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## THE VIRTUES OF COMMON OWNERSHIP

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### INTRODUCTION

Professor Michael Sandel’s theory of justice is attractive and inspirational for lawyers interested in social change. Sandel’s call to go beyond egalitarian liberalism has real and important implications for legal and institutional engineering. For Sandel, liberal neutrality is not enough.<sup>1</sup> To argue for equality of freedom – i.e. freedom from external coercion, freedom to materially pursue one’s ends, and freedom to form and revise one’s ends in an interpersonal context, independent of any particular conception of the good life – is not enough.<sup>2</sup> Progressives need dare to rest their arguments for equality and their policy proposals on their substantive vision of the common good. If we agree with Sandel, we should be thinking about designing and proposing legal institutions that decidedly advance the substantive goals we care about, solidarity and fraternity for example, rather than endlessly strive to achieve liberal neutrality.

Attractive and inspirational, Sandel’s theory of justice is parsimonious of recommendations for medium level institutional design. It offers little detailed guidance to private lawyers called upon to design background rules for the allocation of scarce resources and necessary burdens. In this essay, I will discuss how Sandel’s theory of justice may help orient the work of lawyers and policymakers interested in a question that is central to recent property debates: the question of the potential of common ownership for social change.

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<sup>1</sup> MICHAEL J. SANDEL, *JUSTICE: WHAT’S THE RIGHT THING TO DO?* (2009) [hereinafter *JUSTICE*].

<sup>2</sup> On this characterization of freedom, see Talha Syed, *Is Welfare the Only Value? Part I* (unpublished manuscript) (on file with author).

An often misused term, common ownership is best described as institutional arrangements for the cooperative, i.e. shared, joint, or collective, use or ownership of resources.<sup>3</sup> In legal terms, it is a catch-all category that includes joint tenancies, tenancies in common, tenancies by the entirety, and other forms of marital property, partnership property, and corporately-owned property.<sup>4</sup> Common ownership is the object of periodic revivals of interest in the legal community. Dismissed by Enlightenment and post-revolutionary thinkers as a medieval relic, common ownership was at the center of a heated debate among European jurists in the late Nineteenth Century.<sup>5</sup> For its supporters, it held out promises of equality, freedom, and meaningful work in conditions of fraternity. More recently, scholars are revisiting pessimistic accounts that see common ownership as inevitably leading to waste and overuse, such as Hardin's "tragedy of the commons"<sup>6</sup> or Demesetz's theory of property evolution from the commons to private property.<sup>7</sup> In the United States and in Europe, scholars working from different methodological and political perspectives argue that common ownership should have a more central space in the property law of contemporary liberal democracies.<sup>8</sup> Experimental forms of common land ownership and management include land trusts, neighborhood managed parks, community supported agriculture, and limited equity housing cooperatives. If properly designed, these common ownership forms may achieve a variety of policy goals: greater equality in access to necessities such as housing, or valuable resources such as agricultural land; more efficient and sustainable use of environmental resources; and more cooperative, active, and solidaristic communities.

However, the design of common ownership forms present a normative dilemma. While common ownership regimes may foster community or allow more equal access to certain resources, they often entail limits to the co-

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<sup>3</sup> See generally Margaret A. McKean, *Common Property: What Is it, What Is it Good For and What Makes it Work?*, in PEOPLE AND FORESTS 27 (Clark C. Gibson et al. eds., 2000).

<sup>4</sup> See, e.g., Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 552-53 (2001); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 76-81 (2004).

<sup>5</sup> See PAOLO GROSSI, AN ALTERNATIVE TO PRIVATE PROPERTY 9 (1981); Anna di Robilant, "One Property, Many Properties": Common Ownership and the Disaggregation of Property in 19th Century Europe (unpublished manuscript) (on file with author).

<sup>6</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1243 (Dec. 13, 1968).

<sup>7</sup> See generally Harold Demesetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347 (1967).

<sup>8</sup> See, e.g., YOCHAI BENKLER, THE WEALTH OF NETWORKS (2006); JAMES BOYLE, THE PUBLIC DOMAIN (2008); UGO MATTEI ET AL., INVERTIRE LA ROTTA (2007); Dagan & Heller, *supra* note 4; Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247, 250-53 (1992).

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owners' autonomy. Individual co-owners' abilities to choose and revise their goals, disagree with use or management decisions, and exit are often narrowed to protect and preserve the interest and the project of the majority. Recently, some have noted that common property need not entail a normative trade-off between liberal autonomy and community.<sup>9</sup> A properly designed collective proprietary regime should also afford protection to autonomy values by granting strong exit rights.<sup>10</sup>

