The Common Good in Common Goods
The Decommodification of Fundamental Resources through Law

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I look forward to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them. Oliver Wendell Holmes, *The Path of the Law, (1897)*

"A reformist reform is one which subordinates its objectives to the criteria of rationality and practicability of a given system and policy. Reformism rejects those objectives and demands—however deep the need for them—which are incompatible with the preservation of the system. On the other hand, a not necessarily reformist reform is one which is conceived not in terms of what is possible within the framework of a given system and administration, but in view of what should be made possible in terms of human needs and demands. In other words, a struggle for non-reformist reforms—for anticapitalist reforms—is one which does not base its validity and its right to exist on capitalist needs, criteria, and rationales. A nonreformist reform is determined not in terms of what can be, but what should be." Andre Gorz, *Strategy for Labor, (1967)*

"We must change our conception of who doctrine addresses and of what it is for. The judge or the jurist could no longer be the defining protagonist of legal thought, nor could the question of how judges should decide cases remain its central issue. Much more important is the making of society in the details of the law." Roberto Unger, *What Should Legal Analysis Become?* (1996)

For Ella and Misha

ACKNOWLEDGEMENTS

First and foremost, I must thank my supervisors Filippo Valguarnera and Claes Martinson for their guidance, support and encouragement throughout this process. Their steady hand and open generosity in sharing their knowledge and time, as well as, their genuine faith in me, provided the necessary intellectual and spiritual nourishment I needed to not only pursue this work but to complete it.

My deepest thanks must go to my husband Talha Syed to whom this work is greatly indebted in both its content and form. His brilliance, rigor, passion, and demand for real thought drove me to the edge of madness at times, but I found my work (and even myself) made stronger and better by it.

I am also eternally grateful to the following people who were so critical in my intellectual formation in my long path over the last decade towards pursuing my doctorate and specifically the topic of the Commons through law (as academics or activists or both): David Bollier, Giacomo D'Alisa, Anna di Robilant, Danijela Dolonec, Tomaso Fattori, Silke Helfrich, Vedran Horvat, Ugo Mattei, Giuseppe Mastruzzo, Michele Spano, Gunther Teubner, & Mauro Zamboni. Special thanks to Thomas Wilhelmsson for his feedback and engagement with my Legal Theory Chapter 4.

I would also like to thank the following people at the University of Gothenburg who made this work possible: Sara Stendhal and Eva Maria Svensson, for not only supporting me through this process, but also in demonstrating the fully embodied and human form of the Nordic model. I am truly blessed to have landed in one of the few places in the world that deeply supports women in pursuing careers in

academia while at the same time pursuing a family; many thanks as well to Thomas Erhag, Christine Forssell, Joachim Ahman, and Max Lyles for their always efficient academic administrative guidance; I must also say a thousand thanks (tusen tak) to my brilliant reader Erik Bjorling whom I was lucky enough to have volunteer to provide such priceless and detailed feedback; and finally to my fellow doctoral comrades, without whom the process would not have been nearly so fun and interesting, in particular Tormod Johansson and Erik Lidman.

I would also like to thank those that enriched my work and knowledge of housing policy, cooperatives, and community land trusts during my stay in California: Janelle Orsi and Chris Tittle at the Sustainable Economies Law Center and Noni Session, Ojan Mobedshahi, Greg Jackson, Marissa Ashkar of the East Bay Permanent Real Estate Cooperative; Rick Lewis and Steve Barton at the Bay Area Community Land Trust; Francis McIlveen and Ian Winters of Northern California Community Land Trust & The California Community Land Trust Network; Mark Asturias of Irvine Community Land Trust; Steve King & Jen Collins of Oakland Community Land Trust; Seema Rupani and Hewot Shankute of the East Bay Community Law Center; and Susan Scott of the Policy Committee of the California Community Land Trust Network.

Finally, I need to thank those that provided me with so much emotional, psychological, and spiritual support throughout this long and arduous process: Edward and Tomiko Bailey, Kumi Bailey, Gunnel Reiz, Anna Reiz, Fredrik Reiz & Lili Badawi, Kismet Keefe, Jenna Zarate-Lopez, Lena Sawyer, Sophia Clark-Waddell, and Marybelle Nzegwu-Tobias. Thank you for your love, support, and friendship expressed in a countless multiplicity of ways over these years, without which this work could not have seen the light of day.

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Part I Embedding the Market Through Commons

Chapter 1 The Commons as Post-Capitalist Strategy Advanced Through Law

1.1 Introduction

Over the last four decades there has been a pendulum swing from the expansion of welfare institutions to privatized market solutions in providing people with access to basic fundamental resources like housing, healthcare, and education. In this context of a shift, there has been an emergence of "commons": decentralized and localized governance of fundamental resources providing many with an important buffer from the destructive effects of the market absent the welfare state. This wave of "commons" has emerged all over the globe as an innovative third way – neither state nor market – for the governance and decommodification of fundamental resources.[1] Different from the commons of feudal times with the archetypal image of green pastures for grazing animals and forests for hunting and foraging, the commons of today are diverse, not only in the types of resources governed, but also in their varying legal organizational forms as hybrids of collective associations and communal/group property regimes. What they have in common, however, is the refusal on the part of the "commoners," those who create and maintain access to the commons, to subjugate access to fundamental resources – such as water, food, housing, education, healthcare, culture, nature, knowledge – to the imperatives of the market, and instead to participate in the decommodification of their access through democratic governance prioritizing shared community values- the "common good"- over the market. What this thesis

[1] An example of some of these initiatives can be seen in the "bene-comune" movements in Italy in their alternative provisioning of water and culture, Indian rural water collectives, the open software and creative commons license movements, urban gardening initiatives, new programs for cooperatives of all different kinds beyond the traditional workers cooperatives in housing, banking, and consumer goods, to seed banks, and community land trusts to provide affordable housing, as well as for the preservation of nature.

aims to demonstrate is that today's commons offer an opportunity to go beyond the classic dichotomy of reform versus revolution and market versus state, towards bottom-up institutional experimentation and transformation of access to fundamental resources through law, what will be discussed as "institutional imagination"[2] for pursuing (1) the decommodification of fundamental resources, and (2) the democratization of their governance, in accordance with, and towards achieving, the common good over appeasing the imperatives of the market.

What we will discover in Chapter 2 is that the market operates through the social relations of capitalism not as opportunity but as imperative: producing dependence on all actors to access their livelihood and means of subsistence from the market. These imperatives enable the market to act as a system of commodity production (discussed in more depth in Chapter 2) based on the requirements of: 1)competition; 2) dependence of everyone (even the non-producer class but especially the productive class) on the market for access to the means of subsistence; 3) the need to engage in ceaseless accumulation and investment into new technologies and related; 4) subjecting workers to the imperative to make more in less time to maximize profit; and 5) the extension of this process and resulting commodification into every sphere of life. Capitalism, discussed as a historically-specific economic system in the coming chapters, has resulted in a plethora of negative effects for man and the environment: massive inequalities of wealth, destruction of the environment, destruction and fragmentation of community, worker disempowerment, and human alienation. These effects rather than being merely natural effects of a transhistorical market, are explained in the following Chapters, as the result of a runaway non-social logic, a form of the

2 *See* ROBERTO UNGER, POLITICS (1987). *See also* Erik Olin Wright, *Transforming Capitalism for Real Utopias* AMERICAN SOCIOLOGICAL REVIEW 78/1, 1-25 (2013); ERIK OLIN WRIGHT, ENVISIONING REAL UTOPIAS (2010).

market disembedded from social rules and limits, in which it was embedded in previous epochs.

In the feudal system of production,[3] the social basis of organization was abundantly more transparent though brutal: direct producers were a class of serfs or "peasants" who worked the land for their lords who in return provided them with protection from other nearby hostile kingdoms. Through this system peasants had direct access to food, water and shelter provided by the land, however always at the pleasure of their lords. Peasants could eat the wheat that they grew that year, and trade anything left over after paying their lords tithes, for which they were directly coerced at the threat of death, torture and imprisonment. With what remained of the surplus after the reduction of tithes, they used for clothes and other small comforts, and with rights to the commons, they could forage in the forest to gather wild mushrooms, berries, kindle for fire and hunt for small game where the lord had not prohibited it. The peasants were a part of the territory controlled by those of "noble birth" who "rightly" controlled the land due to their "natural inherited superiority," their fitness to rule determined by a "natural order" operating on noble birthright encased and reinforced in the authority of the church and god. Land was inherited by nobles over generations, and generally the acquisition of new land took place through bequeathal to the lord by the king for good services rendered in his court and/or glories in war. The lord treated everyone and everything in his realm as his own and conditioned the lives of his subjects as he saw fit. Rebellions were not tolerated and met with the consequence of death and even massacres of women and children in retaliation for failure to

3 *See generally* Paul M. Sweezy and Maurice Dobb, *The Transition from Feudalism to Capitalism*, SCIENCE & SOCIETY 14/2, 134-67 (1950). Robert Brenner, *Dobb on the Transition from Feudalism to Capitalism*, CAMBRIDGE JOURNAL OF ECONOMICS 2/2 121-40 (1978). Jason W. Moore, *Nature and the Transition from Feudalism to Capitalism,* REVIEW (FERNAND BRAUDEL CENTER) 26/2, 97-172 (2003).

accept the "natural order." Commons in this order, represented both the resources - grazing land, kindle, consumables like berries and mushrooms, and hunting animals- but also the informal and formal rules over their governance: the rules regarding where the boundaries of the commons begin and end, the manner of collection, the quantity of goods permitted for use, and the sanctions for non-compliance expressed both horizontally, between commoners in community, and vertically, between commoners and their feudal lords.[4] This system of governance of commons and community, along with the principle of *noblesse oblige* – feudal obligation- and the charity provided by the Church, acted to provide direct access to basic means of subsistence in times of scarcity. Four feudal institutions-feudal obligation, the family, church charity, and the Commons- acted as an important buffer from death and poverty for peasants during times of major societal catastrophes like war and famine, but also personal catastrophes like the death of a male head of family. In this sense, Commons represented not only the governance of resources, but also the community ethos of solidarity with one another in times of hardship. These institutions continued to provide an important buffer in the transformation in social relations to the capitalist market beginning as early as the 14th century,[5] in a time when access to fundamental resources was increasingly becoming mediated by the market and one's ability to access these resources was becoming a factor of one's ability to pay through rents and wage labor. *In this sense, commons acted as both a proto welfare institution, as well as, an alternative property arrangement foregrounding use entitlements in contrast to private property, which foregrounded transfer and exclusion entitlements.*

4 *See generally* PETER LINEBAUGH, STOP, THIEF! THE COMMONS, ENCLOSURES, AND RESISTANCE (2014). *See also* Tine De Moor, *From Common Pastures to Global Commons: A Historical Perspective on Interdisciplinary Approaches to Commons*, NATURES SCIENCES SOCIÉTÉS 19/4, 422-431 (2011).
5 *See* ELLEN M. WOOD, THE ORIGINS OF CAPITALISM: A LONGER VIEW (2002).

Undoubtedly, for most, the feudal system of production appears barbaric and the capitalist market an unarguable improvement. Feudalism as a system of production which permitted direct access to the means of subsistence, however albeit conditions of *direct coercion* for the surplus, appears less fair and therefore less attractive compared to another system, capitalism, which requires one to buy the means of subsistence with money earned from labor under conditions of *indirect coercion* (though on pain of starvation) for the surplus produced. However, though capitalism appears more fair and less coercive compared to feudalism, a little pondered fact is that under feudalism, unlike under capitalism, when there was an oversupply of food, people didn't starve, only when -as common sense suggests- when there was an undersupply, however under capitalism, paradoxically people starve when there is an oversupply of food. Why would this be? This optical illusion of the transparency and fairness of the "rules of the game" of the market is illustrated by the opaque nature of the rules which determine the allocation of goods: when there is an oversupply in capitalism, prices drop, when prices drop people are fired, when people are fired they starve since they have no other means of accessing food except through wage labor. In contrast, in feudalism, when there was an oversupply, as one would imagine, there was more surplus to go around for everyone. People only starved when there was an undersupply, and when societal and personal catastrophe arose, they went to the feudal institutions mentioned above to supplement their meager means of subsistence. While, there is no going back, nor desire to return to a barbaric, regressive, hierarchical and unjust form of economic production, the feudal commons remind us of the important role that Commons -as a proto-welfare institution, governance regime, and an ethos of community and being in solidarity with others- played in feudalism and provides important insight into what role it could play again today in a transition towards a new social form.

Commons of contemporary times build from those of feudal times in three respects: 1) as an alternative approach (which is neither capitalism nor feudalism) to production and the division of labor which is the result of socially determined rules (not market imperatives); 2) as a form of governance that emphasizes use over exchange value of resources; and 3) as a set of substantive values, which presents an alternative to liberal values that prioritize solidarity with others in a commitment to "the common good." This dissertation focuses almost exclusively on the second issue: the commons as a form of governance and how law can facilitate a project of advancing Commons, not as a feudal holdover which requires taking ten steps back, but instead as one step back to take a big leap in time, transcending both feudalism and capitalism through the decommodification and democratization of access to fundamental resources. Due to the limits of this dissertation, little will be said about the commons as an alternative system of production and division of labor, an area which some scholars have developed with truly innovative and important contributions,[6] and almost nothing about commons as a system of alternative values to liberalism, a field which is little

[6] Yochai Benkler coined the term "commons-based peer production" and offers an original analysis of an alternative form of production and division of labor to both the market (decentralized coordination) and the state (government planning). *See* Yochai Benkler, *Coase's Penguin, or, Linux and " The Nature of the Firm,"* YALE LAW JOURNAL 112, 369-446 (2002). *See also* YOCHAI BENKLER, THE WEALTH OF NETWORKS (2007). Yochai Benkler, *Sharing nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production,* YALE LAW JOURNAL 114, 273-358 (2004). Michel Bauwens also does important work in this direction. See Michel Bauwens, *Class and Capital in Peer Production*, CLASS AND CAPITAL 97, 121-141 (2009); Michel Bauwens & Vasilis Kostakis*, From the communism of capital to capital for the commons: towards an open co-operativism,* TRIPLEC: COMMUNICATION, CAPITALISM & CRITIQUE. OPEN ACCESS JOURNAL FOR A GLOBAL SUSTAINABLE INFORMATION SOCIETY 12, 356-361 (2014).

developed.[7] *While there are many scholars,*[8] *who analyze the Commons as an alternative form of governanceas well as legal scholars who specifically study the commons through the lens of law,*[9]

[7] Anna di Robilant is a good example of applying normative values -driven analysis to the commons, however she does so within the values of liberalism (though to its outer limits in the form of equality of autonomy), rather than specifically articulating an alternative set of values from within the commons. *See* Anna di Robilant, *The Virtues of Common Ownership*, BOSTON UNIVERSITY LAW REVIEW 91, 1359-1374 (2011). *See also* Anna di Robilant, *Common Ownership and Equality of Autonomy*, MCGILL LAW JOURNAL 58, 263-320 (2012).

[8] For examples of such scholars and works *See* Elinor Ostrom, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990); Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, JOURNAL OF NATURAL RESOURCES POLICY RESEARCH 6/4, 235-52 (2014); Elinor Ostrom, *Polycentricity, Complexity, and the Commons*, *THE GOOD SOCIETY* 9/2, 37-41 (1999). Elinor Ostrom, *A Diagnostic Approach for Going Beyond Panaceas*, PROC. NAT'L ACAD. SCI. 104/15181 (1990); Elinor Ostrom, *The Institutional Analysis and Development Approach*, in *Designing Institutions for Environmental and Research Management* (Loehman, E.T. & Kilgour, D.M. eds.) 68–90 (1998); Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic Systems*, *THE AMERICAN ECONOMIC REVIEW* 100/3 641-72 (2010); Elinor Ostrom, *The Institutional Analysis and Development Framework and the Commons*, CORNELL L. REV. 95, 807 (2010). Elinor Ostrom and Vincent Ostrom, *The Quest for Meaning in Public Choice*, THE AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY 63/1,105-47 (2004). *See also* Thomas Dietz and Adam Douglas Henry, *Context and the Commons*, PROCEEDINGS OF THE NATIONAL ACADEMY OF SCIENCES OF THE UNITED STATES OF AMERICA 105/6, 3189-3190 (2008); NIVES DOLSAK AND ELINOR OSTROM (EDS.), THE COMMONS IN THE NEW MILLENNIUM: CHALLENGES AND ADAPTATIONS (2003); Paul C. Stern, *Design Principles for Global Commons: Natural Resources and Emerging Technologies*, INTERNATIONAL JOURNAL OF THE COMMONS 5/2, 213-32 (2011); Michael D. McGinnis and James M. Walker, *Foundations of the Ostrom Workshop: Institutional Analysis, Polycentricity, and Self-governance of the Commons*, PUBLIC CHOICE 143/3-4, 293-301 (2010); Charlotte Hess and Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, LAW AND CONTEMPORARY PROBLEMS 66/1-2, 111-45 (2003); Edella Schlager, *The Importance of Context, Scale, and Interdependencies in Understanding and Applying Ostrom's Design Principles for Successful Governance of the Commons*, INTERNATIONAL JOURNAL OF THE COMMONS 10/ 2, 405-16 (2016); Ruth Meizen-Dick, Rahul Chaturvedi, Laia Domènech, Rucha Ghate, Marco A. Janssen, Nathan D. Rollins, and K. Sandeep, *Games for Groundwater Governance: Field Experiments in Andhra Pradesh, India,* ECOLOGY AND SOCIETY 21/3, (2016); Sergio Villamayor-Tomas, Forrest D. Fleischman, Irene Perez Ibarra, Andreas Thiel, and Frank Van Laerhoven, *From Sandoz to Salmon: Conceptualizing Resource and Institutional Dynamics in the Rhine Watershed through the SES Framework*, INTERNATIONAL JOURNAL OF THE COMMONS 8/2, 361-95 (2014); Tine De Moor, *The Silent Revolution: A New Perspective on the Emergence of Commons, Guilds, and Other Forms of Corporate Collective Action in Western Europe*, INTERNATIONAL REVIEW OF SOCIAL HISTORY 53,179-212 (2008); Naomi Klein, *Reclaiming the Commons*, NEW LEFT REVIEW 9, 81-89 (2001); PETER LINEBAUGH, STOP, THIEF! THE COMMONS, ENCLOSURES, AND RESISTANCE (2014); PETER LINEBAUGH, THE MAGNACARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL (2009); Chiara Carrozza and David Bull, *The June Referendums: A Partial Victory*, ITALIAN POLITICS 27, 244-61 (2011); Chiara Carrozza & Emanuele Fantini, *The Italian Water Movement and the Politics of the Commons*, WATER ALTERNATIVES 9/1, 99-119 (2016); Karen Bakker, *Neoliberalizing Nature? Market Environmentalism in Water Supply in England and Wales*, ANNALS OF THE ASSOCIATION OF

there are however no legal scholars[10] *who have discussed the commons in view of a post-capitalist strategy for the decommodification and democratization of fundamental resources towards the*

AMERICAN GEOGRAPHERS 95/3, 542-65 (2005); STEFANIA BARCA, ENCLOSING WATER. NATURE AND POLITICAL ECONOMY IN A MEDITERRANEAN VALLEY, 1796-1916, (2010); Stefania Barca, *Enclosing the River: Industrialisation and the 'Property Rights' Discourse in the Liri Valley (South of Italy)*, 1806-1916, ENVIRONMENT AND HISTORY 13/1, 3-23 (2007).

9 *See* Gregory S. Alexander, *Governance Property,* UNIVERSITY OF PENNSYLVANIA LAW REVIEW 160/7,853-887 (2012); GREGORY S. ALEXANDER AND HANOCH DAGAN, PROPERTIES OF PROPERTY (2012); *See also* Benkler, *supra* note. 6; James Boyle, *The Second Enclosure Movement and the Construction of the Public Domain,* LAW AND CONTEMPORARY PROBLEMS 66, NO. 1/2, 33-74 (2003); MERIMA BRUNCEVIC, LAW, ART AND THE COMMONS (2017); James Buchanan, and Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons,* THE JOURNAL OF LAW & ECONOMICS 43, 1, 1-14 (2000); Hanoch Dagan and Michael A. Heller, *The Liberal Commons*, THE YALE LAW JOURNAL 110/4, 549-623 (2001); See also di Robilant, *supra* note. 7; LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES, (2009); *Ostrom's Law: Property Rights in the Commons*, INTERNATIONAL JOURNAL OF THE COMMONS 5/1,9-27 (2011); Sheila R. Foster and Christian Iaione, *The City as a Commons*, YALE LAW & POLICY REVIEW 34/ 2, 281-349 (2016); Sheila R. Foster, *Urban Informality as a Commons Dilemma*, THE UNIVERSITY OF MIAMI INTER-AMERICAN LAW REVIEW 40/2, (2009); Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, HARVARD LAW REVIEW 111/3, 621-88 (1998); Michael Heller, *The Tragedy of the Anticommons: A Concise Introduction and Lexicon*, THE MODERN LAW REVIEW 76/1, 6-25 (2013); Lawrence Lessig, *The Architecture of Innovation*, DUKE LAW JOURNAL 51/6, 783-801 (2002); Christian Iaione, *The CO-City: Sharing, Collaborating, Cooperating, and Commoning in the City*, AM J ECON SOCIOLOGY 75, 415-455 (2016); Gregorio Arena and Christian Iaone, L'Italia Dei Beni Comuni (2012); Maria Rosaria Marella, *The Commons as a Legal Concept*, LAW CRITIQUE 28/1, 61–86 (2017); Margherita Pieraccini, *A politicized legal pluralist analysis of the commons' resilience: the case of the Regole d'Ampezzo*, ECOLOGY AND SOCIETY, 18/1, 1-11 (2013); ALESSANDRA QUARTA AND MICHELE SPANO, BENI COMUNI 2.0: CONTRO-EGEMONIA E NUOVE ISTITUZIONI, (Commons 2.0: Counter-hegemony and New Institutions) (2016). Carol Rose, *Ostrom and the Lawyers: The Impact of Governing the Commons on the American Legal Academy*, INTERNATIONAL JOURNAL OF THE COMMONS 5/1, 28-49, (2011); Carol Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, DUKE LAW JOURNAL 1991, 1, 1-38, (1991); Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, THE UNIVERSITY OF CHICAGO LAW REVIEW 53, 3, 711-81 (1986); Filippo Valguarnera, *Legal Ideology and the Commons: Why are Jurists Falling Behind?* PHILOSOPHY AND SOCIETY 29/2, 205-217; FILIPPO VALGUARNERA, ACCESS TO NATURE (ACCESSO ALL NATURA TRA IDEOLOGIA E DIRITTO), 2013; Filippo Valguarnera, *Access to Nature and Intergenerational Justice* in PROTECTING FUTURE GENERATIONS THROUGH COMMONS (Bailey, Farrell, Mattei eds.) (2013).

10 Some exceptions within the legal academy are Ugo Mattei and Talha Syed. However, while Mattei engages with commons as post-capitalist strategy through law, he does not discuss it within the context of the transformation of capitalist social relations grounded in a specific social theory tradition informed by Marx and Polanyi and specifically their contributions to the changes in *social property relations* between feudalism and capitalism, nor does he offer a specific program of transformation of those social relations through strategic decommodification and democratization of fundamental resources through law. *See* Ugo Mattei, *Communology: The Emergence of a Social Theory of the Commons*, SOUTH ATLANTIC QUARTERLY 118/4, 725-746 (2019);

transformation of capitalist social relations. The idea of the Commons as a post-capitalist strategy more generally pursued by political and legal means, however is not novel outside of legal academia, particularly in the Marxist and post-Marxist traditions of diverse groupings,[11]and has a long legacy in the history and practices of social movements associated with the Commons: from the anti-globalization movement in the 90s[12]; to indigenous sovereignty movements in the Global South[13]; the

UGO MATTEI & ALESSANDRA QUARTA, THE TURNING POINT IN PRIVATE LAW: ECOLOGY, TECHNOLOGY, AND THE COMMONS (2018); Ugo Mattei & Alessandra Quarta, *Right to the City or Urban Commoning? Thoughts on the Generative Transformation of Property Law*, 1 ITALIAN L.J. 303 (2015); Saki Bailey & Ugo Mattei, *Social Movements as Constituent Power: The Italian Struggle for the Commons*, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 20/2, 965-1013 (2013); UGO MATTEI, BENI COMUNI: UN MANIFESTO (2011). Syed, on the other hand is deeply rooted in the social theory tradition of Polanyi and advances a strategic program of decommodification through law however does not apply his analysis to the Commons nor to the strategic decommodification of housing. *See* Talha Syed, *From Imperative to Opportunity: Radically Restructuring Markets*, forthcoming (paper presented at the *Law and Political Economy Project's Inaugural Conference*, Yale Law School, April 3-4, 2020).

11 For scholars in this vein: *See* DAVID BOLLIER & SILKE HELFRICH, FREE, FAIR, AND ALIVE: THE INSURGENT POWER OF THE COMMONS (2019); DAVID BOLLIER & SILKE HELFRICH, THE WEALTH OF THE COMMONS: A WORLD BEYOND MARKET AND STATE (2012); DAVID BOLLIER & SILKE HELFRICH, PATTERNS OF COMMONING (2015). See also George Caffentzis & Silvia Federici, *Commons: Against and Beyond Capitalism*, COMMUNITY DEVELOPMENT JOURNAL 49/1, i92–i105 (2014); SILVIA FEDERICI, RE-ENCHANTING THE WORLD: FEMINISM AND THE POLITICS OF THE COMMONS (2018); Silvia Federici, *Women, Reproduction, and the Commons*, SOUTH ATLANTIC QUARTERLY 118/4, 711-724 (2019); *See also* MASSIMO DE ANGELIS, OMNIA SUNT COMMUNIA, (2017); Massimo De Angelis, *The Strategic Horizon of the Commons*, IN COMMONING WITH GEORGE CAFFENTZIS AND SILVIA FEDERICI (Barbagallo Camille, Beuret Nicholas, and Harvie David eds.), 209-21 (2019); Danijela Dolonec & Mislav Zitko, *Exploring Commons Theory for Principles of a Socialist Governmentality*, REVIEW OF RADICAL POLITICAL ECONOMICS 48/1, 66-80 (2016); MICHAEL HARDT & ANTONIO NEGRI, COMMONWEALTH (2009); David Harvey, The Future of the Commons, RADICAL HISTORY REVIEW 101-107 (2011); DAVID HARVEY, REBEL CITIES: FROM THE RIGHT TO THE CITY TO THE URBAN REVOLUTION (2012); STAVROS STAVRIDES, THE CITY AS A COMMONS (2016), Giacomo D'Alisa & Cristina Matiucci, *Struggling for the Commons*, LOSQUADERNO. EXPLORATIONS IN SPACE AND SOCIETY, 30 (2013); GIOVANNA RICOVERI, NATURE FOR SALE: THE COMMONS VERSUS COMMODITIES (2013); Tommaso Fattori, *From the Water Commons Movement to the Commonification of the Public Realm*, SOUTH ATLANTIC QUARTERLY 112/2, 377-387 (2013).

12 For the link between these two movements: *See* Karen Bakker, *The 'Commons' Versus the 'Commodity': Alter-globalization, anti-privatization, and the Human Right to Water in the Global South*, ANTIPODE 39, 430-455 (2007). *See also* Naomi Klein, *Reclaiming the Commons*, NEW LEFT REVIEW 9, 81-89 (2001).

13 *See* BALAKRISHNAN RAJAGOPAL, INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE (2003); Balakrishnan Rajagopal identifies

worldwide Occupy movements in 2011-2012[14]; to national movements of resistance against neoliberal austerity programs in Europe (in the wake of the 2008 crisis to the present);[15] to municipal experiments taking place throughout the world to retake cities as commons (most robustly in Bologna)[16]; and finally most concretely at the level of the countless number of collectives and individual "Commoners" - groups of individuals- organizing around non-market or anti-market values in constructing alternative legal and economic institutions to decommodify access to a variety of resource. So, while the approach is familiar to activists and scholars who embrace this political and social theoretical approach to the commons, what I claim is novel, is to *approach the study of commons as a post-capitalist strategy through law*, not only at level of social movements, but *as specific property institutions- what I will call a Commons Property Institutions- structured through law for the purpose of achieving the decommodification and democratization of fundamental resources*

three waves of social movements: the first wave is characterized by organization around the "nation," referring to the national liberation projects of the third world which took place in the 1950s and 1960s; the second wave concerns identity, referring to the civil rights, feminist, and gay rights movements which stretch from the 1960s into the 1990s; and finally, the third wave of "antiglobalization" movements which erupted in the 1990s as a reaction against capitalism, and highlighted the struggle over global resources. It is within this third wave that we locate the social movement of the commons, characterized as the struggle of local communities to reclaim access and governance to common resources from collusive state and market actors; *See also* Saki Bailey & Ugo Mattei, *Social Movements as Constituent Power: The Italian Struggle for the Commons*, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 20/2, 965-1013 (2013). Here I elaborate specific indigenous sovereignty movements like that of the Uwa people in Columbia.

14 https://www.onthecommons.org/occupy-commons (last visited January 5th, 2020); https://www.youtube.com/watch?v=aAi4wwirTYU (last visited January 5th, 2020), Michael Hardt on Occupation and Commons (minutes 15:17-16:40).

15 *See* Andreas Bieler and Jamie Jordan, *Commodification and 'the commons': The politics of privatising public water in Greece and Portugal during the Eurozone crisis*, EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS, *24*(4), 934–957 (2018); See also Álvaro Sevilla-Buitrago, *Crisis and the City: Neoliberalism, Austerity Planning and the Production of Space,* CITY OF CRISIS: THE MULTIPLE CONTESTATION OF SOUTHERN EUROPEAN CITIES, (Eckardt Frank and Sánchez Javier Ruiz eds), 31-50 (2015).

16 Cristian Iaione was a central figure in the transformation of Bologna as a "City of the Commons." https://labgov.city/explore-by-lab/bolognalab/ (last visited January 5th, 2020).

towards the transformation of the capitalist market. To understand the importance of the central role of law in studying the Commons and the economy and markets more broadly, one must return to the origins of the Commons as a field of inquiry and study.

1.2 The Origin of the Commons in Legal & Economic Institutionalist Thought

The intellectual origins of the "Commons" has a long lineage, emerging out of the tradition of "institutional political economy" and the legacy of "Institutionalist" thinkers hailing from different disciplines, including political economy, economics, sociology, anthropology and law beginning from the 1920s & 1930s. In Chapters 1 & 2, I offer an alternative social theory to contemporary mainstream thought on the social relations and the legal foundations of the economy, through a synthesis of the contributions of Karl Polanyi, in particular his 1944 work *The Great Transformation*,[17] the Political Marxist tradition of Robert Brenner and Ellen Meiksins-Wood,[18] and the American Legal Realists and "Old Institutionalist" Economists from the turn of the century to the 1930s. Here, I engage in an exposition of contemporary mainstream thought investigating the central role of law and social norms in shaping the economy: the work of scholars in the New Institutionalist tradition (I will focus here specifically on Economic Sociology), and the work of 2009 Nobel Prize winner in Economics, Elinor Ostrom.

Ostrom's work, contrary to what most believe, is relevant not only more narrowly to the study of the Commons, but more broadly as a theory identifying

17 KARL POLANYI, THE GREAT TRANSFORMATION: THE POLITICAL AND ECONOMIC ORIGINS OF OUR TIME (2001 [1944]).

18 *See* ELLEN M. WOOD, THE ORIGINS OF CAPITALISM: A LONGER VIEW (2002). *See also* Robert Brenner, *The Origins of Capitalist Development: a Critique of Neo-Smithian Marxism*, NEW LEFT REVIEW 104/25 (1977); Paul Sweezy, *Comment on Brenner*, 108 NEW LEFT REVIEW 94 (1978); Robert Brenner, *Reply to Sweezy*, 108 NEW LEFT REVIEW 95 (1978); *and* Robert Brenner, *Dobb on the Transition from Feudalism to Capitalism*, 2 CAMBRIDGE JOURNAL OF ECONOMICS 121 (1978).

and highlighting the legal foundations of the economy. To understand this point we must return to the lineage that Ostrom's work departs from and develops, that of old institutionalism, a tradition to which Polanyi also made significant contributions despite being a peripheral rather than central figure.[19] The central figures of American old institutionalism, such as Thorstein Veblen, John R. Commons, Richard T. Ely and Robert Hale, rejected the neoclassical approach to economic analysis, and like Polanyi understood the market as a social institution.[20] These scholars understood the market, not as the product of spontaneous aggregation of individual preferences and choice, but instead as a product of a particular, bounded form of rationality, structured by the complex interaction of different historically-specific institutional settings with their own internal rules and dynamics.[21] For the old Institutionalists, the legal foundations of the economy were central to their analysis, offering an important entry point for intervention towards altering market logic through regulation, which could correct for the deep inequalities in wealth produced by the market in its unfettered wake. The insight

19 Although Polanyi's work can certainly be viewed as falling within the "old institutionalist" line of analysis—and indeed he explicitly cites to and builds upon such work in *The Great Transformation*—nevertheless there are three significant, and related, sets of distinctions that merit treating him as a thinker apart. First, Polanyi's primary formation was within Continental European, rather than American, schools of thought. Second, his primary methodological orientation as an economic historian is less the discipline of economics than those of sociology and anthropology. Third, Polanyi was also—no doubt in large part owing to his roots in European social theory—a socialist and even a Marxist at one point. Even if he no longer was by the time of *The Great Transformation*, his analysis there still bears the strong stamp of Marxisant categories and commitments, although not those of any orthodox variety. (It may be noted that in all three respects, there is one American institutionalist who bears close parallels to Polanyi, and that is Veblen. Yet, despite Veblen's foundational status within the American institutionalist tradition, it remains the case that the main lines of American institutionalism bear less of a European sociological and socialist stamp than Veblen.)

20 *See* THORSTEIN VEBLEN, THE THEORY OF THE LEISURE CLASS: AN ECONOMIC STUDY OF INSTITUTIONS (1899 [1953]); RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATION TO THE DISTRIBUTION OF WEALTH (1914); JOHN R. COMMONS, THE LEGAL FOUNDATIONS OF CAPITALISM (1924 [1995]); Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POLITICAL SCIENCE QUARTERLY 470 (1923); *and* Robert L. Hale, *Bargaining, Duress and Liberty*, 43 COLUMBIA LAW REVIEW 603 (1943).

21 *Ibid.*

that the capitalist market was not the spontaneous product of human nature, advanced by Karl Polanyi (influenced of course by Karl Marx), liberated the market conceptually as a social institution, and at least in principal, as a site for legal regulation, political contestation, and democratization towards the project of socially "re-embedding" the market, which the Old Institutionalists advanced in co-development with and through Franklin D. Roosevelt's New Deal in the United States.

However, these old Institutionalist and Marxian/Polanyian insights were lost in their diluted appropriation by successor generations. The most successful of the two, New Institutionalism, consciously understood itself as both inheritor and transformer of the old legacy, picking up the concern with institutions but inverting its fundamental import, reversing the causal arrow, institutions were no longer the complex historically-specific shapers of individual preferences and choice, but themselves explained in relatively simple terms as the outcome of such choice, being solutions to recurrent transaction-cost problems faced by individuals in the pursuit of their pre-institutional preferences.[22] As we will discussed next, Economic Sociology, the branch of New Institutionalism which most directly descends from Old Institutionalism and Polanyi in their focus on the centrality of social and legal institutions in shaping the economy, like other New Institutionalists shaped the discipline in precisely the opposite direction of their predecessors. Economic Sociology served to bolster, rather than critique, the premises of neoclassical economics and to dilute the concept of "embeddedness" and "social relations" conceptualized by Polanyi (and Marx), as merely modes of

[22] The foundational works of New Institutionalism are those of Coase, Demsetz, and Williamson. *See* Ronald H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); Ronald H. Coase, *The Problem of Social Cost,* 3 JOURNAL OF LAW AND ECONOMICS 1 (1960); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AMERICAN ECONOMIC REVIEW 347 (1967) ; OLIVER E. WILLIAMSON, THE ECONOMICS INSTITUTIONS OF CAPITALISM (1985).

describing aggregated individual behavior resulting in (and promoting) the deeper entrenchment of the naturalization of markets and market logic, rather than to offer a blueprint towards bringing the market under greater social control.

