8

Collective Property: Owning and Sharing Residential Space

SARAH BLANDY*

LET US IMAGINE an island a couple of miles from the mainland where a modern Western society in all its complexity is thriving. Just over 10 years ago, 15 households came to live on the island, which until then had been uninhabited. The original islanders arrived with very definite ideas about a communal way of life, which they had already been discussing together for some time as an informal group. Their ideal was to have a private dwelling for each household, combined with space which all could share. Some had already lived in shared houses, while others had utopian dreams about communal living. This period of discussions proved too long and gruelling for some, and others left because the anticipated costs increased. However, enough members of the original group remained committed and new members joined. Their ideas were encapsulated at the time of the move to the island in a written document setting out the expectations of conduct and commitment of the island residents.

This group was not short of money; they raised loans to buy the island, employ an architect and pay a building company to put up a very well-designed village, which now has 30 houses. These range in size from two to five bedrooms, and each house is allocated a small area of garden. There is a green in the centre of the village. An unusual feature of the development is a large three-storey shared building. The ground floor accommodates indoor games; the first floor has a small kitchen and a large comfortable sitting area; and on the top floor is a dining area large enough to seat about 40 people and a well-equipped large kitchen.

The original group of islanders moved into the first dwellings to be built and then set about finding others to occupy the remaining houses. In the 10 years since the island has been inhabited, a way of life has evolved. Residents meet every two weeks to discuss any issues that have arisen, for example, how the shared building is to be used. Decisions are reached by consensus rather than voting and are recorded for future reference, thus changing the original written 'rules'. Communal meals are prepared every other evening in the shared building and every adult islander must take his or her turn on the cooking rota. Other sub-groups have formed, such as a gardening group, which any resident may join. Some of the boundaries between private and common space, and those between some of the private dwellings have been

* Professor of Law, University of Sheffield; s.blandy@sheffield.ac.uk.

renegotiated to reflect the way that space is used in practice rather than as depicted on the original architect's plan. None of the islanders would assume the right to enter another's house without invitation, although strong social bonds have developed between the residents. The green, the common building and pathways through the village are seen as 'ours': the collective responsibility of all the islanders.

Since the village on the island was first built, five houses have been sold. The newcomers buying into the island community were not 'vetted' by the other residents, but were invited to take part in communal meals and to observe meetings before purchasing their house. New islanders are self-selecting on the basis of these experiences and the information about expectations of conduct and commitment provided orally and in writing before purchasing. Islanders accept that no resident can be forced to leave, although considerable social pressure would be exerted on anyone who failed to comply with the expectations of conduct and commitment, such as taking part in the cooking rota. A complex disputes procedure has been established, although most disputes are resolved without recourse to it. No serious difficulties have threatened the community on the island, although a few disputes rumble on and some residents are less satisfied, or more vocal in their complaints than others.

I. INTRODUCTION

What has been described above is, apart from a few unimportant details,[1] a real housing site. Its residents call it a 'cohousing development', and I will adopt this description (which has no meaning in law). Its portrayal as an imaginary island is a device for analysing its property regime without reference to any specific legal jurisdiction. Harris, for example, invented societies to illustrate concepts and conceptualisations of property, concluding that the existence of trespassory rules and the right to exclude is 'analytically tied to the existence of private property in land'.[2] Examining the cohousing site as an imaginary island shows a clear institution of property as the division between private and common property is accepted and respected, even though in practice the boundaries may become blurred and open to negotiation. Trespassory rules and the right to exclude underpin the islanders' understanding of the distinction between 'ours' and 'mine'. If property rests ultimately on the ability to exclude and control, to exert sovereignty over land, this is exercised collectively by the residents in respect of the island as a whole.

The next part of the chapter sets out the actual property framework for the cohousing development, under the legal regime in twenty-first century England.

[1] Its offshore location is one of the invented details, in order to free it from any existing property regime. The material discussed in this chapter is drawn from a larger empirical research project funded by the British Academy into how residents of eight different sites (with different legal frameworks) share and manage their non-privately owned space, referred to as the 'common parts' in technical conveyancing terminology.

[2] JW Harris, *Property and Justice* (Oxford, Oxford University Press, 1996) 145. See also Scott Shapiro's example in *Legality* (Cambridge MA, Harvard University Press, 2011) of a legal system developed on an island by a group of people whose community originated in making meals collectively, although his view is that hierarchy is inevitable.

I then outline some of the pervasive theoretical and philosophical models of individual property and conclude that these models could support the non-individual version of property, as practised on the imaginary island (and in the cohousing development). The chapter next discusses how different categories of property: public, private and common are defined and discussed in the legal and common-pool resources (CPR) literatures. The latter has proved very informative in addressing the question of how property should be categorised in multi-owned housing sites, where individual property is subject to collective governance regimes but remains private. I suggest that the term 'collective' is the most appropriate for this type of property.

In the penultimate substantive section, extracts from interviews with residents are used to illustrate and build theory about the ways in which rights, governance and everyday practice in the cohousing site are intertwined to produce what I term collective property. This is followed by an exploration of how the legal recognition of collective property might develop over time, rejecting a positivist approach in which current law forms the basis for analysis of property doctrine. Various currently available legal frameworks for multi-housing sites are discussed, which do not adequately reflect the inter-related property and governance regime of the cohousing site.

The aim of this chapter is to examine through empirical research how property is constituted by those who live it. I suggest that this offers an alternative way of understanding property, different from the established philosophical and doctrinal approaches and better able to capture property as a lived process. My research approach was taken from legal anthropology, which shares the understanding of many legal scholars that property is concerned with relations between people,[3] and also informed by the work of Elinor Ostrom and other CPR scholars.[4] CPR analysts start with a detailed examination of what is happening on the ground as a foundation for theory. Their work points to the importance of 'operational details in the real world' to test theories of property: is the right to exclude the be-all and end-all; is alienability crucial?[5] This chapter, and the empirical research on which it is based, is intended to contribute to this emerging debate.

My research techniques were less immersive and time-consuming than the ethnographic studies conducted by anthropologists although I avoided a 'law-first' approach to focus on actual everyday property practices. My intention was to investigate the cohousing development as an example of what the eminent legal anthropologist Sally Falk Moore termed a 'semi-autonomous social field', generating its

[3] See, for example, CM Hann (ed), *Property Relations: Renewing the Anthropological Tradition* (Cambridge, Cambridge University Press, 1998). Similarly, property theorists have defined property as, for instance, 'relations among persons with respect to things' in R Munzer, *A Theory of Property* (Cambridge, Cambridge University Press, 1990) 17; and as 'a network of jural relationships between individuals in respect of valued resources' in K Gray and SF Gray, *Elements of Land Law*, 5th edn (Oxford, Oxford University Press, 2009) 6.

[4] See, primarily, E Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Princeton, Princeton University Press, 1990); E Ostrom, *Understanding Institutional Diversity* (Oxford, Oxford University Press, 2005).

[5] LA Fennell, 'Ostrom's Law: Property Rights in the Commons' (2011) 5 *International Journal of the Commons* 9, 16.

own rules and decisions and means of enforcement, but also penetrated by the external legal system.[6] I visited and observed the cohousing development, sharing one of their communal meals, and interviewed five residents there. In these interviews I avoided any direct questioning about legal issues, allowing the respondents to raise these and to describe in their own words the way in which space is shared and how collective understanding or rules have developed. However, I also obtained and examined the relevant legal documents. This empirical research was designed to capture and explore the complex landscape of the inter-resident legal relationships, as well as the social norms which the cohousing residents have developed over time, and the more formal rules which they have deliberately created.