Sandel's theory of justice, with its emphasis on deliberation, intermediate communities, and a substantive notion of the common good, seems ideal to cast light on these issues. Aren't efforts to outline commons regimes that allow for both community or solidarity and liberal autonomy not only hopelessly doomed to fail but also normatively undesirable and strategically off-target? Aren't common ownership regimes voluntary, intermediate communities committed to substantive values and hence isn't the need for liberal autonomy and exit secondary? Shouldn't we draw common property regimes that decidedly embody values such as community, equality, and solidarity? This paper addresses these questions. In Part I, I briefly outline Sandel's theory of justice, which I describe as a form of "thick republicanism." In Part II, I discuss alternative commons regimes, including Professors Michael A. Heller and Hanoch Dagan's "liberal commons" and an alternative regime designed by an imaginary lawyer less concerned with autonomy and more preoccupied with community and equality. In Part III, I argue that neither regime is likely to balance autonomy and community or equality adequately, and I suggest another way of tackling the commons dilemma. I propose that lawyers interested in the commons as a vehicle for social change combine two insights: the Hohfeldian or Legal Realist concept of property as a bundle of entitlements, and a resource-specific analysis of property entitlements inspired by, among other sources, Sandel's theory of justice. The way out of the commons impasse may be to start from the type of resource – its nature and characteristics – and to argue about the interests and values it involves in an irreducibly interdependent society as well as its just distribution in order properly to shape the bundle of entitlements.

#### I. SANDEL'S THEORY OF JUSTICE: A "THICK REPUBLICANISM"

Sandel's theory of justice has been described as a form of neo-Athenian republicanism that has its roots in Aristotle and Hannah Arendt.<sup>11</sup> For Sandel, republicanism is sharing in self-government, sharing in governing a political community that controls its own fate. It requires civic virtues such as concern for the common good, a capacity for deliberating effectively, and "practical judgment," i.e. judgment oriented to action – to identifying the highest human

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<sup>9</sup> See, e.g., Dagan & Heller, *supra* note 4.

<sup>10</sup> *Id.* at 567.

<sup>11</sup> Philip Pettit, *Reworking Sandel's Republicanism*, 95 J. PHIL.73, 82-85 (1998).

good attainable under the circumstances.<sup>12</sup> These virtues are a matter of practice and habit; we learn them by deliberating, by being steeped in civic life.<sup>13</sup>

First, the teleological and honorific aspect of Sandel's republicanism make it a "thick republicanism," as opposed to the "thinner" republicanism that liberals are often willing to endorse. Sandel's republicanism asks not only about the procedures for moral reasoning – the means for identifying the common good – but also about the nature of the common good. More specifically, Sandel's inquiry addresses the *telos*, i.e. the end or purpose, of our social institutions. It asks what substantive values and virtues we honor and reward in the institutions that structure our social and civic life. For example, what is the *telos* of marriage, of academic education, of professional sports and – one could add – of common ownership regimes? What are the values we honor through each of these institutions, values that give higher meaning to our life?<sup>14</sup> Hence Sandel's republicanism goes well beyond the thinner or procedural republicanism embraced by liberals. It goes beyond Joshua Cohen's ideal of a public deliberation among equals that shapes the identity and interests of participants in ways that contribute to the formation of a public conception of the common good.<sup>15</sup> And it goes beyond Habermasian deliberative action theory, where a community of moral agents trying to adopt each other's perspectives arrives at some agreement by giving arguments.<sup>16</sup>

Second, Sandel's "localism," not integral to the republican conception but rather an implication of it, is central to a discussion of common property regimes. For Sandel, "[f]rom Aristotle's polis to Jefferson's agrarian ideal, the civic conception of freedom found its home in small and bound places, largely self-sufficient, inhabited by people whose conditions of life afforded the leisure, learning, and commonality to deliberate well about public concerns."<sup>17</sup>

Third and relatedly, Sandel interrogates the relation between economic arrangements and civic virtue.<sup>18</sup> Sandel documents a continuing concern, from the period of the framing of the Constitution down to the New Deal with the effect of economic arrangements on the citizenry, i.e. the fear that economic arrangements would subjugate workers and render them incapable of achieving

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<sup>12</sup> MICHAEL J. SANDEL, *JUSTICE: A READER* 192-95 (2007) [hereinafter *JUSTICE: A READER*].

<sup>13</sup> *Id.* at 197-99.

<sup>14</sup> *Id.* at 257.

<sup>15</sup> See Joshua Cohen, *Deliberation and Democratic Legitimacy*, in *THE GOOD POLITY: NORMATIVE ANALYSIS OF THE STATE* 17, 19 (Alan Hamlin & Phillip Pettit eds., 1989).

<sup>16</sup> 1 JÜRGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION* 249 (Thomas McCarthy trans., 1984).

<sup>17</sup> MICHAEL J. SANDEL, *DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 317 (1998) [hereinafter *DEMOCRACY'S DISCONTENT*].

<sup>18</sup> *Id.* at 338.

civic virtue.<sup>19</sup> Sandel contrasts this early preoccupation for a type of economic production and allocation conducive to self-government with Keynesianism, a version of social planning without any formative conception of persons and society, aiming only at mass consumerism, remote from any ideal of self-government and instead committed to a bureaucratic, expert-oriented, elitist orientation.<sup>20</sup>

This threefold emphasis makes Sandel's theory of justice particularly relevant to the commons debate. It allows us to see common property regimes as legal and economic arrangements where a limited group of owners exercises civic virtue by collectively managing a valuable resource to achieve a shared project or according to a shared *telos*. This image of common ownership is an alternative to the autonomy and exit-oriented image offered by liberals. It is a thought-provoking alternative that helps illuminate the normative dilemma central to the legal design of common ownership regimes, i.e. that between liberal autonomy and substantive values, such as community or solidarity.