1.3 Reclaiming the Concept of Embeddedness from New Institutionalist Economic Sociology

Karl Polanyi made three distinct contributions to social theory, which are often confused and conflated with one another: 1) his critique of the self-regulating market as a stark utopia and the idea of double movement; 2) the role of law and social norms in structuring economies, including the capitalist market; and 3) his prescription for protective measures of "re-embedding" the market in the form of legal regulation to bring the economy back under social control. As we will discuss in Chapters 2 and 3, the work of Polanyi made key contributions in developing an alternative view to "market fundamentalism" that of the market as a social institution, rather than as the natural extension of human nature. However, even more important, or as important, was his contribution *to the analysis of markets as a social institution governed and structured by law*, in contrast to the analysis of markets as the aggregate result of individual homo economicus. As Polanyi explains in his essay *The Economy as Instituted Process* (1957), "economics," in the Institutionalist tradition, is a distinct field of inquiry from "formal economics" synonymous with "rational choice." He suggests that instead "economics" as "institutionalist economics" focuses on the means of man's livelihood and through what social logic, rules and systems he gains access to subsistence- rather than the rational choice under conditions of scarcity as the controlling factor.[23] This shift was not

[23] Karl Polanyi, *The Economy as Instituted Process*, TRADE AND MARKET IN THE EARLY EMPIRES: ECONOMICS IN HISTORY AND THEORY (Pearson eds.)(1957), pp. 243. "The formal meaning of economic derives from the logical character of the means-end relationship, as apparent in such words as "economical" or "economizing." It refers to a definite situation of choice, namely, that between the different uses of means induced by an insufficiency of those means. If we call the

only a shift in the subject of analysis -the social relations of allocation/production/distribution of the goods necessary to one's livelihood- but the heralding of an entirely new approach, which viewed the capitalist market and the modern economy as one particular variation of the economy, one among many in the long history of economies across time and space. Viewed this way, it became possible to speak of "varieties of capitalism" or as Polanyi was concerned with, the "varieties of economies," and the historical shifts from one type of economic system to another. Such an analysis necessarily involved a legal institutional analysis- the comparison and contrast of the particular structures as pertaining to rules that shape and render distinct economic systems. Each distinct economic system is dependent upon differing social logics and their embedding (or disembedding as Polanyi suggested of capitalist markets) of differing configurations of *social relations* which in aggregation make up *legal institutions*.

Polanyi's radical *socio-legal* institutional approach (brining the insight into legal instituions into social theory) understood that economies varied not only at the level of rules around "exchange," but also rules at the level of "production," this is why Polanyi focused on the idea of man's livelihood and his means of subsistence- understanding production as the foundational means of man's reproduction. However, when undertaken by successor economists and sociologists in the "Economic Sociology" tradition, legal institutional analysis no longer focused on the level of the socially created rules shaping social relations as connected to livelihood, as intended by Polanyi, but instead the concept of social

rules governing choice of means the logic of rational action, then we may denote this variant of logic, with an improvised term, as formal economics. (…) The two root meanings of "economic," the substantive and the formal, have nothing in common. The latter derives from logic, the former from fact. The formal meaning implies a set of rules referring to choice between the alternative uses of insufficient means. The substantive meaning implies neither choice nor insufficiency of means; man's livelihood may or may not involve the necessity of choice and, if choice there be, it need not be induced by the limiting effect of a "scarcity" of the means."

relation set within methodological individualism framework of aggregating individual behavior within the social constraints of rational choices rather than by social rules. This general trend of the New Institutionalist tradition, is perfectly exemplified by the leading light of the field of Economic Sociology, Mark Granovetter's famous 1985 work *Economic Action and Social Structure: The Problem of Embeddedness*, credited with inaugurating the field in the 1980s.[24] Granovetter's article, rather than shifting the problem of "order," which he identifies at the beginning of his article, from atomized individuals to something he calls *social relations*, remains limited to an analysis of "personal relations" between individuals and "social connections" between firms because he overlooks the importance of the particular historically specific character of the content of those social relations.[25] In other words, embeddedness for Granovetter is simply *the economy embedded in* "personal relations" and "social connections." Granovetter, typical of New Institutionalism, continues to project onto atomized individuals a transhistorical human nature of homo economicus- self-interested and utility maximizing- facilitating deceit and malfeasance as a means to an end- just as the traditions and lineage he aims to correct beginning from Hobbes, Smith, Malthus/Ricardo and ending in the neoclassical economists and New

24 Mark Granovetter, *Economic Action and Social Structure: The Problem of Embeddedness*, AMERICAN JOURNAL OF SOCIOLOGY 91/3 (1985).

25 Regarding whether Granovetter intended to address problems at this market level, Michele Cangiani says, "Granovetter has himself recently observed that his 1985 article "focused on a somewhat narrow range of problems," on "social networks as an intermediate level" between individual behavior and macroeconomic phenomena. In fact, also in the final pages of that article, Granovetter (1985, 506) maintains that his analysis does not concern "large scale questions about the nature of modern society or the sources of economic and political change." See Greta Krippner, Mark Granovetter et al, *Polanyi Symposium: a conversation on Embeddedness*, SOCIO-ECONOMIC REVIEW 2, 109-135 (2004).

Institutionalist tradition.[26] Economic sociologists like Greta Krippner[27] criticize Granovetter's concept of embeddedness, precisely for having little to do with Polanyi's notion and makes an important call for an "adequate theorization of the market in economic sociology."[28] However Granovetter is no exception, and this misappropriation of Polanyi's concept of "embeddedness" is also true of those who associate themselves directly[29] with the Polanyian tradition of Economic Sociology like Fred Block. Block interprets Polanyi's concept of embeddedness to mean that economy is "always embedded" since the market is always a social institution embedded in social and (legal) rules, as opposed to distinguishing the capitalist market as Polanyi did as exemplifying a distinctly non-social market logic, which requires *re-embedding* as I will deploy the concept throughout this dissertation.[30]

[26] In Granovetter's "Economic Action & Social Structure," Granovetter critiques the Hobbesian roots of rational choice theory as well as Parsonian sociology and their common tendency towards atomization of the individual, and argues for a focus on "social relations," however he fails to go beyond the individual as the unit of analysis by reducing "social relations" to "the role of concrete personal relations and structures (or "networks") of such relations in generating trust and discouraging malfeasance." Granovetter concludes from this that, "The widespread preference for transacting with individuals of known reputation implies that few are actually content to rely on either generalized morality or institutional arrangements to guard against trouble." In other words what he concludes is that the social role of reputation acts as a constraint upon pure "rational choice."

[27] Greta Krippner, *The Elusive Market: Embeddedness and the Paradigm of Economic Sociology'*, THEORY AND SOCIETY 30, 775–810 (2001), p.777. Krippner's critique also applies to the work of Enrico Mignione and Fred Block. As Krippner argues of Granovetter's work, "Granovetter remains trapped in the limitations of the original formulations that sharply separate economy from the social. The result is an impoverished analysis of both poles." Krippner's critique also applies to the work of Enrico Mignione and Fred Block.

[28] *Ibid.*

[29] See Krippner et al. *supra* note. 25. Granovetter admits in a symposium on Polanyi and the concept of embeddedness that though he cited Polanyi for the concept, he had actually written the article ignorant of Polanyi's actual understanding of the concept. *See* Greta Krippner, Mark Granovetter et al, *Polanyi Symposium: a conversation on Embeddedness*, SOCIO-ECONOMIC REVIEW 2, 109-135 (2004).

[30] "However, the critical point is that in these chapters in which Polanyi elaborates the multiple forms of protection, he discovers the concept of the always embedded economy - that market societies must construct elaborate rules and institutional structures to limit the individual pursuit of gain or risk degenerating into a Hobbesian war of all against all. In order to have the benefits

Fred Block argues, "When Polanyi wrote that 'the idea of a self-adjusting market implied a stark utopia,' he meant that the project of disembedding the economy was an impossibility; it would ultimately destroy both human beings and their natural environment."[31] In another work, Block goes even further by using "embed" to mean that the market is always embedded, so long as it is embedded in law and legal institutions. "Employers often use the rhetoric of "market freedom" to push for policies that strip employees of rights, but this is not disembedding. It is rather an attempt to embed the labor market in political and legal rules that are more favorable to employers."[32] This interpretation of the "always embedded economy" is partially the result of Block's lack of distinguishing clearly, what I mentioned above as Polanyi's three distinct contributions to social theory: 1) his critique of the self-regulating market as a stark utopia and the idea of double movement; 2) the role of law and social norms in structuring economies, including the capitalist market; and 3) his prescription for protective measures of "re-embedding" the market to bring the economy back under social control. Block's concept of the "always embedded economy" advances the second point while ignoring the first and third, which are by far, as I will advance later, Polanyi's most original contributions to social and economic thought and upon which this dissertation will build. Michele Cangiani, similarly rejects this approach to embeddedness reflected in the mainstream, and argues that "Polanyi's embedded/disembedded opposition concerns instead, as we have seen, capitalism

of increased efficiency that are supposed to flow from market competition, these societies must first limit the pursuit of gain by assuring that not everything is for sale to the highest bidder. They must also act to channel the energies of those economic actors motivated largely by gain into a narrow range of legitimate activities. In summary, the economy has to be embedded in law, politics, and morality." *See* Fred Block and Karl Polanyi, *Karl Polanyi and the Writing of "The Great Transformation",* THEORY AND SOCIETY 32/3, 275-306 (2003), p. 297.

31 *See also* Fred Block, *Relational Work and the Law: Recapturing the Legal Realist Critique of Market Fundamentalism*, JOURNAL OF LAW AND SOCIETY 40/1, 27-48 (2013). Block again argues here that the economy will revert to a more embedded position.

32 *Ibid.*

as a historically specific social system, its dynamics constituting a constraint for the development of the whole society and its "transformation" from one "institutional structure" to another. To bypass and/or repress this kind of question, at this level of conceptual abstraction, seems to be a major concern of contemporary social sciences."[33] Similarly, Krippner in her article "The Elusive Market" suggest that ways forward may lie in the works of historical sociologists that understand that "the opposition between general or universal theory and "empiricism" poses a false dichotomy. Rather, theory operates at different levels and for different purposes, suggesting that propositions closely circumscribed by particular temporal and spatial limits and containing various, complex intersecting processes can indeed make important contributions to theory construction."[34] This socio-historical but also theoretical approach to law grounded in *purpose* is what this dissertation attempts, in its hope to resurrect Polanyi's most radical structural contributions to social and economic thought.

1.4 The Legal Institutional Study of the Commons

A second branch of Institutionalism, distinct from New Institutionalism, was headed by Elinor Ostrom, and while not entirely transparent (though clearly cognizant) about the lineage of her work, transposed these insights about the legal foundations of the market and applied them to the commons in key works such as Governing the Commons (GC) (1990)[35] and Institutional Analysis and Development Approach (IAD) (1998).[36] Ostrom, while never speaking directly

33 Michele Cangiani, *Karl Polanyi's Institututional Theory: Market Society and Its 'Disembedded' Economy,* JOURNAL OF ECONOMIC ISSUES XLV/1, 177-197 (2011), p.193.
34 *See* KRIPPNER, *supra* note. 27.
35 *See* Elinor Ostrom, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).
36 *See* Elinor Ostrom, *A Diagnostic Approach for Going Beyond Panaceas*, PROC. NAT'L ACAD. SCI. 104/15181 (1990)*; See also* Elinor Ostrom, *The Institutional Analysis and Development Approach*, in *Designing*

about the legal foundations of the market, like Polanyi and the old Institutionalists, drew upon institutional analysis to critique the assumptions of neoclassical economics and New Institutionalists through empirical studies of commons governance, critiques which I argue have relevance to the social and legal institutional approach to studying the foundations of the economy, rather than merely Commons more narrowly as most view her work. Using numerous case studies, Ostrom powerfully demonstrated that communities throughout the world were successfully managing access to fundamental resources – which she conceptualized as "common pool resources," in contrast to private, toll and public goods – often over many generations. These findings were starkly at odds with the narrow horizon of the short-term wealth-maximizing individual that had captured the modern mind, as represented perhaps most prominently by Neo-Malthusian Garrett Hardin's influential 1968 article *Tragedy of the Commons* and his illustrative parable of a herd in a green pasture and the natural tendency of the commons to go to ruin.[37] In Hardin's article homo economicus is instantiated by the herdsman who continuously increases his herd in his own self-interest, allowing his cows to graze the commons until they were completely depleted. Ostrom's scholarship succeeded in showing, contrary to this influential parable, that individuals in many real-life settings do not act like Hardin's herdsmen and instead are bound and motivated by social motives structured by social rules-informal and formal legal institutions-that encourage collective decision-making, considering not only the interests of the present generation but also future ones. She revealed that what Hardin mischaracterized as "commons," which are regulated by informal legal institutions such as social norms and customs, were instead lawless realms of "open

Institutions for Environmental and Research Management (Loehman, E.T. & Kilgour, D.M. eds.) 68–90 (1998).

37 Garrett Hardin, *The Tragedy of the Commons*, EKISTICS 27/160 (1969).

access."[38] What this Chapter will attempt to explore is that while Ostrom is recognized in economics, she also made three extremely important contributions to the *legal institutional approach* to studying the economy by: 1) revealing the presence and function of informal legal institutions in the governance of commons resources; 2) the important role of law in debunking one of the basic assumptions of the neoclassical economic model-the naturalization of the self-interested actor- by demonstrating that humans can cooperate and achieve successful sustainable outcomes (as opposed to ruin) when alternative legal institutions-commons governance- are present; and 3) offering design principles based on empirical evidence for the creation of sustainable and long lasting commons legal institutions. Each of these will be developed in Part II of this Chapter.

Ostrom's case studies demonstrate that it is not simply spontaneous human nature to compete and accumulate ceaselessly until resources are depleted as in Hardin's parable, but instead that humans are also capable of cooperating to govern resources sustainably over multiple generations.[39] However, her work evaded the fundamental question of why some communities manage "common pool resources,"- goods characterized by their high subtractability and low

[38] *See* OSTROM, *supra* note. 35.
[39] *Ibid. See also* Elinor Ostrom, *Collective Action and the Evolution of Social Norms*, JOURNAL OF NATURAL RESOURCES POLICY RESEARCH 6/4, 235-52 (2014); Elinor Ostrom, *Polycentricity, Complexity, and the Commons*, *THE GOOD SOCIETY* 9/2, 37-41 (1999). See also the application of work in forging further case studies: Ruth Meizen-Dick, Rahul Chaturvedi, Laia Domènech, Rucha Ghate, Marco A. Janssen, Nathan D. Rollins, and K. Sandeep, *Games for Groundwater Governance: Field Experiments in Andhra Pradesh, India,* ECOLOGY AND SOCIETY 21/3, (2016); Michael D. McGinnis and James M. Walker, *Foundations of the Ostrom Workshop: Institutional Analysis, Polycentricity, and Self-governance of the Commons*, PUBLIC CHOICE 143/3-4, 293-301 (2010); Edella Schlager, *The Importance of Context, Scale, and Interdependencies in Understanding and Applying Ostrom's Design Principles for Successful Governance of the Commons*, INTERNATIONAL JOURNAL OF THE COMMONS 10/ 2, 405-16 (2016); Paul C. Stern, *Design Principles for Global Commons: Natural Resources and Emerging Technologies*, INTERNATIONAL JOURNAL OF THE COMMONS 5/2, 213-32 (2011); Sergio Villamayor-Tomas, Forrest D. Fleischman, Irene Perez Ibarra, Andreas Thiel, and Frank Van Laerhoven, *From Sandoz to Salmon: Conceptualizing Resource and Institutional Dynamics in the Rhine Watershed through the SES Framework.*

difficulty of exclusion like water or timber- collectively (examples of resources analyzed in her works) through commons governance buffered from the imperatives of the market to compete and maximize profits, while in other cases common pool resources are managed utilizing private property regimes and the market. While her later works developed a contextualized approach, to take into account political, legal and historical aspects of resource governance, there was a clearly missed opportunity to build upon the insights of her predecessors like old institutionalism and Polanyi into the social-institutional character of the market in order to investigate the mysterious absence of the imperatives of the market in situations of successful commons-based resource governance.[40] As this Chapter will develop in Part III, Ostrom neglected to connect her central insight challenging the neoclassical assumptions about human nature, to the insight that the market itself, just like the commons, is a social institution for the production, allocation and distribution of resources – one that is the product of a historically-specific set of social relations, and itself structured by formal and informal legal institutions. However, as Polanyi will show us in Chapter 4, unlike the commons, the social institutions of the market are not structured by rules and norms embedded in a social logic, which prioritizes need and is concerned with social motives, thus allowing for clear parameters for sustainable use, but instead operates on rules and norms disembedded from their social origins, thereby producing the behavior of homo economicus. The behavior of homo economicus is ubiquitous and hence why it appears incontrovertible, however rather than being the result of an immutable facet of human nature that is impossible to change, as Ostrom dispelled with her findings, what the work of Polanyi and Old Institutionalism shows us, is rather than homo economicus being a spontaneous outgrowth of the nature order, is the very tangible outcome of a social institution called the market,

[40] *See* OSTROM, *The Institutional Analysis and Development Approach*, *supra* note. 36.

which has managed to penetrate every resource and sphere of social life. It is the very rules of the capitalist market, as a social institution or better a runaway disembedded social institution, which structure individual human behavior towards wealth maximization – in contrast to the commons, as Ostrom demonstrated, which structures human behavior towards cooperation.

This important *structuring* capability of law, as Ostrom demonstrates, is the result of legal rules acting as a system of incentives and disincentives shaping individual behavior effectuated through formal and informal rules and sanctions that enable and disenable different types of social relations. Polanyi saw property, welfare and finance regulation as central to his project of institutionally *re-embedding* because he viewed the capitalist market as a runaway anti-social logic, which through regulation- legal institutions to reconstitute social logic in the market- he hoped optimistically to tame. However, Polanyi, unlike Ostrom, also understood that law, while important, was not the primary source of the structure of the capitalist market, and instead focused much of his analysis on the catalyzing role of historically-specific shifts in social relations. Law, as we will see in the following chapters, while not the source of the social institution called the capitalist market is an important reinforcing and institutionalizing element of the underlying social relations of the market, which has the potential to structure the "rules of the game" away from competition and individual self-maximizing behavior and towards cooperation and solidarity with others. This is an insight not in Ostrom's purview, for whom law and norms are comprehensive in structuring human behavior in the governance of the commons.

Ostrom made three important contributions to law and specifically "legal institutional analysis" through: 1)her study of the presence and function of informal legal institutions in the governance of commons resources; 2) highlighting the important role of law in shaping human behavior through the "structure of

situations" thus debunking the self-interested actor (theorized by neoclassical theory) and demonstrating that humans can cooperate and achieve successful sustainable outcomes and; 3) offering design principles for the creation of sustainable commons legal institutions. I argue, however, that in order to take the best of Ostrom's insights, we must reexamine these three contributions to law in light of the social theory that I will advance in the next two Chapters, as well as, to highlight the important role that normative analysis and values play in shaping legal institutions (Chapter 4 & 5).

Ostrom's view of legal institutions, unlike that of Economic Sociology, approaches the relationship of law not as an ever-present reality in the structuring of a "transhistorical" economy. Instead, Ostrom more narrowly engages in an empirical "time and place" bound analysis[41] of how rules act to both order behavior, as well as, to prescribe behavior in specific contexts. Important to the former is the idea that "rules are the means by which we intervene to change the structure of incentives in situations,"[42] and important to the latter is the idea that the prescription have "prescriptive force."[43] "Prescriptive force means that knowledge and acceptance of a rule leads individuals to recognize that, if they break the rule, other individuals may hold them accountable."[44] Rules, in Ostrom's view need not be formal law, in fact for formal law to constitute a rule, it must meet the above criteria, namely that enforcement can be demonstrated.[45] Ostrom's concept

41 Elinor Ostrom, *The Future of the Commons*, in THE FUTURE OF THE COMMONS: BEYOND MARKET FAILURE AND GOVERNMENT REGULATION (2012), p.35. Ostrom cites Hayek for his work on time and place analysis, F.A. Hayek, *The use of knowledge in society*, AMERICAN ECONOMIC REVIEW, 35/4 519–30 (1945).

42 *See* Elinor Ostrom and Vincent Ostrom, *The Quest for Meaning in Public Choice*, THE AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY 63/1,105-47 (2004).

43 *Ibid.*

44 Elinor Ostrom, *An Agenda for the Study of Institutions*, PUBLIC CHOICE 48 3-25 (1986), pp.6.

45 This approach to law can be seen from within the legal tradition as well in the schools of functionalism in Comparative Law, as well as the work of the early work of Eugen Ehrlich and Roscoe Pound on legal institutions.

of legal institutions, like the New Institutionalists, operates at the level of individuals, similar to neoclassical economics, however Ostrom emphasizes that "instead of viewing rules as directly affecting behavior, I view rules as directly affecting the structure of a situation in which actions are selected."[46] Ostrom's unit of analysis in this sense goes beyond the individual, by instead utilizing the "structure of a situation" as the unit. She clarifies what rules affect the structure of situation, expanding it from rules that prohibit or oblige to rules that permit or allow. "In this rule-structured situation, individuals select actions from a set of *allowable actions* in light of the full set of incentives existing in the situation."[47] This unsurprisingly very much mirrors the view of rules held by American proto-realist Wesley Hohfeld who influenced John R. Commons,[48] a predecessor of Ostrom's work on the effect of rules in structuring commons governance. As I will take in some depth in a later Chapter, rules for Hohfeld simultaneously allow as they forbid, one's duty not to use is the correlate of another's claim (right) to use. This was an insight on which Institutionalist thinkers like John R. Commons developed his public choice analysis of the "rules in use" or "working rules."[49] However, this understanding of rules and the effect of rules on the structure of a situation, begs the question, "How are the structure of incentives of a situation created? Is the source of the structure the rules and norms themselves or are these rules set into

[46] *See* OSTROM & OSTROM, *supra* note. 42 at p.115-121
[47] *Ibid.*
[48] John R. Commons, *Law and Economics*, YALE L.J. 34 (1925), p.375. Commons says on Hohfeld: "Here, it seems to me, the analysis made by Professor Hohfeld,of legal rights, duties, liberties and exposures, is of universal application to all going concerns. His is practically an analysis of the way in which the common practices of any going concern control the individual members of that concern and hold them to the conduct necessary to preserve the existence of the concern. For, as stated by Professor Corbin, these rules affirm what the individual member may expect that he 'can, cannot, may, must or must not do,' in so far as the superior interests of the concern are deemed to be at stake. These principles are just as applicable to the shop rules of an industrial concern, or to the ethical rules of a family or any of the many cultural concerns, as they are to the supreme political concerns."
[49] *Ibid.*

motion within the parameters of a deeper structure?" Implicit in Ostrom's scholarship is the view that law- as both informal and formal institutions- is the source of the structure, law is comprehensive of the structure, it is what delimits the number of choices available thus determining the behavior of individuals. Ostrom never names, nor generalizes a deeper structure, and by limiting her analysis to specific cases of commons governance she is able to avoid both making "transhistorical" errors, as in Economic Sociology, but at the same time lacks a theory to explain the mystery of why in some cases resources are governed by the laws of the market and in other places by the laws created by communities through commons governance.

What we will call here Ostrom's "Legal Institutional Analysis," while critiquing neoclassical economics by focusing on the structure of situations rather than on individual motivations and preferences, and thus debunking the myth of the natural tendency of individuals to consume to ruin, did not extend her critique to the market itself. Ostrom did not connect her empirical evidence, which she uses to challenge assumptions about human nature, to the insight that the market itself, just like the commons, is a social institution involved in the production, allocation and distribution of resources – one that is the product of a historically-specific set of social relations, structured by rules and norms. And that most important, to make the point that distinct from the commons the social relations of the market are not structured by law-rules and norms embedded in a social logic which prioritizes need and is concerned with social motives and thus allowing for clear parameters for sustainable use-but instead operate on rules and norms disembedded from their social origins and in the absence of those social rules leads to ruin as theorized by Polanyi. What Ostrom does not highlight is that commons through law-social rules and sanctions aimed at both altering the structure of incentives and prescribing behavior through enforcement- prevent the full

penetration of market imperatives in the governance of those resources. As a result, without the alternative social theory of the market and the specific way in which commons are buffered from market imperatives through law, her attempt to shift the unit of analysis from individuals to the social relation remains limited and incomplete, as well as, the explanatory power of her theory which has the potential to theorize not only the legal foundations of the commons, but the legal foundations of the economy and namely of the capitalist market. Ostrom's theory, I argue requires intervention by the social theory tradition, and namely of Polanyi and the work of Political Marxists discussed in Chapters 2 & 3, as well as, of the legal theory tradition and in particular towards purpose, values and social relations driven research, which will be discussed in Chapters 4, 5 & 6.

In Ostrom's theory, the legal regime for governance of a resource is not implied from the definition of the resource, in terms of its place in her taxonomy of public, private, toll or common goods.[50] Ostrom and another scholar, Charlotte Hess, emphasize not only that the relationship between common pool resources and commons property regimes is not automatic, but also that CPRs can be owned by "whoever can gain access."[51] This suggests that the "first one there" determines the legal regime. While it was important for Ostrom to disentangle her taxonomy from the choice of property regime used to govern the resource, in order to show that they are distinct steps – the first, determined by two identifiable variables – subtractability and the difficulty of exclusion, which define a resource within her conceptual scheme, and the second, a normative policy choice of institutional design. However, the lack of a discussion in this second step, of which purposes – decommodification and democratization – and which values – the common good

50 Charlotte Hess and Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, LAW AND CONTEMPORARY PROBLEMS 66/1-2, 111-45 (2003).

51 *Ibid. LA* Elinor Ostrom and Charlotte Hess, *Private and Common Property Rights*, Workshop in Political Theory & Political Analysis, Indiana University (2007).

or other candidates – central to making that policy choice potentially lessens the impact of her research. This is especially relevant for understanding contemporary social movements for the commons engaged not only in bottom-up commons governance but also in social and political movements to advance the cause of the commons. Ostrom's later Institutional Analysis and Development Approach addresses relevant contextual factors previously overlooked by her previous eight design principles developed in earlier works such as: political rule, legal polity, geography and the historical dimensions of resources.[52] However, while this analysis provided a better understanding of the interplay of diverse deliberative social processes and spaces, it said nothing about the normative values of these communities underlying-and even driving-these processes. In other words, while it reveals the procedural and structural dynamics within which the values of the commons are deliberated, it completely ignores the values themselves or understands them as merely procedural, for example values such as participation and cooperation. Without addressing the anti/post capitalist values which drive commons communities to create rules and norms which serve to buffer and resist the allocation, production and distribution of goods from the laws of the market, Ostrom's design principles serves to neutralize these values and the force of the movements advancing them. This distinction and insistence of separating normative policy choices from economic analysis is important since resources, as will be developed in Chapter 5, cannot be analyzed merely through an economic analysis, but instead in view of values, and even more controversial to assert, in view of social theory. If commons governance produces more sustainable outcomes why not promote commons/group property for all resources if communities democratically decide that better meets their needs? What determines which resources should be subject to commons governance vs. what resources

[52] OSTROM, *supra* note. 36.

should not? Ostrom's work evades these social policy questions, treating law as if it is not an intrinsically normative enterprise, which, I argue, undermines the important relevance of her work in revealing the social institutional, not just legal institutional, character of the commons and the market.

The normative claim underlying this dissertation, like the social movements advancing commons, is that fundamental resources that constitute man's means of subsistence like water, food, housing, education, healthcare and others should be made available to all without being contingent upon one's ability to pay for that good on the market. This is also the claim that undergirds the social movement around commons – activists and self-conscious commoners fighting market forces and engaged in the activity of creating the commons. In this sense, contemporary social movements of the commons are self-consciously engaged in a normative *political* project of converting private goods governed by market imperatives into common goods governed by the common good.[53] While the approach taken here is complementary to that approach, instead throughout this dissertation, I pursue a normative purpose and value driven *legal* project focusing on the removal of fundamental resources from the market through structural transformation of social institutions *through law*. In exactly the way that Ostrom's work highlights the central role of law in the commons, *I attempt to highlight the central role that law can play in the transformation of the market towards commons*. It is important to note, that the intention here is not to preclude or dismiss a political approach to the commons as that pursued by social movements, in fact it highlights the central and critical role of regular citizens, rather than judges and jurists, as the primary protagonists for bottom up legal institutional innovation of the commons (explored in Part II of this dissertation

53 *See i.e.* Saki Bailey & Ugo Mattei, *Social Movements as Constituent Power: The Italian Struggle for the Commons*, INDIANA JOURNAL OF GLOBAL LEGAL STUDIES 20/2, 965-1013 (2013).

"Towards Commons as Legal Institutional Architecture" and Part III "Decommodifying Housing Through Commons Property Institutions).

1.5 Overview: Bringing Social Theory & Legal Theory to the Commons

What is now needed, this dissertation argues, is to reinforce and enhance the important contributions of Ostrom's work is a three-pronged approach, one that studies law, as purposes, values, social theory and legal institutions. Towards this end, this dissertation analyzes the Commons in the context of law, social theory, and institutional analysis. It is divided into three parts. In Part I "The Field of Intervention: Forging an Alternative Social Theory & Institutional Analysis" (Chapters 1, 2, &3) where the Commons is analyzed in the context of the market in forging an alternative social theory of the market as a social institution (Chapter 1), as well as, conceives of the market and commons in their legal institutional dimensions (Chapter 2), and finally the contemporary approaches to the legal foundations of the economy and the role of the commons (Chapter 3). Part II "Towards Commons as Legal Institutional Architecture" sets the groundwork for analyzing the Commons through law, (Chapters 4, 5, & 6) and a new critical left transformative project of law that combines Theory, Purpose, Law, Fact and Value as elements for the study of the Commons (Chapter 4) is elaborated; I then develop a Resource Specific & Legal Institutional Analysis which utilizes a Social Relations Driven Analysis in addition to the economic analysis and value driven analysis of goods (Chapter 5). And finally, in Part III "Decommodifying Housing through Commons Property Institutions," the concept of Commons as CPIs is developed towards the decommodification of one fundamental resource, Housing (Chapter 6); pursue an analysis of different types of Commons Property Institutions according to their ability to decommodify and democratize housing (Chapter 7); I then attempt to deepen my legal institutional analysis on one

particular CPI, the Community Land Trust, in the context of US law (Chapter 8); and I end by summarizing the results of the contributions of my dissertation with a proposal for a housing policy of "Shared Limited Equity Housing for All" (Chapter 9). While much of this dissertation focuses on the application of my theoretical analysis to the decommodification and democratization of housing, and specifically in the US context, the application is intended as just one example of the way in which all fundamental resources – i.e. food, water, education- could be decommodified and democratized through Commons.

1.6 Dissertation Contribution

This dissertation attempts to make the following contributions in relation to the study of the Commons as Post-Capitalist Strategy through Law:

1. The development of an alternative social theory for embedding the market through law and commons, uniting Ostrom's work on the legal foundations of the economy with the institutional analysis of Polanyi. A social theory that situates the actual, historical and potential, future roles of the commons within larger context of epochal shifts in historically-specific social relations. This social theory is then connected to legal theory through an analysis of the legal institutional structure of the capitalist market (Chapters 1, 2 & 3);
2. Purpose and value-driven research into which legal institutions, and in particular, *disaggregated entitlements* of property regimes, best support the purposes of *decommodification & democratization* of fundamental resources (Chapter 4,5,6); and
3. The study of commons as a Commons Property Institution, one possibility in a spectrum of institutional options available for

experimentation in non-market forms of organizing the allocation, production and distribution of specific fundamental resources through law applied to housing (Chapter 6,7, 8, & 9).

4. The relevance of the *resource specific* approach for the conceptualization of Commons as Commons Property Institutions in designing legal institutions which analyze the specific characteristics of unique resources in pursuing their decommodification and democratization (Chapters 5 & 6).

This dissertation also makes the following contributions specific to Law:

1. An approach to socio-legal analysis which incorporates *theory and purpose* in addition to the poles of analysis of *law, fact, & value.* Theory is conceptualized as both 1) socio-legal theory and 2) social theory. (Chapter 4). An application of this new theory of socio-legal analysis on Commons and Housing (Chapters 5 &6).
2. An approach which connects *social property relations* (Robert Brenner) produced by social theory to *property as a social relation* (Wesley Hohfeld) produced by legal institutional theory. (Chapters 2 & 3)
3. I attempt to forge a new level of *resource specific analysis*, what I call a *social relations analysis.* I also apply *resource specific analysis* in three dimensions to housing: the economic analysis, the social relations analysis and the values driven analysis. I demonstrate the capacity of each level of analysis to reveal relevant characteristics of a given resource in order to design legal institutions (Hohfeld) aimed at different purposes. (Chapters 5 & 6)
4. I offer an application of Roberto Unger's project of "institutional imagination" by locating "deviant doctrine" in relation to Community Land Trusts. I also attempt to combine Unger's project with Thomas

Wilhelmsson's project of alternative legal dogmatics, analyzing Community Land Trusts, in the context of US law at both federal and state levels in view of catalyzing a "switching of principles" in legal doctrine on property and immoveable goods by building a model for embedding the market an decommodifying housing based on existing legal institutions and concrete legal doctrinal material (Chapter 4 applied to Chapter 8).

This dissertation also produces the following results specific to housing policy:

1. A tool kit for constructing CPI institutions towards the decommodification of housing in the U.S. context utilizing associations law, property law, and an evaluation of the advantages and disadvantages of social valuations of property in the form of limited equity restricted resale formulas. (Chapter 6)
2. A comparison of CPIs in housing such as the Community Land Trust, the Housing Cooperative, and Condominium, and their ability to decommodify and democratize housing as a resource with primary attention to the experiences of the United States and Sweden. I explore how CPIs may be utilized to ensuring access to housing which is permanently affordable (decommodified) and collectively owned and controlled (democratized), while at the same time utilizing equity incentives to ensure maintenance and improvement of the housing stock. (Chapter 7)
3. I offer a specific proposal for how to scale and entrench the CLT model at the level of public and private organizations involved in housing development policy and finance in the United States. As well as an analysis of their ability to democratize housing and proposals for improving their democratizing potential. (Chapter 8)

4. Finally, I offer a proposal for a *Shared Limited Equity Housing Policy for All* through the CLT model, analyzing potential necessary modifications to the model to apply shared limited equity beyond those of low to moderate income.

Below I provide a summary of each of the Chapters. This dissertation is recommended to be read from beginning to end or it can also be read, depending on the interest and background of the reader, starting from Part I and skipping either to Part II or Part III. Those not interested in legal theory and interested only in a concrete application of the social theory to housing may skip from Part I to Part III, and those only interested in the theoretical portions (social theory and legal theory) may skip Part III altogether. Finally, for those only interested in the project of the "Decommodification and Democratization of Housing" and a "Shared Limited Equity Policy for All" may skip directly to Part III.

1.7 A Summary of the Chapters

Chapter 2 argues that Karl Polanyi's "institutional challenge" of embedding the market in social, political and legal institutions designed to counteract its negative effects is the most urgent task of social theory and practice today. This Chapter attempts to take the first steps toward meeting this challenge by analyzing the future of two types of institutions – property and welfare – in their ability to socially re-embed the market. A major barrier to tackling this challenge however is the way in which mainstream economics has managed to "naturalize" the market, seeing it simultaneously as an extension of human nature and a self-regulating form of economic organization governed by laws akin to those that govern nature. This Chapter attempts to critique the central assumption of the mainstream view of the market as natural and to argue for an alternative paradigm of the market as a social institution, drawing on the historical and sociological work of theorists of the

institutionalist, principally Polanyi, and Marxian traditions, of Robert Brenner and Ellen Meiksins Wood. Counteracting the destructive effects of the market requires understanding the market as a product of a particular set of social relations appearing in a specific moment of human history. Taking a social relations view of the market opens up the possibility for it to be reclaimed politically, and ultimately reconfigured through legal institutions towards alternate social purposes, namely here of decommodification through law.

Chapter 3 builds from Chapter 1 and the view advanced by Robert Brenner that private property in its modern form, emerged out of the transformation from feudalism to capitalism in England in the 1600s, *as an institution for facilitating the extraction of a surplus absent direct coercion*. Furthermore, I argue that this has monumental significance in revealing the crucial role played by property not only in the societal distribution of wealth but also in the fundamental structuring (and restructuring) of economic activity, as seen from the work of scholars such as Robert Hale, Morris Cohen and Duncan Kennedy. This flies in the face of the persistent myth (tall tale) that distribution is solely the domain of the state acting through public law, or, even more egregious, that it is something taken care of automatically through the invisible hand of the market. The American Legal Realist critique of the public/private distinction in law provides us with a basis for establishing, not only the very political character of property law, but also the importance of property as a legal institution in shaping and reshaping the social relations of capitalism.

In Chapter 4, I make the claim that socio-legal analysis must necessarily include the components, not only of *Law, Fact* and *Valu*e, but also of *Theory* and *Purpose*. I argue that without a discussion of *Theory* and *Purpose* in relation to social problems and concrete legal materials, the aim of socio-legal analysis in legal scholarship, *what socio-legal analysis is for*, will remain unclear, or worse, act as a cover

for covert ideology and subjective value judgements. The Realists believed that they solved the problem of subjective value judgements through *Purpose*, however this could not solve the problem, in fact, it could only make it worse- a human purpose could always be accused of importing in the imposition of subjective personal values. *Purpose* had to be linked to a "non-human, scientific, and objective authority" in order for it to produce a *Value*, which was beyond reproach, it had to be linked to a *Theory* of social order. I argue that this is in large part the success of the Law and Economics movement, with its value of efficiency, informed by a theory of social order derived from classical and neo-classical economics of methodological individualism. This is what *Law and Economics* has accomplished with little detection. The value of efficiency has value because it is embedded in a theoretical paradigm of relevance for explaining the social and economic system around us. It is relevant to talk about the world in terms of scarcity of resources and the need for allocation, which reduces waste and promote wealth, not because scarcity is the most important variable when it comes to the production and consumption of resources, at least in the sense that neoclassical economics (on which LE is based) would like us to believe, but rather because our social and economic system operate on that logic. For most of modern human history, the accepted social theory has been of *Methodological Individualism*, as I develop in Chapter 1 on the *Social Institutional Character of the Market*. I argue, that this theory has also set the parameters for what is possible to discuss within law. It has determined that the purpose of law is to serve the value of neoclassical economics "efficiency" or to serve an unnamed master, to remain priests of the current social order under the pretense of "precedent," "custom" and "tradition." Until that social theory is replaced with another, it will remain an open question, what else socio-legal analysis could be for.