This approach suggested the idea of portraying the cohousing development as an imaginary island in order to analyse its property regime free of preconceptions. A legal anthropologist researching the island would be particularly interested in the social relations between the residents and the social norms which have developed over time to deal with the complex interaction between individual and collective property interests. This anthropological focus would reveal another aspect of property relations, demonstrating that use of the non-privately owned land is shaped by shared commitment and responsibility, while individual control over the private dwellings is subject to the established principle that each resident is part of the whole community. Decisions on matters applicable to individual houses, such as the colour of external paintwork, are taken collectively. There is a tiered dispute resolution system to address problems which cannot be settled informally between neighbours. The property regime on the island is therefore continuously constituted by the islanders' evolving practices in living and making decisions collectively.

My research is informed by social constructionist views that 'law is an aspect or field of social experience, not some mysteriously external force acting on it. They are mutually constituting'.[7] Thus, law 'shapes society from the inside out, by providing the principal categories that make social life seem natural, normal, cohesive and coherent'.[8] One of these principal categories is property. Some property theorists also consider law as a narrative which shapes how we see the world, a persuasive framework to be called upon when necessary.[9] The idea of an intuitive understanding of property has also been extensively discussed in the property literature, especially in relation to possession. Gray and Gray suggest that, at least in respect of land, the notion of property 'connotes, ultimately a deeply instinctive self-affirming sense of belonging and control'.[10] The right to control which is inseparably associated with property has a psychological importance as well.

[6] SF Moore, 'Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study' (1973) 7 *Law and Society Review* 719.

[7] R Cotterell, *Law, Culture and Society: Legal Ideas in the Mirror of Society* (Farnham, Ashgate, 2006) 25.

[8] A Sarat and TR Kearns, 'Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life' in A Sarat and TR Kearns (eds), *Law in Everyday Life* (Ann Arbor, University of Michigan Press, 1993) 22.

[9] See CM Rose, *Property and Persuasion: Essays on the History, Theory and Rhetoric of Ownership* (Boulder, Westview Press, 1994).

[10] K Gray and SF Gray, 'The Idea of Property in Land' in S Bright (ed), *Land Law: Themes and Perspectives* (Oxford, Oxford University Press, 1998) 19.

This deep-seated nature of property understanding has recently been explored in relation to the informal property-based norms which govern on-street car parking[11] and to queues.[12] These self-governing mechanisms rely on property-based behaviour and norms such as trust, solidarity and cohesion to achieve a balance between self-interest and the collective normative order. Further, the empirical observations which underpin these observations and analyses emphasise that property is both an attitude of mind and a process based on continual enactment on the ground. This chapter extends the argument of Epstein and Gray to assert that, in the cohousing development and indeed in other multi-owned housing sites, a property regime is being produced which should be legally recognised.

I argue that the lived experience of the cohousing residents who share common space does not accord with the prevailing idea that property relations are fixed at the time of a grant of property in land, accompanied by contractual rights and obligations. The theory that law and social life are mutually constitutive offers a way around this difficulty, while reflecting the view that property is both a continual and active process 'on the ground', and a set of subjective attitudes. My conclusion is that collective property is a legally distinct form of property and should be recognised as such.

II. PROPERTY IN REALITY

Returning to the island, mapping the property regime found there against the current legal framework applicable in England and Wales,[13] raises interesting questions. For example, would it be accurate to describe each household as having a freehold interest in their individual dwelling? If so, would an easement best describe the nature of residents' rights to the common parts? Or perhaps the individual dwellings are held on leases or licences granted by whoever owns the freehold of the whole island? If so, who is the freeholder? The technical details of property law in the real world provide answers. Freehold and leasehold are the only permissible estates in land at law,[14] and positive covenants cannot be enforced against subsequent freehold owners.[15] Thus, leasehold tenure is commonly used for the individual dwellings in this type of housing site to ensure that residents' obligations to pay for the maintenance and repair of the common parts remain enforceable. Multiple interests in common parts cannot take effect as co-owned private property.[16]

[11] R Epstein, 'The Allocation of the Commons: Parking on Public Roads' (2002) 31 *Journal of Legal Studies* S515.

[12] K Gray, 'Property in a Queue' in GS Alexander and EM Penalver (eds), *Property and Community* (Oxford, Oxford University Press, 2010).

[13] Broadly speaking, the structure of estates and interests established by the Law of Property Act 1925.

[14] Law of Property Act 1925, s 1.

[15] *Austerbery v Oldham Corporation* [1885] Ch D 750; *Rhone v Stevens* [1994] 2 All ER 65 (HL).

[16] Section 34 of the Law of Property Act 1925 provides that there can be no more than four legal co-owners of land. In other jurisdictions, multiple co-ownership is accepted; for example, Hong Kong (see NM Yip, 'Management Rights in Multi-owned Properties in Hong Kong' in S Blandy, A Dupuis and J Dixon (eds), *Multi-owned Housing: Law, Power and Practice* (Farnham, Ashgate, 2010) and Israel (see R Alterman, 'The Maintenance of Residential Towers in Condominium Tenure: A Comparative Analysis of Two Extremes—Israel and Florida' in S Blandy, A Dupuis and J Dixon (eds), *Multi-owned Housing: Law, Power and Practice* (Farnham, Ashgate, 2010)).

This is the legal framework in which the cohousing site exists. Property rights are established as a leasehold estate of 999 years in respect of each individual dwelling with leaseholders' rights and obligations in relation to the common parts created through the lease, a hybrid of property and contract. The parties to each lease are the lessee and the freeholder. The original freeholder was a company owned by one of the residents, who had been a member of the group from the outset and a driving force behind the development. Unlike in many similar developments, the parties to the lease do not include a residents' management company created to take on ownership of the freehold. However, some five years after the first occupation of the site, the freehold was transferred to a management company whose members are the leaseholders. Although the lease provides for a Residents' Association to be 'formed by the majority of the lessees from time to time' and includes a requirement that all occupiers be members of the Association, it is given no legal status or role.

The lease defines the common parts as 'those parts of the estate not exclusively enjoyed by lease, licence or otherwise by one of the occupiers, including pathways, common halls staircases and landings, and all other parts of the estate used in common with other lessees'. The freeholder covenants to maintain and repair these common parts, and in return for payment of a peppercorn ground rent and annual service charges, each lessee gains rights 'to use in common with others enjoying the same rights incidental to the occupation and enjoyment of the demised premises, the Common Parts, communal garden areas for quiet recreational purposes only, and the Communal House for quiet recreational purposes only'. Lessees are bound by mutual covenants to 'comply with the Principles of Co Housing'[17] and to refrain from causing nuisance, noise, obstruction of the Common Parts and having barbecues or bonfires. The property which is subject to the lease must first be offered to the freeholder when put up for sale, and any assignee of the lease must execute an identical Deed of Covenant. The lease further binds lessees to comply with 'other such regulations reasonably imposed from time to time by the Lessor or by the Residents Association with the prior consent of the Lessor'.

From the very detailed legal provisions of this lease, which runs to 28 pages and nine schedules, we now turn to the consideration of property at a more abstract level. How can theoretical models of property encompass this combination of the residents' leasehold rights which amount (almost) to full ownership in respect of their houses and more restricted property rights to use the common parts of the site in common with the other lessees?

