

Laying Bare an Ethical Thread: From IP to Property to Private Law?

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## I. Introduction

To what extent is law supposed to be moral? Holmes had famously said that law was for the bad man, or, I suppose, had to at least be comprehensible as being in those terms. HLA Hart did not go that far but certainly posited, like either positivists “soft” or “hard”<sup>1</sup>, at least some degree of separation between law and morality. Fuller, on the other hand, challenged that notion, claiming that law had a “morality of aspiration”<sup>2</sup>. Some natural law theorists have gone further, claiming that law is a moral exercise, whether or not they make the claim that *lex injusta non est lex*.<sup>3</sup>

I wish to make a more limited claim: that how we, as a society, deal with property resources – objects of social wealth, to use the term employed by the late Jim Harris<sup>4</sup> – is part of a moral context that reflects our values as a society or community.<sup>5</sup> Indeed, I would go further to add that such a moral context imports what have been called the “social obligations”<sup>6</sup> of property. Property rights are not unlimited. In examining how and why private property institutions ranging from ownership of land to ownership of a copyright are limited and indeed *channelled* or *directed*, and in analysing what justifications are offered for this in practice and theory, we inevitably expose larger ethical and moral principles: the common good, the development of individual goods, etc.

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<sup>1</sup> There is a wealth of writing on positivism and its various sub-classifications, and their differences, real and perceived. To begin, see MATTHEW H. KRAMER, IN DEFENSE OF LEGAL POSITIVISM: LAW WITHOUT TRIMMINGS (2003).

<sup>2</sup> LON L. FULLER, THE MORALITY OF LAW 3-32 (1964).

<sup>3</sup> See, e.g., Michael S. Moore, *Law as a Functional Kind*, in NATURAL LAW THEORY: CONTEMPORARY ESSAYS (Robert P. George, ed., 1992); and *A Natural Law Theory of Interpretation* 58 S. CAL. L. REV. 277 (1985). On *lex injusta non est lex*, see JOHN M. FINNIS, NATURAL LAW AND NATURAL RIGHTS 351-366 (1980).

<sup>4</sup> The term is from J.W. HARRIS, PROPERTY AND JUSTICE I (1996). I have used the term “property-as-object” to describe the use of the word “property” in reference to such objects. Similarly, I use the term “property-as-relationship” to refer to instances where the word property is used to describe a relation between or among individuals through a given object of social wealth: see D. Lametti, *The Concept of Property: Relations through Objects of Social Wealth* 53 U. TORONTO LJ 325 (2003), available at <http://ssrn.com/abstract=1758871> [hereinafter *Concept of Property*].

<sup>5</sup> D. Lametti, *The Objects of Virtue*, in PROPERTY AND COMMUNITY I (Gregory S. Alexander & Eduardo Peñalver, eds., 2010) [hereinafter *Objects*].

<sup>6</sup> To be discussed *infra*. See, e.g., Gregory S. Alexander, et al. *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009); G.S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009); and Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821(2009) [hereinafter *Land Virtues*]. See also PROPERTY AND COMMUNITY (G. S. Alexander & E.M. Peñalver, eds., 2010); and Lametti, *supra* note 4.

Social obligations are most obvious in the various areas of intellectual property, even though we have grown accustomed to using individual, right-based vocabularies to frame IP discourse. As I shall argue, the areas of IP, especially copyright and patent, are all in some way subservient to a very ethical teleology. This teleology is present in the very foundational documents of intellectual property. The same kind of teleology is equally pervasive for private property, as a number of scholars are beginning to point out.<sup>7</sup> This point however requires more excavation to unearth, and the bulk of this essay is focussed on that task. This is the “ethical thread” that I wish to expose. Once here, we have reached a point where we can begin to re-think private law in these terms: beginning with elements fundamental to the law of property, then moving to nuisance (on the cusp of property and civil responsibility), and expanding that scope into contract and tort, we can begin to see more fully what Fuller might have called the “aspirational morality” of private law.

This stance taken is from the perspective of “virtue ethics”.<sup>8</sup> Drawing support from the work of Aristotle and to a lesser extent Aquinas, and re-cast by a new generation of scholars,<sup>9</sup> virtue ethics purports to provide guidelines or the right questions to ask in a situation of ethical decision-making. These situations challenge us as actors to adopt an ethical stance and act accordingly, and in doing so force us in effect to define and better ourselves. Such decisions, following Aristotle’s concept of practical reasonableness and attention to context, makes the context or “positionality” of the ethical decision-maker central to deciding how to act in any given circumstances.<sup>10</sup> That is to say, first, all norms are culture-relative and supported by intuitions that are grounded in these community traditions; and, second, these norms are understood and inculcated in the members of a community over time. The hermeneutic tradition that supports this understanding of normativity and the transmission of norms will not necessarily tell agents –us – what the right answer is in all cases, but rather will help us to find the right answer for ourselves. Although set

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<sup>7</sup> See the various works cited *id*, and especially, Lametti, *supra* note 5; Peñalver, *supra* note 6 (property can’t be understood without a relatively thick theory about the sorts of values that people are likely to pursue).

<sup>8</sup> For an introduction to virtue ethics see STAN VAN HOOFT, UNDERSTANDING VIRTUE ETHICS (2006); ROSALIND HURSTHOUSE, ON VIRTUE ETHICS (1999); VIRTUE ETHICS: A CRITICAL READER (Daniel Statman, ed., 1997); and VIRTUE ETHICS (Roger Crisp & Michael Slote, eds., 1997). *See also* ONORA O’NEILL, TOWARDS JUSTICE AND VIRTUE (1996) and CHARLES TAYLOR, THE SOURCES OF THE SELF (1989). *See also* D. Lametti, *The (Virtue) Ethics of Private Property: A Framework & Implications*, in NEW PERSPECTIVES ON PROPERTY LAW, OBLIGATIONS AND RESTITUTION 39 (Alastair Hudson ed., 2003), available at <http://ssrn.com/abstract=1758893>.

<sup>9</sup> As identified, *id*.

<sup>10</sup> The best discussion of “positionality”, in my view, remains Katherine Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV., no. 4, 829-888 (1990). While that article predates the use of the term “virtue ethics” the Aristotelian and neo-Aristotelian sources cited in the text and the substance of the argument indicate that Bartlett’s positionality narrative fits well within the description of virtue ethics.

rules form part of the basis for what it means to act virtuously,<sup>11</sup> rules are often less-than-clear, incomplete, contradictory, and opaque; hence rule-following is incomplete as an ethical stance, outlook or way-of-life.<sup>12</sup> Put simply, we need to do more than follow rules in order to do what is right.<sup>13</sup> Finally, this approach allows for the ethics of a set of legal norms to evolve over time, as societal contexts and underlying moralities (usually slowly) evolve.

The strength of virtue ethics and its contextual positionality is that it helps individuals order their daily decision-making. It demands enlightened, self-reflective and self-critical individual judgment, all in service of the balanced decision-making that Aristotelians and neo-Aristotelians have favoured in their ethics. Of course, the drawback of contextual analysis is that it might be used to justify less-than-virtuous behaviour. But within an interpretive community, these types of decisions will go against the grain of the ever-evolving moral base and the formal and informal norms that it supports and will be identified as outliers or as just plain wrong. So notwithstanding this sort of “situational ethics critique”, the ethical stance based on virtue is sufficiently thick, known and understood to be an effective guide, and, I shall argue, helps inform current practice in both intellectual and common law property (the descriptive claim) and also points the direction in which these areas ought to evolve (the normative claim).

## II. The Ethics of Intellectual Property<sup>14</sup>

The virtue ethics of intellectual property are in plain view. First, IP rights are clearly limited. While most citizens, legislators and scholars are now comfortable with the idea of labeling intellectual property rights as *property* rights in the sense that they have economic value<sup>15</sup>, have an *in rem* and partly exclusive nature, and are treated as such in statutes<sup>16</sup> as well as in practice,<sup>17</sup> this is by no means accompanied by

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<sup>11</sup> Bartlett notes that rules act as a check on arbitrariness and represent past wisdom: *id.* at 850.

<sup>12</sup> According to Bartlett, all truth is situated and partial: *id.* at 851.

<sup>13</sup> Of course, following Aristotle and seeing “law” as a combination of “law” and “equity” (*epikeia*), then a virtue ethics is necessary for all law (or indeed law ought to be an instantiation of virtue ethics), and especially for judging. See Lawrence Solum, *A Virtue-Centered Account of Equity and the Rule of Law*, in VIRTUE JURISPRUDENCE 142-166 (Colin P. Farrelly & L.B. Solum eds., 2008).

<sup>14</sup> This discussions tracks in part what I have written in D. Lametti, *The Virtuous P(eer): Reflections on the Ethics of File Sharing*, in NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY 284 (Annabelle Lever ed., 2012).

<sup>15</sup> Or, in civil law terms, are “patrimonial”.

<sup>16</sup> The Canadian Copyright Act, R.S.C. 1985, c. C-42, Trade-mark Act, R.S.C. 1985, c. T-13 and Patent Act, R.S.C. 1985, c. P-4 all use the term “ownership”.

<sup>17</sup> Think only of the use of IP rights as collateral for secured lending.

the underlying idea that such rights must be absolute.<sup>18</sup> Numerous courts and scholars have noted, in the common law tradition, the statutory origins of the rights in question and the fact that such rights are not rights *in gross*. In theory and in practice, there are serious limits on all forms of intellectual property. Moreover, various substantive doctrines, notably fair use or fair dealing in copyright or patent misuse in patent law, have further emphasized this seemingly banal point by limiting even more specifically the exercise of rights by a right-holder. Even those intellectual property rights that have their origins not in statute but in the common law, such as passing off, are by no means unlimited.<sup>19</sup>

More than merely accepting the presence of limits on IP rights, one needs to acknowledge and underscore the very explicit, very ethical teleology of the various kinds of intellectual property, especially that of patent and copyright. The self-stated purpose of these intellectual property rights is to favour artistic creativity and the promotion of useful inventions, as evidenced in a variety of foundational documents. *The Statute of Anne*, the first copyright statute in the UK and the common law tradition, in its preamble states that the Act's purpose is for "the Encouragement of Learning."<sup>20</sup> The Constitution of the United States, in protecting patent and copyright under federal jurisdiction, does so in order "to promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."<sup>21</sup> The first US federal *Copyright Act of 1790* picked up the language of the Statute of Anne, and was "an Act for the encouragement of learning, by securing the copy of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." Thus in both copyright and patent there is an idea that, in its barest terms, intellectual

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<sup>18</sup> D. Lametti, *The Concept and Conceptions of Intellectual Property as seen through the lens of Property*, in SCIENZA E DIRITTO NEL PRISMA DEL DIRITTO COMPARATO 269 (G. Comandé & G. Ponzanelli, eds. 2004), available at <http://ssrn.com/abstract=1758894>.