In Chapter 5, I reflect on the Method of Chapter 6 and the applied portion of my dissertation Part III "Decommodifying Housing through Commons Property Institutions." This Chapter forges a *resource specific approach* in three dimensions –the economic analysis, the social relations analysis and the values driven analysis- and their capacity to reveal relevant characteristics of a given resource in order to design legal institutions aimed at different purposes, as explained in Chapter 4. In this Chapter I also offer the relevance of the *resource specific approach* for the conceptualization of CPI's in designing legal institutions which address the specific characteristics of unique resources in pursuing their decommodification and democratization. In Chapter 2, I argue that property law is an important institutional support for the capitalist market, and therefore, efforts to reform the market should be focused on the design of counter institutions what I call "commons property institutions" (CPIs). Using Hohfeldian analysis of property as a social relation, CPIs were conceptualized as property regimes in which multiple entitlement holders have use rights in a resource and none have a strong right to exclude one another within the community, and there is limited ability to transfer outside the community. CPIs, I argued there can be utilized for the purpose of decommodifying and democratizing fundamental resources like housing (but also inclusive of others like food, water, healthcare and education) thereby relieving complete reliance on the market for access to these resources leading to the transformation of social relations under capitalism.

In Chapter 6 I apply the *resource specific analysis* developed in Chapter 5 to analyze housing as a unique resource. "Housing" describes the land beneath the house, the building or structure itself, and the equity it represents as an investment for the buyer. In this sense, housing must be analyzed as three distinct but interconnected resources. It also must be analyzed along four different lenses of

resource specific analysis (explored in the Methods Chapter 2), it must be analyzed according to: 1) the economic analysis of goods, 2) the social relations analysis of goods, and 3) the normative analysis of goods. Each lens bears different relevant elements in thinking through legal institutional design and constructing a legal regime for the decommodification of housing. For the purposes of limited space and time, I have chosen to apply the analysis I understood as most relevant to analyzing each resource-building, land, and equity - so rather than a comprehensive analysis of each under all four approaches, I have focused on a particular resource in each of the sections below. In the next Chapter, Chapter 7, I attempt to combine all three layers of analysis in analyzing specific Commons Property Institutions for housing and using these layers as both critical evaluative lenses, but also tools for constructing legal regimes which enhance the decommodification and democratization of housing.

In Chaper 7 I present a program for "Decommodifying and Democratizing Housing through Commons." I analyze CPIs in Housing such as the Community Land Trust, the Housing Cooperative, and Condominium, and their ability to decommodify and democratize housing as a resource. There is primary attention to the experiences of the United States and Sweden, two countries seriously suffering from housing crisis around urban centers, which have had completely opposite housing policies historically, although in recent years they are converging. Both offer tremendous legal institutional diversity in the housing sector for polar opposite reasons. The US through the market has stimulated institutional innovation without government design through facilitating bottom up experimentation with different legal forms, while Sweden with significant government intervention has intentionally structured institutional innovation and in many ways succeeded (at least for some time) to offer the greatest program in the world for universally decommodified access to housing. Even with such

divergence in housing policy and diversity of market and state options, access to housing is still a major challenge for both nations. Here we explore how CPIs may be utilized to ensuring access to housing which is permanently affordable (decommodified) and collectively owned and controlled (democratized), while at the same time utilizing equity incentives to ensure maintenance and improvement of the housing stock.

In Chapter 8, I draw upon the approach of Roberto Unger of locating "deviant doctrine" and catalyzing a "switching of principles" in Thomas Wilhelmsson's approach discussed in Chapter 4, by building my model for embedding the market-based on existing legal institutions and concrete legal doctrinal material. I analyze the legal structure of one specific legal institution, the Community Land Trust (CLT), in the context of US law at both federal and state levels in order to analyze how the CLT can be utilized to embed the market through decommodified access to housing. I explore the challenges and solutions to institutionalize the CLT model in order to both expand (scale) and entrench (allow it to survive political regime change) the model. I also explore the tension between democratic community control and the need to both expand and entrech the CLT model. CLTs have the potential to act as an important lever in creating not only decommodified land and housing permanently removed from the speculative market, but also in democratizing housing by creating communities of residents engaged in making important decisions more broadly in local community development. However, while the CLT is a growing model, CLTs nationwide constitute less than 2%-4%[54] of all housing in the United States. In order for CLTs to make a significant impact in decommodifying and democratizing housing, it must achieve greater scale and to do so it must the ability to survive political regime changes (entrenchment). Here, we discuss the challenges that CLT's face towards

[54] This range is provided since the last major surveys of CLTs in the US was performed in 2006.

greater scale and entrenchment, as well as possible solutions: 1) embedding the CLT in local, state and federal law and government institutions, 2) increasing access to land and large amounts of dynamic capital, and 3) increasing resident participation.

Finally, in Chapter 9, I conclude my dissertation and offer the outlines of an ambitious program for a *Shared Limited Equity Housing Policy for All* and not just those of low and moderate income accomplished through Commons Property Institutions, and specifically the Community Land Trust Model.

Chapter 2 The Social Institutional Character of the Market: Why Isn't the Market Natural? And Other Obvious Questions

2.1 Introduction: Challenge of Embedding of the Market

Once the market is denaturalized and seen for what it is as a social institution, it becomes clear that the role of property, the commons, and welfare institutions – varying according to distinct cultures, histories, and traditions – is central to the market's creation and maintenance, and that understanding its particular variation from place to place, offers us important tools to shape its future transformation. While Hobbes and Smith theorized that individual human behavior can be understood separate from their social relations and that we can explain social dynamics by the aggregate of individual behavior, instead, Polanyi showed us that individual self-interest is less explanatory of economic organization than to understand such organization in terms of social relations, motivated and structured by social interests and purposes. In order to study this in modern times, Polanyi developed a completely new mode of analysis called "institutional analysis" to study the capitalist market as a social institution by looking for patterns of integration between the mechanism of "market exchange" or price making markets and their socially embedding counterparts. Ultimately though he failed to show how market exchange was socially embedded, he gave us an important starting point in his analysis of fictitious commodities- labor, land, and money- and the need to bring them back under control through legal regulation and democratic political institutions. Polanyi's idea of a "double movement," that these forms of social control would naturally grow as the dangers of the unfettered market became more apparent, I analyze here through a socio-historic lens as capturing the narrative of the decline of the commons and the rise of the social democratic welfare state, which in its zenith not only sought to

democratize different aspects of the economy but also to offer decommodified access to fundamental resources.

This Chapter argues that what was needed to complete Polanyi's institutional analysis of capitalism are three elements: 1) a socio-historical analysis as the one presented by Robert Brenner and Ellen Meiksins Wood in their concept of the transformation of social property relations leading to the creation of capitalist market imperatives; and 2) the contributions of Fred Block and Margaret Somers revealing the dialectical relationship between the decline of the commons and the rise of welfare regulation; and 3) the socio-historical work of Gosta Esping Andersen on the different developmental trajectories of the democratic welfare state. Wood's social relations analysis is an important component to understanding Polanyi's call for institutional social embedding of the market, without it, we cannot intelligently or intelligibly talk about the market as an institution and the need for counter institutions. It is by uncovering these dynamics through Wood's historical social relations analysis that the market and the logic of market exchange is illuminated as the product of a changing social institution rather than a natural extension of a fixed human nature, and that the specific dynamics of the social relations of the market finally come to light.

Polanyi was pessimistic about welfare as a counter institution, and also underestimated its important dialectical relationship with the commons, elucidated by Block and Somers, however what he did not anticipate was the emergence of decommodified and democratized access to resources through the welfare state offered by Gosta Esping Andersen's analysis of corporatist and social democratic welfare worlds in his famous *Three Worlds of Welfare Capitalism*.[55] The development of welfare fundamentally altered the way in which market logic functions, supporting the view that once pre-capitalist institutions like the commons were

[55] GOSTA ESPING-ANDERSON, THE THREE WORLDS OF WELFARE CAPITALISM (1990).

destroyed (through enclosure), wage labor became disembedded though in different ways and in differing degrees depending on the presence or absence of pre-capitalist form of welfare like guilds and the church. Continuing Polanyi's work of constructing counter-institutions for land, labor and money and to correct for their destructive effects requires deconstructing the social relations underlying property and welfare in their historical specificity. The current period of roughly 1990 to the present remains unanalyzed by Esping Andersen's approach (his book was published in 1990), a period which is marked by the peak of neoliberal government policies replacing and undoing the social democratic welfare state. Therefore, neoliberalism is analyzed here in its three manifestations: as an economic philosophy of the 20s-50s, into a government policy of the 80s and 90s, to a hegemonic ideological project of ruling elites (2008 to the present).

As this "crisis of neoliberalism" continues to unfold worldwide,[56] it is unsurprising that there is renewed interest in the work of Karl Polanyi, and in particular his seminal text *The Great Transformation*. At the core of Polanyi's thought is the social-institutional rather than "natural" character of the market, and the need to meet the "institutional challenge" of better embedding capitalist market imperatives through political institutions and legal regulation.[57] Polanyi's work in

[56] I elaborate, both conceptually and historically, on what is meant here by "neoliberalism" – as an economic philosophy, a set of governmental policies and an ideological project in a later section. The "crisis" of neoliberalism refers both to its economic crisis – marked by the global financial crisis of 2008 and the central role of deregulatory neoliberal policies in its making – as well as its more recent political crisis, as expressed in the recent wave of left socialist/progressive movements and right nationalist/anti-immigrant movements challenging the policies of free trade (on the left) and free movement of labor (on the right) of neoliberal governments around the world. Examples of these left movements can be found in Syriza in Greece, Podemos in Spain, Movement of the Five Stars in Italy, the rise of Jeremy Corbyn of the Labour Party in England, Democratic Party candidate Bernie Sanders in the United States. Examples of the right movements can be found in Donald Trump in the U.S., Jimmie Åkesson and Mattias Karlsson of the Sweden Democrats in Sweden, Geert Wilders of the Freedom Party in the Netherlands, Marie Le Pen of the National Front party in France.

[57] POLANYI, THE GREAT TRANSFORMATION, *supra* note17. For illustrative indications of the recent, neoliberal-inflected, resurgence of interest in Polanyi, see Joseph Stiglitz, *Foreword* in *Ibid.*

many ways anticipated the strange and contradictory times we live in today: a world where economic inequality and environmental devastation are at unprecedented levels, while at the same time productivity and technological development are also at an all-time high.[58] The problem is clearly not a lack of resources or technological capability, but rather a lack of political will and new social-institutional arrangements. As a result, Polanyi's "institutional challenge" persists as the most urgent task of our day. As Polanyi framed the problem: what kinds of property, welfare and financial institutions offer ways forward towards the re-embedding of the market within social rules that place front and center both human well-being and the environment?

A major barrier to tackling this challenge is the way in which mainstream economics and neoliberal government policy have tended to "naturalize" the

at ii: "it often seems as if Polanyi is speaking directly to present day issues"; *See also* Robert Kuttner, *Karl Polanyi Explains it All*, AMERICAN PROSPECT (APRIL 14, 2014): "In seeking to understand the dynamics of our time, we can do no better than to revisit Polanyi."; Sean O'Riain & Fred Block *Introduction to Symposium on "The Next Great Transformation? Karl Polanyi and the Critique of Globalization*, POLITICS & SOCIETY 31, 189 (2003): "In recent debates about *globalization*, *neoliberalism*, and the *Washington consensus*, few authorities are cited more frequently than Karl Polanyi."; *and* Michael Levien & Marcel Paret, *A second double movement? Polanyi and shifting global opinions on neoliberalism*, 27 INT'L. SOCIOLOGY 724 (2014): "Karl Polanyi's theory of the 'double movement' has gained great currency in recent years to explain the global growth of contemporary social movements resisting neoliberalism." *See also* Beverly J. Silver & Giovanni Arrighi, *Karl Polanyi's 'double movement': The belle epoques of British and US hegemony compared*, 31 POLITICS & SOCIETY 325 (2003); Peter Evans, *Is an alternative globalization possible?* 36 POLITICS AND SOCIETY 271 (2008); *and* Michael Levien, *India's double movement: Polanyi and the National Alliance of People's Movements*, BERKELEY JOURNAL OF SOCIOLOGY 51, 119 (2007); CHRISTIAN JOERGES AND JOSEF FALKE (EDS), KARL POLANYI, GLOBALISATION AND THE POTENTIAL OF LAW IN TRANSNATIONAL MARKETS (2011).

58 For clear indication to the rise of economic inequality, *See* THOMAS PIKETTY, CAPITAL IN THE 21ST CENTURY (2014); THOMAS Piketty & Emmanuel Saez, *Income Inequality in the United States, 1913-1998*, QUARTERLY JOURNAL OF ECONOMICS 118, 1 (2003); Anthony Atkinson, Thomas Piketty & Emmanuel Saez, *Top Incomes in the Long-Run of History*, JOURNAL OF ECONOMIC LITERATURE 3 (2011); ANTHONY ATKINSON, INEQUALITY (2015). For ecological devastation as result of industrial capitalist activity, *See* CHRIS WILLIAMS, ECOLOGY AND SOCIALISM, (2010). For scientific reports documented this devastation *See e.g.,* INTER-GOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 2014: SYNTHESIS REPORT (2015). For long-term productivity trends, *see* ANGUS MADDISON, CONTOURS OF THE WORLD ECONOMY: 1-2030 AD (2007).

market, seeing it both as simply an extension of human nature and – in a closely related, but distinct vein – as a "self-regulating" form of economic organization, governed by laws akin to those that govern nature.[59] This Chapter attempts to answer the seemingly "obvious" question of "why isn't the market natural?" through a critique of the central assumptions of the mainstream view of the market, what we will call "market naturalism."[60] Following this critique, I argue for an alternative paradigm of the market as a social institution, building upon the historical and sociological work of theorists of the vein of institutionalist and Marxian analysis, principally Karl Polanyi, Fred Block, Robert Brenner and Ellen Meiksins Wood.[61]

Deeply troubled by the implications of the market naturalism of his time, Polanyi's attack was two-fold: he rejected both the unit of analysis underpinning this view, namely the view of society as a simple aggregate of individuals operating according to human nature, as well as the view of the market as a self-regulating economic realm, which operated outside of society and subjugated society to its "natural" self-regulating logic. Market naturalism tended to have the implication, moreover, of providing strong support for the closely related view of "market fundamentalism," or the insistence that not only are markets natural, but that they must be left "free," or "unfettered" in their operations from any social intervention.[62] As Polanyi famously warned in *The Great Transformation,* "the control

[59] POLANYI, THE GREAT TRANSFORMATION, *supra* note 17. *See also* Margaret Somers & Fred Block, *From Poverty to Perversity: Ideas Markets, and Institutions over 200 Years of Welfare Debate*, 70 AMERICAN SOCIOLOGICAL REVIEW 260 (2005); Margaret Somers, GENEALOGIES OF CITIZENSHIP (2008); *and* FRED BLOCK & MARGARET SOMERS, THE POWER OF MARKET FUNDAMENTALISM: KARL POLANYI'S CRITIQUE (2014).

[60] *Ibid.*

[61] The next Chapter explores how one could rise to the task of Polanyi's institutional challenge through study of the legal institutional structure of the market, focusing specifically on property.

[62] Most commentary on Polanyi tends to elide the distinction between these two points – i.e., between the critique of a view that see markets as natural, based on an analysis of how they are in fact a specific kind of social relation, and the critique of a view that calls for market relations to be left unfettered by social regulation or embedding in non-market social relations. BLOCK AND

of the economic system by the market is of overwhelming consequence to the whole organization of society: it means no less than the running of society as an adjunct to the market. Instead of the economy being embedded in social relations, social relations are embedded in the economic system."[63] Polanyi's central argument is that market logic had co-opted society and political will, transforming humans into instruments of the market, rather than maintaining the market under democratic control and utilizing it as an instrument to serve human needs. This diagnosis of this inverted relationship between society and the market is no less relevant today than when *The Great Transformation* was first published.

However, it is also the case that Polanyi's project of "institutional analysis," as developed in *The Great Transformation* and companion works – with its controlling aim of identifying and embedding the out of control logic of "market exchange" – was unfortunately left incomplete. I argue that Polanyi's institutional analysis requires deepening through a socio-historical analysis of social relations, as developed by Brenner and Wood,[64] in order to fully comprehend both the social-institutional character of the market, as well as, the legal institutional nature of the market. A socio-historical analysis of social relations requires an analysis that illuminates the origins of capitalism as a particular set of social relations appearing in a specific moment of human history – the great transformation from feudalism to capitalism. This view of the market through the lens of a socio-historical and institutional approach opens up the possibility that it can be reclaimed politically,

SOMERS, THE POWER OF MARKET FUNDAMENTALISM, *supra* note.59; Patrick Iber & Mike Konczal, *Karl Polanyi for President* DISSENT (May 3 2016); PETER Frase, *Social Democracy's Breaking Point*, JACOBIN (June 30 2016). However, as the argument developed in this Chapter seeks to show, it is of fundamental significance not to lose sight of the distinction between these two claims.

63 POLANYI, THE GREAT TRANSFORMATION, *supra* note 17.

64 *See* Wood, *supra* note.5; *See also* Robert Brenner, *Dobb on the Transition from Feudalism to Capitalism*, CAMBRIDGE JOURNAL OF ECONOMICS 2/2 121-40 (1978); Robert Brenner, *The Origins of Capitalist Development: a Critique of Neo-Smithian Marxism*, NEW LEFT REVIEW 104/25 (1977); Robert Brenner, *Reply to Sweezy*, 108 NEW LEFT REVIEW 95 (1978).

and ultimately reconfigured through legal institutions towards alternate social purposes: of human well-being ensured through the decommodified access to fundamental resources.

2.2 The Origins of Market Naturalism: Market as Timeless Individual Human Nature

The theoretical bases of "market naturalism," were laid in the foundational work of Thomas Hobbes, and his famous conceptualization of man as a beast with infinitesimal needs and desires for wealth, status and power, such that the clash of individual wills in the "state of nature" would result in a *bellum omnium contra omnes* – a war of all against all.[65] According to Hobbes, the only way to bring an end to this state of generalized strife was to emerge out of the state of nature through the imposition of the coercive power of a strong sovereign who could enforce the rules of peace and order, "the rule of law."[66] While Hobbes is widely known for the

[65] THOMAS HOBBES, LEVIATHAN 118-68 (1962 [1661] C.B. Macpherson, ed.); *and* C.B. Macpherson, *Introduction* in HOBBES, *id.* esp. pp. 36-39. It is important to note that there does exist a possible alternative reading of Hobbes' text – indeed, a proto-institutionalist one – whereby the focal unit of analysis is not the individual equipped with infinite natural appetites, but rather the "structure of the situation." On this reading, the state of war results not from anti-social natural appetites of individuals so much as projections and fear among anonymous strangers in a state without coercive law or mutual assurances. For discussion, *see* RICHARD TUCK, HOBBES (1989). Nevertheless, the reading advanced in the text is the standard one given to Hobbes and, more importantly, is the one that has exerted great influence on a line of subsequent thinkers. It is this "Hobbesian" view that is our focus, irrespective of its credentials as the best reading of Hobbes.

[66] *See* C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (2011 [1962]), p. 19-41. MacPherson qualifies, contrary to the common misled belief that Hobbes abstracted his state of nature from some actual empirical historically based pre-civilized society, that Hobbes is abstracting the individual in a logically postulated state of nature from the civilized society of his time and assuming a hypothetical world in which an individual socialized in Hobbes's own society would be forced to live in a world absent a perfect sovereign. This is an important distinction because he is NOT theorizing the archetypal Rousseauian romantic savage man in nature but instead a man with all the flaws and desires (Competition, Diffidence and Glory) cultivated by his own society, in other words Hobbes was not postulating man born without civilized society but instead what would happen to a man born within civilized society if the rule of a sovereign were dissolved. See in next footnote that in fact what Hobbes theorized was the dissolution of feudal rule by a market society and that the "state of nature" was the

normative prescription of his political theory, he is no less influential as the first theorist to analyze society as an aggregate of "pre-social" individuals, laying the foundations for what would become known as the neoclassical economics approach of "methodological individualism."[67]

It was within this same tradition that Adam Smith developed his theory of the "invisible hand" slightly more than a hundred years later.[68] As with Hobbes, so with Smith the relevant unit of social analysis was taken to be the aggregation of pre-social individuals, each pursuing their natural inclinations of self-interest. Only for Smith, the essentialized human behavior of individuals was that of their natural "propensity to truck, barter and exchange one thing for another."[69] While Hobbes

market and transformation of feudal man to a brute self-interested individual that of homo economicus.

67 The methodological individualist approach to social theory, anchored in the Hobbesian analysis of pre-social individuals, is perceptively discussed in BARRY BARNES, THE ELEMENTS OF SOCIAL THEORY 10-36 (2014). Key figures in the development of this line of analysis within mainstream economics include, alongside Adam Smith (discussed below): Carl Menger, Joseph Schumpeter, Milton Friedman and Gary Becker. *See* CARL MENGER, INVESTIGATIONS INTO THE METHOD OF THE SOCIAL SCIENCES WITH SPECIAL REFERENCE TO ECONOMICS (1985 [1883] trans. Francis J. Nock); Joseph Schumpeter, *On the Concept of Social Value*, THE QUARTERLY JOURNAL OF ECONOMICS 23, 213 (1909); Milton Friedman, *The Methodology of Positive Economics* in MILTON FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS (1953); *and* Gary Becker, *Investment in Human Capital: A Theoretical Analysis,* LXX JOURNAL OF POLITICAL ECONOMY 9 (1962). In sociology, key figures in the development of a somewhat different stripe of methodological individualism – one retaining the individual as the unit of analysis but remaining open to said individuals being "socialized" and/or more pluralist in their beliefs and attitudes – include Emile Durkheim, Max Weber, Karl Popper, Talcott Parsons and James Coleman. *See* MAX WEBER, ECONOMY AND SOCIETY 12-15, 132-142 (1968 [1922] ROTH & WITTICH, EDS.); KARL POPPER, THE POVERTY OF HISTORICISM (1957); John Watkins, *The Principle of Methodological Individualism*, 3 THE BRITISH JOURNAL FOR THE PHILOSOPHY OF SCIENCE 186 (1952); and JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY (1990). For a leading contemporary exponent seeking to unify economic and sociological analysis in this vein, *see* Jon Elster, *The Case for Methodological Individualism*, THEORY AND SOCIETY 11, 453 (1982); *and* JON ELSTER, NUTS AND BOLTS FOR THE SOCIAL SCIENCES (1989).

68 ADAM SMITH, THE WEALTH OF NATIONS (1776), BK.1 CH.2. ADAM SMITH, THEORY OF MORAL SENTIMENTS (1759 [1790]).

69 *Ibid.* Similar to our discussion above of an alternative possible reading to the standard "Hobbesian" view, so here there is an alternative reading to the "Smithian" view advanced in text – as the standard and influential interpretation of Smith. Based on closer examination of both

believed that this insatiable individual human nature required the presence of a strong sovereign to maintain peace and order, Smith came to the opposite conclusion that the natural tendency of man to pursue his own self-interest should reign free of control ("laissez-faire"), with markets tuning "private vice" into "public benefit" as if "led by an invisible hand."[70]

Hobbes and Smith's views, though vastly different in their prescriptions, commonly assume that individual behavior can be understood separate from their social relations, and also that these dynamics could be understood outside of history: the dynamics they described were understood as universal and ahistorical, holding true across time and space. Their analysis is brilliant and compelling: the state of nature indeed appears boundless and timeless. How is it the case that such a society can exist today in Somalia or the Congo as it did in the 1600s amongst warring English feudal lords when Hobbes was writing the *Leviathan*? Or even more mysterious – how is it that the market mimics this state of nature and creates the very conditions necessary to bring Hobbes's insatiable human nature to life?[71]

Wealth of Nations and *Theory of Moral Sentiments*, these works challenges both the content of the pre-social individual ascribed to Smith and the centrality of "invisible hand" and "laissez-faire" to his thought. *See* EMMA ROTHSCHILD, ECONOMIC SENTIMENTS: ADAM SMITH, CONDORCET AND THE ENLIGHTENMENT (2003).

70 SMITH, *ibid.*, Bk IV, ch. 2. The juxtaposition of Smith's analysis with Hobbes's raises, of course, a puzzle: Why doesn't the pursuit by Smith's individuals of their material self -interests result in Hobbesian clashes culminating in a war of all against all? Because they are not allowed to *by the state*. In other words, Smith's entire analysis presupposes a Hobbesian solution to Hobbes' problem. More precisely, it presupposes the "Lockean" variant of the Hobbesian solution, whereby the state is not "absolute" but "limited" in its powers, to the protection of individuals' natural "rights" to "life, liberty, and property." SEE JOHN LOCKE, *Second Treatise of Civil Government, in* TWO TREATISES OF GOVERNMENT (1970 [1690] Peter Laslett, ed.) Smith's analysis of a naturalized market economy, that is, presupposed a legal framework to get it off the ground, consisting of state enforcement of Lockean natural rights, which enforcement then channels pursuit of individual self-interest into more "benign" ends.

71 *See* MACPHERSON, *supra* note.66, p. 61. "There is plenty of evidence that England approximated closely to a possessive market society in the seventeenth century." "Only in a society in which each man's capacity to labour is his own property, is alienable, and is market commodity, could all individuals be in this continual competitive power relationship." Also *See Ibid.* p.59 MacPherson points out that even more interesting that his model of the state of nature, is the model of society that Hobbes theorizes, which MacPherson develops into three models:

Similarly, Smith's market is equally as timeless: who can deny that from the very beginning of human history, trade and commerce were inseparable from human civilization, as were the existence of modes of exchange and distribution of goods. The most sophisticated anthropologists would have a hard time overcoming that proposition, for even premodern societies were organized around institutions that mediated the exchange of goods. So, why is this assumption of a timeless human nature problematic? Why isn't the individual or the aggregate of individuals the best unit of analysis for understanding the economy? The answer lies in its tendency to obscure from view the reality of the development of the market as a unique set of *historically-specific social relations*. Adopting a pre-social individual human nature view, or "market naturalist" view, of the market is not only unsatisfactory as a positive description of the market's origins, but also places it beyond the realm of societal control-as simply a "natural fact"-and therefore impossible to change. It is only by shifting the unit of analysis to social institutions, and as will be shown later, and to specific transformations in social relations, that bringing the market under social control appears on the horizon of possibilities.

2.3 Overcoming Market Naturalism: The Market as a Social Institution

Customary or status society, simple market society, and the modern market society or what MacPherson calls "possessive market society." *See also Ibid* p.49-57 MacPherson explains the distinctive trait between a simple market society and a possessive market society is that in order to gain access to the means of life a majority must sell their labour. " Having lost this part of their powers they must continually sell the remainder of their powers to those who have the land and capital. What is unique about the transfer in the market society is that there it is maintained by continual competition between individuals at all levels. Everyone is a possessor of something, if only of his capacity to labour; all are drawn into the market; competition determines what they will get for what they have to offer (…) Since this is determined by the impersonal operation of the market, in which relative price changes in response to changes in wants, changes in energy and skill expended, innovations in production, changes in the ratio of labour to capital, and other factors, everyone is potentially in movement up or down the scale of powers and satisfactions."

In shifting the lens of economic analysis from pre-social individuals to social institutions, it is necessary to go deeper into the pioneering contributions of Polanyi.[72] Polanyi's attack on the market naturalism of his time consisted of two important moves: first, he shifted the unit of analysis, from the aggregate of pre-social individuals to historically based social institutions; second, he rejected the idea of the market as operating on a "natural" self-regulating logic and attempted to identify the specific dynamics and logics of the social organization of the economy. As to the first point, Polanyi drew upon and synthesized the findings of anthropologists writing on the economic organization of traditional societies. Based on anthropological research available in his time about these societies, particularly the Trobriand Islander Kula Rings, Polanyi's research illuminated that even when traditional societies were organized around institutions for the exchange of goods, the non-economic social dynamics of reciprocity and redistribution played a far greater role in explaining the organization of the economy historically than individual self-interest as theorized by Hobbes and Smith (and the basis of the neoclassical economic "rational actor").

> "The outstanding discovery of recent historical and anthropological research is that man's economy, as a rule, is submerged in his social relationships. He does not act so as to safeguard his individual interests in the possession of material goods; *he acts so as to safeguard his social standing, his social claims, and his social assets.* He values material goods only in so far as they serve this end. Neither the process of production nor that of distribution is linked to specific economic interests attached to the possession of goods; but every single step in that process is geared to a number of social interests, which eventually ensure that the required step be taken. These interests will be very different in a small hunting or fishing

[72] Indeed, it was precisely the retrieval of Polanyian insights in recent decades that has led to the resurgence in the fields of economics and economic sociology of a distinct "institutionalist" approach to economic analysis. *See* Mark Granovetter, *Economic action and social structure: the problem of embeddedness*, *supra* note. 24. *See also* the discussion in David Coates, *Paradigms of Explanation* in DAVID COATES, ED. VARIETIES OF CAPITALISM, VARIETIES OF APPROACHES (2005), p. 12-18.

> community from those in a vast despotic society, but in either case the economic system will be run on noneconomic motives."[73]

Polanyi identifies in reciprocity, the social dynamics of "friendship, kinship and other social ties," and with regard to redistribution, similarly he connects it to "political and religious factors." Polanyi's mode of analysis of the capitalist market as a social institution involved looking for "patterns of integration" between the historical dynamics of reciprocity, redistribution, and most relevant to analyzing capitalist markets, *the logic of market exchange*.[74]

> "The crystallization of the concept of the economy was a matter of time and history. But neither time nor history has provided us with those conceptual tools required to penetrate the maze of social relationships in which the economy was embedded. This is the task of what we will here call institutional analysis." [75]

In "Economy as Instituted Process," another essay appearing in the same volume Polanyi attempts to analyze markets in relation to "market elements": the presence of a "supply crowd" and a "demand crowd," the rate of exchange according to the character of equivalency either markets are set price markets or price-making markets, and finally in the latter, an additional factor of competition.[76] However, Polanyi generalized these features to all markets except "price making markets and competition,"[77] the two hallmarks of the capitalist market. However, rather than analyze these features in their embedding in concrete social relations, Polanyi ultimately relied too heavily on legal institutions rather than analyzing the

[73] POLANYI, THE GREAT TRANSFORMATION *supra* note. 17 at 49. (emphasis added)
[74] *Ibid.*
[75] Karl Polanyi, Conrad M. Arensberg, and Harry W. Pearson, *The Place of Economics in Societies* in KARL POLANYI, CONRAD M. ARNESBERG & HARRY W. PEARSON, TRADE AND MARKET IN THE EARLY EMPIRES: ECONOMICS IN HISTORY AND THEORY 242 (1971 [1957]), p.242.
[76] Karl Polanyi, *Economy as Instituted Process*, *supra* note. 23..
[77] *Ibid.*

market in relation to other socio-historically specific social institutions like the commons and the welfare state, as will be explored later, resulting in an important lacuna in his analysis. Ultimately, Polanyi's "institutional approach" failed to explain the social dynamics and logic of the central unique feature of the capitalist market, of market exchange, or what he called "price making markets."

Polanyi instead, in attempting to apply his institutional analysis to the economic dynamics of 21st century Europe, focused on an analysis of what he recognized as three fundamental contradictions of market capitalism, expressed in what he called the "fictitious commodities" of land, labor and money.[78] As Polanyi outlined, private ownership in land and the ability to charge a rent was only possible through the result of a "fiction" structured by law; similarly labor is not a "commodity" in the true sense as it is human activity which is not produced for sale but for entirely other reasons; and finally money does not contribute to the production process directly as resources or labor, but serves instead as an abstract and universal marker of purchasing power.[79] Polanyi argued that these three institutions – private property, wage labor and finance – are at the very basis of the organization of the capitalist market, and yet because of their fictional nature they offer important points of transformation of the entire system – Polanyi's "institutional challenge" was to identify and construct "counter-institutions" to socially embed the negative effects produced by these fictitious commodities. According to Polanyi, each of these (private property, wage labor and finance) left to the supposed "self-regulating" market will result in its own destruction: private property must retain limits, for left to itself it would result in the overuse and under preservation of the natural environment; similarly, wage labor must be supported by robust welfare institutions or it will destroy the very men of the labor force

78 POLANYI, THE GREAT TRANSFORMATION *supra* note. 17 at p.75
79 *Ibid.*

either by starvation or overwork; and finally finance requires regulation otherwise all human activity will be inverted- instead of using finance to serve human and societal purposes, finance consumes humans as instruments towards its own ends in an inhuman logic of ceaseless expansion.[80]

Polanyi's entire analysis of the "fictional commodities" is infected by a too-optimistic, indeed deterministically so, spirit as revealed in his concept of the "double movement."[81] Polanyi believed that where the self-regulating market spun out of control and destroyed the very fictitious commodities it relied upon for its very organization, social and political resistance and democratic institutions would rise to counteract and limit those destructive effects.[82] Part of what fueled his misplaced optimism is that Polanyi approached the analysis of the social embedding of these three institutions through the history of their political and legal regulation as opposed to fulfilling the promise of his important shift in unit of analysis to social institutions and institutional analysis. Rather than focusing on unearthing the dynamics of the capitalist market, its embedding of price-making and competition in concrete social relations, he immediately took a leap in logic to an analysis of their regulation. He argued that land should to be regulated through property law and agrarian regulation, labor by contract/labor/welfare law, and money by financial regulation. And while the legal institutional layer of the analysis is important to understanding the institutionalization of these social changes over time, as well as, an important tool towards their transformation, without historically identifying the origins of capitalism in changes in social relations, law acted only as a blind man leading the way and the promise of conceptualizing "the great transformation" lost. Without a socio-historical theory of the transformation from feudalism to capitalism, Polanyi was unable to provide an analysis of the

80 *Ibid.*
81 *Ibid.*
82 *Ibid.*

patterns and dynamics of market exchange as embedded in social processes, as connected to social interests and purposes, as he was able to do with reciprocity and redistribution in premodern economies.