III. MODELS AND CATEGORIES OF PROPERTY

In the liberal model of full individual ownership, 'cases of split ownership ... present baffling problems to one who is compelled to fix on one of those interested as *the* owner of the thing'.[18] This dominant concept of property in Anglo-American property

[17] Defined in the lease as the principles set out in K Macamant, *Cohousing: A Contemporary Approach to Housing Ourselves* (Berkeley, Ten Speed Press, 1989).

[18] T Honoré, 'Ownership' in AG Guest (ed), *Oxford Essays in Jurisprudence* (Oxford, Oxford University Press, 1961) 164 (emphasis in original).

scholarship is organised around the idea that each resource belongs to an individual; the name of the individual is attached to the resource in what Waldron has described as the name/object correlation, the essence of ownership.[19] If we accept that the 'law creates conceptual categories and determines their contents',[20] then individual ownership appears a very strong concept indeed. However, it remains resistant to precise analysis; theorists continue to debate whether property ownership is best categorised using the 'bundle of rights' model or can be reduced to one essential right, the right to exclude. Whichever of these models is adopted, property philosophers acknowledge that individual property ownership is tempered by the needs of wider society and the fact of coexistence with others.

It therefore seems that there may yet be room for a different, more inclusive and collective model of property. Even property theorists committed to the individual property model suggest that its strength relies on shared understandings with non-owners. For example, Penner argues that property resides in 'the right to determine the use or disposition' of a thing, which is concomitant with 'others excluding themselves from it'.[21] What Penner terms this duty of non-interference, protected by trespassory rules, is based on the general recognition that we should exclude ourselves from property that is not ours. Penner points out that although exclusion and control are not written into any conveyancing document or covenant, we understand them as an integral part of property.[22] The 'gut sense' which we all have of property is shared by owners and non-owners alike.[23] Carol Rose has described property as 'one of the most sociable institutions that human beings have created, depending as it does on mutual forbearance and on the recognition of and respect for the claims of others'.[24]

Another aspect of the individual notion of property is apparently supported by the Hegelian assertion that appropriation and ownership of property is required for self-fulfilled personhood. The contemporary property theorist most associated with this view, Margaret Radin, nonetheless suggests that the 'physical and social characteristics of a community [meaning the local neighbourhood] can become bound up over time with the personhood of individual residents *and with the group's existence as a community*' in a process she refers to as 'status creation'.[25] There are two strands to this argument: first, that property can engender community identity as well as individual personhood; and, second, that there is a temporal element involved in the concept of property.[26] Both of these aspects will be examined later in relation to property in practice at the cohousing development.

The classification of the common parts, and the rights in them, clearly present difficulties for theoretical models. The once satisfyingly neat division between private

[19] J Waldron, *The Right to Private Property* (Oxford, Clarendon Press, 1988).
[20] K Calavita, *Invitation to Law and Society* (Chicago, University of Chicago Press, 2010) 35.
[21] JE Penner, *The Idea of Property in Law* (Oxford, Clarendon Press, 1997) 152.
[22] Ibid.
[23] K Gray and SF Gray, *Land Law* (London, Butterworths, 1999) 45.
[24] Rose (n 9) 1019.
[25] MJ Radin, 'Time, Possession, and Alienation' (1986) 64 *Washington University Law Quarterly* 739, 757 (emphasis added).
[26] On the temporal element in property, see also A Clarke, 'Use, Time and Entitlement' in *Current Legal Problems* (Oxford, Oxford University Press, 2004); and Fennell (n 5).

and public property no longer provides an adequate analytic framework,[27] opening up new territory for discussion by property and CPR scholars. Precision is needed for this analysis yet despite pleas for a common multi-disciplinary vocabulary of property, both inconsistent use of the same terms and application of different terms to the same type of property are confusingly frequent.[28] For example, the oceans are referred to variously as 'non-property' and as 'open access commons'.[29] Terminology matters; in Hardin's hugely influential analysis of how property from which free riders cannot be excluded becomes over-used and ultimately degraded,[30] he used the term 'commons'. It is argued that this has led law and economics theorists to criticise all property rights held in common, although this 'communal property paradigm—the open access unregulated common—simply does not exist'.[31] Hardin therefore erroneously labelled 'an ungoverned open-access regime' as 'the commons'.[32] Fennell notes that property used by ubiquitous groups such as households or firms represents overlooked 'everyday examples of non-tragic commons'.[33] The point is that property held or used in common is always, in practice, subject to some regulation or governance, and rights to control or exclude may be exercised collectively.

For Michael Heller, the main distinction is now between private and commons property: resources held in common 'may be arranged along a continuum from open-access to limited-access'.[34] Analysis of the different property categories along that continuum is determined by rights. What Carol Rose describes as 'public property', such as fully accessible parks and highways held in trust for the public by the state which owns it,[35] can only be subject to 'imaginary proprietary control' exercised by individuals, which is usually effective in practice but lacking any legal power.[36] This argument is echoed by Clarke and Kohler in their discussion of 'tacitly accepted conventions about behaviour', for example, that the first person to reach a park bench has the right to sit there until he or she decides to leave. However, the terms used are confusingly different. Clarke and Kohler refer to this type of property not as 'public property', but as 'open-access communal property', which may not be provided or owned by the state, for example, public

[27] ET Freyfogle, 'Goodbye to the Public-Private Divide' (2006) 36 *Environmental Law* 7.

[28] See, eg, N Dolšak and E Ostrom, 'The Challenges of the Commons' in N Dolšak and E Ostrom (eds), *The Commons in the New Millennium: Challenges and Adaptation* (Cambridge MA, MIT Press, 2004) 7.

[29] E Ostrom and D Cole (eds), *Property in Land and Other Resources* (Washington, Lincoln Institute of Land Policy, 2011).

[30] G Hardin, 'The Tragedy of the Commons' (1968) 162 *Science* 124.

[31] A Clarke, 'Property Law: Re-establishing Diversity' in *Current Legal Problems* (Oxford, Oxford University Press, 1997) 135–36.

[32] Fennell (n 5) 12.

[33] Ibid, 13. Alastair Hudson, whose thought-provoking comments I very much appreciate, points out that industrial and provident societies are another example of jointly owned and controlled property in which no member has individual proprietary rights. See further, A Hudson, *Law and Investment Entities* (London, Sweet and Maxwell, 2000).

[34] MA Heller, 'The Boundaries of Private Property' (1999) 108 *Yale Law Journal* 1163, 1195.

[35] This term is also used by CPR scholars; see MA McKean, 'Success on the Commons—A Comparative Examination of Institutions for Common Property Resource Management' (1992) 4 *Journal of Theoretical Politics* 247; see also Ostrom and Cole (n 29).