<sup>19</sup> Passing off, of course, is limited by the use of the mark and the context in which it was used. But it should always be (or have been) understood as not going beyond these limited parameters. See e.g. Jessica Litman, *Breakfast with Batman: The Public Interest in the Advertising Age*, 108 YALE L.J. 1717 (1999); Mark A. Lemley, *The Modern Lanham Act and the Death of Common Sense*, 108 YALE L.J. 1687 (1999); and Stacey L. Dogan & M.A. Lemley, *The Merchandising Right: Fragile Theory or Fait Accompli?* 54 EMORY L.J. 461 (2005). Shyamkrishna Balganesch has argued that we might return, fruitfully, to the methodology and substance of the common law of IP, still present in interstitial state law. But this too is not an argument for absolute IP rights across the various domains, but rather it posits a system in which rights are discerned through a process of "pragmatic incrementalism": see S. Balganesch, *The Pragmatic Incrementalism of Common Law Intellectual Property*, 63 VAND. L. REV. 1543 (2010).

<sup>20</sup> An Act for the Encouragement of Learning, by Vesting the Copies of Printed Books in the Authors or Purchasers of such Copies, During the Times therein mentioned, 1710, 8 Anne, c.19.

<sup>21</sup> U.S. CONST. art. I, § 8, cl.8. Note that this provision also underscores the limited nature of these exclusive rights by positing a limited time on exclusivity and focusing in the utility of the invention (even if the US Supreme Court has in effect held that even lengthy terms of copyright protection are still "limited": see *Eldred et al. v. Ashcroft*, Att'y Gen., 537 U.S. 186 (2003), 239 F.3d 372).

property protection is overtly consequentialist: the according of certain and limited exclusive (and thus property-like) rights is done in order to foster specific desirable and indeed ethical goals.

Certainly, one might take an impoverished view of the above and reduce the idea of progress and incentives simply to economic terms. This reduction, however, would not accurately describe the full amplitude of the notion of progress or creativity that underlies intellectual property. A fuller idea would include intellectual, innovative, technical and artistic progress and their ties to the promotion of knowledge, learning and the advancement of scientific and artistic ideas,<sup>22</sup> human flourishing,<sup>23</sup> social benefits,<sup>24</sup> or to the role that a robust public domain of ideas necessarily has in providing the backdrop for progress.<sup>25</sup> These institutions are not uniquely about according economic rights to the creator, but rather are about the process or “bringing about” of the creation itself: the promotion of the useful arts and science, and the encouragement of learning. This is not something that can be measured in simple *utils*. Rather, there is an ethical direction to the whole of these institutions. This is exemplified in the balance of according rights limited scope in exchange for promoting the public’s access to the arts and providing incentives for authors, all in service of the public good.

Perhaps the best illustration of this point is the discussion regarding a central limitation of copyright: fair use or fair dealing. That voluminous discussion of what is either a central limit to copyright’s property-like rights or an instance of “users’ rights”<sup>26</sup> is an explicitly moral discussion. A glance at s. 107 of the US Copyright Act and its criteria for fair use brings out this ethical picture quite nicely. The purposes which

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<sup>22</sup> See, e.g., Michael J. Madison, *Beyond Creativity: Copyright as Knowledge Law*, 12 VAND. J. ENT. & TECH L. 817 (2010) (knowledge and learning as the central goals of copyright norms); *Beyond Invention: Patent as Knowledge Law*, 15 LEWIS & CLARK L. REV. 71 (2011) (knowledge and learning as the central goals of patent); and *Knowledge Curation*, 86 NOTRE DAME L. REV. 1957 (2011).

<sup>23</sup> See, e.g., William W. Fisher III, *The Implications of Law of User Innovation*, 94 MINN. L. REV. no. 5 1417, 1463 (2010) (human flourishing as a part of the law of copyright); Abraham Drassinower, *Copyright Infringement as Compelled Speech*, in *NEW FRONTIERS IN THE PHILOSOPHY OF INTELLECTUAL PROPERTY* (Annabelle Lever ed., 2011).

<sup>24</sup> See Brett M. Frischmann, *Spillovers Theory and Its Conceptual Boundaries*, 51 WM. & MARY L. REV. 801 (2009) for how social benefits of IP depend on spillovers for which standard economic utilitarian theories cannot account.

<sup>25</sup> See Jessica Litman, *The Public Domain* 39 EMORY L.J. 965 (1990); J. BOYLE, *THE PUBLIC DOMAIN: ENCLOSING THE COMMONS OF THE MIND* 179 (2008) (on the intellectual commons as a source for creative work); LAWRENCE LESSIG, *THE FUTURE OF IDEAS: THE FATE OF THE COMMONS IN A CONNECTED WORLD* (2001); and BRETT FRISCHMANN, *INFRASTRUCTURE: THE SOCIAL VALUE OF SHARED RESOURCES* 333 (2012) .

<sup>26</sup> *CCH Canadian Ltd. v. Law Society of Upper Canada*, 1 S.C.R. 339 (2004) (effectively importing into Canadian “fair dealing” jurisprudence a US-like “fair use” test, and pitching fair dealing not as a mere limitation but as a user right).

justify fair use – “criticism, comment, news reporting, teaching (including multiple copies for classroom use, scholarship, or research” – are purposes that go to the heart of what we feel our society is about: knowledge and knowledge transfer, public debate and discourse, teaching, scholarship and learning. The enumerated factors that follow in that provision are meant to provide a basis for making such determinations: in its channelling of factors, the fair use test is necessarily embedded in positionality or context.

Another interesting example is the emerging doctrine of copyright misuse. Based on the notion of patent misuse, copyright misuse has increasingly been cited as a check or a brake upon the unfettered rights of copyright holders, *even within the normal scope of rights held*. The parameters of the doctrine are being worked out, but what is of significant interest is the focus on the actions of the right holder and the purposes for which the actions were taken.<sup>27</sup> Thus in Canada, the actions of a chocolate maker were scrutinized under this doctrine when copyright was used to vindicate a putative right where neither trademark nor competition law afforded a remedy and where the competitor broke no laws.<sup>28</sup> In the views of some scholars, in this David and Goliath scenario, the large chocolate maker was merely being unethical as regards the competition from the smaller (legal) importer.<sup>29</sup> An obvious parallel is the concept of abuse of rights, or *abus de droit*, in the civil law tradition (a doctrine which, as is argued below, may very well be seeping into the common law, or has indeed already crept in from time to time).<sup>30</sup>

This is true at the formal level – copyright statutes, cases, treaties and such – but increasingly in intellectual property circles, a great deal of behaviour that is being channelled by virtue ethics is being

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<sup>27</sup> See generally Kathryn Judge, *Rethinking Copyright Misuse*, 57 STAN. L. REV. 901 (2004): in her view any attempt by a copyright holder to effectively expand the purview of copyright protection to gain control over an idea or deter fair use constitutes misuse. For an application to digital copyright, see Dan L. Burk, *Anti-Circumvention Misuse* 50 UCLA L. REV. 1095 (2003). For a specific application to the idea of asserting non-existent (copy-) rights, see: Jason Mazzone, *Copyfraud* 81 N.Y.U. L. REV. 1026 (2006).

<sup>28</sup> *Euro-Excellence Inc. v. Kraft Canada Inc.*, 3 S.C.R. 20 (2007), 2007 SCC 37 (Can.) (concurring reasons of Bastarache J. and the warning expressed regarding copyright over reach in the concurring reasons of Fish J.) The majority dismissed the copyright “abuse” claim on technical grounds.

<sup>29</sup> Pierre-Emmanuel Moyse, *Kraft Canada c. Euro-Excellence : l'insoutenable légèreté du droit*, 53 MCGILL L.J. 74 (2008), available at <http://ssrn.com/abstract=1761002>; and A. Drassinower, *The Art of Selling Chocolate: Remarks on Copyright's Domain*, in FROM "RADICAL EXTREMISM" TO "BALANCED COPYRIGHT": CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 121 (Michael Geist ed., 2010).

<sup>30</sup> *Contra* Larissa Katz, *A Jurisdictional Principle of Abuse of Right* (8 February 2010), available at <http://ssrn.com/abstract=1417955>.

done via informal norms,<sup>31</sup> or “copynorms”.<sup>32</sup> This helps foster the ethic of sharing and exchange in the context of Creative Commons, Open Access publishing and Open Source computing.<sup>33</sup> In many of these cases, the informal norm not only contradicts the formal norm, but also takes precedence within the practising community of programmers, creators, gamers, etc.

What is critical to all of these discussions – the scope of rights, the nature of limitations, doctrines such as fair use and misuse – is context. In all of these instances, there is a requirement to look at the context of right-holders and non-right-holders, and come up with a balanced answer based on context or positionality. There is often no clear, bright-line answer that is easily discernable in advance, and hence the resort to a contextualized, ethical assessment. And part of the contextual assessment – a guidepost, if you will – is precisely identifying the ultimate goal or goals to be fostered by the intellectual property norms in question and applying them to the specific circumstances.

Context and positionality *are* the stuff of virtue ethics. In other words, it is a small step from these relatively uncontroversial descriptive points about the nature of patent and copyright, to an understanding of their teleology and context, or to the classification of the ethics of these institutions as an ethics of virtue. My central point here is that this discussion of the teleology of IP is explicitly *moral*, and, while it is very much teleological, any discussion that purports to reduce this teleology to merely acontextual, economic terms will miss much, if not most, of its richness and import, as well as its evolution.<sup>34</sup>

Thus the “virtues” of IP have been rather explicit; they are found in foundational texts, and elaborated in cases and scholarly writing. The question then becomes, if IP is a species or subset of larger property rights, whether we can find traces of these kinds of ethical considerations in the common law of property. And if so, what impact would the presence of this underlying ethics of the common law – this moral

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<sup>31</sup> See generally Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338 (1997); Mark Schultz, *Copynorms: Copyright Law and Social Norms*, in INTELLECTUAL PROPERTY AND INFORMATION WEALTH: COPYRIGHT AND RELATED RIGHTS 201, 309 (Peter Yu ed., 2007); Lior J. Strahilevitz, *Charismatic Code, Social Norms, and the Emergence of Cooperation on the File-Swapping Networks*, 89 VA. L. REV. 505 (2003); and Dan M. Kahan, *The Logic of Reciprocity: Trust, Collective Action, and Law*, in John M. Olin Center for Studies in Law, Economics, and Public Policy Working Papers, paper 281 (2002).

<sup>32</sup> The term is employed by M. Schultz, *id.* and L. Solum, *The Future of Copyright* (Review of Lawrence Lessig, FREE CULTURE), 84 TEX. L. REV. 1137 (2005).

<sup>33</sup> See generally the sources cited *supra* note 25, as well as in Lametti, *supra* note 14.