## II. COMMON OWNERSHIP: LIBERAL AUTONOMY OR SUBSTANTIVE VALUES?

How can Sandel's theory of justice help orient the work of private lawyers interested in designing a default legal regime for common ownership? More specifically, how much should we protect the substantive values the community of owners' values and rewards? And what space should be left for the autonomous choice of individual owners to revise their values, their goals and to exit?

Until recently participants in the debate have focused on "community."<sup>21</sup> For some, community has an ethno-identitarian flavor.<sup>22</sup> In other words, it is possible to design successful common property arrangements that ensure efficient and non-wasteful use of resources, as long as co-owners belong to a pre-existing organic community of mutually vulnerable actors, with shared beliefs and more or less stable members. Examples range from the Maine "lobster gangs" to the community of the inhabitants of a small Swiss alpine village who share grazing meadows.<sup>23</sup> For others, community has a republican flavor. Efficient results are achieved when the common proprietary arrangement is designed in a way that ensures the creation of community, trust, and cooperation.

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<sup>19</sup> *Id.*; see also Pettit, *supra* note 11, at 76.

<sup>20</sup> DEMOCRACY'S DISCONTENT, *supra* note 17, at 267; see also Hilliard Aronovitch, *From Communitarianism to Republicanism: On Sandel and His Critics*, 30 CANADIAN J. PHIL. 621, 637-39 (2000).

<sup>21</sup> See, e.g., ELINOR OSTROM, GOVERNING THE COMMONS 14 (1990).

<sup>22</sup> See, e.g., *id.* at 26-27.

<sup>23</sup> See generally JAMES M. ACHESON, THE LOBSTER GANGS OF MAINE (1988); OSTROM, *supra* note 21.

Professors Heller and Dagan have noted that common ownership need not entail a normative trade-off between community and liberal autonomy.<sup>24</sup> The “liberal commons” regime enables a limited group of owners to capture the economic and social benefits from cooperative use of a scarce resource while also ensuring autonomy to individual members who retain a secure right to exit.<sup>25</sup> Exit is crucial to liberal autonomy; it enhances the capacity for a self-directed life, it allows mobility in the name of promoting the individual freedom necessary to secure one’s own personal happiness.<sup>26</sup> A regime that makes exit impractical is incompatible with liberalism. Heller and Dagan have translated the commitment to liberal autonomy in medium-level guidelines for institutional design, in a regime of default rules regulating three spheres.<sup>27</sup> Rules in the sphere of individual dominion “counteract the potentially devastating effects that individual autonomy may have on the efficiency – even the viability – of commons ownership.”<sup>28</sup> The aim is to deter overuse by setting restrictive limits on exploitation tailored to the specific resource and to prevent underinvestment through investment protection rules.<sup>29</sup> Rules in the sphere of democratic self-governance seek to secure community and autonomy by supporting the commoners’ cooperation and by amplifying each co-owner’s voice, i.e. “ability to influence management from within.”<sup>30</sup> Besides procedural norms relating to disclosure, fair hearing, and consultation, Heller and Dagan suggest broad majority rule jurisdiction for decisions that increase the pie and sharp limits on majority rule for decisions that can be characterized as redistributive.<sup>31</sup> Finally, and most importantly, rules regulating exit aim at protecting individual autonomy while preventing opportunistic behavior and enhancing cooperation.<sup>32</sup>

While Heller and Dagan’s emphasis on liberal autonomy opens up new vistas on the commons debate, an imaginary lawyer may be reluctant to endorse the “liberal commons” if she is wedded to the idea that common ownership is “another way of possessing, another system of legislation, another social order,”<sup>33</sup> one informed by values such as solidarity, fraternity,

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<sup>24</sup> Dagan & Heller, *supra* note 4, at 553.

<sup>25</sup> For an explanation of a “liberal commons regime” and a critique of the idea of property as exit, see Eduardo M. Peñalver, *Property as Entrance*, 91 VA. L. REV. 1889, 1907 (2005).

<sup>26</sup> Dagan & Heller, *supra* note 4, at 568.

<sup>27</sup> *Id.* at 554.

<sup>28</sup> *Id.* at 590.

<sup>29</sup> *Id.* at 582-90.

<sup>30</sup> *Id.* at 590.

<sup>31</sup> *Id.* at 592.

<sup>32</sup> *Id.* at 496.

<sup>33</sup> PAOLO GROSSI, AN ALTERNATIVE TO PRIVATE PROPERTY 21 (1981) (quoting CARLO CATTANEO, SU LA BONIFICAZIONE DEL PIANO DI MAGADINO (1851), in 3 SCRITTI ECONOMICI 187-88 (A. Bertolino ed., 1956)).