Ellen Meiksins Wood locates the failure of Polanyi's institutional method in its inability to conceptualize market exchange as a unique logic, one that was the product of a change in specific social relations, leading him to replicate the very tendency to naturalize the capitalist market of those he attacked. While Polanyi avoided the mistakes of his predecessors-that the market is an extension of human nature- he still viewed it as an unstoppable natural force that was released once pre-capitalist institutions were destroyed rather than a result of a specific shift in social relations.[83] We may, however, advance a more generous reading of Polanyi's concept of "great transformation": Polanyi made the important move of placing the transformation of feudalism to capitalism within the framework of social and political processes of struggle, which lay the foundation for the argument made here of the dialectical relationship between the disappearance of the commons and the rise of welfare. This foregrounding of the social institutions in which the new market economy was embedded is consistent with Polanyi substantive idea of the economy as man's livelihood, which his contemporaries like Talcott Parsons had abandoned in favor of a more "pure" formal conception of economy,[84] focusing instead on a more narrow conception of man as Hobbesian homo economicus, the rational actor. Polanyi's analysis, as we will explore later, located the emergence of the laws of the market in the historical setting of two social institutions: the

83 WOOD, THE ORIGINS OF CAPITALISM, *supra* note 5 at p. 25-26.
84 *See* TALCOTT PARSONS AND N. J. SMELSER, ECONOMY AND SOCIETY, A STUDY IN THE INTEGRATION OF ECONOMIC AND SOCIAL THEORY (1956). *See also* Olav Velthuis, *The Changing Relationship between Economic Sociology and Institutional Economics: From Talcott Parsons to Mark Granovetter*, AM. JR. ECON. & SOC. 58/4 (1999).

decline of the commons and rise of Speenhamland – instead of viewing those laws as appearing automatically as Wood suggests.[85]

2.4 Social Relations Analysis of the Double Movement: Decline of the Commons

Polanyi's account of the transition from feudalism to capitalism reveals that in feudal times, certain pre-capitalist institutions performed an important function by acting as a buffer from the harsh realities of serfdom (low crop yields, disease and scarcity created by war) by providing an alternate means of access to some basic goods. In the feudal period and in the transition to capitalism one of such institutions was the commons, a social institution that took the form of rules permitting the grazing of sheep and cows in pastures, hunting, fishing, collecting firewood, gathering fallen fruit and picking berries and mushroom for personal consumption. I argue that their decline and almost complete disappearance in England between 1600-1800,[86] was central in increasing pressure to create new forms of support and protection from the negative destructive effects of the newly emerging market such as the modern welfare state. While the destruction of the commons made its way more slowly to the rest of the Continent, as Europe raced to keep pace with England's productivity in the 1800s during the Industrial revolution, the same process of enclosing common lands eventually took place everywhere, though in differing degrees and speed.[87] The pressure to address the changing needs of the population in the face of the transition led to incredible variation in the social institutional forms created to replace the traditional right to

[85] *Ibid.*
[86] *Ibid, See also* PETER LINEBAUGH, STOP, THIEF! THE COMMONS, ENCLOSURES, AND RESISTANCE (2014); PETER LINEBAUGH, THE MAGNACARTA MANIFESTO: LIBERTIES AND COMMONS FOR ALL (2009).
[87] Robert Brenner, *The Origins of Capitalist Development: a Critique of Neo-Smithian Marxism*, NEW LEFT REVIEW 104/25 (1977).

access the commons and provisioning of community welfare. In England, and not coincidentally the birthplace of capitalism, the first welfare system created in 1795 was known as the "Speenhamland" system.[88] Speenhamland was a means tested system guaranteeing a certain amount of supplementary income in relation one's family size, income and the rising price of grain.[89] Polanyi bemoaned the creation of Speenhamland, attributing to it the same vices that anti-welfarists argued for its abolition that it made people prone to a form deeper and undignified form of pauperism. However through the important contributions made by Fred Block and Margaret Somers, Block & Somers reveals through historical evidence[90]that Polanyi's view of Speenhamland, although a significant improvement over others (Townsend, Malthus, Von Mises) did not see the important role that it had in acting as "significantly buffering rural poor against unemployment and loss of other income sources and providing food and clothing"[91] and that in fact its role in "wage reductions by employers" was not universal as Polanyi believed.[92] Block & Somers, working within Polanyi's framework of counter-institutions to the market, demonstrate that Speenhamland acted as one such early counterinstitution. What Polanyi did not realize was that the Speenhamland system was an early pioneering welfare institution that would later be followed by more sophisticated forms of welfarism managed by a centralized state. Block & Somers explains that the reasons for Polanyi's mistaken view was that Polanyi believed that "Speenhamland prevented laborers from developing into an economic class and thus deprived them of the only means of staving off the fate to which they were doomed in the

88 POLANYI, THE GREAT TRANSFORMATION, *supra* note. 17 at p.120
89 *Ibid.*
90 Fred Block and Margaret Somers, *In the Shadow of Speenhamland: Social Policy and the Old Poor Law*, Politics and Society 31/2, (2003).
91 *Ibid.* at p.291-292.
92 *Ibid.* at p. 300. Block and Somers show based on a range factors including the county differences in expenditures, wage policy, rising price of grain, that in fact Speenhamland was "a response to the loss of established forms of family income rather than a cause."

economic mill."[93] Speenhamland contrary to Polanyi's analysis was a form of early support that made life possible for many people in the feudal and transition period to capitalism, and had a direct relationship to the enclosure of commons, "enclosures and consolidations of holdings meant that many rural laboring families lost the ability to earn additional income by keeping farm animals or maintaining a vegetable garden."[94] What Block & Somers refers to here is he completion of the "great transformation," in the late 1700s and early 1800s, when in a series of Parliamentary acts and reforms, common lands were completely enclosed by the Enclosure Acts.[95] Speenhamland, like the commons, and early forms of welfare (like the Poor Laws the followed) were almost immediately a major target of classical liberal ideology and was blamed for producing greater incentives for workers to accept welfare income rather than working, a rationale that would associate welfare with stigma.[96] Unsurprisingly, as a result of this stigma, it was the rapidly emerging middle class of the 1800s that led the working class to see the end of welfare as a source of pride and to fight for their abolition. It would be an entire century more, around the time that Polanyi was writing, before the concept of welfare was renewed in the form of the welfare state through liberal reforms with an emphasis on universal access towards decommodification rather than means tested assistance. Polanyi projected unto the poor of the 1700s, the organized working class as the only possible agent of counter-institutional policy.

The work of Block & Somers corrects Polanyi's analysis of the origins of the commons and early welfare, as well as making transparent their dialectical interconnection. Block begins the important work of institutional analysis by

93 *Ibid. See also* G.D.H. COLE, NOTES ON THE GREAT TRANSFORMATION (1943), KARL POLANYI ARCHIVE, CONCORDIA UNIVERSITY, MONTREAL.
94 BLOCK AND SOMERS, *In the Shadow of Speenhamland, supra* note. 90 at p.308.
95 *Ibid.*
96 *Ibid.*

engaging in a historically based social relations analysis of pre-capitalist institutions which offer us clues towards the social embedding of the capitalist market. Polanyi, (wrongly) concludes with regard to the commons and means tested welfare that they ultimately disappeared and failed while Block & Somers reconstruction suggests their dialectical relationship and the important continuing role of welfare institutions. Block & Somers' analysis of the commons and welfare show's that Polanyi's theory of counter-institutions in the transition period pulls in two directions: for Polanyi the end of the commons and emergence of Speenhamland signified the beginning of the dramatic delinking of goods from the social rules of their production and allocation or the disembedded market, however what Block & Somers shows is that their disappearance resulted in the creation of a new social institution, welfare, and another institution that Block & Somers do not discuss, also of private property catalyzed by a dramatic shift in *social property relations*.[97] Welfare programs administrated by the state and the enclosure or conversion of communal/feudal land led to the dominance of private property. In engaging in an institutional analysis of the transformation through the decline of the commons and the rise of welfare in the form of Speenhamland, Block & Somers demonstrate that Polanyi's theory is gesturing towards the changing nature of *social property relations*. It remains the case, however, that even on this more generous view, Polanyi's notion of "institutional analysis" remained radically incomplete and

97 *See* WOOD, THE ORIGINS OF CAPITALISM, *supra* note. 5. See also BRENNER, *The Origins of Capitalist Development: a Critique of Neo-Smithian Marxism*, *supra* note. 87. See also Robert Brenner, *Dobb on the Transition from Feudalism to Capitalism*, CAMBRIDGE JOURNAL OF ECONOMICS 2/2 121-40 (1978). Robert Brenner, *Reply to Sweezy*, 108 NEW LEFT REVIEW 95 (1978).

needs to be supplemented by a deeper going historical inquiry, and one that also shifts the analytic lens from the unit of "institutions" to "social relations."[98]

Ellen Meiksins-Wood however undoubtedly goes much further than Polanyi to analyze the change in social property relations building off of the work of Robert Brenner.[99] She demonstrates in her important work, *Origins of Capitalism* that the market rather than being a natural unstoppable force was the result of a unique historical accident created by a particular set of social property relations present in England in the 1400s, which gave birth to the "market as dependence," and showing step by step the development of the market imperatives we recognize today as those that comprise the capitalist market.[100] In this Chapter I attempt to demonstrate that Brenner and Wood's work is what is needed to fill the gap of Polanyi's institutional analysis of market exchange by engaging in a socio-historical analysis of the way in which the capitalist market came into being through a dramatic and unprecedented shift in social relations. I argue that Wood and Brenner's scholarship offers us a way to give substance to Polanyi's institutional analysis of capitalism, as well as a way forward towards greater social control of the market.

2.5 A Socio-historical Analysis of the Origin of Capitalism

In order to analyze "market exchange" as a specific socio- historic institution, as opposed to a timeless and universal human nature, it is necessary to have an understanding of how it emerged out of the system of feudalism that predated

98 In this respect, the analysis offered here diverges from that of commentators who also seek to develop a more generous reading of Polanyi's analysis, but do so without fully coming to grips with its historical incompleteness and, indeed, analytic limitations. *See i.e.* Fred Block, *Relational Work and the Law: Recapturing the Legal Realist Critique of Market Fundamentalism*, 40 JOURNAL OF LAW & SOCIETY 27 (2013).
99 WOOD, *supra* note. 97. & BRENNER, *supra* note. 97.
100 *Ibid.*

capitalism. However, instead of viewing this transformation through the lens of methodological individualism, I will attempt to analyze it here through the lens of specific historical social struggles as I began to do above in analyzing the decline of the commons and the emergence of Speenhamland. When did "market exchange" first appear? What types of social struggles were occurring in the great transformation from feudalism to capitalism? How did society shift from a system where one's access to resources was determined by one's place in a vertical caste system-feudalism to a system where access to resources was determined by the market- capitalism?

In a series of historical debates about the causes of long-term economic patterns in Europe, Robert Brenner argued in a famous debate bearing his name, "The Brenner Debate,"[101] that contrary to explanations offered by other scholars, a shift in "social property relations" initiated the transformation from feudalism to capitalism in the English countryside in the period of 1400-1600.[102] Together the theories of Ellen Meiksins Wood and Brenner came to be dubbed by Marxists as "Political Marxism"[103] because of its foregrounding of the politics of struggle

[101] T.H. ASHTON & C.H.E. PHILPIN, THE BRENNER DEBATE: AGRARIAN CLASS STRUCTURE AND ECONOMIC DEVELOPMENT IN PRE-INDUSTRIAL EUROPE (1985). Triggered by Brenner's 1976 article, *Agrarian Class Structure and Economic Development in Pre-Industrial Europe* published in *Past and Present*, the debate featured critical responses from leading specialists around the world, all published in the journal over the ensuing decade, alongside Brenner's 1982 reply, *The Agrarian Roots of European Capitalism*. Collected in a single volume with an introduction by Rodney Hilton, the Brenner Debate was the second iteration of major international controversy among historians, economists and sociologists concerning the transformation in Europe from feudal or "medieval" society to capitalist or "modern" society. For the first, centering on the contributions of economists Maurice Dobb and Paul Sweezy, see RODNEY HILTON, ED., THE TRANSITION FROM FEUDALISM TO CAPITALISM (1981). Although Brenner principal targets in his original interventions were "Malthusian" historians emphasizing demographic variables – as represented by M .M. Postan and Emmanuel Le Roy Ladurie, who joined him in debate in the pages of *Past and Present* – he subsequently expanded his focus to take up the contrasts between his account and those advanced by Dobb and Sweezy. See BRENNER, *supra* note. 13.

[102] *Ibid. See also* Wood, supra note. 5.

[103] Coined by scholar Guy Debois as critique of Brenner and Wood's theory.

between different social groups: the peasantry and the aristocracy. Before turning to this theory, it is useful to summarize some of alternative theories on economic development in pre-industrial Europe, which his theory built upon and challenged.

- The Commercialization View: This was essentially the view that originates with Adam Smith that capitalism is the product of the natural propensity of humans to "truck, barter and exchange." The view is that as trade – centered primarily in urban areas – increased and markets expanded, intensified commercial activity led gradually to the birth of the capitalist market. This view has a lineage from Smith to Henri Pirenne and Fernand Braudel,[104]and variations of it anchor the views of contemporary economic and sociological historians of otherwise radically different stripes, ranging from Douglas North to Immanuel Wallerstein.[105]
- The Demographic View: This is the view that is associated with the ideas of Thomas Malthus and David Ricardo. Their theories while different share the common view that long-term economic patterns can be explained as result of the cycles of population increase and decrease, interacting with the availability and fertility of land. The central idea is that of population increases outstripping those of agricultural productivity eventually resulting in a scarcity of resources leading to crisis, which eventually leads to decreases in population. Those that adopt this view believe that these changes explain the period in question covering 1500-1800.[106]

104 SMITH, WEALTH OF NATIONS, *supra* note 69, Bk III; HENRI PIRENNE, MEDIEVAL CITIES: THEIR ORIGINS AND THE REVIVAL OF TRADE (1925); FERNAND BRAUDEL, CAPITALISM AND MATERIAL LIFE 1400-1800 (1973). For discussion, see John Merrington, *Town and Country in the Transition to Capitalism* 93 NEW LEFT REVIEW 71-76 (1975).
105 DOUGLAS C. NORTH & ROBERT P. THOMAS, THE RISE OF THE WESTERN WORLD (1973); IMMANUEL WALLERSTEIN, THE MODERN WORLD SYSTEM, VOL. 1 (1974).
106 H.J. Habbakuk, *The Economic History of Modern Britain,* 18 *Journal of Economic History* 486 (1958); M.M. Postan, *Medieval Agrarian Society in its Prime: England* in CAMBRIDGE ECONOMIC HISTORY OF

- Technological Determinism: This is the view taken by many Marxists to explain the birth of capitalism as the inevitable result of advances in the "forces of production." This view links the birth of capitalism with the industrial revolution.[107]

EUROPE VOL. 1 548 (1968 ED. M.M. POSTAN); *and* Emmanuel Le Roy Ladurie, *L'histoire immobile* 24 ANNALES (1974). Variously termed "Malthusian," "neo-Malthusian" or "Malthusian/Ricardian," this approach was at the center of the Brenner Debate, serving as the principal foil for Brenner's own account – criticized by both Brenner and Guy Bois and defended by Postan and Le Roy Ladurie. *See* Robert Brenner, *Agrarian Class Structure*; *idem*, *Agrarian Roots*; Guy Bois, *Against the Neo-Malthusian Orthodoxy*; M.M. Postan and John Hatcher, *Population and Class Relations in Feudal Society*; Emmanuel Le Roy Ladurie, *A Reply to Brenner* all in ASTON & PHILPIN, *supra* note. 101.

[107] The *locus classicus* for this view is Marx's famous 1859 Preface, presenting, in the words of Eric Hobsbawm, "historical materialism in its more pregnant form." *See* Karl Marx, *Preface to a Critique of Political Economy* (1859), in KARL MARX & FREDERICK ENGELS: SELECTED WORKS 181 (1968); Eric J. Hobsbawm, *Introduction* in KARL MARX, PRE-CAPITALIST ECONOMIC FORMATIONS 10 (1964 [1857-58] E.J. Hobsbawm, ed.). Similarly, fertile formulations of the view may be found in Karl Marx, *Letter to Annenkov* (1846), in MARX-ENGELS SELECTED WORKS, *id.* at 669, 670-1 and KARL MARX, THE POVERTY OF PHILOSOPHY ch. 2 (1847). The position finds its most powerful contemporary elaboration in G.A. COHEN, KARL MARX'S THEORY OF HISTORY: A DEFENSE (1978). For Brenner's critique of the substance of this view, see Brenner, *Social Basis of Economic Development*, in ANALYTICAL MARXISM (John Roemer (ed.)(1986) at p. 40-48, esp. n. 11. Reinforcing criticisms, building in part on Brenner's work, are advanced in Joshua Cohen, *Review of* G.A. Cohen, Karl Marx's Theory of History: A Defense, JOURNAL OF PHILOSOPHY 79, 253 (1982); Andrew Levine & Erik Olin Wright, *Rationality and Class Struggle*, NEW LEFT REVIEW 123, 47 (1980); Ellen Meiksins Wood, *The Separation of the Economic and the Political in Capitalism*, NEW LEFT REVIEW 127, 66 (1981), p. 70-74; and Ellen Meiksins Wood, *Marxism and the Course of History*, 147 NEW LEFT REVIEW 95 (1984). For Brenner's discussion of its provenance in Marx's texts – real yet ambiguous and rooted primarily in "middle" period works of Marx – see Robert Brenner, *Bourgeois Revolution and Transition to Capitalism* in A. L. BEIER ED., THE FIRST MODERN SOCIETY: ESSAYS IN ENGLISH HISTORY IN HONOUR OF LAWRENCE STONE 271ff (1989). *See also* Ellen Meiksins Wood, *Rational Choice Marxism: Is the Game worth the Candle?* NEW LEFT REVIEW 177, 41 (1989), p. 66-8. The central texts of Marx providing the basis for the alternative "social relations" view advanced by Brenner and Wood come from work in his most developed phase of thought, namely the sections on "pre-capitalist economic formations" in the *Grundrisse* and on "so-called primitive accumulation" in *Capital*. See KARL MARX, GRUNDRISSE (1973 [1857-8] trans. Martin Nicolaus), p. 83-8, 100-08, 471-515, 881-2; and KARL MARX, CAPITAL I, (1976 [1867] trans. Ben Fowkes), p. 871-930. The debate between these camps, of "forces of production" versus "relations of productions," continues. Three central subsequent iterations are: (a) ALEX CALLINICOS, MAKING HISTORY 157-172 (1987); Alex Callinicos, *The Limits of 'Political Marxism,'* NEW LEFT REVIEW 184, 110 (1990); and Ellen Meiksins Wood, *Explaining Everything or Nothing?* NEW LEFT REVIEW 184, 116 (1990), p. 122-28; (b) Chris Harman, *From Feudalism to Capitalism*, INTERNATIONAL SOCIALISM 45, 35 (1989); Chris Harman & Robert Brenner, *The Origins of Capitalism*, INTERNATIONAL SOCIALISM 111 (2006); and (c) NEIL DAVIDSON, HOW

- Weberian view:[108] Weber's is supposed to be "idealist" or "culturalist," by emphasizing the role of (a) primarily, religious ideology in the form of Calvinist Protestantism; and (b) secondarily, "rule of law" notions.

While each of these views offers a compelling narrative with regard to different important socio economic and cultural changes occurring in the pre-industrial period, according to Robert Brenner, none of these theories explained the emergence of capitalism. Brenner's theory offers the most plausible explanation by demonstrating historically how the transformation of *social property relations* from feudalism to capitalism are at the root of a causal link between societal economic patterns or collective rules of reproduction by "political communities which are constituted for that very purpose" or in other words "classes."[109] For Brenner *social-property relations* are "the relations among direct producers, relations among exploiters, and relations between exploiters and direct producers that, taken together, make possible/specify the regular access of individuals and families to the means of production."[110] Brenner defines capitalist social-property relations according to two defining elements:

First:

> "Economic agents must be separated from their means of subsistence. Though they may possess means of production- tools and skills- the individual economic agents cannot possess their full means of subsistence, i.e. all that is necessary to allow them to directly produce what they need to survive. What this usually means is that, at minimum, they must be deprived of ownership of land, or at least land that, when combined with their labor and tools, could provide them with everything they need to survive."[111]

REVOLUTIONARY WERE THE BOURGEOIS REVOLUTIONS? 397-427 (2012); and Dylan Riley, *Property Leading the People?* NEW LEFT REVIEW 95, 109 (2014) (review of Davidson), p.114-5, 118-21.

108 *See* MAX WEBER, ECONOMY AND SOCIETY 12-15, 132-142 (1968 [1922] ROTH & WITTICH, EDS.) See also MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM (1905).

109 *Ibid.*

110 *Ibid.*

111 *Ibid.*

Second:

> "Economic agents must lack means of coercion that would allow them to reproduce themselves by systematically appropriating by force what they need from direct producers."[112]

Brenner's work goes far beyond Polanyi's analysis to historicize the transformation in its predecessor of feudalism.[113] To make sense of Brenner's theory, we must have a sense of what he meant by separation from the *means of subsistence* and the land in contrast to *means of production* and the significance of capitalism as a system that "lacks the means of coercion." To do so we must have a better understanding of feudalism as an economic system. In the "Brenner Debate," Brenner engages with scholars like M.M. Postan and John Hatcher who represented the demographic Malthusian/Ricardian explanation of economic development and shows that the crisis of the feudal economy did not take a simple Malthusian form.[114] The plagues of the mid-fourteenth century that resulted in massive population decline should have resulted, according to the Malthusian/Ricardian theory in setting off another period of demo-economic growth, but instead led to stagnation and catastrophe and a deep crisis of the feudal economy for about a century.[115] So what explained this stagnation and lack of growth if it was not explained by increases and decreases in population? Brenner took cues from a fellow Marxist in the group, Guy Bois and the thesis of his book *Crisis in Feudalism*, which pointed to the European wide crisis of seigniorial revenues in this period of stagnation, which Bois argued was the direct outcome

112 *Ibid.*
113 These defining characteristics are the basis for Meiksins Wood's social relations analysis of market dependence vs market opportunity will be discussed in the next section.
114 BRENNER, *Agrarian Class Structure*; *idem*, *Agrarian Roots, supra* note. 106.
115 *Ibid.*

of a continuing process of declining rates of feudal levy.[116] Brenner building on Bois's work showed how this declining rate of levy was bound up with the divergent evolutions of class relations.

> In some places the crisis of seigniorial incomes preceded population decline and was a more or less immediate outcome of peasant conquests and the resultant decline in the rate of rent. But elsewhere, where seigniorial powers and property had remained intact or been strengthened, a declining rate of rent and the seigniorial incomes crisis occurred only after the downturn in population, which was itself the result partly of the tendency of productivity to decline and partly of the persistence of bubonic plague. At the same time, because feudal surplus extraction systems had taken different forms and operated with differing degrees of effectiveness in different places, the methods to which the seigneurs could resort in order to counteract their income problems varied- with variable consequences for short term production trends and long term economic development.[117]

This crisis of the declining rate of the levy revealed that Malthusian boom and bust cycles were not a generalizable theory for economic development for the entire pre-industrial period and the failure of the theory's explanatory power suggested that other forces were at work. Brenner by tracing the very different trajectories of the way in which the aristocracy of Europe attempted to resolve the crisis using the concepts of class conflict and *social property relations*, instead of population increase and decrease, to explain the economic development from the 14th century on. Brenner traces the trajectories and the very different responses of the aristocracy to the crisis in three different regions: Western Europe, North and Eastern Europe, and England. In Western Europe, France and areas adjacent

[116] Bois, *Against the Neo-Malthusian Orthodoxy, supra* note. 106.
[117] Brenner, *The Agrarian Roots of European Capitalism, supra* note 102 at p.269.

including parts of western Germany, peasants had been able from the 13th century on to secure fixed money rents on their property as well as the right to inherit.[118]

According to Brenner, in France where there was a strong peasantry in place, the aristocracy could not increase the rate of levy and therefore this was a major incentive and contribution to the construction of the "absolutist" state marked by its robust centralized administrative apparatus and taxation powers.[119] Monarchs granted offices to members of the aristocracy in the new centralized administration, to be financed out of tax revenues, which allowed them to supplement the falling rate of levy.[120] North East Europe took a completely opposite trajectory: there the aristocracy maintained strong seigniorial property and powers compared to the peasantry which were not well organized to resist them and the aristocracy used these powers to double down on the peasantry to increase their dues. "By tying peasants to their estates by means of vastly out-organizing them politically, north-east European lords were able to transform the nature of feudal exploitation in the region, expanding the size of demesnes at the expense of peasants subsistence plots and imposing historically unprecedented levels of labor services."[121]

The aristocracy of England, on the other hand, neither followed the path of structuring and deepening feudalism as in the North-East nor abandoning

[118] *Ibid. at* 285. By the latter part of the 13th century, cens peasant hereditary tenure had been recognized as tantamount to full property throughout much of the north of France. With hereditary tenure came fixed dues which with inflation resulted in for the lords "a declining rate of feudal levy." In the period of the reconstruction the peasants position as holders of cens tenure was further consolidated, as for the first time there was a cens contract which was universally set in writing, thus providing for even stronger protection in courts. This title to land held by the peasantry in France explains why the capitalist market did not develop its imperatives in the same way.

[119] *Ibid.*

[120] *Ibid.*

[121] *Ibid.*

feudal extraction of surplus in favor of the absolutist state as in the West, but instead in the presence of a highly organized peasantry that had secured its freedom from dues[122] but not its property[123] rights, took advantage of their "freedom" both from serfdom and property to charge peasants rent for the use of their land. "By separating their tenants from their full means of subsistence, rendered them dependent upon the market. (…) By subjecting tenants to competition over leases they imposed on them the need to forsake production for subsistence and adopt capitalist rules for reproduction."[124]

In subsequent work, Brenner significantly broadened and deepened his argument, widening its geographic reach – to take into account regions of Europe outside his original purview, as well as areas outside of Europe, principally China and Latin America – and developing more fully its theoretical foundations.[125] These elaborations have been made partially in response to the intense ongoing attention

122 Status of free tenant was accomplished in formal-legal terms by offering each peasant a copy of the section of the manorial roll where the terms of his tenancy were stated- in effect a contract, in theory between legal equals, that the peasant could go to court to enforce. The upshot was to render irreversible the process of the peasant enfranchisement, cutting off the possibility of "re-enserfment", because the law endowed all freemen with the protection of the king's courts. By the second quarter of the 15th century, the vast majority of English peasants had won their freedom…

123 BRENNER, *Property and Progress: Where Adam Smith Went Wrong*, s*upra* note. 108, p.98. With the decisive help of the early Tudor state and its courts, English lords were able to valorize their claim, against the contentions of their tenants, that much formerly customary, now copyhold, land held by their peasants was ultimately subject to arbitrary thus variable, fines or rents on transfer (at inheritance or otherwise). It could therefore, sooner or later, be transformed into what was, in effect, a commercial leasehold- and was, therefore, in the end, the lords' property.

124 *Ibid.*

125 For the geographic expansion of his argument, *See* Brenner, *Critique of Neo-Smithian Marxism*, *supra* note. 102; Robert Brenner, *The Low Countries in the Transition to Capitalism*, in JAN LUITEN VAN ZANDEN & PETER HOPPEBROUWERS, EDS., PEASANTS INTO FARMERS? THE TRANSFORMATION OF RURAL ECONOMY AND SOCIETY IN THE LOW COUNTRIES (MIDDLE AGES – 19TH CENTURY) IN LIGHT OF THE BRENNER DEBATE (2001); *and* Robert Brenner & Chris Isett, *The Divergence of England from China's Yanzi Delta: Property Relations, Microeconomics, and Patterns of Development, 1500-1850*, LI JOURNAL OF ASIAN STUDIES 2 (2002). For elaboration of its theoretical bases, see Brenner, *Critique of Neo-Smithian Marxism*, *id.*; Robert Brenner, *The Social Basis of Economic Development* in JOHN ROEMER, ED., ANALYTICAL MARXISM (1986); *and* Brenner, *Property and Progress: Where Adam Smith Went Wrong, supra* note.108.

his work has attracted from a wide swath of historians, economists and sociologists. These debates – principally with "world-systems" scholars re-asserting the centrality of international trade and colonial relations, European historians re-examining historical evidence in the wake of the original Brenner Debate and Marxist theorists re-asserting the centrality of the "forces of production"[126] – have served primarily to tighten the force and extend the scope of Brenner's arguments, beyond the implications of his original intervention.[127] Furthermore, Robert Brenner's socio-historical analysis was further refined and clarified by his student Ellen Meiksins Wood who made important contributions in elaborating the market imperatives which came out of the change in social relations analyzed by Brenner.

2.6 The Fruits of a Socio Historical Analysis of Social Property Relations: The Emergence of Market Logic

Brenner's socio-historical approach to *social property relations* merged together with Polanyi's institutional analysis of the capitalist market as a social system offers a more complete account of the market as a social institution. Wood, who took up Brenner's analysis, crystallized the fruits of engaging in such an approach, namely, the explanatory power of the theory of social property relations to explain the logic

126 For the first group, see Giovanni Arrighi, *Capitalism and the Modern World-System: Rethinking the Non-Debates of the 1970s*: LI BOZHONG, AGRICULTURAL DEVELOPMENT IN JIANGNAN, 1620-1850 (1998); *and* KENNETH POMERANZ, THE GREAT DIVERGENCE: CHINA, EUROPE AND THE MAKING OF THE MODERN WORLD ECONOMY (2000). For the second, see the essays collected in VAN ZANDEN & HOPPERBROUWERS, EDS., LOW COUNTRIES IN LIGHT OF THE BRENNER DEBATE, *ibid.* For the third, see the references in note 107, *supra* to Cohen, Callinicos, Harman and Davidson.

127 An especially powerful demonstration of the strength and scope of the argument is provided by Brenner's critical comparison – uniting theory and history – with the alternative "neo-Weberian" analysis of economic development advanced in Michael Mann's influential multi-volume history of the world, MICHAEL MANN, THE SOURCES OF SOCIAL POWER (1986). *See* Robert Brenner, *From Theory to History: "The European Dynamic" or "From Feudalism to Capitalism"*? in JOHN HALL & RALPH SCHROEDER, AN ANATOMY OF POWER: THE SOCIAL THEORY OF MICHAEL MANN (2006).

and dynamics of market exchange- the very aspect of "price making markets" discussed earlier as missing from Polanyi's institutional analysis. The central analytic lesson of Brenner's work is perhaps best encapsulated by Wood: "It is not capitalism or the market as an 'option' or *opportunity* which Brenner seeks to explain, but the emergence of capitalism and the capitalist market as an *imperative*."[128] Wood states her thesis in the important work, *Origins of Capitalism*, "It is the transformations of social property relations that 'set in train' a historically unique progress of productive forces. To acknowledge this is critical to an understanding of capitalism- not to mention the conditions of its abolition and replacement by a different social form."[129] Wood, building on the work of Robert Brenner, uses the unit of analysis of "social relations" to provide an important history of the years relevant to the birth of the capitalist of the market between the years of 1500-1700 in England. Wood, building from Brenner's analysis of the practice of landlords charging rent for their land from tenants in the 1500s,[130] analyzes how this new English rent system created an imperative to improve land by making it more productive, thus leading to competition between producers in order to pay the rents of better more productive land.[131] Wood shows how this incentive to improve land and the imperative to compete gave birth to a new set of social property relations and two classes: landlords/rentier and

128 Wood, *Rational Choice Marxism*, *supra* note 107 at 68.
129 WOOD, THE ORIGINS OF CAPITALISM, *supra* note. 5, p.146.
130 Brenner, *Property and Progress: Where Adam Smith Went Wrong*, s*upra* note. 108 p.96-98; *See Also* MACPHERSON, POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM, *supra* note 66. This is also supported by C.B. Macpherson who argues that in the period that Hobbes was writing between 1588-1679 "Very nearly half the men were fulltime wage earners; if the cottagers are counted as part-time wage earners, the proportion is over two-thirds. And while the wage relationship was not as completely impersonal as it was to become in the following century, it was already, as Hobbes knew, essentially a market relationship. The tendency for land to be exploited as capital was already well advanced, to the detriment of such paternal relations between landlord and tenant as had survived the changes of the sixteenth century."
131 WOOD, THE ORIGINS OF CAPITALISM, *supra* note. 5. Wood shows how this first began with the wool industry but intensifying later with corn.

producers/renters. Rather than using coercive force to extract a surplus, as was done in feudal times and which continued in the same period in France, the newly born market imperative of *competition over productive land* allowed *rentiers to collect surplus without the use of coercion.*[132]

In a second phase through the 1700s, as discussed earlier, the English Parliament passed a number of enclosure acts to privatize what was previously common land and subjected this land to the new agrarian land market. As a result of this, as well as, the growing market in agrarian land many peasants were dispossessed of their livelihood and were forced to hire themselves out to rentier farmers for a wage in order to gain access to the means of life, namely food and shelter. This resulted in the *compulsion to buy the necessities of life,* which created *the second imperative of market dependence for access to the means of life*.[133] The complete reliance of all members of society on the market to sustain human life was entirely historically unprecedented and as such a core characteristic of capitalism, which completely distinguishes it from earlier modes of economic production and distribution. Formally, producers were "free," they were under no obligation (other than eventually only under lease contract) to their landlords to work the land as they were under feudalism, but in reality, they were constrained by their need for food, which they secured through their wages after rentiers collected their rent.[134] While, previously under feudalism, access to the means of life was guaranteed by one's position in a vertical caste system, suddenly and for the first time, access was facilitated horizontally for both producers and landlords by the market. Wood shows through her historical analysis how horizontal relations of workers

[132] WOOD, THE ORIGINS OF CAPITALISM, *supra* note. 5 at p .95-121
[133] *Ibid.*
[134] *Ibid.* The issue of the "liberty" of these "free" workers is an important focus analysis in the Legal Realist analysis of property and critique of the public/private distinction, as discussed the next Chapter on *The Legal Institutional Character of the Market.*

competing against other workers and landlords/producers/capitalists competing against one another, subjected all classes of society to the *market not as opportunity*, as in other historical periods, but the *market as dependence*.[135]

Workers were not only responsible for their own needs but the needs of their family, and therefore production was directly linked to household consumption needs. The consumption needs of these new consumers created a further set of imperatives created by the need to produce food cheaply (since these first consumers were poor and could not afford much), which meant 1) *the constant investment into new technologies to save labor time, and therefore 2) the need to save and accumulate capital for such investment,* but also 3) to *encourage workers to make more in less time to maximize profit*.[136] A strong domestic market in food (wheat) developed in England, which was central to providing cheap food for workers, a critical driver later for the industrial revolution. Farms that were able to make and accumulate profit could reinvest profits to make the land more productive through farming tools, and more profitable farms could then also buy other lesser profitable farms, and as a result, large consolidations of farms began to take place. Further dispossession of farmers intensified the drive of rural laborers into the cities and those successful in their consolidations formed *a new capitalist class*. This new capitalist class fundamentally altered the relationship of humans to money, rather than money serving human purposes as a form of universal exchange for goods; it became delinked from such human purposes to acting as *a medium for accumulation*

135 Ellen Meikins Wood, *The History of the Market*, (July/August) MONTHLY REVIEW 15-16 (1994). As Wood expands on the point: "Far from recognizing that the market became capitalist when it became compulsory, most historical accounts suggest that capitalism emerged when the market was liberated from age-old constraints and when, for one reason or another, opportunities for trade expanded. In these accounts, capitalism represents not so much a radical qualitative break from earlier forms as a massive quantitative break from earlier forms as massive quantitative increase, an expansion of markets, and a growing commercialization of economic life."
136 WOOD, THE ORIGINS OF CAPITALISM, *supra* note. 5 at p.95-121

to improve competitive capacity.[137] Rather than a commodity being sold for money and then used to buy another commodity on the market, *money was being used to buy a commodity to make even more money in a logic of ceaseless expansion* disconnected from human need or limits.[138]

What is remarkable from Meiksins-Wood's history is that she clearly shows the imperatives of the market were alive and well far before the industrial revolution: by the end of the agrarian revolution the imperatives of compulsions of accumulation, profit maximization, and increasing labor productivity, in sum the the dynamics of capitalists markets were already fully developed. The market before 1500 and the market after 1700 were very different types of institutions with completely distinct dynamics. These dynamics, which Meiksins-Wood describes can only be revealed by taking a social relations approach to the market, one that considers how transformations in the social form from feudalism to capitalism turned society from a vertically hierarchically organized domination of lords over serfs through the use of direct coercion into a horizontally organized domination of landowners over producers through the indirect force of "free contract."

Furthermore, I argue that what her history elucidates is, as Polanyi argued before her, contrary to the assumptions of economists, the aggregate of individual homo oeconomicus cannot explain these dynamics, nor does the idea of the market as a static extension of human nature that has been around since the beginning of time as the story of the first political economists assume. The market rather than being merely an extension of the traditional agora accompanied by the dynamics of barter and exchange as some argued, was instead a unique historical accident that took place in the English countryside. Furthermore, the individual "natural propensity to truck, barter and exchange" was not explanatory of any of

137 *Ibid.*
138 *Ibid.*

this and the true "laws of motion" were the result of the dependence and compulsion set into motion by a unique set of social, as opposed to individual, relations and processes.

I argue that it is by uncovering these dynamics through Wood's historical social relations analysis that the market is illuminated as a changing social institution rather than a natural extension of a fixed human nature or unstoppable force released once pre-capitalist institutions were destroyed as Wood reads Polanyi. Fred Block, the leading scholar on Polanyi and his work, defends Polanyi against critics like Wood by arguing that ultimately Polanyi understood that the capitalist market was socially embedded even when pre-capitalist institutions like Speenhamland (discussed later) were destroyed, though he admits, as argued earlier, he failed to demonstrate how. "When Polanyi wrote that 'the idea of a self-adjusting market implied a stark utopia,' he meant that the project of disembedding the economy was an impossibility; it would ultimately destroy both human beings and their natural environment." Block's reading suggests another way in which to interpret Polanyi's theory: Polanyi saw all markets as socially embedded from their outset for capitalism to function without destroying itself (nature and labor), or in other words it could not become completely disembedded from social control- the idea of the double movement discussed earlier. While Meiksins Wood's analysis is essential for analyzing the social property relations of the capitalist market as a distinct form of social institution in which market imperatives structure its dynamics, Block's reading suggests that Polanyi's work urges us to look to the institutions important to the formation of these capitalist economic social relations, in their full modern sense, in order to locate important levers towards greater social embedding.

2.7 Towards Re-embedding: An Institutional Analysis of Welfare

As discussed earlier, Polanyi's history reveals that as both land and labor were exposed nakedly to rapidly emerging market imperatives, commons, between the 15th-18th century almost completely disappeared as the great transformation progressed.[139] Their disappearance resulted in two significant developments: welfare programs administrated by the state and the enclosure or conversion of communal/feudal lands into private property. As the work of Polanyi suggest, the commons in feudal times were more than a "thing"-the resource- but rather a mode of social life and a form of "governance" to supply communities with access to crucial food supplements from shared land during difficult times. Commons in this sense can be understood as both a social relation between people about resources and also a rudimentary form of early welfarism. Between the 9th-15th century the commons acted as a social institution in the triple sense of- unmediated access to resources, the direct governance of their distribution, and commonly held values. They represented an early form of feudally organized welfare with the church and noble families at their center. These actors were expected to provide for the well-being of the members of the community in the form of distributing bread and other simple food supplements for those without feudal plots or members that fell ill or lost their male heads of family. This system of provisioning, while often meager and means tested, represented some shared sense of solidarity. In this way the systems of governance and distribution of common goods represented the first institutions concerned with human welfare, though undoubtedly highly paternalistic and connected to the interests of the ruling class. Later as the great transformation continued, commons institutions began to be administered often informally or in some cases (as with income supplements) by

[139] POLANYI, THE GREAT TRANSFORMATION, *supra* note. 17 at p.71-108.

local parishes taking on the role of local government and administration and applying more formal rules derived from custom.[140]

However, unexplored by Polanyi, is the way in which they were revived in new forms- the way in which Speenhamland was the product of a double movement- the rise of welfare with the decline of the commons. Private property in land and nature to Polanyi meant the death of the commons, however he ignores that while the form "commons" may have disappeared from view, with the development of capitalism, its function was taken over by welfare institutions. In the logic of the double movement, what welfare institutions eventually were for capitalism, commons was to feudalism. It is for this reason, that I argue that it is not enough, or even possible, to simply call for the revival of the commons, but rather to understand the particular role they played in the social form that pre-existed capitalism, feudalism, and to investigate the commons as a mode of social life rather than merely reify the legal institutional form that disappeared in the great transformation.