<sup>34</sup> Indeed, this might very well be the *ethical* problem with the DMCA and other copyright-plus or paracopyright initiatives: they depart quite markedly from the traditional teleology of copyright.



teleology, if you will – have on both the current understanding and the law of property or on its future development?<sup>35</sup>

### III. The Ethics of Private Property

In the preceding discussion of intellectual property norms – formal and informal – we found that these norms helped to promote, serve, foster, care for or nourish virtues such as creativity, knowledge, education, sharing, as well as individual development and expression. The category of IP did so by recognizing formally in its very foundational texts a direction or teleology meant to enhance such virtues. It does so explicitly by recognizing that intellectual property rights are not unlimited, but rather are specific packages of rights tempered with duties and obligations. Particular formal norms such as fair use are explicitly contextual. Where formal normativity may occasionally tend to emphasize the right, other sorts of formal and informal normativity operate to counterbalance.

Can an ethical thread (or ethical threads) be located or be drawn through traditional property discourse? I would argue that such a thread most definitely can be identified and teased out of current and past property norms and understandings, pushing us to the very core of our understanding of the institution of private property. The same method of looking at foundational concepts and justificatory discourses would be employed.

The starting point in all such discussions is the notion of absolute ownership, but further investigation readily reveals that this notion is limited at its very core. In particular, ownership is an institution that serves important societal and individual goals, and indeed can only be justified when it does so. So as part of the justificatory discourse we find limits and duties associated with resource holding in traditional private property discourse. However, this essay argues more than the obvious assertion that private property rights have limits, and even more than the related but now equally obvious conclusion that private property is necessarily a limited concept.<sup>36</sup> Rather, it argues that an examination of the *reasons* for

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<sup>35</sup> For example, I have applied this analysis in helping to resolve the problems raised by “digital copyright” reforms in Canada that have been inspired by the US Digital Millennium Copyright Act, 17 U.S.C. § 1201 (1998): see D. Lametti, *How Virtue Ethics Might Help Erase C-32’s Conceptual Incoherence*, in FROM “RADICAL EXTREMISM” TO “BALANCED COPYRIGHT”: CANADIAN COPYRIGHT AND THE DIGITAL AGENDA 309 (M. Geist ed., 2010).

<sup>36</sup> Funnily, this was one of my strongest points of disagreement with Jim Harris, who argued that, despite all forms of private property being limited in practice by property-limitation rules, that it was not a limited concept: see D. Lametti, *Property and (Perhaps) Justice*, 23 MCGILL L.J. 665 (1998).

such limits that are offered explicitly or implicitly will explain aspects of the underlying ethics of the institution that are not explicable in simply rights-based terms. These limits on property rights generally, and the specific duties imposed on certain property rights, will be seen to serve larger ethical and moral principles: the common good, the development of individual goods, etc. Hence, one must have resort to an understanding of the kind of goals – here I would insert *virtues* among them – that are served by the institution of private property. These principles govern how human beings should interact with scarce resources.

I have already dealt with many of these issues in theoretical, conceptual terms.<sup>37</sup> The ensuing discussion in this paper focuses on selective aspects of the practice of private property in the common law. These examples build a strong *prima facie* case for the claim that there is an ethical thread running through traditional private property that is similar to the one already seen running through intellectual property, though of course the nature of the virtues served may differ. It is survey of a few private property institutions and thus is not meant to be an exhaustive description of the common law of property; indeed, I am “cherry-picking” easy examples – or, even better in property terms, picking low-lying fruit – in order to identify aspects of what I have called the “*virtue (ethics) of private property*”.<sup>38</sup>

The starting point is ownership. The basic underlying assumption or starting point the common law is that ownership entails rights that are relatively absolute<sup>39</sup> – Blackstone’s “sole and despotic dominion”<sup>40</sup> – and that “property law” is about the identification, description and enforcement of these rights. This assumption is deemed to be true notwithstanding the fact that the dominant bundle metaphor for property is not necessarily so rights-oriented or indeed so inflexible. Thus, adjectives like “full liberal” (Becker) or “full-blooded” (Harris) are the norm in describing the paradigmatic concept of ownership. Even framing the concept of property in terms of exclusivity can lead to this result.<sup>41</sup> Such is the case even though most

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<sup>37</sup> Lametti, *supra* note 4; Lametti, *supra* note 5.

<sup>38</sup> This discussion contains selected and revised excerpts from a more extensive discussion contained in the first part of chapter 3 of my unpublished doctoral thesis: D. Lametti, *The Deon-Telos of Private Property: Ethical Aspects of the Theory and Practice of Private Property* (1999) (unpublished D.Phil. thesis, Oxford University). In that work, I had initially called this idea the *deon-telos* of property in my doctoral thesis. The term was meant to be a placeholder for the idea of “non-rights-based”. In the intervening period, the term “virtue ethics” became current for the same kinds of considerations and with the same theoretical sources, and was close enough in application to what I had wanted to convey. From 2003, I have since begun to use the rubric of virtue ethics more widely: Lametti, *supra* note 8.

<sup>39</sup> Specifically, *dominium*: see an extended discussion in Lametti, *supra* note 4.

<sup>40</sup> 2 WILLIAM BLACKSTONE, COMMENTARIES \*2, though this right was qualified elsewhere “by the laws of the land”: 1 WILLIAM BLACKSTONE, COMMENTARIES \*138.

<sup>41</sup> JAMES E. PENNER, THE IDEA OF PROPERTY (1997); Lametti, *supra* note 36. See also Thomas W. Merrill

writers, practical and theoretical, recognize that private property is not unlimited.<sup>42</sup> A cursory glance at virtually any common law text will yield this predisposition towards rights to some degree.<sup>43</sup> This should come as no surprise, given our intuitive and deeply-held understanding of the property relationship in the Western world. Further, it is evidence of an undeniable fact that modern property law systems reflect quite explicitly the continuing primacy of rights-based explanations for private property, a point that has been elaborated elsewhere.<sup>44</sup>

Such a view is clearly deficient, both in theory and practice: it does not explain all that needs to be explained or understood about the nature of private property, missing important descriptive elements of an institution. I draw support from a growing number of property scholars who recognize this deficiency in rights-based property discourse. A group of property writers have begun to focus on the social obligations of property, analyzing property relations in a contextual fashion, and paying attention to an underlying theoretical discourse that is not rights based.<sup>45</sup> This “progressive” property school is now well established intellectually,<sup>46</sup> and, in a sense, physically.<sup>47</sup> These writers have injected a variety of different ethical concerns into theoretical and practical property discourse.<sup>48</sup>

This paper reinforces this position by demonstrating that accepted limitations on private property rights

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& Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849 (2007); and Thomas Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998).

<sup>42</sup> See, e.g., CHARLES R. NOYES, *THE INSTITUTION OF PROPERTY* 299 (1936); and J.W. HARRIS, *PROPERTY AND JUSTICE* 33 (1996). Becker, in his later work, appears to go even further: see Lawrence Becker, *The Moral Basis of Property Rights*, in *NOMOS XXII: PROPERTY* 231 (J. Rolland Pennock & John W. Chapman eds., 1980).

<sup>43</sup> See for example F.H. LAWSON & BERNARD RUDDEN, *THE LAW OF PROPERTY* 8 (3d ed. 2002) for how property confers rights, while other parts of private law impose duties. Notable exceptions are BRUCE ZIFF, *PRINCIPLES OF PROPERTY LAW* (5th ed. 2010) and KEVIN GRAY, *ELEMENTS OF LAND LAW* (2d ed. 1993) [hereinafter *ELEMENTS*], as well as the articles by Gray and Lucy & Mitchell discussed *infra* note 49. See also KEVIN GRAY & SUSAN FRANCIS GRAY, *ELEMENTS OF LAND LAW* (5th ed. 2009).

<sup>44</sup> Lametti, *supra* note 38 at chs. 4-5.

<sup>45</sup> For an introduction, see G.S. Alexander & E.M. Peñalver, *Properties of Community*, 10 THEORETICAL INQUIRIES IN LAW 127 (2009), as well as *PROPERTY AND COMMUNITY*, *supra* note 6. See also the special edition of 94 CORNELL LR. (2009).

<sup>46</sup> Alexander et al., *supra* note 6.

<sup>47</sup> At the Cornell Law School, where three of the four signatories to the Statement – Gregory Alexander, Laura Underkuffler and Eduardo Peñalver – teach. The fourth is Joseph William Singer of the Harvard Law School.

<sup>48</sup> See the work of Singer, for example: *ENTITLEMENT: THE PARADOXES OF PROPERTY* (2000). See also Eric Freyfogle, *Ownership and Ecology*, 43 CASE W. RES. L. REV. 1269 (1993); *The Construction of Ownership*, U. ILL. L. REV. 173 (1996); William N.R. Lucy & Catherine Mitchell, *Replacing Private Property: The Case for Stewardship*, 55 CUMB. L.J. 3, 566 (1996) [hereinafter *Stewardship*]; K. Gray, *Equitable Property*, 49 CURRENT LEGAL PROBLEMS 157, 161 (1996); and Edward J. McCaffery, *Must We Have the Right to Waste?*, in *NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY* 76 (Stephen R. Munzer ed., 2001). See also Lametti, *supra* note 5; Alexander, *supra* note 6; Peñalver, *supra* note 6.

are less than random, all the while trying to tease out the underlying ethical threads. Property limitations and duties reflect a profound and fundamental fettering of property rights by the larger idea of an underlying morality manifested in property law. This underlying morality in property law is, in my view, partly explained by this emerging concept of *virtue ethics*, along with other moral discourses, as well as traditional utilitarian and rights-based narratives. An “ethics of virtue” helps to channel property rights, as well as property duties, in the service of functional and principled goals.

These ethical or virtuous aspects of formal property rules are manifested generally in two ways. First, notwithstanding the existence of a grand principle expressed in a common law maxim, the rights to or the rights granted by title of ownership (let alone lesser entitlements) are never absolute. Indeed, in practice it is quite the opposite, with ownership subjected to various restrictions either in codified law, rules and principles of the common law or Equity, or in public policy, or in statutory and regulatory restrictions. The point is not merely that private property is limited, but rather *why* and *how* it is limited. Most fundamentally, these restrictions reflect non-individuated “goods” which at times can “trump” rights that individuals might otherwise claim in private property in some circumstances. In some cases, these restrictions might even positively channel the property rights one has by fostering or requiring a certain use, or by imposing duties of stewardship in the exercise of these rights. Contrary to the argument advanced by William Lucy and Catherine Mitchell,<sup>49</sup> private property rights do not conflict with stewardship; rather, both are a fundamental part of property properly understood, and are subservient to the teleology of private property.