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and greater equality. She would be skeptical of a regulatory scheme that protects autonomy and facilitates cooperation but leaves too narrow a space for these other values. Unhappy with the liberal commons, she would design an alternative regime. Seeking guidance in her work of legal design and normative justification, she could turn to Sandel's "thick republicanism" for inspiration. With Sandel, she would ask: what is the purpose of common ownership, as opposed to individual ownership? And, in turn, what are the virtues and values common ownership rewards? She would engage in teleological reasoning and look at forms of common ownership as they currently exist. Inevitably, our imaginary lawyer would be faced with competing interpretations of common ownership and would ultimately need to take a substantive position in a difficult normative decision. In Sandel's words, to decide between rival accounts of the *telos* of and the virtue honored by cheerleading, golf, university education, or marriage, we may look at which account makes better sense of the existing rules regulating the practice, but we are ultimately carried onto "contested moral terrain where we can't remain neutral toward competing conceptions of the good life."<sup>34</sup>

Our imaginary lawyer would contrast the *telos* of common ownership with that of individual ownership. Individual property, as historically and currently practiced, rewards a wide set of autonomy values, including both "competency" and "authenticity conditions," i.e. effective ability to act competently and capacity to reflect on and to endorse one's desires and values.<sup>35</sup> The individual we call "owner" has a relatively wide bundle of entitlements (as opposed to only one or a few entitlements) comprising, at a minimum, the right to use, to exclude and to transfer.<sup>36</sup> These entitlements give her the ultimate power to control the scarce and valuable resource. This control power allows the owner to make informed decisions about the use and transfer of the resource and affords her the sense of responsibility, security, and opportunity in planning one's life. It may also yield the comfort and pleasure that comes from emotional and aesthetic identification with one's property.<sup>37</sup>

By contrast, common ownership, as it currently exists in settings such as marital property, condominiums, affordable housing cooperatives, and business partnerships, rewards a number of different values. First, owning in common delivers the benefits of collective value-clarification and "projectuality": the group of owners comes together to discuss, clarify, and

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<sup>34</sup> JUSTICE, *supra* note 1, at 260.

<sup>35</sup> AUTONOMY AND THE CHALLENGES TO LIBERALISM 3 (John Christman & Joel Anderson eds., 2005).

<sup>36</sup> For lists of the entitlements, see STEPHEN R. MUNZER, A THEORY OF PROPERTY 22-25 (1990); A.M. Honoré, *Ownership*, in OXFORD ESSAYS IN JURISPRUDENCE 107, 113-24 (A.G. Guest ed., 1961).

<sup>37</sup> See Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-61 (1982).

realize a vision, a project, or, at a minimum, a set of goals for the owned resource. For instance, the owners of condominium units gather in the condominium association to “design” their neighborhood, making decisions that involve aesthetic values, issues of public morality, and maximization of their property market value. As often noted, they draw a sort of mini-constitution.<sup>38</sup> Similarly, in the case of family property, the spouses discuss projects and priorities and plan the use of their property accordingly. Second, common ownership allows better and more informed decision making. For instance, in a business partnership or in an agricultural cooperative, the co-owners have different expertise, business skills, and attitudes toward risk. This diversity translates into better management decisions. Third, participation in collective deliberation and decision-making may lead to individual empowerment. The literature on limited equity co-ops stresses that the relationships and skills built through cooperation contribute significantly to shareholders’ quality of life and provide potential resources for the neighborhood.<sup>39</sup> The practice of deliberating in common translates into self-empowerment of the individual owners and a stronger civic sense, which in turn benefits the community.<sup>40</sup> Finally, and most importantly for our imaginary lawyer, owning in common affords the good of solidarity, i.e. the sense of material or emotional security that comes from being part of the community of co-owners, from sharing a project, and that more impalpable and vague aesthetic thing that is the spirit of community. For instance, family members’ ability to rely on family property for individual projects, for example a child’s degree, reinforces familial bonds of mutual support and common projectuality. In the context of affordable housing, “the spirit of community” may trigger other forms of solidarity,<sup>41</sup> including day care facilities or food cooperatives.

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<sup>38</sup> The mini-constitution is a recurring image in case law. *See, e.g.*, *Hidden Harbor Estates, Inc. v. Norman*, 309 So. 2d 180, 181 (Fla. Dist. Ct. App. 1975), *quoted in* *Woodside Vill. Condo. Assoc., Inc. v. Jahren*, 806 So. 2d 452, 456 (Fla. 2002) (postulating that “[c]ondominium unit owners comprise a little democratic sub society”); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1526 (1982), *quoted in* *Aquarian Found., Inc. v. Sholom House, Inc.*, 448 So. 2d 1166, 1168 (Fla. Dist. Ct. App. 1984).

<sup>39</sup> *See, e.g.*, Duncan Kennedy, *Limited Equity Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society*, 46 HOWARD L.J. 85, 92 (2002).