[36] Rose (n 9) 290–94.

rights of way over private land. Rights not to be excluded from this type of open-access communal property, such as highways, are enshrined in law and cannot be withdrawn without some legal change taking place. This differentiates it from 'state property', such as a library, from which the state may unilaterally decide to withdraw public rights of access.[37]

Clarke and Kohler contend that communities can hold property rights in limited-access communal property where the community is defined in relation to a particular locality or by membership of a defined class.[38] These rights include the right not to be excluded and the right to exclude non-members, but not the right to transmit property interests.[39] Margaret McKean, a CPR theorist, considers that the rights of each group member in limited-access common property amount to private property.[40] She makes a further distinction between 'common or communal property', where the individual co-owners may only sell their shares simultaneously with all other co-owners, or only in accordance with very stringent rules laid down by the group, and 'jointly owned private property', where the individual co-owners may sell their shares at will.[41]

At this point we could conclude that the cohousing site's common parts are not public property, but might be categorised as limited-access common property, with accompanying individual and jointly owned private property rights. In the property literature, the crucial difference appears to depend on whether residents' rights or shares can be transmitted, either at all or without reference to other members of the community. The cohousing residents may transmit their rights to the common parts by selling their leasehold rights, subject only to the requirement to first offer the property to the freeholder when put up for sale and that the assignee must enter into identical covenants. However, to end our analysis here would be to ignore the most distinctive feature of the cohousing development—the collective governance arrangements through which the residents together continuously constitute their property relations in respect of both the individual dwellings and the collective spaces.

In 1999 Heller wrote that the 'dynamics of rules' governing this type of property rights 'are a relatively little-analysed, real-world problem'.[42] That may have been true then of property theorists, but not of CPR analysts.[43] CPR analysis has 'place[d] limited commons management on the table as an alternative to bureaucratic administration and individual private property [which] certainly made it easier to conceive of parallel issues in property theory'.[44] However, it is important to note that CPR scholars and property scholars are not concerned with the same issues. Charlotte Hess and Elinor Ostrom make a clear distinction

[37] A Clarke and P Kohler, *Property Law: Commentary and Materials* (Cambridge, Cambridge University Press, 2005) 39.
[38] Ibid, 35.
[39] Ibid, 39.
[40] McKean (n 35) 251.
[41] Ibid, 252.
[42] Heller (n 34) 1167.
[43] See Rose (n 9).
[44] CM Rose, 'Ostrom and the Lawyers: the Impact of *Governing the Commons* on the American Legal Academy' (2011) 5 *International Journal of the Commons* 28, 33.

between common-pool *resources* as 'types of economic goods, independent of particular property rights' and common *property* as 'a legal regime—a jointly owned legal set of rights'.[45] According to Ostrom, the task of CPR analysts is to refine the analytical tools to establish why some governance mechanisms succeed and others are ineffective.[46] CPR theorists are not primarily interested in property but in analysing the collective governance of common-pool resources. These resources are characterised by two essential features. First, they must contend with 'subtractability or rivalness', meaning that whatever one person takes from the resource subtracts from the ability of others (the rivals) to do the same. This leads to the second essential characteristic, which is that in all CPRs it is necessary to establish mechanisms of exclusion.[47] In other ways, CPRs are very varied in form.

Therefore, as Fennell points out, governance mechanisms are not determined solely by the fact that this is a CPR, but vary according to context. For example, Fennell emphasises the importance of scale; governance arrangements suited to the management of a small CPR cannot be assumed to transfer effectively to a much larger resource. Certainly, 'the attributes of the resource in question will influence how property rights develop', but that is a separate issue, as property rights 'are matters of human construction'.[48] Empirical CPR research has found that in practice the categories of public, private, individual and common property are combined in various ways. Property theorists have recently been criticised by Elinor Ostrom and Daniel Cole for failing to recognise and take into account the complexity of property systems.[49] CPR theorists are also critical of what has been termed the 'naïve theory of property rights', the law and economics analysis based on Demetz's work, which identifies and welcomes a one-way progression through history towards the full institution of private property.[50] Most CPR scholars argue against the privatisation of property rights in natural resources on the grounds that the systems for managing these resources which develop organically are efficient and adaptable.

Nevertheless, the CPR analytic approach has increasingly been applied to novel types of 'commons' property, in particular intellectual property.[51] Multi-owned housing sites such as the cohousing development have also been described as 'new de facto commons'.[52] The following section focuses more closely on this particular type of property, concluding that 'commons' is not the most apt description.

[45] C Hess and E Ostrom (eds), *Understanding Knowledge as a Commons: From Theory to Practice* (Cambridge MA, MIT Press, 2011) 5.

[46] Fennell (n 5) 9.

[47] Dolšak and Ostrom (n 28) 7.

[48] Ibid, 13.

[49] Ostrom and Cole (n 29).

[50] T Eggertsson, *Economic Behaviour and Institutions* (Cambridge, Cambridge University Press, 1990) 254.

[51] See, eg, JB Holder and T Flessas, 'Emerging Commons: Introduction to Special Issue' (2008) 17 *Social and Legal Studies* 299; Editors, 'Introduction to Special Issue on Community and Property' (2010) 1 *Theoretical Inquiries in Law* 1; Hess and Ostrom (n 45).

[52] A Clarke, 'Creating New Commons: Recognition of Communal Land Rights within a Private Property Framework' in *Current Legal Problems* (Oxford, Oxford University Press, 2007) 319.

IV. RIGHTS AND GOVERNANCE IN COLLECTIVE PROPERTY

The recent property law scholarship which is most relevant to this chapter addresses common interest developments (CIDs) in the US.[53] In terms of property category, CID owners would appear to enjoy private property rights, but these are 'subject to limits imposed by other private citizens—by a homeowners' association', suggesting a continuum between private and public control and use of the land.[54] Levahi has posited the model of a mixed property regime, a 'private-common-public property triangle' to replace the outdated public–private dichotomy. He terms CIDS a new 'hybrid' form of property, made up of the distinct but interrelated realms of rights allocation and governance.[55] CPR analysts also consider condominium developments (ie CIDs) as an example of mixed private and common property.[56] This interconnection between individual and group property rights in CIDs has led Heller to situate them 'at the crossroads of legal theory, between commons and anticommons along the axis of property law, between private and public on the axis of governance'.[57] Smith's analysis of property rights within the CID suggests that they 'fall on a spectrum between the poles of exclusion and governance', with rights to exclude equated with rules of access, and governance with rules of use.[58] In the CPR literature, 'governance' usually refers to the fine detail of common resource management, but Smith extends its meaning and application 'from contractual provisions, to norms of proper use, to nuisance law and public environmental regulation'.[59]

From his theoretical perspective, Heller considers that CIDs which provide homes for 'upwards of 40 million Americans' represent 'a stunning example of the power of law in action—of getting a liberal commons form right'.[60] However, empirical research suggests that this form of property benefits municipal government and developers more than it does many residents. McKenzie, for example, concludes that the law and economics analytic approach ignores both the 'many large and powerful institutions [which] are heavily invested in such housing' and the advantages which they derive from it.[61] Far from representing liberal ideals of free choice, McKenzie asserts that compulsory membership of home-owner associations has 'so little appeal to homeowners that it must be forced on them' as an integral part of their purchase package in one of the 300,000 CID developments.[62] McKenzie argues that rational choice theory cannot fully encompass or explain the

[53] In CIDs, resident-managed homeowners' associations are similar to a residents' management company or commonhold association in the English context, owning the freehold of the common parts.

[54] Freyfogle (n 27) 5.

[55] A Levahi, 'Mixing Property' (1998) 38 *Seton Hall Law Review* 137; A Lehavi, 'How Property Can Create, Maintain, or Destroy Community (2009) 10 *Theoretical Inquiries in Law* 43.

[56] Dolšak and Ostrom (n 28) 4.

[57] MA Heller, 'Common Interest Developments at the Crossroads of Legal Theory' (2005) 37 *Urban Lawyer* 329, 334.

[58] HE Smith, 'Exclusion versus Governance: Two Strategies for Delineating Property Rights' (2002) 31(S2) *Journal of Legal Studies* S453, S455.