Second, there are explicit provisions in the common law that are best grasped only in terms of proper or good behaviour – and hence some form of virtue (via a duty or an obligation to other holders of real rights, or as subservient to some global or local teleology). While these legal norms do not necessarily form part of a coherent taxonomy in the common law – indeed they often appear to be quite idiosyncratic – their presence is enough to illustrate that the law of private property is not only about or explainable in terms of individual rights or protecting the reciprocity of individual rights. As such, these elements and fragments are better understood, along with rights, as an integral element of an explanation or series of justifications for private property containing both rights and duties, and undertaken in pursuit of certain non-individualistic goals. Thus the threads are not so disparate or exceptional; woven together they

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<sup>49</sup> Lucy & Mitchell, *supra* note 48.

exemplify property's virtue ethics.<sup>50</sup>

At this point it is important to underscore the argument that is central to this paper. It is of no great surprise that the rights and powers of private property, as manifested most completely in ownership, are limited, as a number of writers have pointed out. Indeed, it is a fact admitted in all property texts, where it is now trite to say that private property rights are always restricted by specific laws, regulations, etc. The more interesting question, and one that is rarely discussed in depth, is *why* this is the case. That is, in examining how and why private property – specifically the most absolute form of property, namely, ownership – is limited, and in analysing what justifications are offered in practice and theory for limiting property rights (rights which are of capital metaphoric importance to Western society), one goes beyond the merely trite. Indeed, it is in this examination that the teleology of private property becomes clearer. So the limits on property rights generally, and the specific duties imposed on certain property rights, will be seen to serve larger ethical and moral principles: the common good, the development of individual goods, etc. These principles govern how human beings should interact with scarce resources. In other words, I am arguing more than the obvious assertion that private property usually has limits; rather, the argument is that private property is necessarily a limited concept. An examination of the reasons for such limits that are offered explicitly or that are implicit will explain underlying aspects of the institution that are not explicable in rights-based terms: this is property's social dimension, of which virtue ethics is one part. The argument is not that rights have no role, or that duties, goals and virtues are presently excluded from property discourse; rather, the claim is that the role of virtue ethics is presently not properly understood and is thus under-included. As such, we need to re-balance the virtue ethics with the rights-based and utilitarian perspectives, in the same way that copyright and patent have to balance interests: this is property's social dimension, of which an ethic of virtue is a component part. A parallel discussion exists at the level of ethics and justice, and underlies this analysis.<sup>51</sup>

Despite the potentially wide-ranging nature of the types of resources we call property (property-as-object,

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<sup>50</sup> Ultimately, these rules are reflective of the larger ideas exposed in other parts of my work which purport that, to the extent that there are any natural rights to private property, there are also natural duties that flow from some idea of "destination" of the resource; and to the extent that some private property is a creation of the State, its substantive rights, powers and duties can be given out, modified and taken away by the State. Ultimately, private property rights and duties, far from being absolute, are part of a larger, functional and virtue-oriented morality.

<sup>51</sup> The virtue ethics sources have already been cited, *supra* note 8. The "justice" writers include: AMARTYA SEN, *THE IDEA OF JUSTICE* (2009); MARTHA C. NUSSBAUM, *CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH* (2011); and MICHAEL SANDEL, *JUSTICE: WHAT'S THE RIGHT THING TO DO?* (2009).

as seen elsewhere<sup>52</sup>), the focus of this part is on ownership generally, and on land ownership in particular. The discussion is so limited for a number of reasons. First, the fragmented forms of ownership or “lesser estates” are *de facto* limited. In effect, they represent the easy case where duties and obligations to other holders of real rights (in this case, in the same property-as-object) are not only explicit but are subservient to an ethical teleology.<sup>53</sup> In restating the idea that the more expansive notion of ownership is limited and, more importantly, in going on to give the reasons behind these limits, this argument will have met the burden of proof. Second, land ownership has until very recently been the most valuable form of ownership. As a result, much of the legal literature on property law centres around land. Partly as a result of this historical value and critical focus, most of the teleological and deontological elements and fragments I seek to identify deal specifically with land law.<sup>54</sup> Finally, the principles behind these elements and fragments might then be applicable to the other forms of social wealth traditionally governed by “private property”<sup>55</sup> (and as seen above, are also present in IP governance regimes).

Before looking at some of the specific rules and principles regarding ownership, the aspects of the institution upon which the discussion will focus should be clarified more precisely. These aspects divide roughly into what I shall call ethical “elements” and “fragments” of the institution of private property. Aspects of an ethics of virtue are present in all of these component parts of private property, and are critical to their understanding.

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<sup>52</sup> Lametti, *supra* note 4.

<sup>53</sup> This is usually manifested by the use and preservation of the resource; for example, usufruct and emphyteusis in the Civil law.

<sup>54</sup> See JEREMY WALDRON, *RIGHT TO PRIVATE PROPERTY* 34 (1990), who also focuses on corporeals. In addition, the section of the paper is restricted to larger common law principles and jurisprudence. While various statutes, planning and zoning regulations also restrict ownership rights in practice, they are not discussed here. In my view, these sorts of restrictions represent the obvious or easy case of the virtue ethics of practical property law. That is, they explicitly illustrate that private property is limited by community imperatives. These lower level rules, I believe, find their larger explanation or justification in the same wider principles that the argument is trying to identify at the root of ownership in the theory and practice of these two legal systems. To borrow an analogy from Natural law scholarship, they are determinations that, while flexible, must be consistent with the larger, super-eminent principles of law. If this latter case can be made persuasively, the statutory restrictions will have a solid foundation, rendering them less susceptible to claims of illegitimacy *ab initio*.

<sup>55</sup> Hanoch Dagan has identified other regimes, such as marital property, in a larger “property-as-institutions” approach to property. See HANOKH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* 37-75 (2012). I would argue that these kinds of community property schemes are easier cases to illustrate property’s virtues. Hence, my focus is on the traditional ownership paradigm. As regards a conceptual definition for private property, I believe that the institutions approach, while relying on family resemblances (DAGAN xi), is still too loose a concept to withstand the criticisms of the property-as-exclusion theorists. An open-ended, pluralist definition – but still conceptual enough to demarcate property from other areas of law – is possible: see Lametti, *supra* note 5.

By elements, I mean the more general, first-order duties and obligations that form part of the concept of ownership at its core, or in its essence. These elements can only be explained and justified coherently by acknowledging certain overarching deontological or teleological principles, or indeed virtues. These principles are often common to a number of private property systems, and across different jurisdictions within the same paradigm. The full explanation of these core elements provide evidence that private property is a concept which serves various functional ends and ethical purposes, a number of which might be called virtuous. These values and virtues are not monist, but rather form part of a plurality of virtues (and other rights) served by the institution of private property.<sup>56</sup>

By fragments, I mean specific duties attached to more particular incidents of ownership or with regard to particular objects of property. These appear to be less coherent than the core elements in their demonstration of virtues, being more particular to different jurisdictions or even different physical settings. They appear, if you will, idiosyncratic. Nevertheless, any one of these fragments, as well as their sum, might exemplify a more general basic duty or goal, even if that goal is more localized, for instance, if tied to a specific resource. And, as seen in the context of intellectual property, such fragments exhibit the “positionality” that is necessary to understanding facts “on the ground”. The difference may be explained by borrowing from James Penner’s original articulation of property norms: an element is one which may be a criterion of family resemblance for the identification of property in most cases, while a fragment is a criterion only in some cases.<sup>57</sup> Grafting this ethics of virtue onto this Wittgensteinian stance, one might say the rationale underlying an element is a more direct, coherent and systematic example of property’s functional goals and duties, illuminating aspects of private property of a more general nature, while a fragment is an example of particular principles applied to a specific resource.

As with any dichotomy, it is to be expected that the lines of demarcation between elements and fragments are not all that precise; a specific duty may go to limiting ownership at its root. The criterial, family resemblances approach clearly evokes this type of overlap.<sup>58</sup> The main purpose of this taxonomy is to

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<sup>56</sup> Here I am clearly following Dagan’s characterization of property as pluralist: see DAGAN, *supra* note 55, at 57.

<sup>57</sup> James E. Penner, *The "Bundle of Rights" Picture of Property*, 43 UCLA L. REV. 711 (1996). The possibility for Wittgensteinian family resemblances as a means to understanding property had been first identified by Tony Honoré, in his famous article entitled “*Ownership*”: in OXFORD ESSAYS IN JURISPRUDENCE 107 (A.G. Guest ed., 1961). It is now followed by, *inter alia*, myself and DAGAN, *supra* note 55. Penner’s more famous work seems to focus more on exclusion than family resemblance.

<sup>58</sup> Penner, *supra* note 57.

serve as a pointer that helps to identify and organize the argument. In addition, the distinction also illustrates that some duties, goals or functions may be more fundamental than others in identifying and understanding private property's virtue ethics. This classification is also to some extent temporary. If this project is successful, many of the disparate fragments might be bolstered or supplemented or given a theoretical foundation such that they will in fact illustrate larger, more coherent underlying principles of virtue.

### **i. Ethical threads in the history of land ownership**

To understand the basic structure of common law property one must trace, at least superficially, the beginnings of the common law system of landholding.<sup>59</sup> Any discussion of the historical origins of private property in the common law pointedly illustrates that the modern tendency to equate private property only with rights was not always the case, at least with respect to land and fixtures. Historically, even a brief description of the system of landholding which lies at the foundation of the common law is one based on much more than individual rights; one should argue that the structure of private property was initially based on duties which gave rise to rights, and which form the basis of property's ethical structure.

The evolution of the law of real property in the common law is a story well known to every common law lawyer.<sup>60</sup> The structure and details of the law in this area have their origins in the nature of feudal landholding, particularly as manifested in England after the Norman conquest of 1066. The two central organizing concepts of that property system were the web of legal relations known as "tenure" and the means of defining the intensity and duration of interests in land known as the "doctrine of estates".

Tenure was the paradigmatic concept of the early landholding system, both theoretically and practically. In the post-Conquest feudal system, all land was *held of* the King; he was the *dominus*, parcelling out possessory interests in large tracts of land to a relatively small group of nobles. These nobles, or tenants-in-chief, in effect had all the powers one now associates with ownership with respect to their parcels, even though the king "owned" the ultimate interest in these lands. The King also gave his personal protection

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<sup>59</sup> See Charles Donahue, Jr., *The Future of the Concept of Property Predicted from Its Past*, in NOMOS XXII: PROPERTY 37 (J. Rolland Pennock & John W. Chapman eds., 1980).

<sup>60</sup> The ensuing discussion loosely follows and summarizes the general outlines of the more detailed historical analysis in the following works: A.W.B. SIMPSON, *A HISTORY OF THE LAND LAW* c. I, II & IV (2d ed. 1986); J.H. BAKER, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* Part II, c. 13-15 (3d ed. 1990); S.F.C. MILSOM, *HISTORICAL FOUNDATIONS OF THE COMMON LAW* c. 5-8 (2d ed. 1981).



to his tenants, both against foreign attack and by enforcing his – “the King’s” – peace. In exchange, tenants-in-chief owed certain personal obligations to the King, grouped, as one American textbook states, into four categories: security, service, splendour and sustenance.<sup>61</sup> In general, the obligations required the performance of military and other defensive duties, and the provision of various sorts of tasks and products of the land ranging from the trivial and ceremonial to the most costly, demanding and dangerous. In addition, certain revenue-generating incidents of feudal tenure were owed to the King, usually on some significant “passage” of persons or property related to the tenant;<sup>62</sup> these incidents looked like taxes due from time to time with the occurrence of certain significant life events. Tenants-in-chief were allowed to further alienate or parcel out parts of their estate along similar lines, either with the King's blessing or, later, without. Similar duties to those owed as between king and tenant were owed to those above and below in the structure. This *subinfeudation*, combined with the substitution of various links in the hierarchy, left the feudal structure looking like a large pyramid with many complex levels.