<sup>40</sup> *Id.*; *see also* James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. 95, 108 (1988); Susan Saegert & Gary Winkel, *Paths to Community Empowerment: Organizing at Home*, 24 AM. J. COMMUNITY PSYCHOL. 517, 521 (1996); Gregg G. Van Ryzin, *Residents’ Sense of Control and Ownership in a Mutual Housing Association*, 16 J. URB. AFF. 241, 250 (1994).

<sup>41</sup> *See* AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* (1993); DUNCAN KENNEDY, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute*, in *SEXY DRESSING ETC.* 1, 25-29 (1993); Richard T. Ford, *Review: The Repressed Community*, 65 TRANSITION 96 (1995) (reviewing AMITAI ETZIONI, *THE SPIRIT OF COMMUNITY* (1993)); *see*

The next question for our imaginary lawyer would be how to design a regime of common ownership that best promotes the goals of collective value – clarification, better decision-making, empowerment, and solidarity. Let’s try to imagine how such a regime would look. The first rules to consider are entry rules. Minimalist in Heller and Dagan’s “liberal commons,”<sup>42</sup> entry rules would be important to our imaginary lawyer committed to redressing inequalities of wealth, power, and status. But entry entails a difficult trade-off. On the one hand, we want to allow the largest number of potential owners to benefit from the virtues of common ownership. Anyone who is ready to commit to these values and sign the “mini constitution” should be allowed to join as a co-owner. This means minimalist entry rules should focus on avoiding discrimination on the grounds of race, gender, sexual orientation, religion, etc.<sup>43</sup> On the other hand, if the co-owners form a community that shares values and a project, the community should be able to choose its own members, presumably those who can best contribute to the goals the community sets for itself. This translates in more detailed entry rules that allow some reasonable and non-discriminatory degree of selectivity for substantive reasons. Minimalist rules regulate entry in condominiums. Provisions requiring the consent of the developer before future unit sales are, in the vast majority of cases, held void and the condominium association’s preemptive right is subject to a strict reasonableness requirement.<sup>44</sup> By contrast, many argue that affordable housing co-ops should allocate the units to the most qualified applicant according to criteria such as income, education, employment, credit history, or ability to contribute to management.<sup>45</sup> Such entry requirements, observers contend, are crucial for the very viability and effectiveness of a project.<sup>46</sup> “Creaming” the pool of applicants means minimizing the amount of necessary subsidy per unit and maximizing the number of units for a given subsidy.<sup>47</sup> As these two examples illustrate, effectively designing entry rules inevitably involves considering the purpose and nature of the resource owned in common. Namely, what, if anything, is required to be good owners and managers of that specific resource?

As to governance rules, our imaginary lawyer would probably rely on Sandel’s republicanism to argue for rules that foster the practice of deliberation and protect the collective project. These are the substantive values and goals

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also ROBERT N. BELLAH ET AL., *THE GOOD SOCIETY* 9 (1992).

<sup>42</sup> Dagan & Heller, *supra* note 4, at 570.

<sup>43</sup> *See id.* at 571.

<sup>44</sup> *See, e.g.*, *Nw. Real Estate Co. v. Serio*, 144 A. 245, 246 (Md. 1929); *Riste v. E. Wash. Bible Camp, Inc.*, 605 P.2d 1294, 1295 (Wash. Ct. App. 1980). On condominium associations, see *Aquarian Found., Inc. v. Sholom House, Inc.*, 448 So. 2d 1166, 1168 (Fla. Dist. Ct. App. 1984); and *Wolinsky v. Kadison*, 449 N.E.2d 151, 155 (Ill. App. Ct. 1983).

<sup>45</sup> *See Kennedy supra* note 39, at 103.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

endorsed and pursued by the group of co-owners. This could mean majority rule on every decision, including redistributive ones. In contrast to the liberal commons, the group's decision to shrink the pie according to its values and goals would be protected, leaving less room for minority or individual disagreement. However, the proper balance between autonomy and community in management rules depends on the type of resource. For instance, in the case of business partnerships, the Revised Uniform Partnership Act (RUPA) emphasizes the consensual nature of the partnership,<sup>48</sup> the ideal of equal and autonomous partners,<sup>49</sup> and generally defers to party autonomy.<sup>50</sup> It allows ample space for individual autonomy with a counterbalancing irreducible core of fiduciary duties.<sup>51</sup> Additionally, it prescribes unanimity for non-ordinary businesses and for amendments of the partnership agreement while also imposing a duty of good faith and fair dealing.<sup>52</sup> By contrast, in family property, the balance is tilted toward community. Spouses are fiduciaries in community property regimes – they have the duty to manage for the good of the community and to act in good faith to benefit the community. Both spouses must agree to convey or mortgage community property interests in real estate or assets in a business in which they jointly participate. Similarly, in the tenancy by the entirety regime, the individual undivided interest cannot be transferred without the consent of both spouses and cannot be reached by the creditors of one spouse.