[59] Ibid.

[60] Heller (n 57) 333.

[61] E McKenzie, *Beyond Privatopia: Rethinking Private Residential Government* (Washington DC, Urban Institute Press, 2011) 64.

[62] Ibid, 52.

complexities of collective action, social norms and social structure; analyses based on this theoretical approach are often driven by an underlying belief in 'the moral superiority of private, contractual, and voluntary living arrangements over those compelled by government authority'.[63]

Further, McKenzie's research found that CID internal rules are generally non-negotiable, having been set by the developer. The outcome is that many North American common interest developments are riven with dissent, disputes and difficulties between residents, officers of homeowner associations and their lawyers.[64] McKenzie has provided compelling evidence that Heller's depiction is not borne out in reality by setting out the regulatory provisions which have been introduced by many US states in an attempt to ensure protection for CID residents.[65] In the case of English multi-owned residential sites, it appears to be accepted by most commentators that 'the community cannot choose the form of governance appropriate to its circumstances ... [as this] is dictated by the legal form the underlying owner happens to take'.[66] This choice of legal framework usually depends on how the developer hopes to make a profit out of the site: either as a long-term investment with a continuing right to benefit from residents' service charges or from quick sales to individual owners.[67] If it is the latter, a residents' management company will be established and included as a third party to the lease to become the freehold owner of the whole site in a similar way to the US homeowner associations which own the common parts of the development, and often engendering similar (although perhaps less widespread and serious) difficulties for residents.[68] Evidence from the cohousing development indicates that residents need not *necessarily* be passive recipients of a legal structure adopted in advance to suit the interests of the developer, and nor are residents *necessarily* 'subject to the whim of their neighbours, just as feudal tenants were subject to the whim of their lords', as Singer puts it in relation to US CIDs.[69] As the detailed work of CPR analysts shows, the specific context of a particular site is extremely important.

Where the freehold estate is owned by a legal entity such as a residents' management company, residents' rights over the common parts are not 'rights over property belonging to another' in any meaningful sense, as all resident owners are members of the legal entity that owns the freehold. The type of property in the cohousing development is hard to align precisely with any of the categories discussed in the literature; in any event, 'public', 'private' and 'common or communal' property, together with 'the commons', are now overworked terms used differently

[63] Ibid, 45.

[64] See RK Lippert, 'Governing Condominiums and Renters with Legal Knowledge Flows and External Institutions' (2012) 34 *Law & Policy* 263.

[65] E McKenzie, 'Emerging Regulatory Trends, Power and Competing Interests in US Common Interest Developments' in Blandy, Dupuis and Dixon (n 16) 53.

[66] Clarke (n 52) 348.

[67] D Clarke, 'Long Residential Leases: Future Directions', in S Bright (ed), *Landlord and Tenant Law: Past, Present and Future* (Oxford, Hart Publishing, 2006).

[68] The unequal relationship between the developer/freeholder and the leaseholder/residents has been examined as an illustration of how power is exercised and materialised through law, in Blandy, Dupuis and Dixon (n 16).

[69] JW Singer, 'Democratic Estates: Property Law in a Free and Democratic Society (2008–09) 94 *Cornell Law Review* 1009, 1026.

by different authors. Perhaps the most appropriate term would be Lehavi's 'hybrid property',[70] but it hardly captures the way in which residents' property rights are inextricably associated with governance obligations, nor the way in which rights over the common parts cannot be legally or physically separated from the property rights in individual dwellings. In the cohousing site, for example, it is difficult to see how a resident's rights over the common parts could ever be 'not-purtenant' to their home.[71]

I therefore suggest that the term 'collective property' is the most apt expression for the property and self-governance rights and obligations in the cohousing site. Here, residents must develop collective rules and norms about the use and management of both individual and collective property, define their boundaries (legal and physical) and decide how to resolve any disputes that may arise. The following section makes use of data from observation and from interviews conducted with five residents to examine more closely how property and governance are practised in the routine life of the cohousing development.

V. PROPERTY AND GOVERNANCE IN THE COHOUSING DEVELOPMENT

The cohousing development is not strictly speaking a CPR; it is not a profit-making resource whose users must contend with subtractability or rivalness, and mechanisms of exclusion are therefore not the most important aspect of this site's property regime.[72] However, it demonstrates many features of successful self-governing CPR institutions, as identified by Ostrom.[73] The cohousing residents' collective commitment to self-governance has a profound effect on their understanding and practice of property in relation to both individual leasehold properties and the common parts. As discussed earlier, social life and (property) law are mutually constitutive; property is both a continual and active process 'on the ground', and a set of psycho-spatial attitudes with a subjective dimension. The ways in which property is thereby 'produced' at the cohousing site are illustrated here through the residents' own words.

The boundaries of the cohousing development are made clear physically through the distinctive style of the buildings and legally through the mechanism of the lease, meeting Ostrom's suggestion that it is essential for collective property to have defined boundaries. Residents understand the internal boundaries within the site, between the collective space and individual property: *'I feel that this house is my space and outside is the shared space ... space that I can use.'* So far as the shared space is concerned, residents' practice and explanations clearly reflect a proprietorial psycho-spatial attitude: '*there is a perception that we own the common spaces together*', together with

[70] Lehavi, 'Mixing Property' (n 55).

[71] This creates a very strong legal and spatial link between the two, echoing medieval grazing rights. However, the decision in *Bettison v Langton* [2001] UKHL 24 has converted most communal grazing rights into fully tradable rights which can be detached from the agricultural holding to which they were once appurtenant.

[72] These are the two essential characteristics of CPRs identified by Dolšak and Ostrom (n 28).

[73] Unless otherwise stated, this section of the chapter draws on the features of effective self-governing CPR organisations listed in Ostrom, *Understanding Institutional Diversity* (n 4) 88 onwards.

collective property as practice: '*There is a sort of collective responsibility … people go and clear it up after the kids have dropped litter.*' Rules have developed; for example, there is a reservation system for using the middle floor of the communal house for private parties or meetings (with right of veto by other residents if they object to the type of use), but the village green cannot be 'booked'. This space is governed by informal norms, so that it is accepted that adult residents will intervene if, for example, a football game played by older children is preventing quiet use of the green by others. The principle of give and take is well understood by the cohousing residents: '*You can do whatever you want* [on the green] *as long as it doesn't interfere with anyone else. If you want to invite your mates over to have a game of rounders, but you've got little Johnny there playing with his cars in the middle [of the green], then it's better to go to the park* [outside the site] *and play your rounders there.*'

At the cohousing site there was a strange, at least to my eyes, disregard of legal property boundaries. The location of boundaries seemed determined more by a practical understanding of property relations: '*in fact the slope, I think, is common land ... it's just regarded as my garden; actually, I've put the plants in there*'. In this instance, Lockean appropriation had led to a recognition by others of that individual's property rights. Trading of individually owned property has also taken place, in the full awareness that: '*I mean, legally it was my garden, and she wanted to have that bit of land close to one of her windows. In the end a solution was reached ... she paid some money to me and I passed that on to someone else, and I got another bit of garden.*'

Interviews at the cohousing site demonstrated that the usual understanding of individual property rights was considerably compromised by the collective control that could be exercised over individual owners and their dwellings. Far from confidently exercising and expressing sovereign control, one resident said: '*I still feel* [the house] *is mine, but it's a new situation for me, having to negotiate.*' At the time that the research took place, a debate was under way over the rights of another resident who wished to paint the external wall of his house. He explained that: '*where I come from, you know, it's your house and you do what you want with it. So we had big long meetings ... and we've come to some sort of compromise.*' This solution was achieved through the constitution of a 'colour committee' made up of interested residents, which would recommend a range of acceptable paint colours for those who wanted to paint their external walls.