Polanyi saw the end of the promise of welfare with the end of programs like Speenhamland. However, decommodified access to resources aimed at specifically targeted groups – and in some cases all citizens, and not just the very poor – -continued to develop in many countries alongside capitalism or, rather, in reaction to its unfettered effects. These developments are most usefully analyzed under the rubric offered by Gosta Esping–Andersen, of "corporatist" and "social democratic" models or "worlds" of welfare.[141] Esping-Andersen's work, like the work of Brenner and Wood on social property relations, offers a historical analysis of the different trajectories of the development of welfare, but directly inspired by

140 BLOCK AND SOMERS, *In the Shadow of Speenhamland, supra* note. 90 at p.308.
141 ESPING-ANDERSON, THE THREE WORLDS OF WELFARE CAPITALISM, *supra* note. 55.

Polanyi's institutional analysis. His work demonstrates not only how precapitalist social relations shaped different notions and forms of welfare, but also how their different forms fundamentally altered the way in which market logic functions in different places, to the point that one cannot speak of one capitalism, but rather "varieties of capitalism"[142]with differing degrees or levels of decommodification. In this way Esping-Andersen brings together the "structural" socio-historical approach of the Political Marxists with the institutional analysis of Polanyi.

2.8 A Socio-Historical & Institutional Analysis of the Modern Welfare State

Esping-Andersen's work unsurprisingly consciously built upon the work of Polanyi by studying the extent to which welfare institutions could counteract the destructive effects of the market and embed it within a social logic through the policies of "decommodification."

> Inspired by the contributions of Karl Polanyi, we choose to view social rights in terms of their capacity for 'decommodification.' The outstanding criterion for social rights must be the degree to which they permit people to make their living standards independent of pure market forces. It is in this sense that social rights diminish citizen's status as commodities.[143]

An interesting question that emerges from analyzing Esping-Andersen's "three worlds": why did this incredible variation exist when the imperatives of the market were the same everywhere? Esping Andersen's work shows that the answer lies in social relations of wage labor and specifically the decommodifying effects of welfare institutions. Esping Andersen's work affirms the dialectical relationship between welfare to market capitalism or the socially embedding potential of welfare for the fictious commodity of "wage labor" the clues of which began with Polanyi. Market capitalism required that workers have no alternative but to labor

142 *See* COATES, ED, VARIETIES OF CAPITALISM, VARIETIES OF APPROACHES, *supra* note. 72.
143 ESPING-ANDERSON, *supra* note 55 at 3.

for their access to fundamental resources necessary to survival, and yet to keep those workers alive when the fluctuations in the labor market prevent them for working or when the market does not allocate goods correctly, some other mechanism must be in place to provide for access. What Esping-Andersen shows is that originally it was precapitalist institutions (the commons and assistance provided by noble families and the church) that played this important role, but later as market imperatives continued to destroy these sources, new state organized forms of welfare were needed. However, this relationship between welfare and market capitalism did not take the same form everywhere due to the persisting importance of precapitalist institutions in some nations and greater sophistication of new institutions of welfare in others. This interplay or dialectic between the democratic welfare state and market capitalism is crucial to understanding the capitalist market not just as one capitalist market but "varieties of capitalism" and not merely as an economic, but a social institution.

As Esping-Andersen's *Three Worlds of Welfare Capitalism* reveals: precapitalist institutions represented by different groups found their interests undermined by the emergence of the market system. The Church and feudal families who saw their power and wealth challenged by the new logic of the market were the strongest early institutional opponents though their objections were entirely based on a conservative paternalistic ideology. They argued that this new economic institution of the market was divorced from social rules and was "socially corrupting, atomizing and anomic."[144] In this view, individuals were not meant to compete or struggle but rather to submit their self-interest to a recognized authority-the ruling noble class- and its traditional institutions. Another important institutional challenger was the guild and fraternal associations that adopted to a lesser degree the ideology of feudalism but viewed the market and the new mobility

144 *Ibid.*

it carried with trepidation. The new market presented a threat to their systems of apprenticeships, which maintained high barriers to entrance and strict quotas for each profession. By introducing market competition to these professions, it effectively robbed the guilds and closed associations of control to regulate entrance. While the power of the church and feudal families waned in the industrial era, this "corporatist" spirit of guilds and closed associations continued to dominate in such nations as Austria, France, Germany and Italy, and later upgraded to what Esping-Andersen calls "corporatist statism": the preservation of status differentials, but now upheld not by the church, feudal families, or guilds but rather by the state as a provider of welfare.[145]

In other countries such as the US, Canada, and Australia, which lacked such early traditional institutional opponents, the development of welfare took a very different trajectory, facilitating the ideology of classical liberalism to take a much deeper hold, while paradoxically the ideology depended on the continuing strength of institutional actors like the church and family to care for those that could not compete on the market for access to the means of their well-being: the sick, disabled, very young and old.[146] Unsurprisingly access to welfare benefits in these countries was means tested, based on one's demonstrated financial need, and thus associated with high stigma. While still other countries took a polar opposite development, and overcame both the liberal and corporatist model, influenced by early socialist policy instituted by strong workers movements of basic minimal but strong entitlements to a limited amount of benefits: old age pensions, accident insurance, unemployment and illness and disability benefits.[147] Such select few countries as Scandinavia and Japan transformed into social democratic regimes that adopted not only strong entitlements to social rights, much stronger than in any of

145 *Ibid.*
146 *Ibid.*
147 *Ibid.*

the other nations discussed, but also a unique commitment to full employment and thus the right to labor, which through a strong system of taxation, financed the expensive and growing needs of an expansive and sophisticated welfare state.

Esping-Andersen's work on the social relations of wage labor as embedded in the development of welfare gives life to Polanyi's institutional analysis for contemporary times. In this way Esping-Andersen brings together the more structural Political Marxist tradition with Polanyi's institutional approach of embedding market relations in non-market institutions. It also tells us, through the measure of decommodification, the extent to which the fictional commodity of wage labor came to be embedded or disembedded from nation to nation or in other words how welfare altered the dynamics and specifically the bargaining power of owners/employers vs. non owners/workers in the social property relations theorized by Brenner And Wood. In countries with high levels of decommodification, even with private property in place, workers enjoyed not only a better quality of life, but also greater bargaining power vis a vis their employers. Non-property owning classes through the welfare state obtained an alternate access point to the means of life, allowing workers to turn down work with unfair the terms or low wage, thereby increasing the bargaining power of the non-property owners/working class with property owners/employers.

In the heyday of the social democratic welfare state, such as in countries like Sweden in the 60s/ early to mid 70s, the market imperative of wage labor was significantly weakened and altered to the point that workers and unions had significant bargaining power not only to negotiate with employers for better wages and conditions but also to influence the social democratic government to consider proposals for profit sharing within the firm with the ultimate plan of worker owned

enterprises.[148] The zenith of such policies was the famous Meidner Plan and specifically the proposal for a Workers wage-earner Fund, which would have initially placed at least 20% of annual profits in the hands of workers and gradually over time (anywhere from 20-85 years) firms would be worker owned. However, while the proposal of the Fund did pass, unfortunately it had become almost unrecognizable to the point that a future of worker owned firms had completely disappeared from view.[149] The reasons for why this was the case is hotly debated: one position is that the proposal too directly challenged the central pillar of the capitalist market- that of private property.

Esping-Andersen's book came out in 1990, only ten years after the inauguration of neoliberalism by Thatcher/Regan, when possibly the political project of neoliberalism had not yet become deeply entrenched and institutionalized to make apparent the alterations to the previous analysis. However since then the Blair/Clintonite neoliberal policies have undoubtedly made their mark on the world, and it is almost a certainty that this has led to a shift in the corporatist and social democratic welfare worlds-with high levels of decommodification-towards the Anglo-Saxon means-tested welfare world-with lower levels of decommodification. To obtain a clearer picture of the welfare state today and the politics of the policies of decommodification, it is necessary to analyze the changing nature of corporatist and social democratic welfare worlds over the last twenty-seven years under Neoliberalism.

148 *See* Gosta Esping-Andersen & Walter Korpi, *From Poor Relief to Institutional Welfare States: The Development of Scandinavian Welfare Policy*, INTERNATIONAL JOURNAL OF SOCIOLOGY 16/3-4, 39-74 (1987); *See also* Michelle Alexopolous and Jon Cohen, *Centralised Wage Bargaining and Structural Change in Sweden,* EUROPEAN REVIEW OF ECONOMIC HISTORY 7/3, 331-63 (2003); Jonas Pontusson and Sarosh Kuruvilla. *Swedish Wage-Earner Funds: An Experiment in Economic Democracy*, INDUSTRIAL AND LABOR RELATIONS REVIEW 45/4, 779-91 (1992).
149 *See* Suzanne Unger*, Wage-Earner Funds in Sweden*, Comp. Lab. L.J. 12, 498 (1991).

2.9 The Return of Market Fundamentalism: The Rise of Neoliberalism

Neoliberalism may possibly be one of the most complicated concepts to pin-down and grasp with requiring a combination of economic philosophy, government policy considerations, political ideology and historical context.[150] In order to understand the effects of neoliberalism on the welfare state and its future trajectory it is necessary to consider all three of its manifestations: the economic philosophy of neoliberalism developed in Germany and Austria from the 1920s-1950s, in particular its continuity and differences with the classical liberalism of the 19th century and its revival of "market fundamentalism" in a new form; its contemporary role as a political project and set of government policies of the 1980s and 1990s under Reagan/Thatcher and Clinton/Blair; and finally in its final stage as a hegemonic ideological project of global elites, which has become increasingly transparent from 2008 on.

The history of neoliberalism arguably begins with the founding of the famous Mont Pelerin Society (MPS) which included among its founders some of the leading conservative intellectuals of modern times (philosophers, economists and historians): its leader Friedrich Hayek, along with Karl Popper, Ludwig von Mises and Milton Friedman.[151] In a meeting organized by Hayek on April 19th, 1947, just two years after World War II and with the "red menace" of the Soviet Union hanging in the air, 39 scholars gathered to inaugurate a new economic philosophy of neoliberalism, with the self-conscious project of combatting "collectivism" – a broad term meant to encapsulate all notions of state intervention

150 Michael Levien & Marcel Paret, *A second double movement? Polanyi and shifting global opinions on neoliberalism*, 27 INT'L. SOCIOLOGY 724 (2014).
151 Ralf Ptak, *Neoliberalism in Germany: Revisiting the Ordoliberal Foundations of the Social Market Economy*, in PHIL MIROWSKI & DIETER PLEHWE, EDS., THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE, (2009), p.98.

influenced by either Marxist or Keynesian notions of governmental planning.[152] To understand the thinking of Friedrich Hayek, one must understand his relationship and clash with the ideas and policies of the great contemporaries of his time, Karl Polanyi and John Maynard Keynes. In the same year, 1944, that Polanyi published *The Great Transformation*, Hayek published his widely influential work *The Road to Serfdom*,[153] as an attack on the very interventionist state that Polanyi championed as a cure to the demise inherent in a self-regulating market, and on the policies of macro-economic management that Keynes was advocating through his work during the years of the Great Depression and World War II.[154] The central arguments of *The Road to Serfdom* are two-fold: an attack on the "totalitarian state," with the target extending beyond either Nazi Germany or the Soviet Union to include the social democratic welfare state coming into being at the time; and advocacy of a return to the laissez-faire of classical liberalism, and as a result an attack on an expanded governmental monetary policy, of the sort underpinning Keynesian macro-economic policies.[155]

As a result, on the whole, the MPS was anti-state-interventionist, although Hayek was less opposed to state intervention than the caricature of his views suggest: he was not against governmental intervention into the economy to break up monopolies and he and MPS supported the promotion of anti-trust measures promoted by the Ordoliberals and Alfred Armack Muller of the Cologne School, which had tremendous influence over post World War II Germany's economic policy in the late 1940s and early 50s.[156] Hayek's MPS cross fertilized with leading

152 *Ibid.*
153 FRIEDRICH VON HAYEK, THE ROAD TO SERFDOM (1944).
154 JOHN MAYNARD KEYNES, THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY (1936).
155 HAYEK, ROAD TO SERFDOM, *supra* note. 153.
156 David Gerber, *Constitutionalizing the Economy: German Neo-Liberalism, Competition Law and the "New" Europe*, AMERICAN JOURNAL OF COMPARATIVE LAW 42, 25 (1994).

Ordoliberals Walter Eucken, Franz Böhm, William Röpke and Alexander Rustow, and the synthesis between the two schools and the policies they promoted can be understood as what we know as Neoliberalism today.[157] In fact some of the most influential members of the Ordoliberal Freiburg School were members in the MPS.[158] Hayek, however was less interventionist than his Ordoliberal brethren, who believed that active intervention into the economy was a necessary precondition for its continued growth and stability, and he was much more purist in his "market fundamentalist" Smithian revivalist leanings. His view was, yes markets do fail without intervention, but not as often as the Ordoliberals believed and definitely not as much as the Keynesians presented. When the market does fail, market solutions, not welfare solutions, should be facilitated by the state to remove transaction costs and other barriers to private action. And if that fails then state solutions should mimic market solutions, which should be carried out by the private sector operating under market incentives, in sum: deregulate the market and privatize government.[159]

While the Ordoliberals, who predated the MPS and began in the 1920s and 1930s, were deep in hiding during World War II in Germany, after the war they saw their ideas finally take off and become mainstream economic policy in certain narrowly prescribed areas such as anti-trust, while Keynesianism continued to persist in macro-economic policy. Meanwhile, Hayek's Neoliberal economic philosophy, while marginalized in Europe, was transported to the US by

157 The ideas of Alfred Muller-Armack of the "Social Market Society" are also relevant, but less so since his vision placed a state sponsored social program on a par with economic policy. *See* Nils Goldschmidt, *Alfred Müller-Armack and Ludwig Erhard: Social Market Liberalism*, FREIBURG DISCUSSION PAPERS ON CONSTITUTIONAL ECONOMICS 04/12, Walter Eucken Institut e.V. (2004).

158 This was true of Walter Eucken and Alexander Rustow who were regular participants of the MPS although not amongst the founding group.

159 For a statement of arguments in this vein *See* Ronald Coase, *The Problem of Social Cost*, JOURNAL OF LAW & ECONOMICS 3/1 (1960).

intellectuals like Milton Friedman and Ronald Coase, founding members of the MPS. Friedman and Coase were among the intellectual leaders of the Chicago School of Economics which had influence both in and outside of academia and was adopted as US government policy both at home and also even as its foreign policy abroad. Indeed, Coase's 1960 article *The Problem of Social Cost* is not only the founding work of modern "law and economics,"[160] as well as the most cited piece in the history of American legal scholarship,[161] its core arguments likely encapsulate the central tenets of neoliberal micro-economics better than any other single work, with its reframing of the "market failures" of the era of welfare economics as problems of "transaction-cost barriers," to "market solutions," for which the preferred remedy is likely to be "more markets" and "less government."[162]

It was not, however until the economic crisis of the late 1970s, which produced high inflation and rising unemployment throughout Europe and the U.S. that Neoliberalism came to represent a new world order. The crisis of the '70s was the third of four major crises of capitalism in the 20th and 21st century, as explained by economists Gerard Dumenil and Dominique Levy in their recent book *The Crisis of Neoliberalism*, the latest being the subprime crisis of 2008.[163] According to Dumenil and Levy, each crisis resulted in the end of the dominant economic policy paradigm of the time and the birth of a new policy framework, with Keynesianism ending with the crisis of the '70s and Neoliberalism, waiting in the wings, entering center stage from that point forth.

160 *See* Richard Posner, *The Economic Approach to Law,* TEXAS LAW REVIEW 53, 757 (1975), p. 758-59 (. (citing the *Problem of Social Cost* as one of the "two founding documents" of the "new" law and economics).
161 *See* Fred R. Shapiro, *The Most Cited Law Review Articles of All Time,* 110 MICHIGAN LAW REVIEW 1483, 1489 (2012). *See also* DAVID KENNEDY & WILLIAM W. FISHER III, THE CANON OF AMERICAN LEGAL THOUGHT (2006): "of all the articles reprinted in this book, [*The Problem of Social Cost*] perhaps can with least controversy be described as canonical."
162 Coase, *Problem of Social Cost*, *supra* note. 159.
163 GERARD DUMENIL AND DOMINIQUE LEVY, THE CRISIS OF NEOLIBERALISM (2013).

Margaret Thatcher, a student and disciple of Hayek became prime minister in 1979, and together with Ronald Reagan, who came into office two years later, inaugurated the ascendance of Neoliberalism as the new paradigm of government policy. Under Thatcher/Reagan, Hayek's neoliberal economic philosophy was realized into concrete policies.[164] Neoliberal government policy developed between the 80s and 90s as: the privatization of previously public industries like utilities and transportation, the deregulation of industries to allow for the greater concentration of ownership, as well as deregulation of the banks and financial instruments, the break-up of unions and other forms of collectivism that could prevent barriers to the free market in labor, and the signing of free trade agreements to deregulate the flow of capital and labor across borders. Did all of this result in massive prosperity and continued economic growth in the West, even in the face of a clearly contracting as opposed to expanding economy? Indeed, it increased profits for some in the short term, however at the cost of the many in terms of: greater inequality, weakened bargaining position of workers, and the biggest environmental crisis ever known to mankind. In the 1990s, in the midst of concern over the negative effects of neoliberal policy, the political pendulum appeared to have swung from the right to the left, from the Conservative party to the Labor Party in England, and the Republican to the Democratic party in America.

164 *See* R. BIDDISS & K.R. MINOGUE, THATCHERISM: PERSONALITY AND POLITICS (1987). *See also* A. Farrant & E. McPhail, *Hayek, Thatcher, and the Muddle of the Middle,* In HAYEK: A COLLABORATIVE BIOGRAPHY. ARCHIVAL INSIGHTS INTO THE EVOLUTION OF ECONOMICS (Leeson R. (eds)) (2017). *See also* F. A. Hayek, *Thatcher's Economics*. LETTER TO THE TIMES 1 (July 13, 1982). See also F. A. Hayek, *Advice and Consent.* LETTER TO THE TIMES 2 (March 16, 1982). Hayek says coyly here, "'I am too much aware of my limited knowledge of political possibilities to presume to advise her [Margaret Thatcher] on particular decisions." This claim is refuted by letters between Thatcher and Hayek, in particular a very controversial one which is the subject of "Hayek, Thatcher, and the Muddle of the Middle," where Hayek suggests that Thatcher use Pinochet's Chile as an example in England and she politely declines.

However, rather than right to left, the new elections brought the world into the age of the Center, the new Third Way. What the elections of the 1990s and the leadership of Tony Blair and Bill Clinton revealed was that when it came to economic policy there was no right or left, but only a hard neoliberal center. In 2008, and the economic crisis of neoliberalism gave birth to a new vacuum, an invisible field of battle only made visible on the surface several years later by the political crisis of neoliberalism in the form of anti-immigrant nationalist right and a socialist/labor oriented leaning left. Neoliberalism at its final stage has come to signify neither an economic philosophy nor a governmental policy, but the hegemonic ruling class ideology of elites.[165]

[165] Neoliberalism in this new phase was most apparent in the confrontation between the Euro Group and Greece in 2015 over the negotiation of austerity measures. What was so striking about the confrontation was not that the Eurogroup –an unelected body – was able to overcome the democratic referendum of the Greek people to reject the terms of austerity package offered, but that the Eurogroup was able to do so in complete transparency of their ideological project. The Eurogroup, particularly Wolfgang Schäuble, made clear to Yanis Varoufakis, the Economic Minister of Greece at the time and an economist leading the Greek side of the negotiations, that Germany was not interesting in negotiating with Greece but instead was only interested that Greece taking the deal exactly as it was offered or leave the European Union and the Eurozone.[165] The International Monetary Fund, also owed debts by Greece, confirmed that indeed the package offered by the Eurogroup could not realistically allow Greece to pay back what they owed in the time given.[165] It became apparent to all at this point that the package was not meant to actually bring Greece out of its recession and pay back what it owed, but rather punitive and – even more – demonstrative: not only to teach Greece a lesson for being fiscally irresponsible, but to send a clear signal to the rest of Europe regarding the necessity of austerity. All of this done at the cost of either Grexit and/or destabilization of the European Union or at great human sacrifice on the part of Greek citizens. Never before had the political agenda of Neoliberalism been articulated in such an ideologically naked manner, completely devoid of any pretense of the shroud of good governance and/or sound economic policy. Whose interests did Schäuble represent? It was completely counterproductive to German interests to structure a plan in which they could never plausibly receive the debt owed. From the perspective of the project of the European Union, losing a member was not only destabilizing for the currency but bad politically from the point of view of a unified Europe. Whose interests was Schäuble representing if not German interests or European interests? Punishing Greece was an important strategic move in a longer game of sending other countries-Spain, Portugal and Italy- the message that the Eurogroup/Germany would not tolerate resistance even in the face of evidence that resistance could be understood as reasonable given the penal and unfair nature of the packages offered. Why was it necessary to crush resistance so swiftly and demand the acquiescence of the Greek government to its terms? Did Schäuble really believe that Greece would leave the Eurozone rather than acquiesce?

Here Dumenil and Levy's thesis becomes relevant to understanding this new phase of Neoliberalism, not as a principled (if contestable) economic philosophy or program for government policy, but as a project of the elite (financial) class capturing high incomes from a finance-led economic model in the wake of the crisis of overproduction leading to the recession of the 70s:

> "Neoliberalism is a class phenomenon, a social order, a new 'financial hegemony'. It is the result of the victorious struggle of upper capitalist and managerial classes (upper classes) against the classes of production workers and clerical-commercial personnel (popular classes). The objective of this struggle was the quest for high income (capital income, that is, interest, dividends, and capital gains, and high wages including stock-options and bonuses)."[166]

In other words, the neoliberal package of deregulation, privatization, and fiscal austerity, in addition to resulting in a redistribution upwards of income and wealth from the population at large to managerial and financial elites who are demanding higher and higher incomes. Meanwhile these financial elites are completely immunized from popular sovereignty as a result of the transfer of decisional power from the political arena to the gospel of market fundamentalism. What this three-stage analysis hopefully demonstrates is that the welfare states of corporatist and social democratic welfare states throughout Europe are under serious threat, not merely by a dominant economic philosophy, or a concrete set of government policies, but as a hegemonic ideology of a ruling class elite determined to wield its power to protect its class interests with the welfare state as its target. If we accept this analysis as having merit, the trajectory of the welfare state over the coming years, unless the Socialist/left leaning political opposition

[166] Gerard Dumenil and Dominique Levy, T*he Crisis of Neoliberalism and US Hegemony*, Kurswechsel 2, 6-13 (2009), p.6-7. Available at https://www.researchgate.net/publication/228952305_The_Crisis_of_Neoliberalism_and_US_hegemony/link/58595ef108ae64cb3d493eeb/download (last accessed Janurary 5th, 2020).

begins to win gains, will be towards its eventual demise. The Southern Corporatist welfare worlds of Italy, Spain and Portugal are under serious attack as they continue to institutionalize their austerity packages, which will have consequences for weakening protection for workers, as well as the privatization of currently many public and common resources. The Northern Social Democratic welfare worlds of Germany and Scandinavia are in better condition: the working class of these countries better organized and the imperatives to privatize and deregulate have been more incremental, nevertheless the policies of neoliberalism from the Third Way phase of the 90s have made deep and lasting effects both on economic policy, as well as, in the shift in power of political parties from Social Democratic to Neoliberal parties as well as traditionally Social Democratic parties adopting neoliberal policy. The ascendance of neoliberalism suggests decreasing levels of decommodified access to goods everywhere which will not only have negative effects on human well-being but the weakening of bargaining power for workers vis a vis their employers.

2.10 Conclusions and Next Steps

Polanyi convincingly demonstrates that individual self-interest is less explanatory of economic organization than social relations motivated and structured by social interests and purposes. This Chapter argues that what was needed to complete Polanyi's institutional analysis of capitalism is socio-historical analysis (Brenner and Meiksins Wood) of *social property relations* leading to the creation of capitalist market imperatives, and work of Esping Andersen on the varieties of the welfare state (and varieties of capitalism which in turn are the result). Polanyi saw little hope in welfare as a counter institution, however what he did not anticipate was decommodified and democratized access to fundamental resources through the social democratic welfare state. The development of welfare, and specifically

decommodified and democratized access to the basic means of subsistence, which fundamentally altered the way in which the market functions by breaking the chain of market as imperative and allowing it to function as opportunity. Unfortunately, however, these transformations of the market were short-lived and did not take place outside of Scandinavia due to the emergence of neoliberal government policies in the 80s and 90s. Continuing Polanyi's work of constructing counter-institutions for land, labor and money today and to correct for their destructive effects requires reviving the project of the decommodification and democratization of fundamental resources.

One particular layer of this institutional analysis, which social theorists, such as the scholars discussed ignore (Meiksins Wood and Esping-Andersen), and which Polanyi emphasized is the legal institutional aspect of the market. An important question arises at the end of our inquiry with regard to Polanyi's institutional challenge: what is the role of law in institutionalizing the change in social relations discussed and bringing these fictions of the fictious commodities into being? What is the role of law in regulating the negative effects of these fictions or their social embedding counterparts? And finally, how can we use the law towards the transformation of the capitalist market? These are questions that I attempt to address in next Chapter, which analyzes the legal institutional layer of the market.

Law as a scholarly discipline, much more than any other social science and humanities discipline, has been characterized by it tendency to follow advances made in other fields exemplified by the plethora of "Law and _" traditions.[167] In the last 30 years or so the emergence of the economic approach to law or "Law and Economics" school has brought the market fundamentalist view back into

[167] This is particularly true after the advent of Legal realism both in America and Scandinavia which opened law up to social science and in particular psychology, economics, sociology, political science and anthropology.

dominance. As a result, much of contemporary legal scholarship, consciously or unconsciously, is confined within the mainstream view of the market as ahistorical and universal, operating on laws akin to that of those in nature. This has had the effect of stifling institutional imagination in challenging the legal structure of the market and completing Polanyi's project of embedding property and welfare in legal regulation. This is the subject of the next Chapter 3 on *"The Legal Institutional Character of the Market* and Chapter 4 *"What is Legal Analysis For Today?"*

Chapter 3 The Legal Institutional Character of the Market: Property as Market Pillar and Other Tall Tales

3.1 Introduction

As the last chapter attempted to demonstrate, the market is not a natural extension of an insatiable human nature, but instead a social institution structured by a set of historically specific *social property relations*. As this Chapter will attempt to demonstrate, the market once denaturalized, presents a malleable and potent site for political and legal transformation. There is a tendency within legal academia to both understate and overstate the role of law in structuring the market: in the understated mainstream view or *market naturalism,* the economy is presented as a private realm which operates on the natural law of supply and demand where *man-made* law has no relevance, while the other overstated version tends to radically swing to the complete opposite pole- law is not only the structure but the source of the market. I argue, supported by the social theory presented in the previous chapter, that both views of law are not useful: law was not the catalyst for the change in social relations which produced the market, as was hopefully beginning to become more evident in the previous chapter, however neither should the role of the law be marginalized as it is an important source of further extending, codifying, and institutionalizing the social relations of the market, as well as, potentially, towards their eventual transformation.

As Karl Polanyi's work suggests, law and legal regulation plays a central role with regard to the three "fictitious commodities"- the cornerstones of economic organization of the capitalist market- in socially embedding land, labor and money within legal institutions: land within property law, labor within labor and welfare law, and money within competition and financial regulation. This embedding of the market through law was almost successful during the period in which state-led protectionist measures were normalized in the late 19th and early

20th centuries, both as a result of hard won political struggle, as well as the deep social and economic crisis of capitalism which continued to assert itself periodically.[168] In reaction to these struggles and crisis, state power was massively expanded in the early part of the 20th century under the Keynesian and in particular the Scandinavian social democratic welfare state: the development and expansion of labor regulation to protect workers,[169] welfare law to govern the provision of

[168] Some of these political struggles and the change in social relations that resulted were traced in the previous article, *ibid.*, starting from the early formation of capitalist social relations in the early 1400-1600 period, which left peasants dispossessed of their means of subsistence and unable to adjust to the fluctuations of the new agrarian employment market, moving on to the first means-tested welfare programs of the 1700s, onto the crisis of exploitation in the industrial system in inhumane working conditions and hours which led to the revolutions of 1848, to crises internal to capitalism marked by tendencies towards overproduction, inflation and stagnated growth characterizing cyclical periods in the west, leading in each period – except the most recent from the 1980s on – to strengthening of the social democratic welfare state. The key periods of cyclical crisis and reform at issue here were those of the "progressive" (i.e., 1890-1920) and "New Deal" (1930-1950) eras. The character and content of progressive and New Deal era reforms has been the subject of fierce contention among historians, concerning the extent to which the measures reflected truly reformist impulses with corresponding effects, or rather were by and large the successful restoration of a conservative order by business elites responding to rising economic instability and political unrest. For competing accounts of progressive-era reforms, compare GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM: A REINTERPRETATION OF AMERICAN HISTORY, 1900-1916 (1963); *and* MARTIN SKLAR, THE CORPORATE RECONSTRUCTION OF AMERICAN CAPITALISM, 1890-1916 (1988); *with* ALAN DAWLEY, STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE (1993); *and* MICHAEL MCGER, FIERCE DISCONTENT: THE RISE AND FALL OF THE PROGRESSIVE MOVEMENT IN AMERICA, 1870-1920 (2003). For parallel debates concerning New Deal reforms, compare Baron J. Bernstein, *The New Deal: The Conservative Achievements of Liberal Reform* in BARON J. BERNSTEIN, TOWARDS A NEW PAST 263 (1968); Thomas Ferguson, *From Normalcy to New Deal: Industrial Structure, Party Competition, and American Public Policy in the Great Depression*, INTERNATIONAL ORGANIZATION38, 1 (1984); *and* COLIN GORDON, NEW DEALS (1994); *with* ARTHUR SCHLESINGER, THE AGE OF ROOSEVELT vols. 2 and 3 (1958; 1960); *and* WILLIAM LEUCHTENBERG, FRANKLIN D. ROOSEVELT AND THE NEW DEAL (1968). For an illustrative work of legal scholarship that seeks to straddle these competing interpretations, by advancing a Legal Realist-inspired understanding of the open-ended or "up for grabs" character of the reforms – as amenable to development in either a progressive or conservative direction – see Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness: 1937-1941*, MINNESOTA LAW REVIEW 62, 265 (1978).

[169] Workers protections took the form of laws regulating working hours, conditions of work relating to work safety and health, conditions of redundancy such as notice and severance, severance for disability caused on the job, as well rights of union representation and participation. *See* DAWLEY, *supra* note.168; KLARE, *supra* note. 168.

public benefits to classes of individuals,[170] competition law to prevent the creation of monopolies, as well as, banking and finance regulation to prevent predatory and fraudulent practices that could lead to economic recession. In Scandinavia, the welfare state went even a step further to offer universal decommodified access to fundamental resources like healthcare, education, and housing.

However, as discussed in the end of the previous Chapter, this period gave way in the late 20th century to the ascendance of neoliberalism, which revived the market fundamentalism of classical liberalism's laissez-faire state, albeit in a new form, one that adopted the state as handmaiden, similar to the Keynesian social-democratic welfare state, only now with the crucial difference of re-orienting the state to the project of reviving market fundamentalism as economic policy.[171] Polanyi's idea of social embedding, though often in a rather diluted form, was advanced by the Keynesian social democratic welfare state: each cornerstone of the economic organization of the market appeared embedded within political and legal regulatory institutions aimed at the redistribution of wealth that seemed built to last. But the collapse of the Keynesian social democratic welfare state led one to eventually question whether those legal institutions ever really had the potential to permanently tame capitalism's negative effective on citizens while at the same time allowing for adjustments in public allocations to appease and mitigate for recessionary cycles. Did the social democratic welfare state collapse because these legal institutions failed to both redistribute wealth while at the same time appeasing the market? Or was it the result of one important institution, property, which was left behind in reform and regulation? The previous Chapter, on which this Chapter builds, argued that Polanyi's institutional analysis failed to consider the shift in social property relations that produced the laws of the market, as argued by Robert

[170] For example but not limited to sickness, disability, and maternity leave, subsidized and state organized childcare, healthcare, and dental care, as well as unemployment benefits.
[171] *See* earlier Chapter on crisis of capitalism and emergence of neoliberalism.

Brenner and Ellen Meiksins Wood. At the heart of Brenner and Wood's analysis is property as the *social property relations* between the class of owners and the class of appropriators of land and the related means of subsistence it gave access to: food, water, and shelter. In the entire history of the 19th and 20th century, private property in such resources was, unlike labor and money, never attempted to be substantially reformed nor its negative effects formally recognized and counteracted by the state as with labor and finance. In fact, it remained strangely excluded from the intervention of state reform and the political process. Why is this the case?

The jurist's answer to this question is seemingly straightforward: labor, welfare, competition and finance regulation are areas of "public law" where the state can justifiably intervene, whereas property has traditionally been an area of "private law" that must be left to individuals.[172] However, this does not answer the question of *why* this has been the case for over most of modern legal thought, and in fact is deeply indicative of what legal rights remain strictly off the table for modern western democracies based on liberal constitutionalism. The history of liberal political thought,[173] which underpins the liberal constitutional democratic form has a strong presumption for the separation of the economic and political realms, with the important distinction between the public domains of life where the government can interfere and the private domains of life, which are of the utmost important to protecting individual liberty and therefore where government is forbidden to traverse.[174] And yet there is a fundamental perhaps naïve

172 WILLIAM W. FISHER, MORTON J. HORWITZ & THOMAS A. REED, AMERICAN LEGAL REALISM (1993), p. 98-100: "[d]uring the nineteenth century, a growing number of lawyers … judges and commentators asserted with growing frequency" that the "public and private 'spheres' … ought to be kept separate."

173 FISHER, ET AL., *ibid.* at 99 (the sharp separation in 19th century law of "public" and "private" spheres was driven or reinforced by a host of loosely related attitudes and assumptions – many of them the outgrowths of the ideology of classical liberalism").

174 Property established its sacrosanct status through the very founders of liberalism, from John Locke through to the framers of the American constitution and into the 20th century. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF THE AMERICAN CONSTITUTION:

contradiction brought to light in this story: if the right to property is a fundamental right because it is an important source of individual liberty, why would we leave it to the market to decide who enjoys property entitlements and who doesn't?[175] Why would it be relegated to a matter of private law rather than a constitutional guarantee for everyone? To this question, liberal constitutionalism – in both its classical and modern guises – provides no satisfactory answers.[176]

In searching deeper for another explanation, I argue that it is necessary to look beyond the history of liberal political thought and instead to the history of capitalism, and the important function of property, and specifically of private property, in that context. I argue, returning to the work of Robert Brenner and his theory of the specific configuration of *social property relations* that served as the catalyst for the capitalist market. However, this time, I turn to his work not to unearth the rules of the market, but to unearth the legal institutional layer of the *social property relations* analyzed in his theory. I argue that the role of private law institutions and the legal institutional layer of property relations is not one developed in Polanyi's scholarship, although as discussed he treats law as a panacea, nor in the scholarship of others working in the same vein. For example, Ellen Meiksins-Wood whose work is fundamental on the institutional character of

THE MADISONIAN FRAMEWORK AND ITS LEGACY (1990); *and* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 9 (1992): "The fundamental issue of American political thought was how this most politically democratic country in the world could avoid the threat of coerced economic equality."

175 *C.f.* JEREMEY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988): arguing that the most persuasive liberal justification for private property rights is one that carries with the implication of generalized fair distribution of such rights, beyond what would be achieved by an unregulated market).

176 Thus, despite being widely acclaimed, the argument advanced in Waldron, *id.*, has fallen on deaf ears, including those of the author himself, who expressed uncertainty about its prescriptive relevance today. *See, e.g.,* GREGORY S. ALEXANDER & HANOCH DAGAN, PROPERTIES OF PROPERTY (2012): indicating agreement with the normative argument for a general right to private property with implications for distributive justice, but without elaborating any prescriptive implications that may follow.

the market and the social relations central to its dynamics, fails to engage in any concrete analysis of the legal institutions underlying those relations in ways that could suggest their transformation. On the other hand, Robert Brenner, upon whom Wood builds her analysis, offers an account of *social property relations* that actually identifies the relevant legal institutions in the transformation described. This chapter will discuss the specific institutions around which Brenner's account pivots – namely, *cens tenure* in France versus the *copyhold lease* of England – arguing for the importance of the latter in structuring private property relations of the capitalist market in England between the 15th to 19th centuries, and as such giving birth to an entirely new mode of surplus extraction – one free from direct coercion – facilitated through the institution of private property.