While this structure was common throughout Continental Europe and pre-Norman England, Norman England was truly unique in the sense that the feudal structure covered virtually all available land.<sup>63</sup> Unlike other previous or contemporary feudal systems, no allodial landholding was allowed in Norman England.<sup>64</sup> Thus, all property holding was tenurial, grounded upon a prior personal relationship predicated on duties and obligations, and was implemented and refined in the English setting to provide security, revenues and power for both native Anglo-Saxons and conquering Normans. It was a system of symbiotic relationships which lay at the heart of the feudal system and which formed the basis for the common law of property, and indeed the whole of the common law. The key was that the feudal network was a system of effective government; property relations were a component of social ordering, and were subservient to its larger functional goals.

Inextricably linked to the structure of tenure was the doctrine of estates. While tenure defined the correlative relationship and the conditions upon which landholding was possible, estates defined the type

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<sup>61</sup> JOHN E. CRIBBIT & CORWIN W. JOHNSON, *PROPERTY, PRINCIPLES OF THE LAW* 311 (3d ed.1989).

<sup>62</sup> These were: Aids (owed in financial emergency), forfeiture (if tenant broke oath of loyalty), relief (owed by heir on death of tenant), wardship and marriage (if tenant died with underage heirs), and escheat (if tenant died without heirs).

<sup>63</sup> E.H. BURN & JOHN CARTWRIGHT, *CHESHIRE AND BURN'S MODERN LAW OF REAL PROPERTY* 13 (17th ed. 2006). The exception, of course, was the lands belonging to the Church and religious orders (at least until Henry VIII).

<sup>64</sup> *Id.* at 14.

of interests which could be had in land. In particular, estates defined the duration of the interest. So if tenure described relationships between people, estates described the relation of persons to the land, and the main feature of the relationship was its temporality. An estate in “fee simple absolute” was the most powerful interest one could have; it was of infinite duration and could be inherited. As a species of freehold estate, the conditions of tenure of a fee simple were fixed and certain, even while its duration was uncertain. A “life estate” on the other hand, while still a freehold estate of uncertain duration, lasted only as long as the holder’s life. Other estates existed as well, each with their own restrictions.<sup>65</sup> The most powerful of these estates attracted seisin, the legal possession of the land, which in turn afforded the protection of certain real actions and real rights used to protect or regain one’s rights in the land, and led to the use of the descriptive term “realty”.

The notion of seisin is worth some emphasis. The concept entailed more than legal possession; its substance focussed on proprietary rights based on actual physical possession or being in a position to so enjoy. As Gray states: “Seisin thus expressed the organic element in the relationship between man and land and as such provided presumptive evidence of ownership within the medieval framework of rights in land.”<sup>66</sup> Rights and duties are thus based on a very close, objectively intrinsic relationship with the resource; a relationship that is predicated on being able to derive direct benefits from the object. In addition to the doctrine’s application throughout the law of real property is the inbuilt tendency it demonstrates towards the facts, and the factual relationship of being seized. It draws attention to the substance of physical possession – what it entails and what it does not – by virtue of which rights it protects and obligations it requires, and those which it does not.

Perhaps most importantly, the doctrine of estates allowed for multiple interests to be held in the same land at the same time. These interests were not arbitrary; estates in land were limited to those recognized by the common law.<sup>67</sup> The fact that multiple interests in the same resource could exist makes the practice of common law property less-than-absolute at the outset, at least with respect to relations between interested title-holders. No one title-holder has absolute rights over all of the potential uses of a resource, which are

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<sup>65</sup> The third freehold estate was “fee tail”, which I shall not discuss; similarly “copyhold” and “leasehold” estates are not treated.

<sup>66</sup> GRAY, *supra* note 43, at 61.

<sup>67</sup> *Keppell v. Bailey*, 2 My. & K. 517, 39 ER 1042 (Ch. 1834) (Eng.). See Bernard Rudden, *Economic Theory Versus Property Law: The Numerus Clausus Problem*, in OXFORD ESSAYS IN JURISPRUDENCE 239 (J. Eekelaar & J. Bell eds., 3d Series, 1987). See also Thomas H. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1 (2000).

divided according to some division of functions. Furthermore, what is crucial is that a multiplicity of estates in the same land recognizes, of necessity, correlative duties and rights as between and among the various estate holders. What is obvious in the doctrine of estates is indicative of the larger system of feudal tenure; every instance of tenure has duties attached to it and serves functional goals. These obligations were initially enumerated by the tenurial system, thus creating a framework in which multiple estates could exist.

Initially, the degree of control afforded to the King by tenurial landholding and the specific feudal duties attached to it were quite strong. Based on the virtue of loyalty or fidelity, these ties gave a conquering king absolute control over a country and its population, allowing him to establish a stable monarchy. However, the importance placed upon the actual performance of the specific duties associated with the English feudal system was of relatively short duration; the services were in time converted into financial obligations and eventually abolished altogether. Duties and obligations became less personal and more financial, approaching routine payments. This de-personalization paralleled a movement away from the direct control over land by the King. Again, this is a familiar historical narrative to the common law lawyer, and there is no need to enter into it in a systematic way. Of significance is the fact that the structure of tenurial feudalism was greatly simplified in a relatively short time span following the prohibition of alienation through subinfeudation, while allowing alienation through substitution.<sup>68</sup> This had the effect of eliminating the middle levels of the hierarchy. So, while more landholders held directly of the King, the King had little personal or strategic interest in either the actual land or the performance of most of the personal tenurial obligations, provided the various incidents and taxes were paid. As a result, although it is still true that one holds an estate in land of the Crown, in practice one holds an estate without any specific duty to the Crown. But in theory, the notion of tenure still exists, even if it is descriptive and “no longer restricts the tenant in his free enjoyment of the land.”<sup>69</sup>

There is a larger point to be taken from this familiar discussion of origins. First, both the doctrines of tenure and of estates, at a conceptual level, explicitly acknowledged the general limitations of private property by recognizing the function of property within the organic structure or chain of society and within a context of reciprocal rights and duties. Within this structure, certain virtues were fostered – loyalty being the most obvious, but also generosity on the part of a superior lord – and certain types of

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<sup>68</sup> Statute Quia Emptores Terrarum, 18 Edw. 1, c.3 (1290).

<sup>69</sup> BURN & CARTWRIGHT, *supra* note 63, at 25.

behaviour were expected, forming the basis for duties and obligations through the property relationship. These general limitations were particularized in the specific duties that were a pre-condition to landholding. Moreover, through a doctrine of estates, recognizing as it does multiple interests in the same resource, one's interest might be further limited. That is not to say that a form of powerful property "ownership" *right* did not exist in the common law; a number of writers have pointed out that indeed it has and does.<sup>70</sup> Rather, the context for property ownership, as well as its structure, evinces *virtues* as well as rights: there were manners of conduct, duties and obligations that were expected and had normative force. Second, and more importantly, the system and its base values and virtues themselves served larger goals: the effective organization of society, the productive use of land, the raising of revenues, and the ensuring of the polity's overall security and political stability. These goals were recognized explicitly in the personal relations and pledges of loyalty, as well as the nature of the services provided to each ascendant and descendant within the structure. They were recognized implicitly in the productive use to which the land was put and the system of order protected. Thus, at the outset, property holding in the common law had an explicit teleology and was reinforced by a system of duties and rights. Third, in a point related to the second, despite the admission that only the shell of the system of tenure exists today in common law systems, its theoretical existence still points to the larger, unstated goals that continue to be fostered by the landholding system of the common law.

If ownership of land explicitly served societal goals and fostered virtues in the past, then it likely still does so, though perhaps more implicitly. The same is also true of the private property institution more generally. It still serves similar kinds of goals, although in an understated manner. And, to the extent that there has been a change in societal structure, there may also have been a change in the underlying teleology of private property. The past, in my view, has left its imprint on our collective memory, and shapes our legal imagination. It is from this last point that we move from past to present.

## **ii. Ethical threads in the practice of land ownership**

What ethical or virtue-oriented elements exist in the modern system of property law in the common law as it relates to land? In terms of the elemental or core structure of property, it is restating the obvious to

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<sup>70</sup> See HARRIS, *supra* note 4; and GEORGE W. PATON, A TEXT-BOOK OF JURISPRUDENCE 516-17 (G.W. Paton & D.P. Derham eds., 4th ed., 1972). This also implied, in my view, by the discussion in LAWSON & RUDDEN, *supra* note 43 at 6-11, c.V, even if never formally stated as such.

underscore that there are restrictions on most modes of exercising the rights of private property, whether in the most powerful estate, the fee simple, or other lesser estates. As regards what I have called fragments of such ethical threads, one would look at a number of context-specific, land-based duties that do not appear to fall into any sort of coherent conceptual regime of reciprocal rights. Rather, these duties appear to be tied to owning a specific physical resource, and the vocation of destination of that resource. Far from being idiosyncratic, these examples – often on the conceptual boundaries of property law, especially nuisance examples on the border with tort – have much to offer in our understanding of the nature of property rights.

For the purposes of this essay, I shall focus only on the most powerful estate, that of fee simple ownership of land. In the common law, the fee simple estate is the greatest and most durable interest one can have in land. It has the largest number of metaphorical sticks in its bundle.<sup>71</sup> It is infinite in duration, can be alienated in whole or in part, vertically or horizontally, and some of its rights can be parcelled off and alienated through the granting of easements.<sup>72</sup> But even where no other concurrent lesser estate exists in a certain real property (the Crown's interest or eminent domain still exists in theory as a greater estate), the remaining rights and powers of fee simple are still not absolute.<sup>73</sup>

While it is quite evident in practice that “low-level” restrictions impinge on ownership – zoning rules, regulations, etc. – the larger conceptual point is that the nature of fee simple is limited at the very outset by common law doctrine. A pertinent example, applying to all common law jurisdictions, is the common law's restriction of the very physical scope of ownership as stated in the *cuius est solum eius est usque ad coelum et ad inferos* rule, a maxim whose origins trace back to the medieval glossator Accursius.<sup>74</sup> The import of the *cuius ad coelum* rule is that the owner of the soil in theory owns a column proceeding downward to the centre of the earth and upwards to the heavens. However, contrary to the wide scope implied by this rule, the common law has restricted the full impact of this defining element of ownership to something far less extensive. Thus, in terms of air or aerial space above one's land, a person can only claim exclusive ownership of what he can reasonably use and enjoy.

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<sup>71</sup> See GRAY, *supra* note 43, at 58, n.16.

<sup>72</sup> *Id.* at c. 5.

<sup>73</sup> It should be noted that “absolute” in the term *fee simple absolute* refers to duration only: the estate is not limited in time. I am discussing “absolute” in the sense of unlimited more generally.