Thus, any resident could find his or her present or projected use of his or her property up for discussion and subject to collective decision making. The residents had, in effect, made 'a binding contract to commit themselves to a cooperative strategy that they themselves will work out' in a similar manner to many CPRs.[74] However, the clause in the cohousing leases referred to earlier—that each leaseholder covenants to 'comply with the Principles of CoHousing'—is likely to be unenforceable in law as it does not touch and concern the land.[75] Nonetheless, it is

[74] Ostrom, *Understanding Institutional Diversity* (n 4) 15.

[75] *Spencer's Case* [1583] 5 Co Rep 16a; it would be an interesting argument that this covenant affects the nature, quality and mode of use of the land, thus meeting the test set out in *P & A Swift Investments v Combined English Stores Group plc* [1988] UKHL 3 [1989] AC 632 (HL).

accepted as binding by the residents who have chosen to live at the cohousing site. This way of life demands much of their time. Unlike most sites of this size, there is no professional property manager employed; all tasks are taken on by the residents themselves. Each adult resident must join a team for cooking the communal meal at least once a month, through a highly organised rota system. The experience of working in a cooking team, just as much as the pleasurable experience of eating communally, was described to me as playing a key role in forging community ties.

Decision making is not delegated to the officers of a residents' management committee.[76] Fortnightly meetings of the Residents Committee are well attended and residents understand that their contributions to discussion about individual and common property are not based on '*whether we like it or want it personally, but as to whether it's good for* [name of the cohousing development]'. Consensus rather than majority voting is the basis of decision making, a process described as '*really, really good because nothing needs to happen quickly … which leads to strong decisions that everyone's agreed with*'. Other residents told me that they were sometimes frustrated at the time taken to reach consensus, but valued the process nonetheless. Robert Ellickson discusses the process of consensus decision making in his exploration of the household (which he defines widely to include cohousing) through the prism of transaction cost analysis.[77] His summary of the advantages and disadvantages misses an important point which was made by most of my interviewees. In the words of one of them, '*the whole process "makes" the community. The fact that we've had endless fraught meetings as well as nice meetings is the glue*'. As in the example of the colour committee mentioned earlier, alongside the formal fortnightly meeting for all residents, a structure of sub-groups has emerged over time: '*sub-committees* [for example, the one which organises the cooking rota] *form when somebody who's really interested in it will hold a meeting, and anybody who's also interested will go. It seems to be rather sort of ad hoc and informal but it works*'.

Ostrom's model of working rules[78] provides a helpful framework for analysing how property is constituted through the everyday practices which contribute to the social ordering of the site. She defines working rules as those which are actually used, monitored and enforced by those directly involved, and which are known about by most of the people affected by them. Ostrom distinguishes between rules, norms and shared strategies; these are all 'institutional statements', but the critical difference is that sanctions for breach, determined by collective decisions and action, only apply to rules.[79] There are multiple sources for these working rules, ranging from state legislation to the collective working out over time of how best to resolve frequently encountered practical problems.[80]

[76] This can lead to problematic divisions between residents, as in many US CIDs (see McKenzie (n 61) and as empirical research in England has found (see, for example, R Atkinson, S Blandy, J Flint and D Lister, *Gated Communities in England* (London, Office of the Deputy Prime Minister, 2003)).

[77] RC Ellickson, *The Household: Informal Order Around the Hearth* (Princeton, Princeton University Press, 2008) 97–100.

[78] Ostrom, *Understanding Institutional Diversity* (n 4).

[79] Ibid, 137, 149.

[80] Ibid, 19.

It was very evident from my interviews that working rules in the cohousing development are developed over time through a cooperative process; one resident summarised their approach as: '*let's get on with each other, make these rules and sort things out and see how best to make it work*'. Dolšak and Ostrom stress the importance of trust and connections between CPR members.[81] The population of cohousing residents has been reasonably stable; mutual trust is developed through the system of meetings, communal meals and use of the collective space. A relatively new resident said: '*I don't know them all very well but I trust them because I know that generally we're all going in the right, in the same direction … everyone is in it for the long haul*.' The rules which are developed through these processes are context-specific, a feature noted by Ostrom as characterising successful CPRs. In the cohousing site, for instance, '*if you want to use this middle floor* [of the communal house] *for a party, you can't book it exclusively for yourself and your guests, you have to throw it open to the whole community*'.

Dolšak and Ostrom consider it crucial that resource users can design and implement new rules to ensure the 'best fit' for managing the particular resource.[82] There is wide participation amongst cohousing residents in clarifying and modifying their operational rules in response to new circumstances, for example, the debate over whether residents have the right to choose external paint colour. Compliance with the working rules is monitored by members, although the CPR parallel is somewhat strained in respect of the requirement for graduated sanctions for breach of the rules.[83] In the cohousing development, the management company ultimately has the power as the freeholder to bring forfeiture proceedings for persistent breach of the lease, subject to strict procedural requirements and the leaseholder's right to apply for relief from forfeiture.[84] Any such proceedings brought for breach of requirements to take part in collective cooking or to observe other principles of cohousing would test their legal enforceability. More effective is the considerable social pressure to conform to the collective norms: '*It's difficult to go against the group or go against your neighbour or go against your friend*.' These constraints are internalised by residents, with the effect that conflict is usually avoided: '*I didn't want to ostracise myself or do something which upsets people*.' However, acknowledged disagreements between residents have arisen; some have been satisfactorily resolved while others rumble on. Fairly formal mechanisms have been developed for conflict resolution as part of the working rules, something explained by one member of the disputes committee:

> We do have a disputes process. The idea is that you try and talk to each other. Each individual would have a buddy and try and reach agreement. And if that fails, it would then go to the disputes committee. It hasn't ever got as far as that. The disputes committee is like any sort of group, about four or five people volunteered to be on it. The people in dispute would have to agree to stick with what the committee decides, it's a voluntary process. Things can also go to the residents' committee and be talked about there.

[81] Dolšak and Ostrom (n 28) 17.
[82] Ibid, 21.
[83] Ibid, 22.
[84] Law of Property Act 1925, s 146.

As well as these working rules, other everyday practices have developed over time into accepted norms. This resident articulated rules and norms as distinct: '*I think as we live together longer and these things develop, you know what the rules are, what the unwritten rules are, what the conventions are.*' Residents also routinely used broadly legal procedural notions; for example, while the residents' committee meetings are minuted, there was reluctance to record some decisions for fear of '*setting a precedent*'. It was also striking how frequently formal law was invoked as a way of justifying the rules by which they live, as these extracts from interviews with different residents illustrate: '*You have to cook ... I think that is in the lease somewhere*'; '*legally, or in the lease, the communal house is supposed to be an extension of our own sitting rooms*'. Although the lease does not specifically include either of these points, they were reiterated by other residents I interviewed. The provision in the lease for the addition of further regulations 'reasonably imposed from time to time' may provide some basis for this belief. The lease seems to be frequently referred to in residents' meetings: '*Then we all have to get the lease out and trawl through it and come to an interpretation of the lease that everyone is happy with*'; '*There are a number of things in the lease that are talked about quite a lot*'; '*The lease provides a platform for someone to say "well, are you aware this is against the lease?*"', indicating that it is a legal document that is taken seriously.