Our progressive lawyer would also privilege equality when distributing rights to the flow of income. Income that results from the effort of all commoners would be divided equally rather than per property share. This would redistribute wealth as to increase material equality, rather than reproduce existing wealth inequalities. However, the egalitarian division of profits may not work for every commonly-owned resource or for every product. Studies show that it has worked for common grazing lands, in contexts as different as Switzerland and India, but it has been rarely adopted in the case of common irrigation systems, where entitlement to water, whether in volume or time-share, is proportional to the size of each co-owner's fields.<sup>53</sup> As to profits due to individual effort, our progressive lawyer would also opt for an egalitarian criterion. She would give the laborer a return for the labor but equally distribute the rest. This rule would find support in Sandel's discussion of desert. It would strike a fair balance between egalitarianism and the honorific aspect of justice. Sandel concedes, with Rawls, that effort is partly the result of natural and arbitrary skills or a happy social or familial

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<sup>48</sup> UNIF. P'SHIP ACT § 101 cmt., 6 U.L.A. 62 (1997).

<sup>49</sup> *Id.* § 301(1), 6 U.L.A. 101.

<sup>50</sup> *Id.* § 103(a), 6 U.L.A. 73.

<sup>51</sup> *Id.* § 103(b)(3)-(5), 6 U.L.A. 73; § 404(a), 6 U.L.A. 143.

<sup>52</sup> *Id.* § 401(j), 6 U.L.A. 133.

<sup>53</sup> McKean, *supra* note 8, at 262.

background.<sup>54</sup> But he also emphasizes that there is something more to effort, an honorific aspect that is vague and difficult to capture but important in giving meaning to our life and practices. Effort, however, can only be translated in rules if we consider the type of resource. For example, a business partnership may be very different, in this respect, from an agricultural cooperative. Individual effort may deserve more recognition within a “partnership,” where the partners are arguably more equal, in that they contribute different but equally valuable skills or assets. Under RUPA, a partner does not violate her fiduciary duty merely because that partner’s conduct furthers her own interest.<sup>55</sup> Conversely, individual efforts may deserve less recognition in an agricultural cooperative created to foster development in a depressed rural region, where co-owners belong to different segments of the rural poor and possess varying degrees of skills and ability to contribute efforts.

Finally, while the need to regulate exit in a way that enhances cooperation remains paramount, our progressive lawyer would contemplate limiting exit to protect the group’s goals. Rather than delaying exit through longer cooling off periods, which Heller and Dagan would agree threaten the cohesion of the group and thwart good governance, she would consider a general rule enabling the group to link exit to the achievement of certain group objectives. Such a rule would have two beneficial effects. First, it would allow the community of co-owners to delay disruptive exits that could hinder the attainment of a specific productive or business objective. Second, it would allow the co-owners to restrict exit where free exit would impact the very viability and effectiveness of the project. But, once again, the effectiveness and desirability of restricting exit depends on the nature of resource owned in common. It is sensible in the context of affordable housing. In both limited equity co-ops and community land trusts, exit is restricted in two respects: first, co-owners can sell only to another low-income buyer or to the community land trust and second, the resale price is limited. These restrictions are crucial to the very achievement of the project’s goal, that is, keeping housing affordable for multiple generations of low-income owners, rather than benefiting only the first buyers. However, limits to exit are less justified in “love it or leave it” relationships<sup>56</sup> such as business partnerships. Under the RUPA, a partner may dissociate at any time and is entitled to the value of her interest in the partnership, irrespective of any contrary provision in the partnership agreement. The partners’ common *telos* or project is protected because dissociation in breach of the partnership agreement, or before the expiration of the term or the completion of undertaking, is wrongful and triggers liability for damages.<sup>57</sup>

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<sup>54</sup> JOHN RAWLS, A THEORY OF JUSTICE 301-12 (1971).

<sup>55</sup> UNIF. P’SHP ACT § 404(e), cmt. 5, 6 U.L.A. 143, 146 (1997).

<sup>56</sup> Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 L. & CONTEMP. PROBS. 221, 223-28 (1995).

<sup>57</sup> ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON LIMITED

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### III. A NEW APPROACH TO THE COMMONS: RESOURCES, VALUES, AND ENTITLEMENTS

Would the commons regime designed by our imaginary progressive lawyer and inspired by Sandel's theory of justice be illiberal? At times yes, the autonomy of the individual co-owner would be compromised. Are we comfortable with this sacrifice because we are honoring and protecting the values that common property – as opposed to individual property – embodies? I believe not always. A collective property regime that sacrifices autonomy becomes a less attractive option. In many instances, even those of us who are most committed to community, equality, or solidarity are not ready to sacrifice autonomy (i.e. the effective ability to act from reasons that are most fully one's own in a context of interpersonal relations of mutual recognition).<sup>58</sup> But aren't efforts to mediate between autonomy and other substantive values doomed to be unsatisfactory? Yes in many instances. A one-size-fits-all default model would fall short of adequately balancing autonomy and solidarity or equality. The "liberal commons" are likely to carve out too much space for autonomy where there are strong reasons to privilege the protection of the project and values of the group, as in the case of an affordable housing co-op. Conversely, the commons regime designed by our imaginary lawyer is likely to sacrifice autonomy in instances where there are plausible reasons for allowing a wider margin for individual choice, disagreement, and exit, as in the case of an agricultural co-op or business partnership.