<sup>74</sup> See K. Gray, *Property in Thin Air*, 50 *CAMB. L.J.* 252, 253, n.1 (1991) [hereinafter *Thin Air*].

Oft-cited cases present a familiar story; what is of current theoretical interest is why and how the limits are understood and justified. In the case of *Bernstein of Leigh (Baron) v. Skyviews & General Ltd.*,<sup>75</sup> a wealthy landowner attempted to sue a company in trespass for having taken an aerial photograph of his estate. The company routinely took aerial photographs of properties and then tried to sell them to the respective owners. Griffiths J. held that no property right was being trespassed upon by the overhead flight of aircraft at high levels. In doing so he explicitly stated that the scope of the maxim was not unlimited:

... [T]he maxim, *usque ad coelum*, ... is a fanciful notion leading to absurdity of a trespass at common law being committed by a satellite every time it passes over a suburban garden. The academic writers speak with one voice in rejecting the uncritical and literal application of the maxim. ... I accept their collective approach as correct. The problem is to balance the rights of an owner to enjoy the use of his land against the *rights of the general public* to take advantage of all that science now offers in the use of air space. *The balance is in my judgment best struck in our present society by restricting the rights of an owner in the air space above his land to such height as is necessary for the ordinary use and enjoyment of his land and the structures upon it*, and declaring that he has no greater rights in the air space than any other member of the public.<sup>76</sup>

A number of observations emanate from these reasons. The first is that a traditional right or power of ownership is not unlimited; the extent of ownership will in large measure *depend on the resource*. This passage is, in my view, best understood as a way of drawing lines around the objects of property or resources in question, as opposed to mere qualification of rights. It is the nature of the resource that will determine the scope of the rights and duties. Second, and more importantly, is the speculation on how and why the right is limited. Here, the balancing of interests undertaken by Griffiths J. is of capital import. He states that the limit is one of “ordinary use”, which implies some idea of a standard destination for this particular resource – whether it is a “natural” or ordinary use, or whether there is an agreed-upon, conventional use – which delimits the way in which the resource should be used. Implicitly, one might even infer the notion of “destination” for the Civil law: some objects of property are classified or change classification according to their function (or a change in function), or some resources should be used in specific ways.<sup>77</sup> In this case, the “historical use” or “vocation” of the land appears to be tied to some idea of utility.

The employment of the concept of utility might be evidence that there still exists, in part, a

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<sup>75</sup> 1 QB 479 (High Ct. 1978) (Eng.).

<sup>76</sup> *Id.* at 487-8 [emphasis added].

<sup>77</sup> D. Lametti, *The Destino of Destination in Civil Law Property* (unpublished manuscript) (on file with the author). See also Peñalver, *supra*, note 6.

consequentialist teleology to private property. That is, if it is seen as one of the explanations for private property that all of society will benefit economically from putting land to productive use, then utility does have at least one non-individual, non-rights-based aspect.<sup>78</sup> Yet, utility on its own is insufficient to capture the robust ethical nature of the balance struck in this decision. The idea of how a resource ought to be used is based on more than simply productive or allocative efficiency. The idea of “rights of the general public” implies a benefit to individuals, but also implies a benefit to the community as a whole. It necessarily entails neither merely correlative rights and duties nor reciprocal rights. Rather, there is an asymmetry in the relationship between owners and non-owners mediated through the resource. If use or utility is often used to justify restrictions on core ownership rights, it might be evidence that tenurial ownership, even in the absence of personal duties, fits into a larger, goal-oriented structure. Yet utility on its own is insufficient to capture the robustness of the balance struck in the decision; the idea of how a resource should be used is the more profound understanding of the process.

The same types of balances between the individual landholder and the community or neighbourly interests are drawn when applying the same maxim downward, toward the centre of the earth. Another well-known case is equally enlightening. One set of reasons in *Edwards v. Sims*<sup>79</sup> does appear to apply the *cuius est solum* rule in an absolute way. In that case, a plaintiff landowner was attempting to bar a neighbour from having an underground survey undertaken of a scenic cave that existed under the plaintiff’s own land. The survey was supposed to ascertain if the cave, whose mouth opened onto the plaintiff’s land and was economically exploited by the plaintiff, was also situated beneath the land of his neighbour.<sup>80</sup> The plaintiff cave-mouth owner ultimately failed in preventing the survey from being undertaken, even though the defendant neighbour could not have exploited the cave on his own in any event. So the neighbour’s right *ad inferos* was seemingly upheld, at the expense of the trespassory rights of the plaintiff. Nevertheless, even with respect to the neighbour’s rights, the *cuius est solum* rule was not given its largest potential reading. While the majority decision of the Court used the maxim as the starting point for discussion, it did note that the scope of the rule was not unlimited, subject as it was to “certain limitations on the right of enjoyment of possession of all property, such as its use to the detriment or

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<sup>78</sup> Of course, I do not deny a whole host of factors promoting individual utility, or individual self-development.

<sup>79</sup> 24 S.W.2d 619 (Ky. Sup. Ct. 1929); 232 Ky. 791.

<sup>80</sup> The plaintiff was actually seeking a writ of prohibition, barring a judge from ordering the completion of the survey: *id.* at 620.

interference with a neighbour and burdens which it must bear in common with property of a like kind.”<sup>81</sup>

In the end, the majority of the Court fixed on what it felt was an analogous provision in the law pertaining to the surveying of mines, and applied the provision to caves.

More illuminating is the dissent of Logan J. to the effect that the maxim and indeed ownership was not unlimited. In particular, he focuses on potential “use” as a limitation circumscribing the ownership rights protected by the maxim:

It is well enough to hang to our theories and ideas, but *when there is an effort to apply old principles to present-day conditions, and they will not fit, then it becomes necessary for a readjustment*, and principles and facts as they exist in this age must be made comfortable. *For these reasons the old sophistry that the owner of the surface of land is the owner of everything from surface to nadir must be reformed, and the reason why a reformation is necessary is because the theory was never true in the past, but no occasion arose that required the testing of it.* Man had no dominion over the air until recently, and, prior to his conquering the air, no one had any occasion to question the claim of the surface owner that the air above was subject to his dominion. Naturally the air above him should be subject to his dominion in so far as the use of the space is necessary for his proper enjoyment of the surface, but further than that he has no right in it separate from that of the public at large. The true principle should be announced to the effect that a man who owns the surface, without reservation, owns not only the land itself, but everything upon, above, or under it which *he may use for profit or pleasure, and which he may subject to his dominion and control.* But further than this his ownership cannot extend. *It should not be held that he owns that which he cannot use and which is of no benefit to him, and which may be of benefit to others.*<sup>82</sup>

There are a number of relevant points to draw from this statement of principle. First, as in *Bernstein*, the scope of the *cuius est solum* rule is not unlimited. The maxim was never true, according to Logan J., but in effect was tolerated because it could not be challenged. Second, it is recognized that the scope of private property is contextual. New resources and new means of exploitation open up different possibilities and hence different kinds of property rights. These rights, and their limitations, will evolve as the conditions of societies change. As the nature of private property (as both resource and relation) changes, so might its underlying principles. This is a step toward some recognition of a larger functional purpose: to some extent, the institution of private property reflects the needs of society. Third, one limiting principle in the view of Logan J., and to a lesser extent the minority, is once again utility. Use, or potential use, is the factor that determines the scope of ownership rights. There is recognition that potential benefits falling within “the centre to the heavens” might be owned by others if indeed they can

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 622 [emphasis added].



derive the benefit but the owner cannot, or might be beyond the ambit of anyone's *dominium*, if no one can derive a benefit from it. In short, Logan J. presents a very functional, use-oriented approach to the scope of property rights.

This statement of limitation according to uses is potentially very wide, and is reflective of a larger theory that land ownership is for the benefit of human beings; if an individual cannot benefit from the use of a land resource, others should not be so prevented. Indeed, Logan J. in a lavish piece of rhetorical flourish goes on to describe the exploration, development and opening of the cave in near-epic terms: allowing the defendant neighbour to succeed would kill all incentives to develop.<sup>83</sup> This last point, that of individual interest, coupled with the second point, recognizing changing conditions, leaves open to speculation whether one could go further than Logan J. went by explicitly stating that putting land to productive use and development is also a communal good, and as such susceptible to regulation by the community, even if it is individual landowners who benefit. Moreover, one might see this as a condition of ownership for an extremely scarce and precious resource. While the passage cited above does not go that far explicitly, certainly the rhetorical tone in other parts of the judgment indicate that Logan J. was favourably disposed to such a view.<sup>84</sup> The point is that limitations on ownership rights are very much tied to questions of the characteristics of the resource and the manner in which it is used, and whether that is a productive use.

The obvious point of the narrative so far is that even the rights associated with the most absolute estate in common law land law are in fact not so absolute. Hence, even land ownership in fee simple was never treated as absolute; this is true not only in the sense of a correlative limit in that in over-extending one's rights another's rights were undermined, but more importantly, in the non-correlative sense that there are larger, non-individualized interests at stake in the resource. In these cases, the community's interests in the proper use and development or protection of a resource might be undermined by a characterization of the property relation that is too strictly rights-based.

The more profound general point that begins to emerge as well, even using the example of fee simple, is

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<sup>83</sup> *Id.*

<sup>84</sup> Morton Horwitz has argued that judges in the United States in the 19th Century used law in an effort to favour all sorts of economic development. *See* M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, 31 (1977). I am not sympathetic to any theory of conspiracy of elites, while recognizing that utility has always played a large role in analysing property rules. There are other systemic goals, the stewardship over and protection of the natural world (for religious or secular reasons), for example, which have also existed in addition to individualistic utility.

that these limitations are tied both to the resource itself and to some immanent teleology (or teleologies), whether explicitly or implicitly, which serve to justify or explain the limits. From these two examples, utility is an obvious candidate that helps to illuminate a consequentialist teleology. To some extent, a notion of utility helps to explain why we impose limits on fee simple ownership (as well as lesser rights). But a purely economic calculus fails to capture the teleology of private property in its fullest sense.

Another example of a limit on the basic concept of property ownership that exemplifies a larger sense of direction or vocation to private property is that of the possibility of adverse possession leading to a change in ownership. A fee simple owner might lose the whole of the bundle of rights because of non-use: the doctrine of adverse possession. Under this doctrine, a non-owner who has an intention to possess a piece of land as an owner, as well as a sufficient degree of possession for a specified period of time, may eventually extinguish the rights of the true owner. Historically, the required conditions enabling a claim of title through adverse possession to be successful are onerous; in general they require the continued public use of the property without the consent of the owner, often in a way inconsistent with the owner's intended use.<sup>85</sup> As a result, these requirements in fact provide a great deal of protection for ownership. Nevertheless, the possibility remains for one to lose one's land completely.