However, at the same time, respondents acknowledged that: '*There are all sorts of minor violations of the lease going on, naturally.*' Just as with property boundaries, the provisions of the lease may be ignored when convenient by tacit mutual agreement. The same approach was found in relation to the freehold property interest. The original freeholder of the cohousing site was a company set up and run by one of the founding members of the community. Some years later, with no urgency, the freehold was transferred to a residents' management company that had been established for this purpose. The formal vertical legal relationship was irrelevant to most residents; those interviewed expressed the view that the freehold had always been owned by all residents collectively and that governance arrangements had always been conducted on that basis.

There is a strong argument here that parallel rules have been developed through consensus to match actual property practices at the cohousing site, illustrating Ostrom's reference to collective rules which 'assign de facto rights and duties that are contrary to the de jure rights and duties'.[85] As in the case of property boundaries, the working rules collectively constituted over time can depart from the formal rules, as one resident described: '*We sort of choose not to enforce some things* [that are set out in the lease]*—like no barbecues, or hanging out washing—because after a while we discovered what as a group we want to do.*' The phrase 'after a while' illustrates the temporal dimension of collective property; it is not static and cannot be captured in a once-and-for-all document.

Successful CPRs depend on the existence of an external (if minimal) recognition of the right to organise as a group.[86] The Residents Association recognised in the cohousing lease arguably meets this requirement. However, Dolšak and Ostrom

[85] Ostrom, *Understanding Institutional Diversity* (n 4) 51.
[86] Ibid.

expand the point by stating that either governance mechanisms must conform to requirements devised by the external legal environment or the external legal environment must legitimate users devising and implementing their own institutions.[87] On the basis of empirical evidence, it can be asserted that the 'real' property status in the cohousing development is constituted by the residents' everyday practices and their conscious decisions leading to parallel rules, most appropriately described as collective property and governance. However, in legal terms, property in the site consists of leasehold interests in the individual dwellings, rights of access amounting to an easement over the common parts, with a separate freehold interest in the whole site.

Collective property rights are currently not recognised in law, which in the positivist sense fatally undermines any claim that this is a particular type of property. The next part examines the value and application of the suggestion that property is a concept broader than merely legally recognised rights: 'a claim which the individual can count on having enforced in his favour by society or the state, by custom or convention or law'.[88]

VI. TOWARDS THE LEGAL RECOGNITION OF COLLECTIVE PROPERTY?

If collective property is to be established as a form of property, we must break out of the 'horrible circularity' inherent in theories that property must be deduced from the law, so that only those rights that have become established as property rights can tell us what property is.[89] The most promising approach to conceptualising property, for my purposes, is 'a right ultimately validated by some social or collective judgement about the propriety of the claim involved'.[90] This both reflects the mutual constitution of law and the social, and holds the implication that over time social or collective judgments are capable of reflecting new realities. Grear links the notion of propriety, a concept which has a strong linguistic association with property, to a rights discourse which 'is naturally quite amenable to inclusive, community-oriented values'.[91] For Macpherson, the fundamental property right is *not to be excluded* from a resource rather than the right to exclude, based on his understanding that common property had been of great importance until comparatively recently.[92] Other authors[93] have also drawn attention to the long history of property rights held in common which were swept away by the 1925 legislation in order to simplify

[87] Dolšak and Ostrom (n 28) 20.

[88] CB Macpherson, 'Capitalism and the Changing Concept of Property' in E Kamenka and RS Neale (eds), *Feudalism, Capitalism and Beyond* (Canberra, Australian National University Press, 1975) 106.

[89] K Gray, 'Property in Thin Air' (1991) 50 *CLJ* 252, 293.

[90] Gray and Gray (n 23) 77.

[91] A Grear, 'A Tale of the Land, the Insider, the Outsider and Human Rights (an Exploration of some Problems and Possiblities in the Relationship between the English Common Law Property Concept, Human Rights Law, and Discourses of Exclusion and Inclusion)' (2003) 23 *Legal Studies* 33, 61 and 62.

[92] CB Macpherson (ed), *Property, Mainstream and Critical Positions* (Toronto, University of Toronto Press, 1978).

[93] See, for example, RW Gordon, 'Paradoxical Property' in J Brewer and S Staves (eds), *Early Modern Conceptions of Property* (London, Routledge, 1995); Clarke (n 31).

conveyancing and to make rights in land 'clearly defined, easily identifiable by third parties, and readily convertible into money'.[94]

Over the course of the transformation from feudalism to capitalism, legal principles of 'private property, free contract, and individual rights … came to be seen as part of the natural order of things'.[95] It is arguable, however, that the type of collective property most often associated with the mediaeval open fields system never actually disappeared, meaning that 'the question of the commons is not and has never been archaic'.[96] Indeed, in the past few decades, the rights in common held over village greens have been specifically acknowledged and protected.[97] Courts are becoming more used to dealing with collective rights, holding, for example, that recreational easements and rights to use village greens registered under the Commons Acts are to be exercised collectively, on the basis of the common law principle of 'give and take'.[98]

Against the argument that 'the mid twentieth century template for a property interest—well established, clearly defined, and readily converted into money—is too rigid and simplistic',[99] other influential theorists have emphasised the need for clarity and stability in property rights.[100] The classic statement of what is required for a right or an interest to be included in the 'category of property, or of a right affecting property' is that it must be 'definable, identifiable by third parties, capable in its nature of assumption by third parties, and have some degree of permanence or stability'.[101] This presents difficulties for collective property rights, as illustrated by Susan Bright, who set out the principles that determine which rights should have a proprietary edge.[102] Citing *Thomson v Park*[103] as illustrative of the 'general principle' that a property right must be capable of practical enforcement, Bright concludes that 'rights requiring active cooperation and mutual trust and confidence between the right-holder and the landowner cannot be property rights'[104] within the system established by the Law of Property Act 1925. *Thomson* concerned a problematic licence agreement that one prep school would share another school's premises during wartime, and it was observed that 'the court cannot specifically enforce an agreement for two people to live peaceably under the same roof'.[105] However, those two 'people' in *Thomson* were a landlord and a lessee in a vertical

[94] Clarke (n 31) 120.
[95] Calavita (n 20) 18; see also Gordon (n 93).
[96] BJ McKay, 'Foreword' in N Dolšak and E Ostrom (eds) (n 28) xvi.
[97] Commons Registration Act 1965 and Commons Act 2006.
[98] *R (on the application of Lewis) v Redcar and Cleveland BC* [2010] UKSC 11; [2010] 2 AC 70 [48] (Walker JSC); and see the discussion in Adam Baker, 'Recreational Privileges as Easements: Law and Policy' [2012] *Conv* 37.
[99] Clarke (n 31) 121.
[100] See principally T Merrill and H Smith, 'Optimal Standardization in the Law of Property: The Numerus Clausus Principle' (2000) 110 *Yale Law Journal* 4, who argue that the alienability of property is central to property law.
[101] *National Provincial Bank Ltd v Ainsworth* [1965] AC 1175, 1278 (Wilberforce LJ).
[102] S Bright, 'Of Estates and Interests: A Tale of Ownership and Property Rights' in S Bright and J Dewar (eds), *Land Law: Themes and Perspectives* (Oxford, Oxford University Press, 1998).
[103] *Thomson v Park* [1944] KB 408.
[104] Bright (n 102) 541.
[105] *Thomson* (n 103) 409 (Lord Goddard).

relationship, whereas the collective property that is the subject of this chapter derives from the horizontal relationship between residents of equal status.