The way out of the commons dilemma may be to abandon the idea of a one-size-fits-all regime and to design bundles of entitlements that are resource-specific. One such regime would bundle entitlements based on the economic characteristics of the specific resource as well as on the interests, values, and the social meaning involved in ownership of that type of resource, in an irreducibly interdependent society. Such a solution would build on two insights crucial to twentieth-century legal and social theory: the Hohfeldian or Legal Realist image of property as a bundle of entitlements and a goods-specific or institutions-specific approach to questions of distributive justice developed by Sandel, among others.

The image of property as a "bundle of rights" has gained wide acceptance both in the United States and in Europe. In the United States, Professor Hohfeld paved the way by disaggregating the concept of "right" in opposites and correlatives, and many after him specified the "incidents" of property rights.<sup>59</sup> In this widely-shared Hohfeldian perspective, property consists of a

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LIABILITY PARTNERSHIPS, THE REVISED UNIFORM PARTNERSHIP ACT, AND THE UNIFORM LIMITED PARTNERSHIP ACT (2001) 337-40 (2010).

<sup>58</sup> See Joel Anderson & Axel Honneth, *Autonomy, Vulnerability, Recognition, and Justice*, in *AUTONOMY AND THE CHALLENGES TO LIBERALISM: NEW ESSAYS* 127-45 (John Christman & Joel Anderson eds., 2005).

<sup>59</sup> MUNZER, *supra* note 36, 22-24, 43-44; Honoré, *supra* note 36, at 107. *But see* LAWRENCE C. BECKER, *PROPERTY RIGHTS* 18-20 (1977).

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set of entitlements: the owner's right to exclude, privilege to use, power to transfer, and immunity from loss. These entitlements are susceptible of being distributed between different subjects and parceled along a temporal dimension. Further, they are relative rather than absolute. In various circumstances, the owner's right to exclude is limited by non-owners' rights of access; in other circumstances, her privilege to use is limited by others' right to be secure from harm. Lawyers and policy makers combine property rights in different bundles to pursue regulatory or redistributive objectives or to increase efficiency.

Lawyers interested in experimental common ownership regimes face the question of how to design the best bundle of property entitlements to achieve the variety of goals they envision. Economists have long developed a resource-specific analysis of property rights. They have noted that the economic characteristics of goods, for example their degree of rivalrousness and excludability, affect the diverse incentives that participants face and, in turn, determine which bundle of property rights allows the most efficient use of the good in question. A resource's degree of rivalrousness and excludability, whether the resource units are mobile or stationary, and whether storage is available in the resource system, are crucial considerations for tailoring a bundle of entitlements that promotes investment and solves the problems of overuse, productivity, and access to credit. Private law scholars have reasoned along similar lines. Carol Rose has investigated the potential of, respectively, common ownership and private property for environmental protection.<sup>60</sup> Rather than arguing that one is preferable to the other in all circumstances, Rose maintains that the choice between community based management regimes and tradable environmental allowances depends largely on characteristics of the resource, size, complexity, whether the resource presents an extraction problem or a pollution problem, and the resource's adaptability to commerce and market fluctuations.<sup>61</sup> Richard Epstein has suggested that "any responsible search for a sound system of property rights searches for the net social advantage by minimizing the sum of the rival inconveniences."<sup>62</sup> These inconveniences are coordination and exclusion costs which depend on the nature of the resource in question and the technology available to exploit it.

Developed piecemeal by economists and private lawyers, a resource-specific analysis of property entitlements deserves to be fore-grounded and its focus expanded to consider the values and interests involved in ownership of particular resources. Resources differ not only in the degree of rivalrousness and excludability but also in the values, interests, and social meaning they

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<sup>60</sup> Carol M. Rose, *Common Property, Regulatory Property, and Environmental Protection: Comparing Community-Based Management to Tradable Environmental Allowances*, in *THE DRAMA OF THE COMMONS* 233, 233 (Elinor Ostrom et al. eds, 2002).

<sup>61</sup> *Id.*

<sup>62</sup> Richard A. Epstein, *On the Optimal Mix of Private and Common Property*, 11 *SOC. PHIL. & POL.* 17, 20 (1994).

involve. These different interests and social meanings are central to any conversation about the just distribution of resources in society. The idea of a goods-specific or institution-specific answer to questions of distributive justice is central to a strand of contemporary social and normative theory to which Sandel belongs. Jon Elster's *Local Justice* suggests that different goods are, as matter of fact, allocated by different principles.<sup>63</sup> The choice between strictly egalitarian principles of allocation, principles based on status, time-related principles, desert or interpersonal comparisons of welfare depends on the characteristics of the goods to be allocated. In *Spheres of Justice*, Michael Walzer argues that human society is a distributive community: we come together to share, divide, and exchange goods such as money and commodities, education, welfare, hard work, leisure time.<sup>64</sup> All goods are social goods, they have shared meanings because their creation and conception are social processes. Every social good or set of goods constitutes a distributive sphere within which only certain distributive arrangements are appropriate. It is the shared meaning of goods, which is historical and culture-specific, that determines the appropriate distribution of goods.