The possibility of adverse possession has a number of practical functions: it provides protection for settled interests and allows for the quieting of titles. It might also reflect, at least in part, the idea that land should be put to productive use, and if it is not so used, and someone else puts it to an alternative use, title will flow to the new user. It rewards the "purposeful" at the expense of the "sluggard".<sup>86</sup> This last function in particular illustrates a teleological aspect to the rule: land is an important resource of objective value, and given its finite quantity and relative scarcity, certain types of uses will be favoured over others. Conversely, certain types of non-use will put one's ownership rights at a risk of loss. This particular rationale is not watertight, as has been pointed out.<sup>87</sup> One might frame the same argument more gently in terms of stewardship.<sup>88</sup> If stewardship entails a duty to preserve and use, one might interpret the law of

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<sup>85</sup> See generally ZIFF, *supra* note 43, at 118-26. See also M. Lubetsky, *Adding Epicycles: The Inconsistent Use Test in Adverse Possession Law*, 47 OSGOODE HALL L.J. 497 (2009) (challenging the validity of the notion of inconsistent use).

<sup>86</sup> GRAY, *supra* note 43, at 285.

<sup>87</sup> See ZIFF, *supra* note 43 at 120, n.20-24. To reiterate, my claim is that adverse possession is "in part" so explained.

<sup>88</sup> There is a more detailed discussion of stewardship later in this part.

adverse possession as either punishing the owner's lack of stewardship or rewarding the squatter's.<sup>89</sup> We reward the virtuous party. Whatever the case, acquisition through adverse possession certainly cannot be explained in terms of absolute rights of ownership, as an owner's rights in theory cannot be compared to a mere possessor. Thus, there must be some other functional justification – historical contingency, utility, stewardship or even a self-developmental argument<sup>90</sup>, possibly virtue-based<sup>91</sup> – which allows us to compare the benefit that the use of the resource confers to the owner and the possessor as well as to society, thus serving to explain adverse possession.

What may be equally telling from the example of adverse possession is that the teleologies informing a particular legal property norm can evolve over time. Environmental concerns actively challenge the notion that land must be used productively in the traditional sense; protective non-use may be more beneficial to society than the depletion of a particular resource.<sup>92</sup> Thus the process of determining the value of the nature of the resource is similar, but the underlying teleological and deontological considerations have moved. In one case, forests are seen as a valuable source of wood and pulp; in another they are seen as objectively valuable for their beauty as part of a wilderness area or according to their role in an ecosystem (perhaps even with a standing independent of human beings).<sup>93</sup> Coupled with the perceived harshness of the rule, some jurisdictions are further restricting the scope of adverse possession.<sup>94</sup> Thus, as the larger goals of societies change as underlying moralities evolve, the scope of ownership changes.

It is from these sorts of examples that the social dimension of private property, expressed in moral terms as the social obligations of property or the virtues of property, becomes visible. In terms, or property's virtues, I have elsewhere noted that Aristotle had seen the promotion of friendship through liberality as

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<sup>89</sup> I am indebted to Jim Harris for this reading. For a lengthier theoretical discussion on the moral status of the possessor vis-à-vis the owner in Quebec Civil Law, see generally, D. Lametti, "Prescription à la recherche du temps: In Search of Past Time (or Recognizing Things Past)" in M. Dévinat, ed., *Les livres du Code Civil du Québec* (Yvon Blais, 2012) (forthcoming). The argument applies *mutatis mutandis* to the common law.

<sup>90</sup> See A. RYAN, *PROPERTY AND POLITICAL THEORY passim* (1984).

<sup>91</sup> Lametti, *supra* note 89.

<sup>92</sup> John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 *CORNELL L. REV.* 816 (1994).

<sup>93</sup> See the influential article by Christopher D. Stone, *Should Trees Have Standing? -- Toward Legal Rights for Natural Objects*, 45 *S. CAL. L. REV.* 450 (1972).

<sup>94</sup> For example, Ontario, which has abolished adverse possession for land under land titles registration: Land Titles Act, R.S.O. 1990, c. L-5, s. 51(1).

one of the virtues fostered by the institution of private property.<sup>95</sup> Eduardo Peñalver adds industry, justice, and humility.<sup>96</sup> Gregory Alexander and Madhavi Sunder, following Martha Nussbaum, posit the virtues in terms of human flourishing.<sup>97</sup> Or these dimensions can be framed within specific kinds of property institutions.<sup>98</sup>

### iii. Ethical elements in the ownership of lesser estates

If such virtuous aspects of private property – gleaned through a fuller understanding of *why* ownership is limited – exist in the common law’s most absolute estate, then one would expect the same to be true for lesser estates. Using only one example, I think that the expectation is a fair one. A life estate is another long-term, freehold interest, but it too is modified rather obviously at its core by the idea that there is someone who has an estate in the same land, which will go in remainder over to that person at the end of the present freeholder’s life estate. So with respect to alienation, since one cannot alienate more than one’s own interest in land, alienation at common law is restricted.<sup>99</sup> This, however, is trite. The important aspect of the life estate in my view is the life tenant’s relation to the resource. Life tenants at common law are governed by a set of rules preventing them from permanently altering the physical condition of the land: the doctrine of waste. The doctrine involves a number of diverse strands, but in general the life tenant is prohibited from making alterations which diminish the value of the freehold (voluntary waste) or which are severe and malicious acts of destruction (equitable waste). Damage resulting from the failure to preserve or repair (permissive waste) and waste which actually improves the value of the land (ameliorating waste) can (but does not always) result in compensating the person holding the remaining interest. In short, a balance is struck between the person with the life estate and the person holding the remainder interest.<sup>100</sup> The life tenant is, in effect, a steward of the land in question, preserving its value for the ultimate owner. These common law provisions, which identify the estate holders and attempt to settle

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<sup>95</sup> Lametti, *supra* note 4.

<sup>96</sup> Peñalver, *supra* note 6, at 876-86.

<sup>97</sup> See GREGORY S. ALEXANDER & EDUARDO M. PEÑALVER, AN INTRODUCTION TO PROPERTY THEORY 80-104 (2012); MADHAVI SUNDER, FROM GOODS TO A GOOD LIFE: INTELLECTUAL PROPERTY AND GLOBAL JUSTICE (2012).

<sup>98</sup> See generally, DAGAN, *supra* note 55 and Singer, *supra* note 48.

<sup>99</sup> This fettering of sale and mortgage had a negative impact on the maintenance of land, often preventing the life tenant from making major repairs. Alienation is now allowed under certain conditions designed to protect the ultimate interest of successive owners; this is now governed by different rules in different common law jurisdictions.

<sup>100</sup> ZIFF, *supra* note 43, at 155-64.

their respective rights and obligations, explicitly illustrate a limited concept, at least with respect to the life estate.

As it stands, the importance of the particular example of the life estate to my overall argument is limited. As a formally limited type of freehold interest with relatively well-defined limits and duties, its intrinsic characteristics are not immediately applicable to property theory more generally. The notion of stewardship, however, both in the life estate and latent in the doctrine of adverse possession, has a larger import that is only beginning to be acknowledged more widely. Given the contours or characteristics of landholding in the common law, the explicit notion of stewardship present in the life estate might well be applicable to the larger concept of ownership as well. That is, the virtuous aspects evinced or required by the relationship of the life tenant to the ultimate owner might be applicable to ownership of land generally. The fundamental premise of the life estate is that one turns over the resource at the end of the tenure to someone with a stronger claim. The resource is valuable over the long term, and requires protection and preservation in order to maintain this value.

One might say the same is true with respect to ownership. If one determines that land is a scarce and valuable resource, necessary for the survival and flourishing of the human race, then one might be compelled to conclude either that its distribution into private hands is predicated on the obligation to preserve the resource for future generations; or on the requirement to put the resource to certain productive uses the benefit of which accrue to the individual and society, directly or indirectly, or equally the requirement to avoid uses which will destroy the resources or harm other individuals. Thus all landowners might be classed as stewards of a valuable resource, holding with regard to a higher claim held by society and the human race, present and future.

The formal structure of the life estate also applies to the formal structure of ownership. A remnant of feudal landholding is that the ultimate reversionary interest in land is in the Crown or the state. While “holding of” the Crown is only symbolically true today in a doctrine like eminent domain, it does represent the ultimate interest that the state has in determining how land is used: land can be expropriated or re-zoned, for example. The Crown or the state embodies the collective interests of those who might in fact be analogous to holders of the remaining interest, namely everyone. Thus, the life estate has greater metaphorical application generally to the whole of property law than is strictly considered to be the case, and the paradigm of stewardship exemplified in the life estate acquires even greater persuasive force. In

my view, we can apply this metaphor to land ownership generally. If Kevin Gray is correct about the emerging importance of “equitable property”,<sup>101</sup> in particular equitable property in the natural environment, perhaps the usufructuary relationship of the life estate is a more appropriate metaphor for land entitlement than is ownership: indeed, one pair of writers have advocated stewardship as a *replacement* of ownership in land.<sup>102</sup>

My understanding of stewardship is in what one might call its “theological” conception.<sup>103</sup> That is to say, human beings might benefit personally from the goods committed to them, unlike a trustee, for instance. Thus, they can use the resource. In addition, however, they also have a duty to preserve the resource, and if Gray is correct, perhaps even to share it in some way, for instance, by allowing access. Stewardship does not replace ownership in this form, because – as the practice is revealing – ownership is in part stewardship. Seen in this light, ownership in practice comprises a rights element (uses to which the owner may suit herself) as well as elements of *virtue ethics* (goals which must in some way orient her use, or duties to preserve) both of which comprise stewardship in the fullest sense. Over time the specific duties and goals can evolve – feudal incidents to productive use to environmental concerns – depending on the resource in question and the stage of development.

This argument – *virtue ethics* both as a third *ethical methodology*, between the poles of utilitarianism and rights-based views, and as explaining part of the *ethical substance* of property relations – ties into the role played by another overarching set of principles in the evolution of the common law: Equity. In addition to the explicit mention thus far of productive use and utility, the limitation of ownership is also consistent with some of the larger, ethical principles found generally in the past and present of the common law legal world through the ever-evolving principles of equity. The term equity is here used in the Aristotelian sense of the general principles of justice behind specific and unarticulated laws,<sup>104</sup> as well as their specific manifestations in the law of Equity, which traces its origins to the moderation of the harshest elements of the common law by the Lord Chancellor and Chancery Courts. Equity thus has a general, all-pervasive supporting function – which can have the effect of limiting ownership rights.

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<sup>101</sup> K. Gray, *Equitable Property*, 47 CURR. LEG. PROBS. 157 at 204-5 (1994).

<sup>102</sup> Lucy & Mitchell, *supra* note 49. It is also an argument made from outside the Western paradigm, by native peoples, for example, but I submit a similar argument can be made on Western terms.

<sup>103</sup> The late Jim Harris had helped me to frame this point.

<sup>104</sup> ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 133 (David Ross trans., 1980) (c. 384 B.C.E.).