An alternative, functional conception of property which allows for change in the interests of the individual and of society has been put forward by scholars holding a range of different views about which rights are central to property.[106] Describing property as a rights paradigm, van der Walt argues that nonetheless interests that are not compatible with established property rights can be valued in the margins. He points to many examples of once marginal property interests joining the mainstream rights paradigm as a result of wider societal changes or of legal and political developments.[107] More specifically, in relation to the recognition of collective and individual rights, Fennell makes the point that 'as a human institution [property can] adapt dynamically to changing circumstances ... by moving the wall between common and private elements'.[108] The theory is that property practices established on the ground will be recognised at common law: 'the identification of 'property' in land is an earthily pragmatic affair',[109] which 'utilises a foundation of de facto control to generate a legal (hence normative) proprietary entitlement'.[110] There have indeed been some recent examples of this process at common law.[111] However, most recent new property rights have been introduced through legislation, which Bright describes as 'break[ing] the mould' for sound policy reasons, such as the spouse's statutory right of occupation in the matrimonial home.[112]

The history of the legislative reform of leasehold does not inspire confidence that collective property will soon achieve statutory recognition. Reflecting the power of vested interests, slow progress has been made in redressing the inherent imbalance of the vertical relationship between freeholder and leaseholder, involving almost 30 attempts over the past 100 years.[113] These include the Landlord and Tenant Acts 1985 and 1987, which enhanced the rights of individual leaseholders, and the Leasehold Reform, Housing and Urban Development Act 1993, which introduced collective enfranchisement for leaseholders of flats. Indicating the complexity achieved by these piecemeal reforms, a helpful government-produced publication for long leaseholders runs to just under 150 pages.[114] The long-awaited commonhold title, finally brought in by the Commonhold and Leasehold Reform Act 2002, has proved a failure, with less than 20 such developments registered to date.[115] Commonhold does not suit developers' interests and nor has it been adopted by groups wishing to establish intentional communities. The prescribed standard

[106] Eg, C Rotherham 'Conceptions of Property in Common Law Discourse' (1998) 18 *Legal Studies* 41.
[107] A van der Walt, *Property in the Margins* (Oxford, Hart Publishing, 2009).
[108] Fennell (n 5) 17.
[109] Gray and Gray (n 4) 104.
[110] Grear (n 91) 40.
[111] Instances include milk quotas: *Swift v Dairywise Farms Ltd* [2000] 1 WLR 1177; and carbon emission allowances, known as European Union Allowances: *Armstrong DLW GMBH v Winnington Networks Ltd* [2012] EWHC 10 (Ch).
[112] Bright (n 102) 545.
[113] S Blandy and D Robinson, 'Reforming Leasehold: Discursive Events and Outcomes, 1984–2000' (2001) 28 *Journal of Law and Society* 384.
[114] Communities and Local Government, *Residential Long Leaseholders: A Guide to Your Rights and Responsibilities* (London, Communities and Local Government, 2008).
[115] Personal communication to the author from the Land Registry, 17 February 2012.

documents for commonhold associations prevent the organic development of rules specific to each development, the company structure is onerous and does not reflect the true relationships between residents and there is no right to expel members, which some groups consider to be a necessary final sanction. Leasehold does, at least theoretically, offer the possibility of forfeiture for breach of covenant.

Other currently available legal structures include companies limited by shares or by guarantee, and trusts. In his discussion of the household from a law and economics theory perspective, Ellickson briefly considers these alternatives. He suggests rather unconvincingly that 'limited liability corporations with shares allocated in proportion to investments made' might be appropriate for cohousing, while a trust 'might serve occupants' interests, providing that the trustees were so instructed'.[116] Following her more thorough review of these options, Alison Clarke concludes that limited liability cannot reflect the commitment required from residents in collective property and that company formalities prevent the evolution of site-specific rules, whereas trusts are essentially an investment device not suited to self-governance.[117] The residents would be beneficiaries of the trust and, as such, would not be entitled to control and manage the trust property, as that is the role of the trustee. From the findings of my larger empirical study, it would seem that the trust structure can work well in sites where a small number of residents share collective property and wish to safeguard their shares acquired through monetary contributions to the property. However, for the reasons discussed by Clarke, the trust structure would not seem appropriate for larger sites such as the cohousing development. Fully mutual housing cooperatives offer an alternative structure for those committed to collective ownership and management.[118] However, as cooperative residents are tenants rather than owners, this legal framework is unlikely to have wide appeal. Further, a recent decision of the Supreme Court decision has highlighted deficiencies in the legal framework of housing cooperatives.[119]

VII. CONCLUSIONS

Returning for a final time to the imaginary island, we have seen that its property regime could be accommodated by contemporary property philosophy. By contrast, our actual property law framework is still centred on individual property ownership and cannot accommodate collective property. As Clarke points out, 'in real life we organise ourselves into communities for all sorts of purposes … and we acquire and use resources in our group capacity. As long as we think only in private property terms, we have no satisfactory legal mechanisms for this group-holding of property'.[120] Cohousing is only one example among a range of different approaches

[116] Ellickson (n 77) 73.
[117] See Clarke (n 52) 349–56.
[118] Industrial and provident societies.
[119] *Berrisford v Mexfield Housing Co-operative Ltd* [2011] UKSC 52 found that a tenancy for life had been granted rather than a periodic tenancy. The Welsh government is committed to the introduction of a Housing Bill to resolve difficulties in the legal framework for housing cooperatives, but at the time of writing no parallel provision is envisaged for England.
[120] Clarke (n 31) 136.

to the management and ownership of common parts in multi-owned sites, which are becoming more common in England and around the world. Freyfogle accurately predicted the 'greater use of novel collective-management arrangements … that involve collaboration, cooperation and adaptive management'.[121] The empirical research on which this chapter is based indicates that a variety of such arrangements are already flourishing.

Investigating property 'from the bottom up' in sites such as in the cohousing development adds weight to the existing arguments that collective rights in property are in need of legal recognition, and provides an alternative to the legal positivist approach that cn only produce normative property statements from existing statute and case law. This research was based on the premise that law and society are mutually constitutive. The literature on common-pool resources provides a valuable background for the examination of how self-governance mechanisms are continually developed by the residents, but cannot on its own tell us much about property relations or the relationship between state law and other forms of legal ordering. The critical question is whether the cohousing residents are engaged in legal ordering (in the form of property) or whether they are only creating 'order without law', to use Ellickson's term for describing how ranchers avoided law through the development and use of common-sense norms and informal rules.[122]

This research demonstrates that cohousing residents do more than social ordering. They exercise the rights to manage and control both their individual properties and the site's common parts collectively, and have developed complex mechanisms for self-governance through working rules which are capable of adaptation to suit new circumstances. Equally importantly, the cohousing residents have a sense of collective belonging and ownership. Their parallel rules, differing in material ways from formal law, constitute a different form of property incorporating collective self-governance which should now be legally recognised. The empirical methodological approach adopted here ensures that this conclusion is firmly based on property practices in real life, which should drive developments in the law.

[121] Freyfogle (n 27) 23.

[122] RC Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, MA, Harvard University Press, 1991).