With the insights made available by Brenner's social-theoretical account in hand, I attempt to integrate these within legal-institutional analysis, by developing an analytical framework that draws on the legal-theoretical tradition most fruitful for these purposes. The American Legal Realists were among the first in legal theory to recognize the significance of property law in providing a central pillar for the operationalization and functioning of the capitalist market. I argue that their critique of the private/public distinction in law reveals that "private law" institutions, specifically property and contract law, have very "public" effects – not only in providing the institutional pre-conditions for the functioning of the market, but also, importantly, in structuring liberty and shaping the current distribution of wealth.[177] Within law, the American Legal Realists were amongst the first, and

[177] The central works of the Realist critique of the public/private distinction are: Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, POLITICAL SCIENCE QUARTERLY 38, 470 (1923); Morris R. Cohen, *Property and Sovereignty*, CORNELL LAW REVIEW 13, 8 (1927); Morris R. Cohen, *The Basis of Contract*, HARVARD LAW REVIEW 46, 533 (1933); *and* Robert L. Hale, *Bargaining, Duress and Liberty*, COLUMBIA LAW REVIEW 43, 603 (1943). Equally fundamental, but more by way of laying the preparatory analytical foundations rather than directly adumbrating the critique, are: Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, YALE LAW JOURNAL 23 (1913); Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in*

possibly the most important, legal theorists to give explicit and elaborate recognition of the legal institutional character of the market and the possibilities for its transformation. As will be discussed in this Chapter, the Scandinavian Legal Realists, while making important headway in deconstructing the concept of property, and namely of the vague and nonsensical concept of "ownership," are split in their recognition of state intervention into private law, and neither camps recognized the political nature of property nor its negative societal effects. There are three important components of the American Legal Realists' corpus, which I will explore in this Chapter: first, their analysis of the deep and wide extent to which markets are structured by legal institutions, and specifically property law. Second, with regard to the institutional setting of property, their emphasis on the consequences of choosing particular institutional arrangements over others in terms of the distribution of liberty, bargaining power, and wealth through, in particular, access to fundamental resources: I argue, based on their work that property law not only determines the initial grant of rights, but also the resulting class structure of those who control access to life giving goods and others that must accept their terms of access; And, third, I argue for the need to deconstruct those property relations analytically in order to have a better understanding of the classic property trilogy, private, public and group or commons property, towards the possibility of designing new forms of property institutions aimed at

Judicial Reasoning, YALE LAW JOURNAL 26, 710 (1917). Antecedent works that provided a crucial stimulus for the critique, by elaborating a new conception of the social stakes of law are: Oliver Wendell Holmes, *Privilege, Malice and Intent*, HARVARD LAW REVIEW 8,1 (1894); *and* Roscoe Pound, *Law in Books and Law in Action*, AMERICAN LAW REVIEW 44, 15 (1910). And in a similar vein was the work of two contemporary institutional economists: RICHARD T. ELY, PROPERTY AND CONTRACT IN THEIR RELATIONS TO THE DISTRIBUTION OF WEALTH (1914); *and* JOHN R. COMMONS, THE LEGAL FOUNDATIONS OF CAPITALISM (1924). Finally, to round out, are a pair of contemporaneous works providing a necessary supplement to the critique, by way of elaborating and distilling a critical analysis of formalist legal reasoning: Karl Llewellyn, *The Leeways of Precedent* in KARL LLEWELLYN, THE BRAMBLE BUSH (1930); *and* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, COLUMBIA LAW REVIEW 35, 809 (1935).

counteracting the negative effects of the market: namely to decommodify access to fundamental resources to ensure increased human well-being, as well as, to ensure ecological integrity of the resources themselves (a subject of a future article).

I argue that the work of American Legal Realists, such as Robert Hale and Morris Cohen, was crucial to developing the second set of points: with regard to their critique of the public/private distinction in law, as well as in their emphasis on the distributional consequences of law. Their theories however owe a tremendous debt to the "proto-Realist" work of Wesley N. Hohfeld, a scholar who will be discussed throughout this dissertation, both for his insights on the private/public distinction but also for his analytical and functional approach to property. I argue here that just as Polanyi and Wood's analysis denaturalized the market and revealed it as a historically-specific social institution, Hohfeld denaturalized the concept of *private property entitlements*, not by combatting them ideologically as other Realists, but by disaggregating them analytically. His foundational 1913 and 1917 works, both bearing the title "Fundamental Legal Conceptions," analyzed property rights as social relations, and ones amenable to analytical disaggregation and reconfiguration and therefore bears on the third point of analytically deconstructing the property trilogy and disaggregating the monolith of absolute property into discrete entitlements.[178] In doing so, Hohfeld pioneered the view of property as a social institution.[179] Contrary to beliefs held dear by many judges and legal scholars of his time, Hohfeld insisted that property is *neither* the material object or thing over which one may have legal rights, *nor, importantly,* a

178 *See* Wesley N. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, YALE LAW JOURNAL 23 (1913); Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, YALE LAW JOURNAL 26, 710 (1917).
179 This point is elaborated with special emphasis by Anna di Robilant & Talha Syed, *Hohfeld in Europe and Beyond: The Fundamental Building Blocks of Social Relations Regarding Resources* in THE LEGACY OF WESLEY HOHFELD (Shyam Balganesh, Ted Sichelman & Henry Smith eds.) (forthcoming).

relationship between a person and the thing.[180] Rather as Syed and di Robilant argue, it is a relation *between people with respect to things* – i.e., a social relation.[181] Moreover, Hohfeld asserted that the dynamics of property were better understood through the rubric of a diverse "bundle" of entitlements reflecting the *distinct kinds* of interests of the parties involved in the social relation(s), with the advantages or benefits of an entitlement for one necessarily implying the disadvantage or burden of a disentitlement for others.[182] The significance of this analysis is that the disaggregation of the property entitlements or the traditional "bundle of sticks" of "ownership" of use, exclusion, transfer and immunity from expropriation into distinct functions of property offers not only: (1) an analytical structure of the different possible configurations or forms of property; (2) but also a structure that provides the basis for evaluating the effects of each particular configuration on the market; and eventually; (3) moves towards meeting Polanyi's institutional challenge[183] of reconfiguring the entitlements of property into new types of property institutions aimed at counteracting the negative effects of the market. Could we use Hohfeld's disaggregation of property to reconfigure property as a legal institution with the purpose of decommodifying access to resources? Could one imagine creating a "real alternative" to the unequal and skewed bargaining

180 Contrary to, most notoriously, the dictum associated with William Blackstone, of property as "the sole and despotic dominion over a thing." WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (1979) (1765-1769). A dictum that, as Profs. Alexander and Dagan point out, "has become an icon of property theory." ALEXANDER & DAGAN, PROPERTIES OF PROPERTY, *supra* note. at p.178.

181 *See* Hohfeld 1913, *supra* note 178 at p. 20-28: devoting eight pages "[a]t the very outset … to emphasize the importance of differentiating purely legal relations from the physical and mental facts that call such relations into being"; and Hohfeld 1917, *supra* note 178 (1917), p. 720-33 (devoting twelve pages to establish his first point, namely that "a right *in rem* is not a 'right against a thing.'"). *See* the discussion in Syed, *supra* note. 179 at p.3-4: emphasizing the foundational status of this claim in Hohfeldian analysis, and clarifying, in the face of widespread misunderstanding, its precise content and status as a positive, rather than normative, claim.

182 *See* Syed, *ibid.* at 4-5.

183 Referring to Polanyi's institutional challenge discussed in previous Chapter.

situation of workers by altering the very structure of private property in order to create decommodified and democratized access to fundamental resources? Is it possible to utilize law to create an alternative means for access to these resources other than the market or through the welfare state? I argue that this is possible so long as one treats law as informed by human purposes and a social theory of how social change and transformation occur.

As this chapter emphasizes in its final section, the market can only serve as an important site of legal contestation if it is informed and guided by a social theory that orients the analysis, by providing guidance concerning what are significant versus trivial, or feasible versus pyrrhic, points of legal-institutional intervention. A theory, that is, along the lines of the one presented in the previous article, which does not treat the market and market logic as a natural extension of a universal and timeless human nature, nor as a hard and fixed structure as the Political Marxists, but instead a historically-specific social institution, arising out of a particular configuration of social property relations, having particularly significant and transformative effects on human well-being.

3.2 The Ideology of the Private Sphere & Private Property

By and large the legal systems of the Western World, and the Anglo-Saxon countries as prime examples, have been dominated by the public/ private divide in law. What does this mean beyond pointing to different sources of formal texts? Beyond the formal sources lie very different substantive sources of authority and therefore also of very different sources of transformation. What the private/public divide reveals is that some areas of law (private law) are determined by custom-with small amounts of tinkering here and there on the margins by judges-while others in the public domain are forged by and large in the western world through representative democracy, the will of the sovereign state, and therefore capable of

societal transformation through new and/or amending legislation. Within those areas of private law that remain the subject of custom, namely contracts, property and torts, there is one true victor of customary authority or at least in maintaining that illusion: property law. Tort law has always had a closer relationship than the other two to public law as it its domain is just the outer rim of what is regulated by criminal law, the oldest domain of public law.[184] Developments in the tort liability of companies towards strict liability in products liability also reveals its close relationship to public regulation on behalf of consumer interests.[185] Similarly, Contracts, as a result of its contact with the social democratic welfare state has been hemmed in from without by public interventions through Consumer Protection Law, not to mention by Labor law. And one could even argue that Contracts itself has always historically been dominated by its own "public interest" doctrines for the protection of weaker parties such as the unjust enrichment clause. Property Law, on the other hand, while concerned with what should be understood as the most public of legal subject matters- the distribution of resources-still remains largely regulated by customary law in most western legal systems. The one significant area in which property is limited by the state is in the case of "takings for the public interest," which requires offering "fair compensation" which has a long lineage of interpretation depending on the country.[186] Some countries such as Italy, have recently gone far enough to place limits on private property through Constitutional Law and to even carve out a special category of goods called

184 *See i.e.* G. E. White, *Tort Reform in the Twentieth Century: An Historical Perspective*, VILL. L. REV. 32, 1265 (1987).
185 *See i.e.* Dix W. Noel, *Strict Liability of Manufacturers*, AMERICAN BAR ASSOCIATION JOURNAL 50/5 446-50 (1964).
186 *See i.e.* Daniel H. Cole, *Political Institutions, Judicial Review, and Private Property: A Comparative Institutional Analysis*. SUPREME COURT ECONOMIC REVIEW 15, 1141-82 (2007). *See also* Abraham Bell, *Private Takings*, THE UNIVERSITY OF CHICAGO LAW REVIEW 76/2 517-86 (2009). Some nations like the United States, which is particularly market oriented has developed Supreme Court case law which advances the idea of compensating to the level of not only present value but the value of "investment backed expectations."

Common Goods.[187] There are however, certain exceptions to this rule, one foremost example are the Scandinavian countries, where the Blackstonian conception of property has had far less of an influence and the social democratic state reached an unprecedented zenith, however even there, and in particular Sweden, the famous Rehn-Meinder[188] plan to gradually redistribute profits and eventually, even ownership in the means of production from owners to workers, ultimately failed.[189] The famous Meidner plan, some say, failed because the workers were not organized enough against the interests of capital due to internal fighting and managerial corruption, while others point to the recession that started in the same period, however another competing theory is that challenging ownership, even in a property law system that emphasized limits on individual ownership, was

187 Bailey & Mattei, *supra* note. 53.

188 *See* Rudolf Meidner, *The Swedish Labour Movement at the Crossroads: Interview with Rudolf Meidner*, STUDIES IN POLITICAL ECONOMY 28, (1989). *See also* Lennart Erixon, *The Rehn-Meidner Model in Sweden: Its Rise, Challenges and Survival, Journal of Economic Issues,* 44/3, 677-715 (2010).
"Ownership" in the 1976 plan meant eventual transfer of a majority of the shares by workers of a fund that invested in the stock market,as well as, (the most radical aspect of the plan) over the means of production. This would be accomplished by using 20% of each companies' profits to invest in the buy out of those shares, which over time was envisioned to reach 52% of all shares. On the other hand, the 1984 plan only allowed for 5% of those shares to be transferred to workers with no mention of the means of production. The original purpose of the Meidner Plan was wider than mere wage solidarity (the only part of the plan retained in the 1984 version, though in crippled form), but instead specifically targeted the private concentration of capital. According to Löntargarfonder (1978) there were three main goals: 1) to counteract the concentration of ownership; 2) to increase wage earners' influence in economic life through ownership of capital; and 3) lastly to facilitate the solidaristic wage policy.

189 *See* Rudolf Meidner, *Why Did the Swedish Model Fail?* THE SOCIALIST REGISTER, 211-228 (1993), p.223."When the social democratic government finally in 1984 introduced wage earner funds it was the first time that a Western country had realized the idea of employee-owned funds. But the scheme had been changed beyond recognition from the original LO proposal. Five small regional funds were established, mainly financed by an excess profit tax. The fund capital was used for purchasing shares in the stock market. The scheme was intended to be annulled after only seven years and the total assets of the funds amounted at the end of the period (1991) to less than five per cent of the total value of the Swedish stock market. None of the original tasks has been achieved and the whole scheme must now be considered a rather symbolic gesture. The strong Swedish labour movement had proved its inability to encroach upon private ownership, the very core of the capitalist system."

too radical even for Sweden. Why? Because even where Blackstone failed to influence Scandinavian lawmakers, Lockean liberal political thought theorizing entitlements to property as consequences of "natural right" and "desert" and its function in ensuring "liberty" were deeply entrenched everywhere in the west, even in places like Scandinavia, which offered many counter influences to sole ownership and a much more egalitarian culture and ethos. In Sweden, while functional and interest-based approaches to property were accepted and even the norm, the notion of subjecting property to the democratic state and to publicly intervene and redistribute the property of industry leaders went too far ahead of the national imagination. To date the Meinder Plan remains the pinnacle artifact of the most progressive and radical program of redistribution ever proposed in any western country though falling far shorter than its original plan.[190] Today, as a result of the victory of neoliberalism, such a program would be considered completely out of the question: pass legislation to give majority company shares in companies like Ikea and Volvo over to the workers?! One clear objection would be "that would be unfair to those that worked hard to create those companies." However why is it assumed that the only way to compensate entrepreneurs is through a regime of private property? What is private property in this context? It is not just legal entitlements determined by custom clearly, for what property code of the 1700s discusses the right to control an entire company's assets and profits ad infinitum? While no text of that period of course mentions entities like the corporation or their powers (which was added much later in the late 1800s and early 1900s), the views that underpin the text continue to permeate our legal and political thinking, serving as an important conceptual background principle even in thinking about modern day private property. What are these important

190 Jonas Pontusson and Sarosh Kuruvilla. *Swedish Wage-Earner Funds: An Experiment in Economic Democracy*, INDUSTRIAL AND LABOR RELATIONS REVIEW 45/4, 779-91 (1992).

conceptual background principles? What is the powerful authoritative reasoning that animates property throughout history? The roots of such reasoning lie in the fundamental contributions of John Locke.

John Locke's liberal political thought was the ideological counterpart of Thomas Hobbes's social theory, and even more than that further built and elaborated his social theory based on pre-social individuals and gave his political prescription an ontological justification.[191] On the first, Locke continued to build on Hobbes's pre-social individual as explored in the last chapter, describing a world of individuals guided by their human nature of "right reason."[192] And on the second, while Hobbes called for ending the state of nature through the coercive power of a strong sovereign capable of enforcing law and order, Locke understood the role of the sovereign as enforcing the "natural rights" of these individuals guided by "right reason."[193] Hobbes's political theory now could be justified on the basis of being "natural" and an expression of the timeless dimension of "reason."[194] The way that the sovereign maintained peace and order therefore was not just through pure coercion, but by respecting the individual propensity towards reason and to protect those important domains of "life, liberty and property" that allowed for the exercise of that reason. Locke's idea of property came out of his labor theory of value (not to be confused with Marx's often mistaken for Locke's): the fruits of one's labor was their own, one should be rewarded for hard work through ownership.[195] The power of this idea is difficult to dispute except of course when it is put into practice within a given political and economic system. In the dusk of

191 *See* JOHN LOCKE, *Second Treatise of Civil Government, in* TWO TREATISES OF GOVERNMENT (1988 [1689] Peter Laslett, ed.) in BK. 1.
192 *Ibid.* For Locke's debt to, and departures from, Hobbes, See C.B. Macpherson, *Introduction* x-xiv in JOHN LOCKE, SECOND TREATISE OF GOVERNMENT [1690] (1980 ED. C.B. MACPHERSON).
193 *Ibid.*
194 *Ibid.*
195 *Ibid.*

feudalism when Locke first forged his ideas, his ideas were revolutionary, but did not actually describe the reality of most serfs forced to hand over surplus value- the collective fruits of their labor for their livelihood and protection- to their manor lords. Similarly, in the birth of capitalism, when farmers labored for profit, the fruits of their labor were not returned to them in full, but rather only a portion in the form of a wage while the rest went to the new capitalist and rentiers classes. Later under the industrial revolution, workers labored in exchange for a wage while the surplus value of their labor was handed over to the capitalist entrepreneur. In all the periods discussed the "laborer" was never considered the "owner" of the goods they produced, nor were these goods produced by one laborer in the abstract, but instead in the context of a historically specific social and collective process. However, the success of the timelessness of this Lockean view is a result of its ahistoricity and blindness to the social process through which these "fruits" are produced. Which takes us to a critique of the second and more clearly ideological part of the view I discuss above, the idea that one should be rewarded for one's hard work. Even if one can similarly dismiss this view for being completely unsupported by any historically existing political and economic system, it is irresistible to believe in as a moral principle. However, the devil lies in the details: what form of reward? Does one's hard work entitle one to ownership over the goods produced? If so, what type of ownership? Should a wage in lieu of direct access to fundamental goods be viewed as enough? Locke's views while attractive as moral principles lose their force when divorced from their historical, economic, legal, and social context. In other words, they may offer important and interesting normative starting points, but only when they are completely divorced from a Hobbesian methodological individualist's view and linked to an alternative social theory rooted in a socio-historic examination of social relations as related to the market.

3.3 The Legal Structure of the Market: Private Property as Surplus Extraction

Towards this direction, in his penetrating inquiry into the divergent outcomes of the "crisis of feudalism," Robert Brenner provides an impressive comparative analysis of the specific property relations between peasants and aristocrats in three regions of Europe during the transformation from feudalism to capitalism: Northern and Eastern Europe (as one region), France, and finally England between the 1200s-1600.[196] Brenner's findings show that while in France peasant struggles did not result in freedom from feudal dues and obligations, as in England, the majority of peasants held property in *cens tenure* which was "tantamount to full property" including the rights of inheritance, while on the other side of the isle, their neighbors recognized as "free peasants" by law, had no such rights in land. I argue, drawing from the work of Robert Brenner, that it was through this confrontation between peasants and the landed aristocracy in England in the 1600s, which resulted in peasants winning their freedom from feudal obligation and the landed aristocracy "winning" exclusive private property rights in previously feudal manorial land[197] that the modern legal institution of private property was born. The modern form of private property not only completely separated ownership of land from local political sovereignty but also turned property into a means of production as a source of rent and a surplus generating engine for the aristocracy and eventually giving birth to the full-fledged form of the capitalist market.[198]

196 BRENNER, *The Origins of Capitalist Development: a Critique of Neo-Smithian Marxism*, *supra* note. 87.
197 *Ibid.* This included demesne (land, which was exclusively the lords on which he could charge economic rent without any burdens) customary land (land held by tenants by custom- this was the best type of land tenure peasants could have as it meant fixed dues and rights of inheritance), and copyhold land.
198 The complete transformation would continue all the way through the 19th and 20th century. As analyzed by M. Cohen it was actually the 1910 act to tax the land –of public law-of the aristocrats who paved the way for the 1925 act in private law. Cohen, *Property and Sovereignty*, *supra* note. 177 at p.11-13. As Cohen discusses, the actual death knell of the system was initially

English peasants were free in the "double sense"- free from feudal obligations of personal homage, which made it impossible for the aristocracy to coerce seigniorial revenues as in other parts of Europe but on the other hand, "free" or unencumbered by property rights unlike the peasants in France, which made it possible for lords to charge English peasants a portion of the surplus created from working the land in the form of a rent.[199] French peasants, as mentioned, were *cens tenured*[200] or property owners in the full sense, while English

sounded *not* in the field of property law, but taxation. It was a 1910 budgetary proposal to tax aristocratic land so as to force it on the market--whose "radically revolutionary character [...] was at once recognized in England"--that paved the way for sweeping reforms to the estate system shortly thereafter. As Cohen remarks, this "revolution which was fought in the forum of public law, i.e., in the field of taxation" then saw its "final completion in the realm of private law" fifteen years later, with the passage in 1925 of the Law of Property of Act which "swep[t] away substantial remains of the complicated feudal Land Laws of England, by abolishing the difference between the descent of real and that of personal property, and by abolishing all legal (though not equitable) estates intermediate between leaseholds and fees simple absolute." *Ibid.*

[199] It was, of course, Marx who famously characterized modern or capitalist "wage labor" as labor "free in the double sense." KARL MARX, CAPITAL I, ((1976 [1867] trans. Ben Fowkes)), p. 272-3.

[200] For an explanation of cens tenure See M. Morineau, *La conjuncture ou les cernes de la croissance*, in HISTOIRE ECONOMIQUE ET SOCIALE DEL LA FRANCE, BOOK I, (Braudel and Labrousse (eds)) (1993[1977]), pp.978-80.

peasants held property as a *copyhold lease*[201] or as a *leasehold*[202] as opposed to freehold ownership - full ownership as in France - which made them more vulnerable and eventually subject to a system of competitive rents. As explained in the previous article, this system of competitive rents as the solution to the problem of declining "seigniorial revenues" in England was the mechanism by which both lords and

[201] A *copyhold* was a type of lease registered in the manorial rolls- each manor had a record of its tenants. The security offered by a *copyhold* depended on the type of *copyhold* one owned: a *copyhold* at will could be canceled at any time while a *copyhold* for lives existed during the life of a tenant or a *copyhold* by inheritance- which meant that the lease could be passed on and acted in this way almost like full ownership although title was held by the lord of the manor. *Copyholders* unlike customary landholders could be subject to arbitrary rather than fixed fines/dues. There is a debate about the security of *copyholders* and therefore the significance of this vs. cens tenure in catalyzing agrarian capitalism *See* Patricia Croot and David Parker, *Agrarian Class Structure and the Development of Capitalism: France and England Compared*, in THE BRENNER DEBATE *supra* note 101. Croot and Parker claim that copyholders had greater security in their land than Brenner presents. This is also supported by E. KERRIDGE, AGRARIAN PROBLEMS IN THE SIXTEENTH CENTURY AND AFTER (1969) and C.M. GRAY, COPYHOLD, EQUITY, AND THE COMMON LAW (1963), who both show that copyholders could take their claims to court, and that this practice started already from the early decades of the 16th century. See also R.W. Hoyle, *Tenure and the Land Market in Early Modern England: Or a Late Contribution to the Brenner Debate*, THE ECONOMIC HISTORY REVIEW, NEW SERIES 43/1, 1-20 (1990). Hoyle also makes a similar point critiquing Brenner's idea that the law was always in favor of lords rather than tenants, and argues that rather it being the case that all lords could easily convert their land from copyhold to leasehold but rather those that got in early. *See* p.10 "It was those lords in the early 16th century who had converted their copyholds to leaseholds in order to destroy the inheritance of the sitting tenants heir before the mid-century watershed that benefited and were able to enlarge their claim to rent over their tenants, while lords attempting to do so, in response to the rising rents of productive land, at a later stage found it almost impossible due to more organized tenants ready to cite them in equity court and often winning." *See also* Robert Brenner, T*he Agrarian Roots of European capitalism*, PAST AND PRESENT 97,16-113 (1982). Brenner responds to this argument stating that even if copyholders enjoyed more security than he was aware of when formulating his theory of the unique social property relations in England, this does not change the fact that no one can refute several points: 1) english lords held outright in demesne-economic rent sector) a much greater percentage of the cultivated land than did their French counterparts, something like 1/3 as compared to 1/8 or 1/10, and 2) peasants in England regardless of what type of a leasehold they held, copyhold or otherwise, were much less successful than their French counterparts in establishing heritability and fixed fines- the conditions which could make them freeholders, until much later, a century later when copyholds were already on their way out due to rising prices and rents in the beginning of the 17th century and at this point the amount of customary and copyhold land had shrunk even more in relation to demense land than earlier. These points support Brenner's view that the presence of the non-secure copyhold lease in the 1500s was what set the conditions for social property relations that resulted in agrarian capitalism in the 1600s.

[202] A Leasehold allowed the Lords to treat the land as part of their demesnes- land which was customarily exclusively the lords and therefore possible to charge economic rent.

tenants came to be dependent on the market for their own survival and maintenance of their positions - the logic of aristocratic reproduction - which set the entire train of market imperatives into motion. Through the leasehold the English aristocracy had accomplished a totally new use of "private property": one characterized by its right to use of the land by the tenant but exclusion from a part of the surplus produced by the land, which facilitated for the aristocracy, free from direct coercion, the extraction of a surplus on which they depended not just as a supplement to their regular surplus (extracted by direct coercion) but instead as their main source of surplus (extracted absent direct coercion).[203]

A second step towards the transformation of feudal social relations into capitalist social relations was the effort of the aristocracy to extinguish customary rights: not only the enclosure of the commons but also to challenge customary tenures and copyholds of inheritance[204] in response to the competition over rents of productive land. With regard to the commons, the use rights of peasants were so well established by custom and tradition that to revoke them required drastic state expropriation, which took place in a series of thousands of individual bills considered in Parliamentary acts between the 18th and 19th century,[205] where at

[203] Private property of course was used in other periods, namely under the Roman empire as a method for extracting a surplus, however it was never the main source of surplus, nor was private property separated from the politically constituted property. See Anna di Robilant, *The Roman-Bourgeois Jurists and the Invention of Modern Property* (draft manuscript on file with the author). See also generally PAOLO GROSSI, LE SITUAZIONI REALI NELL'ESPERIENZA GIURIDICA MEDIEVALE. CORSO DI STORIA DEL DIRITTO (1968), p.144-208. Anna di Robilant's description Roman dominium divisum, dominant through the middle ages in countries like Italy and France, which divided land ownership into two owners, one superior owner with formal title and the ability to charge rent, and a second inferior owner who used the land in exchange for rent is analogous to the English leasehold and copyhold in the common law, however with the difference that in France, where capitalism emerged a century later, the concept of Roman Bourgeois property which was based on the idea of Roman dominium-full property rights had taken hold as a result of stronger ties between the "inferior" owner and the land from the18th century on ensuring that peasants were given full property rights for example in France in the form of "cens tenure."

[204] *See supra* note. 201.

[205] *See* J.R. Wordie, *The Chronology of English Enclosure*, The Economic History Review 36/4, 483-505 (1983). *See also* POLANYI, THE GREAT TRANSFORMATION, *supra* note. 17; Linebaugh, Stop

times Parliament would go through a hundred enclosure acts in one session. Some, however argue that those acts were only the final nail in the coffin and that the process began in a piecemeal fashion from the 1500s and that in fact the high point of enclosure occurred in the 1600s by extra parliamentary means, which further supports Brenner's thesis.[206] One of the results of enclosure was not only the enclosure of common lands, but even more so the continued enclosure and dispossession of peasant tenants from their land, which often resulted in the total annulment of all leases on the land, which were then re-leased to the same peasants at much higher rents as explained by the Economic Historian J.R. Wordie.

> One of the great blessings of enclosure Acts from the point of view of the landlords who promoted them was that they annulled all leases. After enclosure, a tenant could think himself lucky to get his farm back at all at a time of increasing pressure on the land and of rapid consolidation of holdings, and if he did get it back, he could expect to pay a much higher rent for his newly enclosed acres. This was not only because they were assumed to be more productive, but also because the landlord was determined to take full advantage of the new situation by charging economic rents after enclosure perhaps on a tenancy-at-will basis. Much of

Thief!, *supra* note. 86. *See also* historical records: Robert Tennyson 16-53 H.L. Jour. (1696-1820); 13-70 H.C. Jour. (1700-1820); 1 Her Majesty's Stationary Office, Chronological Table of the Statutes, 1235-1974 (HNSO, 2007) 84-257; and Chronological Tables of Local Acts and of Private and Personal Acts, 1715-1820, http://www.opsi.gov.uk/chron-tables/chron-index (accessed 03/15/2017). Julian Hoppit's compilation on failed bills was also useful as a starting point for this examination. JULIAN HOPPIT, FAILED LEGISLATION 1600-1800: EXTRACTED FROM THE COMMONS AND LORDS JOURNALS (2003).

[206] *Ibid.* Wordie relies on data supplied by W.E. Tate and interpreted and published by Michael Turner which shows that "at least 75 per cent of the land area of England and Monmouthshire was already enclosed by I760. In other words, England had already become a predominantly enclosed country by that date. Only twenty years later, by the end of I780, it can be calculated from the figures provided by Turner and Tate that the proportion of enclosed land in England was almost 8o per cent." The enclosures were also well documented by the famous English historian John and Barbara Hammond though they locate the highpoint of the enclosure period as the 18th century, which in fact was the highpoint for parliamentary enclosures. Unlike other Historians argue that these enclosures led to the Proletarianization of the English Peasantry. English peasants, unlike in France where capitalism emerged much later, dispossessed of both their customary land allotted to them under the feudal system, as well as, the common lands on which they relied for supplements, were completely cut off from their means of subsistence, forcing them to set in a train the market imperative to exchange their labor on the market for access to the means of life- the transformation to capitalism was complete. Others like

> the rent rise might therefore represent a simple transfer of income from the pocket of the tenant to the pocket of the landlord, rather than a commensurate increase in the productivity of the land.[207]

What Wordie shows is that while the land was not more productive, in the sense that the yield was the same amount as before, peasants being subjected to a much higher rent, forced them to compete to increase their yields in order to maintain their leases and thereby their means of subsistence. I argue, based on the work of these economic historians and Brenner's theory of *social property relations*, that this history of the origin of capitalism demonstrates that in England "private property," emerged in its fully developed modern form in the 16th and 17th century -marked by its ability to exclude- both in the sense of "from the surplus" in the case of the lease and "off the land"- through the enclosure of commons. I argue that this change in *social property relations* together with the legal institutional form of the "lease" (but in the copyhold and tenancies at will form) transformed private property, from this time in history, into an engine of surplus creation, which I argue is the essential character of "modern" property. Through modern property the landed aristocracy was given freedom from materially providing for peasants while still retaining their rights to extract a surplus from their land.[208] And likewise on the side of peasants, being free men unbound to their masters, they received freedom from feudal obligations but in exchange were cut off from their means of subsistence. Formally peasants were "free" to contract to sell their labor on the market, but in practical terms, this "freedom" was somewhat empty as the

[207] *Ibid.* pp. 504-505. *See also* J. R. Wordie, *Rent Movements and the English Tenant Farmer, 1700-1839*, RESEARCH IN ECONOMIC HISTORY, VI,193-243 (1981).
[208] ELLEN MEIKSINS WOOD, LIBERTY AND PROPERTY: A SOCIAL HISTORY OF WESTERN POLITICAL THOUGHT FROM THE RENAISSANCE TO THE ENLIGHTENMENT(2012), p.12. Rent producing private property was the best strategy of the aristocracy to extract a surplus in the absence of the absolutist state as in France, which guaranteed the aristocracy a politically constituted means of surplus extraction through taxation.

alternative was simply to starve. Legally, lords- soon to be the bourgeoisie- were governed by property law, while peasants- soon to be the proletariat- were governed under pressure of starvation by the law of contract. What is remarkable is that two hundred years later, when the Industrial Revolution would begin, the institution of private property as a vehicle for surplus creation was already fully matured meaning that capitalism emerged not from the cities in the 1800 but from the countryside starting already from 15th & 16th centuries.

3.4 Modern Property Operates as (Delegated) Sovereignty

As argued by the previous section, private property, operating as a mechanism for extracting surplus through the charge of rent for productive land, was almost fully matured far before the Industrial Revolution. Furthermore, I argue, what this essential character of private property reveals is that the effects of private property have far reaching long term socio-economic effects, none of which were recognized during the "classical" period of law and legal theory. Among the first, and certainly most penetrating, of the schools within legal theory to give serious consideration to the socio-economic effects of modern private property, and in particular the ability to charge a rent, were the American Legal Realists of the 1920s and 30s, although even they failed to explicitly connect their ideas to an underlying social theory of the capitalist market and its formation. Leading the way was Morris Cohen in his article "Property and Sovereignty," which historically analyzed the institution of private property in its modern form as discussed above, as one that conferred upon the owner not only the rights of exclusion that protect their bearer's interest in "possession," but also the ability to extract a surplus through rents.[209] Cohen argued that private property essentially was paramount to the

[209] Cohen, *Property and Sovereignty*, *supra* note 177 at 13. But also extends itself into courts today: cases protecting economic use of property.

transfer by and from the state to individuals of the power to rule over others: "dominium over things is also *imperium* over our fellow beings."[210] He went on to show that private property not only gives some people the power to exclude others from resources, but also the ability to charge a rent, which facilitates the accumulation of wealth - the ability to extract surplus value as analyzed above- effecting the long term distribution of goods.

> The extent of the power over the life of others which the legal order confers on those called owners is not fully appreciated by those who think of the law as merely protecting men in their possession. Property law does more. It determines what men shall acquire. Thus, protecting the property rights of a landlord means giving him the right to collect rent, protecting the property of a railroad or a public service corporation means giving it the right to make certain charges. Hence the ownership of land and machinery, with the rights of drawing rent, interest, etc. determines the future distribution of the goods that will come into being-determines what share of such goods various individuals shall acquire.[211]

Here, Cohen while not explicit of the social theory that underpins his work, intuited in his own way and lineage, the contributions of Brenner and Wood: property ownership under capitalism means much more than personal ownership – that is, ownership over one's home or personal belongings. Rather, he argues, it

[210] *Ibid.* We might note that Cohen's verbal formulation of his point leaves something to be desired, and possibly betrays a residual "Blackstonianism" and failure to fully internalized the Hohfeldian relational conception of property. The phrase a "dominion over things" (even as an addition to "dominion over persons") is unfortunate because property is *not at all* a person-thing relation, but rather *solely* a person-person relation. (Relatedly, "possession," being a physical state or relation between a person and an object, is not descriptive of any entitlement of property – the relevant entitlement is one of "exclusion," of one person by another with respect to an object.) *See* Syed, *supra* note 179 at notes 6 to 10 and accompanying text. This *possibly* lingering trace of a non-relational conception of property – in someone not only committed to the alternative view but also among its most powerful exponents – suggests something of the depth and power of Hohfeld's conceptual revolution, one that remains unconsummated in the legal academy today. Needless to say this does not take anything away from the substance of Cohen's analysis.
[211] *Ibid.*

has become an instrument of surplus extraction, which required private property rights aimed, not just at protecting owners in their use of a resource, but in protecting the productive economic use of the resource. Cohen was expressing the concerns of an important and growing group of scholars who reacted to the way in which courts of his time defended the rights of big business over common people, a class of property owners against a class of non-owners, employers over employees, and calling to their aid the rhetoric of "private" versus "public" areas of law where the state was forbidden from intervening.[212] This type of argumentation to defend the market fundamentalism of his time was made possible in part by the lack of a settled idea of what property was and wasn't, what powers it encompassed and when it went too far in terms of effecting the freedom of others. What does it mean to have a property right? Does property imply far-reaching powers and protections of productive economic use, which justifies advantaging the few at a disadvantage to the many, as Cohen suggests may be happening? For the answer to this question the American Legal Realists took as their starting point the work of the proto-Realist Wesley Newcomb Hohfeld. I argue, based on the work of Talha Syed, that the work of Hohfeld not only made the concept of property more clear, and therefore less likely to be used for covert ideological projects, but also allowed for the conceptualization of property as a social relation, provided an important constructive tool for reforming private property institutionally and counteracting the negative effects identified by Cohen, and also as we will later discuss, by Robert Hale.

3.5 Property as a Social Relation

[212] See for example *Lochner v. New York*, 198 U.S. 45 (1905).