Most basically, Equity has provided for the splitting of ownership interests between legal owners and beneficial owners or interest-holders. This fragmentation was effected by the development of the trust. Its standard structure is well known: in this institution there is an estate created for a specific purpose vested in a trustee who is the legal owner. It is, however, an estate where the legal owner is charged with fiduciary duties to certain other persons, called beneficiaries. They are the objects of the specific terms of the trust. These persons to whom the duties of the trustee are owed, the owners of the beneficial estate, may owe nothing in return to the trustees, and indeed may have certain common law and statutory rights against the trustees. Thus, we see two types of ownership: the first, the legal ownership recognized at common law in the trustee; and the second, recognized in Equity as the beneficial ownership in the beneficiary.

There are two features of the trust that are crucial to illustrating the underlying concept of virtue ethics. First, trust ownership recognizes a limited idea of ownership, coupled with a specifically stated teleology – the purpose or goal of the trust – and a set of general duties and obligations. It is a most complete institution in terms of balancing rights, duties and goals, all the while maintaining a flexibility that is envied – and adopted – in Civil law jurisdictions.<sup>105</sup> The institution embodies a view of ownership that is explicitly consistent with stewardship in its most stringent manifestation, setting very onerous standards for the maintenance of the trust property. Thus trustees are stewards as well as owners; moreover, unless also a beneficiary, they will have no personal interest at all in the corpus. Second, the fiduciary relationship that finds its source in the trust and principles of Equity has found wider application in all areas of private law dealing with property:<sup>106</sup> family, corporate law, restitution. It thus serves as a metaphor for a more moral institution of private property, representing the conscience of the property institution.

Equitable remedies specifically have influenced the law of property and the concept of ownership in a number of areas. In particular, equitable remedies have protected certain rights a person might have in another's land, as well as protecting the duties that might be owed by an owner to these lesser right holders. These remedies posit a formal role for the concept of virtue – here expressed as loyalty or

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<sup>105</sup> Such as Quebec: see CIVIL CODE OF QUEBEC arts. 1261 ff.

<sup>106</sup> See: Lionel Smith, *The Motive, Not the Deed*, in RATIONALIZING PROPERTY, EQUITY AND TRUSTS: ESSAYS IN HONOUR OF EDWARD BURN 53 (Joshua Getzler ed., 2003); Lionel Smith, *Philosophical Foundations of Proprietary Remedies*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 281 (Robert Chalmers, Charles Mitchell & James Penner eds. 2009).

fidelity<sup>107</sup>, stewardship, responsibility, or duty. If other property theorists are correct, the concept of the trust may have deeper import for all of property relations.<sup>108</sup>

#### **iv. Ethical fragments relating to land ownership**

I now turn briefly to the discussion of what I have called ethical fragments. These property rules that might be traced to or understood in fragmented terms of an underlying concept of virtue. They are those norms that, while restricting and channelling property, do so not widely and generally, but rather more directly and specifically, often by imposing specific duties on landowners in specific circumstances. As such, they even appear idiosyncratic and haphazard. While these piece-meal duties do not appear to be a coherent part of the common law of property – indeed the substantive rules often change in different jurisdictions – they do illustrate the idea that such duties can be imposed to serve some non-rights-based purpose. They are examples where specific rights and duties might attach to specific resources; resources with a traditional destination or teleology. For instance, if there is a certain specific duty one has toward one's neighbour which is unique given the situation of one's land, such a duty is in no way reciprocal – other landowners do not have such a duty – and therefore difficult to justify under some sort of reciprocal or “golden” rule for property owners. Put another way, such rules cannot be universalized in some *a priori*, Kantian fashion: these duties do not exist because all owners are bound by similar formal rules, or could be bound if similarly situated. Context, and virtue, or some ethical goals, must supply the answer to the question why in a way not permitted by some categorical imperative.

I shall not go into detail on these examples, leaving that task for another occasion. It suffices for now to claim that the rules to which I wish to attach some significance deal with the duties a landholder might owe to his neighbours. There are, in the common law, certain neighbourly duties that are specific to landholders: duties of support or riparian duties, for example. Thus, a landholder can expect that land in its natural state will attract duties of both lateral and vertical support from his adjoining neighbours. Or, a landowner will owe certain duties to other downstream landowners as regards the water flowing in a river or stream through their lands. Typically framed as a right of landowners against other adjacent landowners, these are best thought of as duties, which may not even be correlative to a right, depending

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<sup>107</sup> See Smith, *supra* note 106; and Lionel Smith & Remus D. Valsan, *The Loyalty of Lawyers: A Comment on 3464920 Canada Inc. v. Strother*, 87 CANADIAN BAR REVIEW 247 (2008).

<sup>108</sup> See R.A. Macdonald, *Relational Ownership*, in CROSS-EXAMINING PRIVATE LAW 167 (2008).



on the nature and destination of the land.

Care must be taken from the outset to distinguish these types of property norms from those pointing to extra-contractual responsibility: *i.e.*, the law of tort. This is not always a clear distinction to draw, as it is also true that one cannot act completely independently on one's own land without regard for one's neighbours. The doctrine of nuisance is a limiting idea in this regard with respect to property law, as it would be in other areas of private law.<sup>109</sup> So there is some question as to when the duty or obligation restricting ownership comes from a private property rule or principle itself, and when it is imposed because of a standard in tort. Waldron, as I have pointed out in "The Concept of Property",<sup>110</sup> argues that justifications for private property rules do not generally encompass uses, but only allocation.<sup>111</sup> Presumably, this might lead him to apply tort rules in all of these cases. I disagree; at least in this type of case, there is some direct link or characteristic in the rule that gives the norm a specificity that is uniquely tied to a resource and hence invokes property rules.<sup>112</sup> The distinction can be stated as a use whose consequential damage to neighbours are reasonably foreseeable (tort) versus a common law rule which gives one a right to reasonably use, often regardless of damages, or a duty to reasonably use in the limiting sense (property). These latter property rules are tied to some notion of destination, natural or artificial.

There are three points to note for these kinds of adjacent duties cases. First, each case would be determined according to its unique facts and circumstances. Second, and what is more, the specification or instantiation of this overarching teleology – for example, a balanced use of water resources between individuals and the ultimate benefit to the community through the protection of the resource – can change from place to place, time to time and technology to technology. Given that these rights are so closely tied

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<sup>109</sup> See, *e.g.*, *Bradford v. Pickles*, A.C. 587 (H.L. 1895) (Eng.); *Hollywood Silver Fox Farm v. Emmett*, 2 K.B. 468 (1936) (U.K.); *T.H. Critelli v. Lincoln Trust* 86 D.L.R.3d 724 (Ont. High Ct. 1978) (Can.); and *Rylands v. Fletcher* L.R. 3 H.L. 330 (H.L. 1868) (Eng.). *But see* Katz, *supra* note 30. On things such as spite walls, a virtue ethics approach would (and should) allow us to go further than Katz allows, indeed allowing the common law to be (Razian) "perfectionist" in its pluralism. Of course, the civil law tradition is well acquainted with the idea of "abuse of right". In the French-language tradition the *locus classicus* is LOUIS JOSSEAND, *DE L'ESPRIT DES DROITS ET DE LEUR RELATIVITÉ : THÉORIE DITE DE L'ABUS DES DOITS* (2d ed. 1939). See also R. A. Macdonald, *id.*; and P.-E. Moyse, *L'abus de droit : l'anténorme - Réflexions sur l'application de l'abus de droit aux droits intellectuels*, MCGILL L.J. (forthcoming 2012).

<sup>110</sup> Lametti, *supra* note 4.

<sup>111</sup> WALDRON, *supra* note 54, at 32.

<sup>112</sup> In any event, we should hesitate to impose tort standards willy nilly and try to find the demarcating lines between these areas of private law. See the brief discussion, *supra* note 55 on what a conceptual definition of property is still required.

to the character of the land upon which they arise, rules change to affect the larger purpose. Third, especially as regards water, there is a clear teleology here with respect to how riparian water must be used. But the same is also true for the use of land. Most of the time, the *telos* emanates from some natural destination, anchored in timeless basic needs. Sometimes, however, the meeting of basic needs is manifested in different ways in unique settings. Thus, even particular rules such as prior appropriation are indicative of some larger systemic goals at play, all of which are “grounded” on the lie<sup>113</sup> of the land.

#### **IV. Conclusion: Speculating on the Ethics of Private Law**

It seems fair to conclude on the descriptive claim that those teleological and virtuous elements of ethics (and, hence, of *virtue ethics*) that are explicitly present in the intellectual property regimes of copyright and patent are also implicitly present in the common law regimes covering land law and personal property, and especially in the former. Whether as part of the recognition that the notion of ownership of land is limited with some attention paid to the care or stewardship of the resource through a contextually limited package of rights and social obligations; whether as part of the recognition that the very fragmentation of property rights at common law was a product of an ethical teleology; or whether we see the numerous fragmentary limits on ownership in service of neighbours, the neighbourhood and the lie of the land as part of a larger moral picture about how we use resources, there can be little doubt that the fullest understanding of property rules pushed us into an analysis of how we understand and value, and then how we distribute, re-distribute and care for these resources. There are few governance challenges that are more fundamentally grounded in ethics than this; how we regulate resources will say a great deal about us as a society. And here we slide into the normative claim: the better, the more virtuously or the more ethically we do this, the better will be our property system and our ability to build a more ethical society and citizenry. It should even be the case that attention to virtues will provide us with not only better norms, but in understanding, formulating and justifying property rules we will achieve more stable norms as they are calibrated to context. Property and intellectual property law force a society to deal with important ethical questions, and thus are an important place to begin.<sup>114</sup>

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<sup>113</sup> Even this very term is contextual, depending on where one learns to speak English: it is also “lay” of the land!

<sup>114</sup> According to James Penner, in order to understand these ethical questions, “we must transcend the outlook of the individual owner of property vis-à-vis others if we are to understand with any sophistication the ethical community in which humans live, or rather must live to be fully human.” See James E. Penner, *Property, Community and the problem of Distributive Justice*, 10 THEORETICAL INQUIRIES IN LAW 193, 208 (2008). I would add that the inverse is true; we can better understand the ethical community by understanding the norms it has

What if any of these threads might be woven through other parts of private law? Regarding the descriptive claim, it is certainly true that, at the very least, the Aristotelian-Thomistic notion of *epikeia* or *aequitas* that underlies both the common law doctrine of Equity and its civil law analogue, *équité*, is explicit evidence that this ethical direction – explicit in IP and increasingly being understood in property law – is also present in the larger private law tradition. As regards the common law, the central point is an obvious one: the common law system as we know it is comprised of both the common law doctrines *and* doctrines of Equity. Together, there is a strong ethical element that has always been present in the structure of the common law system. Of course, as regards the Civil law, such doctrines are quite clear, with good faith and *abus de droit* being the most obvious. In other words, the very fact of a doctrine of Equity points to a set of guiding and determinative considerations that in turn are tied to the morality of society.

At the very least, asking ethical questions and trying to foster virtuous actions force us to build a system that *aspires* to the good and to the virtuous. So we are back to Fuller's aspirational morality of law, at least in formal terms of how to understand and to structure property norms, but perhaps also in the substantive terms that appeared to have eluded Fuller.