic argument for property rights opened up an important path for thinking about property and the ways in which it is tied up with personhood. In continuing down this path, this essay has

<sup>55</sup> Singer, 'Reliance Interest,' *supra* note 8.

<sup>56</sup> For example, in *Appleby*, *supra* note 46, the mall at issue had come to function as the town centre, and included a number of public services.

nonetheless sought to provide an alternative account of Radin's personhood intuition, shifting its focus to a different, but related, set of concerns. I have argued that the reason that places like the home are important for selfhood is their role as the location of important, even constitutive, direct social relations. Property rights in relation to the home provide rights holders with the ability to both choose those social interactions and control their terms. Although this account does not necessarily deny that individuals may also have important attachments to their homes of the type that Radin describes, its normative focus is on direct social relations, rather than on person–thing relations, and on the way in which property rights affect an individual's objective capacity for these social relations. Moreover, I have argued that a focus on direct social relations that occur in some locations can help us understand why the existence of some communities is intrinsically tied to some locations and their public accessibility. These insights into the relationships between property rights and both individual identity and community constitution can also show why some types of property – privately owned but publicly used – raise concerns about the potential for owners to unduly dominate the social relations that take place there. My account therefore provides an alternative framework for arguments regarding limitations on the scope of some traditional property rights, which I hope will open Radin's critical path to a broader debate about the importance of place.

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