In his seminal "Fundamental Juridical Conceptions" articles, Hohfeld argued that the idea of a "property right" was misleading, and indeed the source of persistent and pernicious confusion in the Anglo-American case law. He analyzed the confused and often false distinction between "in rem" and "in personam" made in these cases and found it was being used to cover "any sort of legal advantage."[213] His commitment to the necessity of conceptual clarity provided the Realists with an important framework for penetrating the cloud of ideology often masked in the garbled legal jargon of the jurists and judges of his time. Hohfeld argued that juridical concept of rights should be deconstructed into claim-rights, privileges, powers, and immunities, with each being distinct from the other and defined in relation to the presence or absence of their "jural correlatives." Jural correlatives he defined as: duty, no-right, liability, and disability, and in contrast to its "jural opposite": no-right, duty, disability, liability.[214] He conceptualized the most common notion invoked by the looser terminology of "right" as closest to his technical notion of "claim," with its correlative of a duty. If the law confers upon someone the entitlement of a claim to something, this has the meaning or practical implication that (one or more) others have imposed upon them a duty to respect that claim upon pain of legal sanction. Through these entitlements, their correlatives and opposites, Hohfeld provided an analytical basis for the concept of *property as a social relation*: where one holds an entitlement, this immediately implies that someone else must hold a disentitlement. Applying his deconstruction of jural concepts to the concept of a "property right," Hohfeld demonstrated that property – rather than being defined by cloudy, confusion-proliferating concepts such as "ownership" or "possession" – could be better understood by disaggregating

213 Hohfeld 1917, *supra* note 178 at 717.
214 Hohfeld 1913, *supra* note 178 at 30ff; Hohfeld 1917, *supra* note 178 at 710.

ownership into a "bundle of sticks," or in other words, a package of discrete potential entitlements.

While Hohfeld's theory of juridical relations is the most cited idea in all of American property scholarship,[215] it remains the most misunderstood and not only misused but "underused" conceptual framework, as said by Duncan Kennedy: "Hohfeld's system survives, like a sack of dried beans, unesteemed by those who have lost the recipe for its use."[216] Talha Syed explains that the reason for this is that the disaggregation of the entitlements was conflated with Hohfeld's contribution of the conception of *property as a social relation*, causing the former to be forgotten and hidden in the content of the latter. "Indeed, if a short moniker were wanted for Hohfeldian analysis, much preferable to the "bundle of rights" would be the "relational" conception of property."[217] Property cannot be understood from the abstract vantage point of a person on a desert island imagining their relationship with the objects around them. Syed not only underlines the centrality of Hohfeld's point that property is *not at all* a relationship between a person and a thing, but rather *only* a relationship *between people about things*. Going further, he argues that the concept of the "bundle of rights" can only make sense

215 *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY (1997), p.319. "No expression better captures the modern legal understanding of ownership than the metaphor of property as a 'bundle of rights.'" The "bundle of rights" phrase precedes Hohfeld, who in fact did not use it, but it has become the common label for his analysis of property as "a complex aggregate of jural relations." Hohfeld 1913, *supra* note 178 at 319, 322. *See also* Eric Claeys, *Is Property a Thing or a Bundle?*, SEA. U. L. REV. 32, 617 (2009) (reviewing leading legal authorities adopting the bundle of rights terminology)p. 619-21; *and* J.E. Penner, *The "Bundle of Rights" Picture of Property*, UCLA L. REV. 43, 711 (1996) (reviewing leading philosophical works doing same), p. 712-14.

216 Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, HOFSTRA LAW REVIEW 8, 711 (1980), p. 751-52. Professor Horwitz writes: "The problem of recapturing the political and theoretical significance of Hohfeld's categories is not without its difficulties." MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 152 (1992).

217 Syed, *supra* note. 179.

when it is seen as flowing from the social relations insight.[218] He further explains that the particular structure of the social relation of property "involves – always and necessarily – pairs of competing interests." According to Syed, these pairs of competing interest, which make up the "bundle of rights" concept, are not simply a series of formal possibilities to be endlessly proliferated, but rather are purposively driven and conceptually integrated.[219]

Developing Hohfeld's scheme of juridical concepts and correlates, he offers a scheme of the "fundamental building blocks of *all* property analysis" locating the bundle in a precise set of entitlement-disentitlement pairs: (1) use; (2) exclusion; (3) immunity; and (4) transfer, with each conceptually building upon the other, and reflecting a distinct set of competing human interests in a resource. As Syed explains, "use", is the most basic concept in relation to resources, namely one's ability to directly, concretely, use a particular thing. Consider by contrast the concept of exclusion: one cannot even possess the concept of "exclusion," without asking "exclusion *of what*?" to which the answer, of course, is "exclusion of *use*."

218 I*bid* at 7: "When, however, the claim of disaggregation is set loose from its basis in the social-relational claim and delinked from its driving purpose – of ensuring careful consideration of meaningfully significant distinctions in interests – it threatens to spin out into an endless proliferation of formally possible (even if practically inert) entitlement options, or devolve into a laundry-list taxonomy of the fine-grained complexities of various and sundry existing arrangements." Syed argues this results in the "disintegration" of property entitlements leading the entitlements to be emptied of all content. For proponents of the disintegration view, *See* Kenneth Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, BUFFALO LAW REVIEW 29, 325 (1979); Thomas C. Grey, *The Disintegration of Property*, *in* NOMOS XXII: PROPERTY 69 (J. Roland Pennock & John W. Chapman eds.)(1980). For critics of disintegration and, as a concomitant, the Hohfeldian scheme tout court, see J.E. PENNER, THE IDEA OF PROPERTY IN LAW (1997); THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES (2007) v, 1 (defending, in contrast to "an ad hoc 'bundle of rights'" view, a "traditional everyday view" of property as "a right to a thing good against the world"); Henry Smith, *Property as the Law of Things*, HARVARD LAW REVIEW 125/1691 (2012) (arguing that "property is, after all, a law of things" contrary to the "conventional wisdom" that "property is a bundle of rights"). *See generally* Symposium: *Property: A Bundle of Rights?* ECON. J. WATCH 8 (2011).

219 This is contrast to the more standard treatments of the Hohfeldian entitlement scheme. *See* Joseph Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, WISCONSIN LAW REVIEW 975 (1982); *and* Pierre Schlag, *How to do things with Hohfeld*, LAW & CONTEMPORARY PROBLEMS 78,185 (2015).

Hence, the conceptual priority of "use" over "exclusion" as the most elemental entitlement in the system of property. By itself, "use" does not even necessarily imply a social relation, but X's entitlement of use (taking, typically, the form of a use-privilege) does, of course, imply it, requiring as it does a disentitlement in Y (typically, a no-right to prevent use). If, however, Y did have the entitlement to prevent use, one would have the opposite pairing: a right to exclude correlated with a duty not to use. Following from these two concepts, one may inquire into a distinct human interest in a resource that the legal system may seek to protect: not simply to allow X to use, free from Y's interference, and perhaps also to exclude Y, but to hold said use and exclusion entitlements with some degree of security, knowing that they cannot simply – arbitrarily and/or without compensation – be "expropriated." Thus, immunity-from-expropriation, which correlates with a disability to expropriate or transfer, builds on the concepts of use and exclusion. The absence of said immunity means the presence, in another (such as the state), of the power to so transfer or expropriate. Thus, completing the quartet of fundamental entitlements, two "primary" ones of use and exclusion (entitlements pertaining to relations regarding the resource itself) and two "secondary" ones of transfer and expropriation (entitlements pertaining to other entitlements). This disaggregation of property provides specific substance through the functions of property, which expresses more concretely the nature of the social relation expressed by different entitlement and disentitlement pairs.

Let us attempt to illustrate this in an example presented by Hohfeld himself: "A has a fee simple in Blackacre. His 'legal interest' or 'property' relating to the tangible object that we call land consists of a complex aggregate of rights, privileges, powers and immunities." [220] What does this concretely mean in expressing a particular *social relation*? In other words, what does it mean not only in

[220] Hohfeld, *supra* 1917.

terms of the effect or consequence of the entitlements on the entitlement holder but also for others? By combining Hohfeld's deconstruction of juridical concepts with Syed's "fundamental building blocks of property" the social relational character of the entitlements come to light. First, (Privilege to Use): A has legal *privileges* of entering, using, degrading Blackacre and others have *no rights* to prevent A's use. Second (Right to Exclude): A has a *claim* to prevent other's uses, these others now having a *duty* not to enter the land. Third (Power to Transfer): A has the legal *power* to transfer his legal interests (i.e., his use-privileges and exclusion-rights) to another, to extinguish his complex aggregate of jural relations and create a new and similar aggregate of jural relations in any other person, in which case everyone else is subject to a *liability* in the change of jural relations. Fourth (Immunity from Expropriation): A has an *immunity* from being expropriated – from his entitlements over Blackacre being transferred away from him – and correlative to this is that everyone else has a legal *disability* – they cannot take Blackacre from him.

Let us put it in another way that is more straightforward, using Hohfeld's object of a shrimp sandwich, an example he himself uses, however removing the language of the juridical concepts while retaining their functions as elucidated by Syed: "A" can exclude others from his shrimp sandwich in whatever manner he sees fit so long again as it is not a crime or tort. "A" can also transfer his entitlements to use and exclude others from the shrimp sandwich to someone else without necessarily transferring the entitlement to transfer (i.e., lease the sandwich). "A" can also transfer use, exclusion and transfer entitlements in which case he or she would not hold entitlements any longer in the shrimp sandwich and somebody else would retain those entitlements. "A" is immune from expropriation of the shrimp sandwich, and expropriation can only occur by "A"'s consent or legitimately by the state (with compensation).

A similar idea of property, with regard to the competing-interests-based structure of the social relation, is advanced by scholar Claes Martinson, who describes the Scandinavian approach to property as being "interest based," rather than "ownership based," as in most European countries. In his article *The Scandinavian Approach to Property Law, described in Six Common Legal Concepts,* Martinson is critical of the way in which a Strasbourg judge ruled over a case originating from the University of Gothenburg[221] over information produced from a study by Prof. Gillberg under the aegis of the University. In the case, the Strasbourg judge applied the concept of "ownership" to the object of the conflict, and transformed the legal issue from one about the competing interests of the parties (Prof. Gillberg, the university, other researchers) to the use of the study into a conflict over the "thing," the ownership of the documents themselves. As Martinson describes the Scandinavian approach:

> "Ownership is always understood in relative terms and as a more specific interest in the relation and context at hand. To underscore this, Scandinavian lawyers even tend to avoid using the concept when dealing with legal issues. Since the relations are kept apart a clearer way is to use words such as 'priority' or refer to a 'better right' of one party with respect to the other." [222]

Martinson's analysis reveals that the Scandinavian context may be one of the only parts of the world that conceives of property in this particularly unique interest based way not only in theory but in practice, although not always in practice, as Martinson reveals in his discussion of transfer of ownership of information produced from the Gothenburg study where a Swedish presiding judge slides into an "ownership" based mode of argumentation. The reasons for the uniqueness of the Scandinavian approach is difficult to locate with precision,

[221] *Gillberg vs. Sweden*, 41723/06, Strasbourg, April 3, 2012.
[222] Claes Martinson, *The Scandinavian Approach to Property Law, described in Six Common Legal Concepts,* JURIDICA INTERNATIONAL 22, 16-26 (2014), p.17.

and most likely one cannot attribute this approach to Hohfeld, given that he had little impact outside of the United State. However, as Martinson states, "The reason for which the Scandinavian approach sees some concepts as problematic is that the underlying ambition of the Scandinavian approach is realism." [223]

3.6 Contrasting American and Scandinavian Legal Realist Approaches to Property

Scandinavia is the only region outside of the United States that had an independent Legal Realist movement, with brilliant and influential leaders like Axel Hägerström, Vilhem Lundstedt, Karl Olivecrona, and Alf Ross who emphasized, like Hohfeld, the rigorous commitment to conceptual clarity – some, such as Hägerström, even demanding an ostensibly higher standard of "scientific purity."[224] However, unlike their American counterparts, the Scandinavian Legal Realists, did not engage in an analysis of the public and political dimension of private property.[225] This is argued by Gregory Alexander with regard to the scholarship of Hägerström, as revealed in his conceptualization of property in his book *Der romische Obligationsbegriff im Lichte der allgemeinen romischen Rechtsanschauung (The Roman Concept of Obligation in Light of the General Roman Legal View)*.[226] Alexander argues that Hägerström's concept of property only involves state intervention when it is to recover property that has been taken by another or in other words when a party has brought suit against another.

> " '[The state does not step in as protector,' he argued, 'unless I have actually lost possession of the thing . . .' 'But the right of property would seem to be a right to the thing itself, i.e., a right to retain possession valid against every other person. Can the state guarantee this? Of course not. All that it

223 *Ibid. at* p.21.
224 *See* Gregory S. Alexander, *Comparing the Two Legal Realisms – American and Scandinavian*, AMERICAN JOURNAL OF COMPARATIVE LAW 50/131 (2002). *See also* MAX LYLES, A CALL FOR SCIENTIFIC PURITY: AXEL HÄGERSTRÖM CRITIQUE OF LEGAL SCIENCE (Doctoral dissertation) (2006).
225 Alexander, *Ibid.*
226 *Ibid.*

> can do is to enable me to regain the house if it should already be in the possession of another person.'"[227]

This is greatly contrasted to Hohfeld's work, on the other hand, which had an important influence on the work of the American Legal Realists – not only within property law theory, but also in its contribution to the critique of the Public/Private distinction. Duncan Kennedy of the American Critical Legal Studies School, a contemporary school of legal thought that builds upon the work of the Realists, explains the wider implications of Hohfeld's work:

> "A basic reason for the invisibility of the distributional consequences of law is that we don't think of ground rules of permission as ground rules at all, by contrast with the ground rules of prohibition. This is Wesley Hohfeld's insight: the legal order permits as well as prohibits, in the simple-minded sense that it could prohibit, but judges and legislators reject demands from those injured that the injurers be restrained."[228]

If every property conflict necessarily implies that one person will be permitted an entitlement this means that there is always a disentitlement for others; in other words even where the law does not specifically act to prohibit an action, its non-action results in permission. Where the state fails to act on behalf of those injured "that the injurers are restrained" there is still state action amounting to a state permission to injure. This is very different from Scandinavian Legal Realism, at least as seen in the position of Hägerström.

However, there is an opposing strain within Scandinavian realism, as represented in the tradition of A. Vilhem Lundstedt's work *Legal Thinking Revised,* which espouses a position much closer to that of Hohfeld:

> "In opposition to such a metaphysical view, it is of importance to understand that [an owner's] "authority" or "title" to the possibilities of

[227] *Ibid.*
[228] Duncan Kennedy, *The Stakes of Law or Hale and Foucault!* LEGAL STUDIES FORUM 15, 327 (1991), p.333.

> action is absolutely as natural, i.e., empirically to establish, as, e.g., the "authority" of the lion in the jungle to throw itself upon an antelope or a zebra and devour it. In the former case the "authority" is nothing but actual possibilities owing to the attitude of man as a consequence of legal machinery in operation (immediately the maintenance of certain so-called rules of law and its effect on man as a psycho-physical being). In the latter case (that of the lion) the possibilities implied in the "authority" have a need no such a condition."[229]

Alexander interprets Lundstedt here to be saying, similar to Hohfeld above, that state power, or what Lundstedt referred to as "legal machinery" is a constant presence in enforcing private legal relations, even when it does not act. Lundstedt said with regard to the application of his thinking to property, that any other position is "a product of pure fantasy."[230] Lundstedt is well known for his standard for evaluating legal decisions according to whether or not they serve "social welfare," which on the surface appears very similar to the way in which American Legal Realists used the standard of whether or not an outcome was "in the public welfare," first formulated by Oliver Wendell Holmes.[231] However, rather than using this insight to politicize property and critique its protection from state reform as an area of private law, Lundstedt used his standard of "social welfare" in practice not to defend workers or critique the current distribution of wealth, but often to defend market fundamentalism.

> "If the views of equity and justice were here really to be taken into consideration to any great extent, it would of necessity be at the expense of the regard for the economic prosperity of the community. A distribution

229 Alexander, *supra* note. 224 at p.154.
230 *Ibid.*
231 Holmes expounds the "in the public welfare" standard in *Strickley v. Highland Boy Gold Mining Co.*, 200 U.S. 527 (1906) (justifying takings of property on grounds of "public welfare"), p. 531. Earlier and equally influential formulations by Holmes of this leading idea, are that hard cases in private law must be decided on the basis of "the public good" or on "legislative" grounds of "policy." See Oliver Wendell Holmes, *The Path of the Law*, HARVARD LAW REVIEW 10, 457 (1897) , p. 466, 471 ("the public good"); and Oliver Wendell Holmes, *Privilege, Malice, and Intent,* Harvard LAW REVIEW 8, 1 (1894), p. 3 ("legislative" grounds of "policy").

> of wealth on equitable principles is worth nothing if there exists no wealth to be distributed."[232]

Here, as Alexander says, Lundstedt uses his insight into state intervention and the concept of social welfare on behalf of "ownership and wealth maximization."[233] Hohfeld, unlike Lundstedt, used his insights regarding state power in private property relations to combat the idea that the state is forbidden from intervening in the "private sphere" of the market, and his predecessors Robert Hale and Morris Cohen used this insight to open up property law into a fertile ground for revealing the politics and ideology hidden under the guise of neutrality.[234]

3.7 The Realist Critique of the Public/Private Distinction

The major point of departure for the Realist critique of the public/private distinction was the United States Supreme Court decision in *Lochner vs. New York* (1905), which overruled state regulation on the maximum number of hours worked by bakers on the basis of the employer's right to the "freedom of contract."[235] This decision stood for the deeply entrenched social naturalism reflected in a strong dichotomy between the public/political realm, in which the law could justifiably intervene, and the private/pre-political realm, where intervention was seen as

232 *Ibid.*
233 *Ibid.* at p.154.
234 An example of this is provided by Duncan Kennedy: "For example, in most jurisdictions a homeowner or developer can block the light and air of neighboring buildings with impunity, even though doing so reduces real estate values dramatically and deeply annoys the victims. This is not a "gap" in the law, but a conscious decision that it is better to let builders have their way, and make victims buy them out if they care that much about their view." Kennedy, *Stakes of Law*, *supra* note. 228.
235 *Lochner v. New York*, 198 U.S. 45 (1905). Some say this case created a property right in the employer to guarantee his right to contract as a business owner. For conceptions of property giving comfort to this view, see Charles Reich, *The New Property*, YALE LAW JOURNAL 73, 733 (1964); *and* Grey, *Disintegration of Property*, *supra* note 218.

interference with the natural workings of the market. While this division was always taken for granted amongst both liberals and conservatives alike, at least in the US, the blatant favoring of the interests of the business community over that of workers revealed the danger of holding the thin line between the public and private too firmly, and inspired important scholarship from legal scholars and judges for decades to come.[236] These works argued that essentially all "private" actions take place within a background structure of legal entitlements enforced and upheld by a public authority, not only when the government actively enforce the rights of private parties through courts, but also when there is simply reliance on the potential enforcement of their legal entitlements, for example, as explained above when one relies on one's Hohfeldian "privileges" free from tort or criminal liability, although they may not be explicitly guaranteed by the state.[237] Thus according to the Realists, one's legal entitlements – whether within the domain of labor

[236] For the central works developing the Realist critique, see references cited in note 177. Perhaps the most direct legal fruit of this critique, in terms of changing the actual landscape of American law, was its deployment in the landmark case of *Shelley v. Kraemer*, in which the U.S. Supreme Court, directly influenced by – indeed, citing – the legal-realist critique of the public/private distinction, accepted that judicial enforcement of a racially restrictive covenant constituted state action. *Shelley v. Kraemer*, 334 U.S. 1, 19-21 (1948). The Court reasoned that although the seller's own actions were private and thus did not trigger the Fourteenth Amendment's requirement of "equal protection," for a court to enforce the restrictive covenant would constitute public or state action sufficient to raise constitutional questions. *Ibid.* The case has since then been contained in its impact in numerous ways, but its reasoning remains powerful. *See, e.g.,* Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, GEORGETOWN LAW JOURNAL 92, 779 (2004).

[237] The influence of the Realist critique on subsequent scholarship is legion. For illustrative examples of work following in their wake, see Warren J. Samuels, *The Economy as a System of Power and Its Legal Bases*, UNIVERSITY OF MIAMI LAW REVIEW 27 /261, 340-44 (1973); *Symposium: The Public/Private Distinction*, UNIVERSITY OF PENNSYLVANIA LAW REVIEW 130/1289 (1982); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, HARVARD LAW REVIEW 96, 561 (1982), p. 616-41 and p.567-70; Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, AMERICAN UNIVERSITY LAW REVIEW 34, 939 (1985); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 3-5, 102-07 (1987); Cass Sunstein, *Lochner's Legacy*, COLUMBIA LAW REVIEW 87, 873 (1987); Joseph Singer, *Legal Realism Now*, CALIFORNIA LAW REVIEW 76, 467 (1988); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY (1992), p. 163-66, 206-08; Barbara Fried, *Wilt Chamberlain Revisited: Nozick's "Justice in Transfer" and the Problem of Market-Based Distribution*, PHILOSOPHY & PUBLIC AFFAIRS 24, 226 (1995), p. 230-40.

regulation (clear state action) or property law (private law) – are always the result of a conscious government decision, or what Institutionalist Economist and Legal Realist Robert Hale called "government coercion."

3.8 Applying the Critique of the Public/Private Distinction to Property Law

Many Realists explored the distributional consequences of the invisible ground rules of permission in different areas of law, particularly in property and contract law, but I argue that it is the analysis of Robert Hale that applied this critique of the public/private distinction to reveal the extent to which the capitalist markets depends upon and are structured by property law. In what may be the single most influential elaboration of the Realist critique of the private/public distinction, Hale points out that property law, while supposedly only governing the "private" transactions between individuals, in fact has very "public" outcomes and systemic social effects, which require government coercion for their enforcement and institutionalization. In his 1923 article "Coercion and Distribution in a Supposed Non-coercive State," Hale argues that one's "liberty" to "enjoy" one's property or to contract "freely" is always the product of the degree of coercion, not whether it is supposedly present or absent.

> In protecting property the government is doing something quite apart from merely keeping the peace. It is exerting coercion wherever that is necessary to protect each owner, not merely from violence, but also from peaceful infringement of his sole right to enjoy the thing owned… In short, if he be not a property owner, the law forbids him to produce with any of the existing equipment, and the law, which forbids him to eat any of the existing food, will be lifted only in case he works for an employer. It is the law of property which coerces people into working for factory owners.[238]

Hale shows how freedom and coercion are internally related, paired concepts,

[238] Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, *supra* note. 20.

one's "freedom" to use one's property in a multitude of ways, which may be clearly guaranteed formally and in courts, is only made operational by all the unwritten aspect of the laws of property imposing or "coercing" duties onto others (non property owners) to respect the "rights" of the owner. The duty side of rights is rarely enumerated by any property law of any nation, and yet they are implicitly necessary to effectuate the protection of the rights of the owner, as explained above in the context of explicating the Hohfeldian analysis of entitlement/disentitlement pair structures. Hale recognized, intuiting again, like Morris Cohen, a social theory in the vein of Brenner and Wood, that the stakes of private property are much greater than that of protecting owners, going as they do to structuring the market and in determining class relations. He understood that although there is no law that states that if one is born a non-property owner, one must work for other property owners in order to earn money to buy food, this is a direct consequence of the law of private property: those that own property are entitled to extract a surplus, those that don't must labor for others for access to the means of subsistence.

As Duncan Kennedy says in his article, "The Stakes of Hale and Foucault,"

> "Since what we mean by capitalism or by private property is a particular legal regime, then law, in the form of that regime choice, is responsible for the distribution of income that we actually get…. The point Hale emphasized repeatedly was that this particular property regime allows something close to unlimited accumulation of property at one extreme, and something close to absolute destitution at the other."[239]

Kennedy argues that just as we must abandon the no government coercion/coercion distinction that is the basis of the false public/private distinction in law, we must also abandon the "one/off all-or-nothing

[239] Kennedy, *Stakes of Law*, *supra* note 228 at 338.

understanding of capitalism and private property."[240] He argues that capitalism cannot be reduced to one "capitalist system,"[241] and also that property rights are neither "absolute" nor "self-defining." If property rights are neither absolute nor self-defining but instead a result of a particular configuration of property entitlements and disentitlements as the work of Hohfeld demonstrates, it is possible to redesign property towards different social purposes. I argue that the critique of the public/private distinction reveals that there is nothing "private" about property, neither in the sense of the absence of state intervention in the enforcement of property rights, nor in the absence of its negative public societal effects. So why should we continue to protect it as something beyond social control and contestation? This was precisely the point posed by Hale regarding the need to alter the property rights enjoyed by owners against non-owners:

> It is with these unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining . . . With different rules as to the assignment of property rights, particularly by way of inheritance or government grant, we could have just as strict a protection of each person's property rights, and just as little governmental interference with freedom of contract, but a very different pattern of economic relationships.[242]

As one can see, Hale was no revolutionary: he was not proposing the overthrow of private property, but instead a different assignment of property rights. What he could have meant by a different assignment is unknown: Did he mean to merely to reform the laws of inheritance? Or a full-scale radical policy shift towards government redistribution of property? The absence of any clear answers – or even very clear indications of the directions in which to look – have

[240] Kennedy, *Stakes of Law*, *supra* note 228 at 338.
[241] This was demonstrated by the working of Gosta Esping Andersen in the previous Chapter which contextualized the different institutional actors in the making of capitalism in different places.
[242] Hale, *Bargaining, Duress and Liberty, supra* note. 20.

resulted, unfortunately, in a languishing of Hale's work and influence among most contemporary legal scholars. Even for among commentators otherwise admiring of his critical analysis, the gaps in the "constructive" side of Hale's analysis continue to haunt his legacy.[243]

Kennedy, however, builds on the work of Hale to argue that the project of reconceptualizing property rights must be done in the context of the conflict between different market actors, namely to use law to reduce the inequality of bargaining power and differential access to the means of life between owners/capitalists and non-owners/workers. Or, I argue, in the language of Polanyi: to regulate the fictitious commodity of private property and to socially embed the destructive effect within an alternate legal institution designed to counteract those effects.

3.9 A Counter Institution of Property: Using Property Law to Embed the Market

I argue, based on the work of Cohen, Hohfeld, Hale, and Kennedy that it is not only possible to pierce the veil of the sacrosanct status of the "private realm" of property but that it is possible to do so through the creation of a counter institution of property to reverse the negative effects of the market namely on bargaining power and differential access to the means of life. Sociologist and Polanyi scholar Fred Block, in an article that brings together social science research with the American Legal Realist critique of market naturalism, argues that if we are to institutionally transform the market, then we must understand the extent to which

[243] For admiring laments, *see* BARBARA FRIED, THE PROGRESSIVE ASSAULT ON LAISSEZ FAIRE: ROBERT HALE AND THE FIRST LAW AND ECONOMICS MOVEMENT (1998); Ian Ayres, *Discrediting the Free Market (Review of Fried)*, UNIVERSITY OF CHICAGO LAW REVIEW 2 66/73 (1999). For a more dismissive view, *See* Richard Epstein, *The Assault that Failed (Review* of FRIED), 97 MICHIGAN LAW REVIEW 1697 (2000).

the market, as well as the power of market participants, is shaped by law and legal institutions:

> Labor markets, in short, are politically structured institutions in which the relative power of the participants is shaped by legal institutions that grant or deny certain baskets of rights to employers and employees. And this, in turn, generates an ongoing process of political contestation to shape and reshape these ground rules to improve the relative position of the different actors. Employers often use the rhetoric of "market freedom" to push for policies that strip employees of rights, but this is not disembedding. It is rather an attempt to embed the labor market in political and legal rules that are more favorable to employers.[244]

Block argues that the success of certain institutional participants –i.e., employers over others-employees – in order to alter existing legal institutions in their favor, does not "disembed" the market, *but rather is an instance of how the market is a site of important political and legal contestation.* However, even if this is true, that the market is never truly "disembedded," even when it is embedded in rules that favor employers, there are some arrangements that serve to counter the destructive effects of the market – and thus embed it – better than others. An arrangement that favors employers, even if it is embedded in law and legal institutions, has minimal effect in counteracting the fictitious nature of labor, when it is not accelerating its near demise, by making it possible to pay laborers much above starvation or bare subsistence levels. Therefore, to give meaning to the idea of "embedding," we must measure it not by whether or not it happens through law and legal institutions, but whether it actually makes the "fictitious commodity" more stable, in the concrete sense of ensuring that land – the environment – is not destroyed and that workers have a decent quality of life. Block points out correctly

[244] Fred Block, *Karl Polanyi and the Writing of The Great Transformation*, THEORY & SOCIETY 32, 3 (2003), p. 6. *See generally* Block, *Relational Work*, *supra* note. 98.

that the ability of workers to make their lives more bearable depends on law and legal institutions, but only as a tool towards increasing their bargaining power in an already unequal bargaining situation.

Duncan Kennedy describes two important categories of law effecting the bargaining strength of workers: the first, the rules of torts, contracts, and employment that govern the conduct of parties during the bargaining process such as in the example Block offers, but also a second important category of "rules that structure the alternatives to remaining in the bargaining situation."[245] With regard to the first category, just because the initial grant of property rights determines who gets what, this does not mean that this initial distribution must completely determine the bargaining power of wage laborers, and it is the role of law to act as a source of constant intervention in shifting this balance of power. With regard to Kennedy's second point, even independent of legal intervention, this balance of power can shift depending on one's access to alternatives, which are also structured by law. While Kennedy's point as to the two-fold role of law in structuring the outcomes of bargaining is a radically important one, the examples he offers seem implausible as real alternatives. The examples of alternatives offered by Kennedy are "(1) welfare; (2) criminal activity; (3) independent petty commerce, from the corner store to the street vendor; (4) the status of franchisee; and (5) independent professional activity, from the therapist, to the real estate broker working on commission, to the "consultant"; and (6) "providing household services in a marriage, or equivalent form, in exchange for support."[246]

While the insight that law has the ability to structure a real alternative to the bargaining situation is crucial, Kennedy makes two mistakes in his selection of concrete examples: First, his analysis is made completely in the abstract, assuming

[245] Kennedy, *Stakes of Law*, *supra* note 228 at 330.
[246] Kennedy, *Stakes of Law*, *supra* note 228 at 339.

that all of the options he offers are available to all workers without regard to their historical place, time, and class position. Second, he lacks an important evaluative concept – that of partial decommodification, one that builds on Gosta Esping Andersen's idea of full decommodification, as an alternative that could "enable a person to maintain *access to the means of life* without *complete* reliance on the market." Without the concept of decommodification, Kennedy confuses measures that could reduce the alienating aspects of work with one that actually provides a real alternative. To know what options are available to workers in a given place and time requires a socio historically specific analysis, which analyzes whether or not the options provided could exist as real options. For example, the first, welfare, does not function as a real alternative in the United States, while it may be in Scandinavia. And even in that case, it may have functioned as a real alternative in Scandinavia in the 1970s during the social democratic welfare state but much less so today in the neoliberal state as analyzed in the first Chapter of this series. However, if one wanted to generalize beyond time and place, the most decisive factor of what options are available outside of a bargaining situation for workers would be class, however this requires an understanding of class different from the one offered thus far by Brenner and Wood or the Legal Realists. It would require a concept of class within the "non-owners"-of both the working and middle class. Useful concepts in differentiating the working class forged by Marxist and Marxian scholars are the distinctions between mental or manual laborers, the professional managerial class versus the classic working class of the factories and today the service industry versus the petty bourgeoisie of small business owners.[247] However, while such generalizations can be made, to understand to what extent class mobility within those divisions is possible and therefore what options are available requires

[247] SEE PAT WALKER, ED., BETWEEN LABOR AND CAPITAL (1979); GEORGE KONRAD & IVAN SZELENYI, INTELLECTUALS ON THE ROAD TO CLASS POWER (1979).

a socio-historical analysis. Mobility between factory work and managerial work may have been more fluid in the 1950s and 1960s, when the transition did not necessarily require a college degree, but today a college degree is a basic requirement for most managerial work. Without an analysis of class, it is impossible to know whether the options offered of: "(3) independent petty commerce, from the corner store to the street vendor; (4) the status of franchisee; and (5) independent professional activity, from the therapist, to the real estate broker working on commission, to the 'consultant,'" are really meaningfully available.

With regard to the second critique: the more meaningful of these "alternatives," are not merely those that reduce the "alienating" aspect of wage labor[248] (which I think all of these examples might do) but actually provides for at least the partial decommodification of labor or in Kennedy's words real "self sufficiency," which is never conceptually clarified, but could, I argue, be articulated as decommodification or partial decommodification. What Kennedy does not seem to realize is that while creating access to less alienating work might improve the lives of workers, it may not actually have an effect on their bargaining power unless access to those alternatives is a) guaranteed and b) covers the basic costs of consumption of the laborer and his/her dependents. A "true alternative" must be defined its ability to actually decrease the pressure on the worker to accept an undesirable labor arrangement. Only two of the alternatives (1) welfare & (6) marriage actually seem capable of meeting that criteria, and of course with the rate of divorce increasing each year in both developed and developing world nations

[248] Four key dimensions of "unalienated" work are: (a) decent and stable income; (b) intrinsically engaging, in the sense of involving challenging tasks that require exercise of one's creative and cognitive puzzle/problem-solving capacities; (c) meaningfully oriented, toward making valuable social contributions (as determined by a mix of personal, peer and societal judgments); (d) relatively autonomous, in the sense of enjoying a fair degree of self-management and discretion in one's daily work activities, and, ideally, collaborative. *See* BERTELL OLLMAN, ALIENATION (1976); Jon Elster, *Self-Realization in Work and Politics*, SOCIAL PHILOSOPHY 3, 97 (1986).

(6) looks less guaranteed then it may have been historically. Kennedy is correct in locating an important lever on bargaining power in the alternatives available to workers, however he fails to consider seriously the criteria for a real alternative. A real alternative would require at least the partial decommodification of labor, which requires that laborers either have guaranteed access to a state welfare system that guarantees high levels of decommodification, as in the old social democratic welfare states of Scandinavia, or something like a universal basic income.[249] However both options rely on the presence of strong welfare institutions, which may not be a viable option in many countries where the welfare state is being undermined or never existed in the first place.

One possible alternative to this approach is instead of proposing to challenge the class structure and bargaining power created by institution of private property through external mechanisms of reducing these negative effects, why not do so directly through property law itself? Could we use Hohfeld's disaggregation of property to reconfigure it as a legal institution with the purpose of decommodifying access to resources? Could we imagine creating a "real alternative" to the unequal and skewed bargaining situation of workers by altering the very structure of private property? Could we imagine using law in way, more than merely shaping the behavior of actors during the bargaining process, actually provides them with an alternative to the market but by a means other than welfare? What if workers were permitted take a share of a small amount of the surplus in

[249] The Universal Basic Income is becoming a serious debate again in both Europe and the United States. In 2016 Switzerland had a referendum on the Universal Basic Income, although it did not pass 23% of the population voted in favor. http://www.bbc.com/news/world-europe-36454060 (last visited January 5th, 2020). Similarly, even in the United States with only minimal means tested income, discussion and even experimentation with a Universal Basic Income is currently taking place as reflected by the platform of Democratic primary candidate Andrew Yang. https://www.yang2020.com/what-is-freedom-dividend-faq/ (last visited January 5th, 2020). Also Silicon Valley tech startup incubator Y Combinator that launched an experiment with the Universal Basic Income: https://blog.ycombinator.com/moving-forward-on-basic-income/ (last visited January 5th, 2020).

the form of direct food supplements? What if they were allowed a share in the surplus at the point of surplus creation in the firm and not just at the point of tax and transfer through the welfare state?[250] Could we imagine a new type of property institution capable of altering the bargaining relationship in favor of workers and improving the distribution of wealth at the very point of surplus creation? Similarly, beyond decommodifying the surplus within the firm, what about decommodifying access to fundamental resources like food, water, and housing by undoing the absolute ownership entitlements of property in order to create greater access to use values rather than restricted access to exchange values? This is the topic which will be explored in Chapters 5 & 6 and Part III on the decommodification of housing.

3.10 Conclusion and Towards Designing an Alternative

I argue in this Chapter, using the work of Brenner, that private property, emerged out of England's agrarian revolution in the 1600s, as an institution for facilitating the aristocracy's extraction of a surplus absent direction coercion, and that specifically this was facilitated through the legal institution of a lease. Furthermore, I argue that property plays an important distributive function as we can see from the work of Hale, Cohen and Kennedy, completely undermining the idea that distribution is the sole domain of the state and public law or that it is something taken care of automatically through the invisible hand of the market. The private/public critique provides us with a basis for establishing not only the very political nature of property law, but also the importance of property as a legal institution that has real effects in structuring economic and political outcomes.

[250] An example which is very well known in Sweden is that of the Worker's Fund of the Meidner Plan discussed earlier, however the types of commons property institutions that I expect to analyze in the last Chapter of this series will not have such radical transformative potential but rather much more modest forms of redistribution of surplus.