Sandel's honorific and teleological theory of justice fits into this strand. It invites us to expand the focus of a resource-specific analysis of property entitlements to values and virtues. Flutes, Sandel tells us, are meant to be played well: good flutes should be allocated to those who can play them well.<sup>65</sup> In designing common property regimes, for each type of resource, we should ask, with Sandel, which virtues or values does common ownership of this type of good reward and honor? Often, the nature of the resource, i.e. the values or virtues it involves as well as arguments about its just distribution in society, justifies sacrificing liberal autonomy. In my view, autonomy may be sacrificed, and in Thomas Nagel's words we should dare be "progressive but not liberal,"<sup>66</sup> in the area of affordable housing cooperatives.

Common ownership has been an important tool for affordable housing projects. However, both limited equity co-ops and community land trusts often involve restrictive entry rules (interviews, eligibility requirements) as well as restrictive exit rules (limits to the resale price, limits to the reimbursement of improvements, and limits to the pool of prospective buyers). These are significant sacrifices of owners' autonomy. Observers committed to the "liberal commons" can plausibly argue that these limits hinder the individual's sense of worth, the authenticity of one's life plans as well as the confidence in one's ability to carry them out. Are these limits to liberal autonomy justified? I think yes. I think the case for a bundle of entitlements that privileges community and solidarity over autonomy can be made in a powerful way. Not

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<sup>63</sup> See JOHN ELSTER, *LOCAL JUSTICE* 67 (1992).

<sup>64</sup> MICHAEL WALZER, *SPHERES OF JUSTICE* 68 (1983).

<sup>65</sup> JUSTICE, *supra* note 1, at 187.

<sup>66</sup> Thomas Nagel, *Progressive but Not Liberal*, *NEW YORK REVIEW OF BOOKS*, May 25, 2006, at 45.

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because housing cooperatives are chosen, voluntary communities,<sup>67</sup> but because they are a “special” resource, one that involves special interests and values.

What are the values and virtues honored by common ownership of housing? Why do we choose to have common ownership housing alongside privately owned housing? Or why prefer common ownership regimes to other schemes of affordable housing? Because of two substantive values we deeply care about. First, equality of autonomy, or equality of self-respect. Housing is crucial to the primary good “self-respect.” One’s home is a private refuge, a safe harbor, and a source of material security and emotional stability. A home is crucial to both aspects of self-respect, namely the sense that one’s plan of life is worthwhile and the confidence in one’s ability to fulfill life plans. If self-respect is a primary good we should secure at any cost, greater equality in access to housing is paramount. This means eliminating the social conditions and the material obstacles to self-respect for the largest number possible. Given the structure and the constraints of the housing market, an effective way to make good quality affordable housing available to low income buyers in the long term is limiting entry and exit.

We choose common ownership of housing also because we care about a second value – community. We value the sense of empowerment that comes from being part of a community of homeowners sharing values and problems, the sense of agency and creative energy that come from designing one’s neighborhood together. We also cherish the empowerment afforded by collective decision-making, the learning process, and the development of new skills. If these are the values honored by common ownership of housing, a regime that sacrifices autonomy in governance and exit rules is justified. Yes, we do forgo some degree of autonomy because we care deeply about equality and community. What we sacrifice is, mostly, the ability to rely on the surplus in the resale price for other life projects. In other words, what we forfeit is income rights. And, one could argue, in imperfect markets, full income rights afford owners a benefit that is equivalent to an economic rent.<sup>68</sup> Losing this aspect of autonomy<sup>69</sup> is the price for more equality in autonomy.

For private lawyers, Sandel’s theory of justice has heuristic value and an important energizing effect. It is a powerful call for daring to restore substantive values and notions of the common good into private law debates.

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<sup>67</sup> For a critique of the idea of community as voluntary, see Peñalver, *supra* note 25, at 1900-01.

<sup>68</sup> JOHN CHRISTMAN, *THE MYTH OF PROPERTY: TOWARD AN EGALITARIAN THEORY OF OWNERSHIP* 130 (1994); *see also* BARBARA H. FRIED, *THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE* 143-45 (1998).

<sup>69</sup> John Christman argues that while control rights serve autonomy-protecting functions, income rights serve an allocative function, and that the contrast between each of these pairs is so stark that the principles of distributive justice must deal with them as completely separate normative structures. CHRISTMAN, *supra* note 68, at 8.

It orients our work as legal architects. Property scholars and economists have long noted that different resources have different economic characteristics that determine the optimal bundle of rights. Sandel helps us see that different resources also involve different values, interests, social meanings and, in turn, different arguments about their distribution in a just society.