Following from this, I argue that the Realist critique of the private/public distinction in law reveals that private law institutions, specifically property, have the potential to play an extremely important role in the social embedding of the market. I argue this is a fundamental piece of the puzzle missing from both the discussion of Polanyi and Meiksins-Wood on the institutional character of the market and the social relations central to its dynamics. While Meiksins-Wood showed us how capitalism was a dramatic change in social relations, she completely ignored the important role of property law, in setting the background conditions for the class structure she analyzes. Wage labor and the creation of a class of wage laborers, a competitive market for productive land and the creation of a class of rentiers, the ability of those rentiers to buy, own and invest in new technologies to increase productivity, and to own those means of production as well as the products, as shown by the earlier discussion of Hale and Cohen, is structured and facilitated by the laws of property. Like Hale and Cohen I argue that property law determines the initial grant of property rights, which sets the conditions for a specific class structure, to the rights to accumulate wealth and extract a surplus, which have long-term distributional consequences such as affecting the bargaining power of class members. Furthermore, I argue that in order to address these negative effects produced by the capitalist market, it is necessary not only to counteract them through their welfare and finance regulation but through regulation and redesign of the institution of private property. With the deconstruction of rights and the disaggregation of property, Hohfeld made the dynamics of property not only conceptually more clear but also rendered them as tools for construction, not just in the critical deconstructive sense of showing them to be something without meaning like his predecessors.[251] Hohfeld's brilliant

[251] *I.e.* Jeremy Bentham's critique of the concept of "right" as empty "nonsense on stilts" without the positive state supporting entitlements based on utilitarianism. *See* JEREMY BENTHAM, ANARCHICAL FALLACIES; AN EXAMINATION OF THE DECLARATION OF RIGHTS ISSUED DURING

insights are crucial to understanding property law as a social relation and the specific set of dynamics of social relations at work. I demonstrate how is his view, together with Syed's "fundamental building blocks" provides the foundation for constructing counter institutions aimed at decommodification and ecological integrity. This was work that I already began in my article *"The Architecture of Commons Legal Institutions,"* where I started the work of deconstructing the classic property trilogy of private, commons/group and public property and the creation of a commons legal institution. In that work I argued that through deconstructing the property trilogy as a precise set of entitlements associated with each type of property institution it becomes possible to evaluate their effects in supporting or counteracting the capitalist market, and to what extent they commodify or decommodify access to resources. However this cannot be done without approaching law, as purposes, values and legal institutions, which requires: (1) purpose and value-driven research into which legal institutions, and in particular, *disaggregated entitlements* of property regimes, best support the purposes of *decommodification & democratization* in pursuit of shared values-*the common good*- across communities engaged in commons governance of resources. This will be explored in the following section Part II "Towards Commons as Legal Institutional Architecture." The ultimate goal of this section is to present different models of how to reconfigure private property into new types of property institutions, what I call a "commons property institution" in the decommodification of housing developed in Chapters 5, 6, and Part III.

THE FRENCH REVOLUTION [1796].
https://is.muni.cz/el/1423/jaro2016/POL478/um/Bentham_-_Anarchical_fallacies.pdf

PART II Towards Commons as Legal Institutional Architecture

Chapter 4 What is Socio-legal Analysis For? The Effect of Theory and Purpose on the Analysis of Law, Fact and Value

4.1 Introduction

Law as a discipline is resistant, if not hostile, to integrating social theory (of the type offered in the previous Chapters) into legal analysis due to its default practice, if not outright commitment, to legal formalism. Though most legal scholars acknowledge that the study of law must transcend formalism, or what is referred to in the Nordic context as "legal dogmatics," the continuing dominance of the formalist doctrinal approach is striking in a supposedly post-realist and post-modern period of legal scholarship.[252] What I refer to as the "formalist approach" is the analysis of law as a closed system, disconnected from the influence of politics and societal problems, and therefore not in need of a theory of the relationship between law and social change. While the formalist approach is, in theory, rejected by most contemporary schools of legal thought, either in part or in whole, what is surprising is that, in practice, it is still very widespread as the dominant mode of analysis in legal scholarship. This tendency is especially evident in the private law tradition, where private law scholars discuss the importance of inclusion of topics related to *socio-legal theory*[253] – theories that elaborate the relationship between law and society and their relevance for positive legal doctrinal research – however when it comes to the actual work of "serious rigorous scholarship," analysis and

252 John Singer, *Legal Realism Now*, CALIFORNIA LAW REVIEW 76, 465-544 (1988). Singer explains how despite the contributions of Realism all the major contemporary traditions: Legal Process & Reasoned Elaboration Schools (Hart & Sacks), Rights Schools (Dworkin) Law and Economics (Posner) continue to be dominated by formalism. Similarly, Brian Z. Tamanaha says the same of post-modern and socio-legal schools.

253 BRIAN Z. TAMANAHA, REALISTIC SOCIO-LEGAL THEORY (1997), p.7. Tamanaha defines socio-legal theories as "theoretically informed social science applied to law theoretically informed." I take this to mean what I say here, which is a social science which is theoretically informed by a theory regarding the relationship between law and society, which is then in turn applied to law, which is itself not purely "doctrinal" but theoretically informed by the purpose through which to analyze doctrine.

discussion rather than being aimed at contextualizing doctrinal research via specific purposes and aims offered by socio-legal theories, tends to remain limited to the level of legal doctrine and deriving their purposes from within law and even more narrowly within legal doctrine.[254]

This is even more true in the field of property law where most scholarship consists of "neutral" descriptions of doctrine, often with theoretical frameworks and assumptions completely missing, and often, though less so, the issue of values completely ignored, or only considered in a separate, and marginal policy analysis divorced from the doctrinal analysis. When scholars in private law do engage in a theoretical analysis of doctrine it is almost uniformly to adopt a Law and Economics (LE) analysis, even if rarely referred to explicitly with that label: "efficiency" analysis has become so ubiquitous as the default mode of analysis that legal scholars typically feel no need even to identify (much less justify) it as a particular school of thought. LE analysis is often performed on the assumption that its basic premises are a given and therefore unnecessary to articulate, or, possibly, as a result of a lack of understanding on the part of the scholar adopting such an analysis that there are a set of specific premises informing, and problems facing, the neoclassical economic theory underlying LE analysis.

While these two traditions – Formalism and LE – are in an important sense on the opposite poles of approaches,[255] they nevertheless have something notable in common: an aversion to being explicit about their underlying assumptions regarding law's relationship to society and social change, and more controversially,

254 Illustrative works in this vein are those marching under the banner of "the new private law theory." For a representative sample, see the articles collected in the *Symposium on the New Private Law Theory*, Harvard Law Review 125, 7 (2012).

255 Formalism or doctrinalist approaches being strongly internalist, viewing law as a closed system with the purpose of jurists being to systematize the legal sources. While LE being externalist, viewing law as an instrument of social policy, to achieve efficiency.

to social order.[256] The consideration of something called "social order," as a "deeper structure of society," is baffling from the vantage point of law, if not completely blasphemous: after all, what deeper ordering of society could there be beyond that structured by law? And yet it is invoked all the time by LE analysis, at least if one takes seriously its basis of *Methodological Individualism* (MI) from which the entire tradition departs. By MI, I mean the Hobbes/Locke/Smith view of human nature and social order, which was briefly elaborated in Chapter 2. In a nutshell, the key components of this view, which provides the theoretical foundation for both classical and neoclassical economics, may be summarized as follows: the unit of analysis is a pre-social individual, having a fixed human nature consisting (and this is where some variation enters within the different lines of analysis feeding into this tradition) of insatiable self-regarding appetites that tend to devolve into a "war of all against all" (Hobbes), or a natural inclination to "truck, barter and exchange" for material gain, an inclination giving spontaneous rise to markets (Smith), and/or "right reason" that recognizes and requires the defense of certain pre-political natural rights of the individual, to "life, liberty, and property" (Locke). On the composite analysis emerging from this tradition, social order is not created by law, but by the market, operating, not on human-made, historically-specific social relations, but instead on the laws of nature. I will bracket for now the larger question of examining the merits of this (or other) views of social order and its sources, and simply note the paradox involved within those strands of legal scholarship that both insist that law is where all the action takes place, with regard to questions of social order, and yet embrace the LE approach, which is based on quite the opposite view. By contrast, the Formalist view, is in a way less

[256] By "social order," I do not mean "social control," which is the general way in which "social order" is discussed within socio-legal studies. For an example of social order as social control See J.M. Conley and W.O'Barr, *Legal Anthropology Comes Home: A Brief Study of the Ethnographic Study of Law*, LOYOLA UNIVERSITY OF LOS ANGELES LAW REVIEW 27, 41-64 (1993).

schizophrenic in rejecting the relationship between law and social order, because – whether out of an unconscious default orientation or from a more sophisticated, conscious ideological position – it makes no claims about law's effects and interaction with social order, one way or another.[257] By the same token, however, it suffers from a completely different problem: although its implicit avoidance of taking any position on the relation between law and society allows it to retain some internal coherence, it stands exposed on the completely question-begging character of that premise – why study law if it has no relation to the surrounding society? In a similar position are those scholars who adopt LE and fully stand behind its underling approach to law (which as just mentioned is not the case for most scholars adopting LE analysis), of subjecting it to a particular theory of social order (MI-based on neoclassical economics): their vulnerability like the formalist does not lie in the inconsistency of schizophrenic premises, but in the untenability of the consistent premise they adopt. Such legal scholars, however, are far and few between, as most oscillate between both modes of analysis – avoidance of, yet reliance on, a theory of social order outside law – as if one is consistent with the other. The upshot is a failure to discuss the problematic assumptions underlying *either* mode, due to the scholar being unaware of these assumptions or because they

257 This also applies to more sophisticated, neo-formalist views of legal reasoning, such as the accounts of "reasoned elaboration" advanced by the "legal process" and "rights" schools of thought. *See* HENRY HART & ALBERT SACKS, THE LEGAL PROCESS (EDS. WILLIAM ESKRIDGE & PHILIP FRICKEY [1958] 1994); Ronald Dworkin, *Hard Cases*, HARV. L. REV. 88, 1057 (1975); and RONALD DWORKIN, LAW'S EMPIRE (1986). The nub of these views, for present purposes, is their process-based articulation of an institutional division of labor between legislatures and courts, with the former taking up substantive questions of "social policy" while the latter are restricted to questions of neutral "principle" or individual "rights." What makes such views "*neo*-formalist," on the account of formalism advanced here, is that, on the one hand, they go beyond classical formalism's restriction of "legal" materials to those of black-letter doctrine and background concepts, by supplementing these with larger background "principles" deemed to be latent, if not explicitly articulated, in such materials; while, on the other hand, they retain classical formalism's avoidance of any exploration of the relation between such "legal" materials and societal effects and purposes – indeed, they reinforce that implicit avoidance with their explicit insistence that properly "legal" reasoning eschews taking into consideration any concerns of "social policy."

are avoided strategically. This critical diagnosis of alternative positions will be pursued later in this chapter, however, it is not this chapter's primary aim.

This chapter, instead, attempts to develop the first modest step towards contributing to addressing the problem of how to truly go beyond the dominance of the Formalist and Law and Economic approaches to legal scholarship and what I will refer to specifically as developing a "socio-legal analysis." Socio-legal analysis is used to refer to what "lawyer do" while socio-legal studies and scholarship is the realm of scholars. I argue that the only plausible way forward is through: 1) bringing together the "heavens" of theory and with "earthly" doctrinal research by connecting socio-legal theory (and social theory as will be explained later) to legal doctrinal analysis, and 2) offering greater theoretical transparency, or "naming and taming" of what I will argue are the fundamental elements of socio-legal analysis in order to make the work of scholars in different socio-legal disciplines transparent to one another in order to build upon one another's work. Only through theoretical transparency can the premises and assumptions of these approaches be attacked and dissolved, clearing the way for the possibility of other alternative approaches. However, in order to do so, a commitment must be nurtured not only to critically dissolve problematic foundations in an anti-foundational stance, but also to offer constructive elements common to all socio-legal analysis not for the purpose of establishing a grand theory but to pragmatically allow for clear communication and building from and with one another's work. I claim, based on the work of diverse legal theorists of the schools of Realism and Post-realism, that the interconnection between five elements are necessary to socio-legal analysis: *Theory, Purpose, Values, Norm* and *Facts*. While the role of the latter four have come to be more generally accepted in the mainstream of socio-legal analysis due in large part to Legal Realism, as will be explored in this chapter, the role of *Theory* has remained less clear. And as a result, I claim, so have the

purpose, contents, and methods of socio-legal analysis. *Theory* operates at two distinct levels: unconscious *social theory* and conscious, though often unarticulated, *socio-legal theory*. By *socio-legal theory*, I mean theories which elaborate the relationship between law and society, and by *social theory, theories on the structure and sources of social order, the role of individual agency, and the dynamics of change.* The dominant mode of social theory in legal scholarship, though often quite unconscious and unidentified, is MI, as I have argued above. The role of social theory and the concept of social relations has rarely if ever been explicitly recognized in law as a field of study, which I argue has resulted in a lack of a clear orienting purposes for socio-legal analysis more generally. Toward fostering what kind of social relations and dynamics should socio-legal analysis be aimed? If the instrumentalization of law towards social purpose is rejected, as has been the case with post-realist schools in their internalist adoption of a formalist socio-legal theory, then *what is socio-legal analysis for today*?[258]

I argue that law benefits from an explicit discussion of theory both internally, in terms of *legal theories* (background concepts and doctrine), and externally, in the sense of, *socio-legal theories about the relationship of law and society*, and finally, at the level of *social theory*, which frames both, to encourage not *theoretical modification*, as in other disciplines, but rather *theoretical transparency*. Why? Because while law is not in the enterprise of objective truths but an intrinsically normatively driven enterprise, it is inevitably *theory laden*. This theory laden-ness invisibly directs our subject matter, our methods of reasoning, and ultimately how we view *what socio-legal analysis is for*. As I will attempt to demonstrate, the "correctness" of analysis in law is buttressed not only by the specific *legal theory* invoked, but also by an underlying *socio-legal theory* about the relationship of law to society, as well as a

[258] This is a play on Roberto Unger's question "what should legal analysis become?" ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? (1996).

particular *social theory*, or view of social order, of *its structure and sources*, *the role of individual agency, and the dynamics of change.*

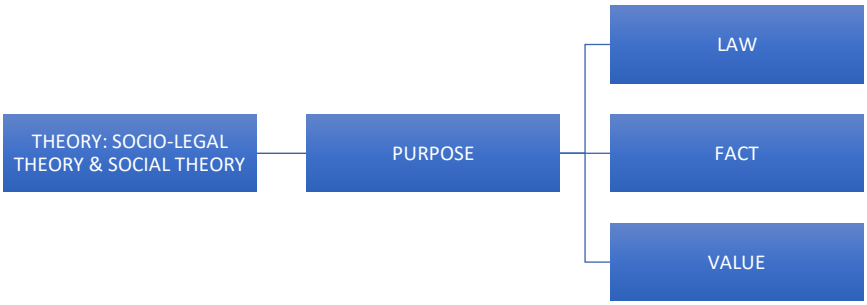


Figure 1 BAILEY Theory & Purpose Driven Approach

Allow me to illustrate my point. I argue that the "theory of contracts," a *legal theory*, is buttressed by the *socio-legal theory* of *formalism,* which is further framed by *the social theory of MI*. Let us take the first layer, of the *socio-legal theory of formalism.* A socio-legal analysis is "correct" not only because a particular theory of contracts has been demonstrated to be "correct" through the interplay of deduction and induction with the facts of a case, but also because it assumes a theory of law's relationship to society or rather, in the case of formalism, the explicit *lack* of a relationship to society. Formalism assumes that law is a closed system that is capable of providing correct answers to social problems through the systematization of the legal sources. This is a *socio-legal theory – the assumed relationship of law to society* – which is rarely articulated as such in most doctrinal analysis. And yet, while it perhaps makes sense for judges and lawyers not to acknowledge the role of this *socio-legal theory* in legal argument and decision-making, given the

important roles of ideological legitimation and providing certainty, it must be the case that a legal scholar, whose role is to study the legal system external to the process of adjudication, needs acknowledge the overwhelming role of the socio-legal theory of formalism in determining the way in which a social problem is analyzed, not only for her own sake in clarifying the approach taken (and thus ensuring the consistency and coherence of the analysis), but also for others to build on and extend this work.

This was apparent to the schools of Realism, which named this covert operation of Formalism as ideology, and insisted that law's relationship to society be made explicit.[259] With the incorporation of pragmatism and the social sciences within law, as will be explained in more detail below, the difficult relationship between the "is/ought" of law became a full-blown crisis, giving birth to the problem of the role of *Values* in socio-legal analysis, which as I will explain, created the need for the inclusion of both *Purpose* and *Theory* in socio-legal analysis. The American Legal Realist Felix Cohen came closest to articulating the role of *Values* and *Purpose*, but he did not, I argue, go far enough on account of a lack of development of the role of *Theory*. I argue in this chapter that this confusion stems from his lack of clarity between *Theory*, *Purpose*, and *Values*, conflating all three under the latter rubric, and thereby failing to distinguish between thin epistemological purposes – *Theory* – and thick societally defined normative purposes –*Values* – and the unique role of law concerning each.

Realists argued for the importance of looking to law's effects, or real-world consequences, in defining the "is" of law, as well as its "ought"- the need for law

[259] The pioneering works in this regard were Oliver Wendell Holmes, *The Path of the Law*, HARV. L. REV. 10 /457 (1897); Roscoe Pound, *Liberty of Contract*, YALE L. J. 18, 453 (1909); *and* Felix Cohen, *Transcendental Nonsense and the Functional Approach*, COLUMBIA LAW REVIEW 35, 809 (1935). *See also* Karl Llewellyn, *The Leeways of Precedent* in KARL LLEWELLYN, THE BRAMBLE BUSH (1930).

to be altered openly to reflect a changing social reality.[260] As I will explore in this chapter, the Realist description of reality was purposive and pragmatic: its key criteria was neither "true/false" (science) nor "right/wrong" (classical socio-legal analysis), but "useful/useless."[261] However, although Realism marked a monumental advance forward with its emphases on the "purpose" and "fact" poles of socio-legal analysis, it still did not go far enough: having articulated a new *socio-legal theory*, or view of law's relation to societal reality, what the Realists fail to do is take the final step of then articulating the *social theory* underlying their view. How can one evaluate law in relation to social purposes, so as to provide an alternate guiding orientation for law, if one has no idea of what is currently being assumed by the legal system about *the structure and sources of social order, the role of individual agency, and the dynamics for change? Without such an analysis, it is wholly unclear what type of social change a socio-legal theory is aiming for.* Without an explicit view of the *social theory* that provides a framework for its assumptions, an evaluative measure like the Realists' "in the public interest" will collapse into a contest of arbitrary values, either those derived internally from the legal system, which thus reinforce the default *social theory* assumed by mainstream liberal approaches, or as values unanchored in any theory of social reality and how social reality can be transformed, which, being ungrounded in any plausible account of their supporting interests and effects, ineffectively free-float in mid-air.[262]

[260] The pioneering works here were OLIVER WENDELL HOLMES, THE COMMON LAW (1881): "The life of the law has not been logic; it has been experience…; Louis Brandeis, Brief for Defendant in *Mueller v. Oregon* 208 US 412 (1908); Roscoe Pound, *Law in Books and Law in Action*, AMER. L. REV. 44, 412 (1910). *See generally* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: THE DECLINE OF LEGAL ORTHODOXY, (1992) p. 187-189.

[261] F. Cohen, *supra* note 107.

[262] Alternatively, the lack of a proper social-theoretical grounding for one's theory of law may result in dropping a social approach altogether. The psychological turn within Realism marked by the work of Jerome Frank provides an apt illustration (and warning). JEROME FRANK, LAW AND THE MODERN MIND (1930).

The *social theory* assumed by mainstream liberalism, including the Realists, is based on *Methodological Individualism (MI)*. Without naming this *social theory* on which the current order depends, even the Realists, who sought to challenge the core tenets of this order (namely the sanctity of private property), were unable to make major headway in altering the social relations underlying this order (i.e., in the system of private property). Instead Realism remained trapped in reforming doctrine at the margins, towards less abstract and more downward-distributing decision making, but without ever attacking the sources of systemic injustice and inequality. By contrast, the Scandinavian Legal Realists (SLR), while similarly avoiding social theory, and thereby a systemic critique, found themselves in a moment of history in which the politics of their time and place permitted the pursuit the very type of systemic critique and alternative vision made possible by an alternative social theory influenced by Marxism. However, unfortunately the articulation of the influence of this *social theory* in *legal theory* remained completely missing remained entirely missing from SLR socio-legal analysis though reaching in that direction for example in Lundstedt's "social welfare" criterion.

The problem of the inclusion of *socio-legal theory* and *social theory* even persists, oddly enough, in the "Law and Society "and "socio-legal" schools. One would assume that the very purpose of these schools would be to attempt to redress the missing articulation of the relationship between law and society, i.e., a *socio-legal theory,* and the influence on law of the social order, requiring a *social theory.* In sociology proper, students are given a core canon of social theory (for example Marx, Weber, Talcott Parsons) and positive social science theory (Comte and Durkheim), theorists that offer a *framework* – what we will call *a theory of structure* – for theorizing social order, its dynamics, and its conditions of transformation. A *theory of structure* is indispensable in sociology as it determines not only the interesting questions to ask in the field, but also the kind of analysis that follows.

Sociology students are also introduced to a tool-kit of methods related to the positive or empirical social scientific analysis, both qualitative and quantitative. In law, however, an idea of a "canon" of *socio-legal theories* is absent and depends entirely on the particular tradition: the US socio-legal schools being entirely distinct and far more leftist from the Continental. Some emphasize formalism, others realism/functionalism, or rights, or "law and economics," or critical legal studies, and others still some alternative view altogether, via the "Law and" approach of external disciplines like sociology or anthropology. Since there is no consensus on core theories from which the "socio-legal discipline" departs, there is instead a push to insist upon rigor in method, by importing the positive social science methodology as a substitute for common standards of analysis in legal scholarship. These, however, are often completely divorced from the substance of the theories and the corresponding assumptions behind the method.[263] The problem, it seems, is that the "theory" side of these schools is divorced from its "empirical" side.[264] Either one studies theories about law and society, the "big questions" about law's relationship to social order, or one studies the effects of current law on society, without, what I assert in this chapter, a crucial bridge: *the effects of social order – the deeper structures of society – on the study of law, the role of law in reinforcing that structure, and the strategic levers of the legal system, in its detail of specific doctrines, for change of that structure towards specific social purposes.* Is it possible to both act as a social scientist and a legal

263 That being said, however, it remains that the sociological and socio-legal schools of law are likely our best way forward in that they are at least consciously attempting to address the issues of the relationship of law to society. The present critique is that they currently fail to make good on that promise by not examining the connection between substantive social theories and the empirical methods used.

264 Tamanaha, REALISTIC SOCIO-LEGAL THEORY, *supra* note 254 at p.14-24. Tamanaha analyzes the three problems leveled at socio-legal studies, one of them being the way that the "theory" schools of socio-legal studies are often divorced from empirical social science schools. A further related problem he names is the "questionable value of the work produced" which refers to the problem of the lack of instrumental work aimed at usefully answering pertinent questions for lawyers and jurist (p.15).

scholar? Is it possible to have a common method in law that doesn't depend on importing in external criteria from the social sciences, while at the same time demanding scientific rigor in discussing theories about social order within law? Part of the answer lies in the difficulty of the concept of *structure* and the relationship between *theory*, *structure, and law*. This is what I hope to shed some light on in this chapter.

Finally, it is important to recognize the paramount efforts of the "Critical Legal Studies" movement (CLS) and related schools, to explicitly address issues of *socio-legal theory* in law. CLS made important contributions towards naming the liberal ideology inherent in the current legal system (and thus edging towards *social theory)*, as well as in advocating concrete transformative policies – here I am thinking of the Feminist and Critical Race veins – to demand that the values of liberalism be taken at their word and lived up to in practice, so as to guarantee rights of formal liberty, equality, and opportunity through the legal system.[265] However, when it comes to challenging the major substantive source of economic inequality – the social relations structured by the capitalist market – and offering solutions to legal problems in view of that economic system – by engaging with the minutiae of related legal doctrinal details that constitute the market – CLS has been largely ineffective, with its deconstructive analysis offering few meaningful

[265] Some key works by CLS, feminist and critical race scholars criticizing the role of legal liberalism in legitimating and reinforcing inequitable social relations include: ROBERTO UNGER, KNOWLEDGE AND POLITICS (1975); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, HARV. L. REV. 89, 1685 (1976); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); Mark Tushnet, *An Essay on Rights* TEXAS L. REV 62, 1363 (1984); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); Kimberley W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, HARV. L. REV. 101, 1331 (1988); CATHERINE MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE (1989). For works by scholars in this vein aimed at re-appropriating liberal rights for progressive reform, see, e.g., CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); PATRICIA WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1992); Morton Horwitz, *Rights*, HARV. C.R.-C.L. L. REV. 23, 93 (1988). *See generally* DAVID KAIRYS, ED., THE POLITICS OF LAW (1998 3rd ed.).

points of departure towards a constructive alternative. This need for construction is acknowledged explicitly within the scholars of these Critical schools,[266] but the questions of *what kind of construction and towards what end* remains to be answered. The very idea of orienting socio-legal analysis towards specific purposes outside of law – to address specific societal problems in view of explicit social purposes – has faded from view, has become passé, in the search for the postmodern/post-liberal possibilities of the law. However, I argue, without a constructive approach to socio-legal analysis driven by specific articulable social purposes – grounded in a transparent *social theory* and related to *legal theories* through the bridge of a *socio-legal theory* – the dominant approaches will not really be successfully challenged. On the one hand, the value of "efficiency" will continue to reign, as the most scientific and authoritative guide for socio-legal analysis, while on the other, the prevalence of formalism will persist, either in original or more sophisticated, contemporary "neo-" versions such as the "reasoned elaboration" schools of "legal process" or "rights."[267]

In part, as a result of the fading trend of Realist purposive and value-driven modes of socio-legal analysis, for example in its leftist heirs like CLS, there is little fruitful discussion of what role *social theory* could or should play in law. Therefore, even to make social theory relevant to law for CLS, one must push to reverse that trend and to demonstrate social theories utility in diagnosing a problem for which law is uniquely positioned as a potent handmaiden to redress. There is a crucial need within CLS for an alternative *social theory* to *MI*, which is assumed by all mainstream schools of socio-legal theory, whether in the form of Legal Formalism, LE, or "reasoned elaboration" approaches. Without an analysis of the source of the problem, it will never be clear what leftist legal intervention is aiming towards,

266 Unger, *The Critical Legal Studies Movement*, *supra* note. 239.
267 *See supra* note. 258.

as well as what the most strategically promising points of departure and transformation could be. Is the aim a market-friendly but more downward-distributing capitalism? Is it welfare-state or social democratic redistribution? Or something else? For a leftist oriented project in law, the articulation of that "something else" is crucial, and the first step towards that end begins with diagnosing the problem. Legal formalism as a result of its (implicit) underlying social theory of MI, assumes and upholds a strong division between private law and public law, between private ordering where the individual with his natural rights reigns versus the realm of the sovereign or legitimate public intervention. Law and Economics similarly assumes MI, however differently from formalism, because unlike formalism, LE operates on the very idea that a social architecture is possible. For LE, the purpose of law is to make society more efficient (increase wealth, principally by reducing transaction costs, or barriers to private ordering via the market) but it also assumes that the best mediator for that social design is the market – operating according to natural principles of pre-social individuals, rather than humans embedded in historically specific social relations capable of institutional transformation through law and politics.[268] The explanation of this

[268] The assumption of an MI social theory, by way of neoclassical economic premises, is common to all three of the main variants of the LE approach – those rooted, respectively, in the works of Ronald Coase, Guido Calabresi and Richard Posner. *See* Ronald Coase, *The Problem of Social Cost*, *supra* note. 159; GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970); RICHARD POSNER, ECONOMIC ANALYSIS OF LAW (1975 1st ed.). What distinguishes these variants are not either of their premises (a) of MI, with its default view of social order as achieved by private individuals pursuing their presocial preferences through market transactions; or (b) that the aim of law is to pursue efficiency in its interaction with such private market ordering. These premises are shared across the variants. What primarily distinguishes the variants is: (a) first, whether, in the face of market failures, law should intervene substantively and seek to achieve efficiency directly, by "mimicking" the market via the adoption by legal decision-makers of the efficient solution (the view traceable to Calabresi and Posner), or only intervene procedurally, and seek to achieve efficiency indirectly, by "facilitating" the market through decisions aimed at lowering barriers to transacting for private parties (the view traceable to Coase); and (b) second, whether efficiency is the *sole* aim (Coase and Posner), or only the primary aim, one that may sometimes be supplemented, or perhaps even constrained, by "distributive" or "other justice" considerations left unspecified (Calabresi).

alternative social theory is developed in Chapter 1 on the "The Social Institutional Character of the Market," so I will not elaborate that *social theory* further here. Instead, one purpose of this chapter, in addition to "naming and taming" the elements of socio-legal analysis, is to explore how something called *social theory,*[269] of the type offered in that chapter, plays an important role in the selection of one's *socio-legal theory* as well as in influencing how specific *legal theory* and socio-legal analysis is approached.

Returning to "naming and taming," an important step towards bringing these three worlds of legal scholarship together – unscientific and non-theoretical formalism/neo-formalism, "scientific" but non-theoretical social science, and theoretical but non-doctrinal and unscientific critical theory – is to build transparency and consensus about what is involved in socio-socio-legal analysis and to highlight the important role of *Theory*, separated into *socio-legal theory* and *social theory*, in relation to the elements added by Realism, of *Value* and *Purpose*. What I call the "elements" of socio-legal analysis will be explored through, as well as drawn from, the work of five critical schools of *socio-legal theory*: American Legal Realism via Purpose (F. Cohen), American Legal Realism via Social Sciences (Llwellyn & Pound), the Gothenburg School of Scandinavian Legal Realism (Martinson), Critical Legal Studies (Unger), and Alternative Legal Dogmatics (Wilhelmsson). These schools have each made distinctive contributions toward re-orienting socio-legal analysis beyond formalism, with their views of law as the interrelation between *Norm (Law),*[270] *Fact and Value* (Llwellyn, Pound, &

[269] The importance of *social theory* is completely below the radar of most legal scholars with one major exception, Roberto Mangabeira Unger, whose work is engaged with in detail here.

[270] Throughout this work I oscillate between the use of "law" and "norm" to refer to reference to "rules and reasons," which can either be formal and written (concrete legal doctrinal materials) or informal and unwritten (custom). I use both not to make a distinction between "norms," which is generally used to describe informal and unwritten law, and law (often understood as something more formal), but simply because different legal systems/nations use one or the other. The civil law tradition using more often "norm" and the Anglo-legal tradition more often using the word

Martinson), along with the additions of *Purpose* (Cohen), *Social theory* (Unger), and, finally and crucially, all five elements integrated (Willhelmson). I believe the engagement of these schools with the poles of "*theory," "purpose," and "values"* leads us to see the underlying framework within which law and fact are selected, interpreted, and interrelate. I claim that one's *theory* and *purpos*e paradigms determine not only what *values* are relevant for socio-legal analysis, but also the strategic points of intervention in transforming social relations through legal theory and doctrine.[271] I claim that one's method of socio-legal analysis flows directly out of one's theoretical approach, one's *socio-legal theory and social theory*: whether dogmatic, empirical, deconstructive, or constructive (including the comparative versions of each), towards what end – rationalizing, or critical, or transformative – and finally, regarding which evaluative values are invoked.

The purpose of these argument is both specific and general: (1) it is specific to clarifying the theory and method approach of my dissertation, (2) as well as contributing more generally to a new and distinctive theory about socio-legal analysis that adds *Theory* and *Purpose* to the building blocks of *Norm*, *Fact* and *Values,* and (3) finally, it is an argument for the importance of "social theory" for any critical left project of law that has the credibility to challenge and overcome the dominance of mainstream approaches.[272] On the second point, the stakes of my

"law." However, it is important to note "law" can present confusion due to the fact that in the Anglo-tradition it can used to refer both to concrete legal materials, custom, as well as, the entire process or emergent concept represented by the whole triangle of law-fact-value. In this chapter, I make the argument the "LAW" is actually the synthesis of not only law/norm-fact-value but also theory and purpose.

271 I will elaborate this theory in the next chapter devoted to *Method* in relation to my proposal for a transformative left project to design Commons Property Institutions for the decommodification of fundamental resources.

272 It should be clear that the second and third contributions are different. Even if one does not embrace a critical left project or the need for any critical left project, my claim about the importance of the transparency of theory (at the three levels I name), as well as Purpose, Values, Law and Fact for the purpose of advancing legal science still applies, and any critiques of the third claim should be distinct from those of the second.

argument are both critical and constructive: revealing the background theory and purpose of socio-legal analysis has deconstructive effects, of showing the assumptions (and possible weaknesses) of the approach taken, as well as the source of the values implied, but it also has the constructive impact of creating a culture of increased theoretical transparency, which in turn could lead to the development (or at least the reinforcement) of a new type of legal science[273] aimed at the development of new theoretical and purposive paradigms that build upon and from previous ones. I claim a "theory transparent" approach has the potential to re-orient the law as a discipline organized around the development of ideas and pursuit of ideals in relation to societal realities, rather than as merely the ideological cover of an immutable historical deposit of legal and political settlements defended by the need for "neutrality" or "certainty" (in Formalism) and "efficiency" (in LE), or redeemed only by the illusory idea of "objective" descriptions through social science methods. I believe this clarification is important to creating a theoretically rich, rigorous, and "methodological" analysis of law that is theoretically transparent, as well as an openly value and purpose-driven in its analysis of law and fact. I argue that this "theory transparent" approach would allow legal scholars to pursue work openly within very different theory paradigms, while ensuring scientific rigor through a commitment to the articulation of those paradigms in view of five common elements of *theory*, *purpose*, *values*, *norm* and *fact*. With theory divided, again, into *socio-legal theory* and *social theory* and including explicit consideration of their inter-relation and their impact on the analysis of legal theories and doctrines.[274]

[273] Legal Science here is not intended to refer to a "scientific method" but rather the enterprise of studying the law using the method I am proposing here, which acknowledges the problems of "scientific method" as not really a black and white formula at all.

[274] Charles Sanders Peirce argued that, in philosophy as in the sciences, we ought to "trust rather to the multiplicity and variety of its arguments than to the conclusiveness of any one. Its reasoning should not form a chain which is no stronger than its weakest link, but a cable whose

4.2 The Changing Relation of Norm (Law) to Fact from Formalism to Realism: The Emergence of Purpose & the Crisis of Values

Formalism, contrary to how it is commonly discussed amongst scholars, is not, I argue, only a *legal theory* of jurisprudence – i.e., a theory about the appropriate source(s) of law and mode(s) of *legal reasoning* – but rather also a *socio-legal theory*, premised on the *rejection* of an open relationship between law and society, viewing law instead as a self-contained or closed system.[275] Formalism's *socio-legal theory* is that law operates autonomously, as a closed-off system capable of producing objective, because internally-generated, answers to social problems in a theoretical one-way street. Formalism consists of both doctrinalism – the view that legal outcomes are and ought to be a straightforward product of the "black letter law" encased in legal rules – and conceptualism – the view that legal rules are composed not only of black letter doctrines but also more abstract background juridical concepts that operate in a more or less close-knit ensemble, such as the "will" and

fibers may be ever so slender, provided they are sufficiently numerous and intimately connected." Charles Saunders Pierce in COLLECTED PAPERS OF CHARLES SANDERS PEIRCE, 8 VOLS. (CHARLES HARTSHORNE, PAUL WEISS, AND ARTHUR W. BURKS EDS.)(1958) IN VOL 1932-1935: 5.265. Could we see this approach as valuable in law? My arguments here, although building towards a view to how this type of analysis could be used for a critical left project of social transformation through law, is in this chapter focused on clarifying more generally the role of Theory in legal analysis (in distinction from, but conjunction with, Purpose, Law, Fact and Value). I do not deny, however, that the effect of "naming" one's social theory has the function of also creating greater political transparency, which may also have the effect of "taming" covert ideological projects – and thus, to the extent that conservatives and liberals benefit from having the ideological dimensions of their projects hidden under the cover of being "mainstream," this may work to the advantage of critical left scholars.

[275] The more common view of formalism is to think of it simply as a legal theory, with its socio-legal component – i.e., theory about law's relationship to society – often simply conflated with, or subsumed under, its legal theory component, or theory internal to doctrine, such as a "theory of contracts." But it is important to keep both clearly mind, along with the distinction between them. This is not to deny that formalism *is* an approach to legal theory, but only to insist that it *is also* a specific approach to socio-legal theory *and* that it is important not to lose sight of the latter point. Formalism has both legal theories internal to it and it is a socio-legal theory about a particular understanding of law's relationship to society, namely the refusal of a relationship.

consent of the parties in contract or "ownership" and possession in property.[276] As a method of jurisprudence, the instructions of Formalism are clear: systematize the doctrine and concepts according to the hierarchy of legal sources. The sources, however, have proven to present less precise answers than Formalism has supposed. American Legal Realism's devastating critique of Formalism began with the proto-Realist Oliver Wendell Holmes, whose critique was two-fold: first, a critique of the under- and in-determinacy of law and, second, a critique grounded in "purpose" informed by philosophical pragmatism. Regarding the first critique: contrary to the premise of Formalism, often (perhaps typically) legal sources point in different directions – there are often multiple and conflicting legal sources relevant to addressing any one problem (under-determinacy), and secondly even if there is one clear source, there are many possible interpretations (indeterminacy). What this critique revealed is that law (or norms) is both under-determinate and indeterminate. This under- and indeterminate character of law demonstrated that the legal sources cannot alone constitute "law," and so begged the question, "What is law if not the legal sources?" Holmes then used this first critique as an opening or springboard for launching an attack of the entire s*ocio-legal theory of Formalism*: even if the legal sources provided one answer, which they cannot, *why should we accept that answer if it goes against relevant social purposes*?

We shall return below to Holmes's purposive move, which gave birth to the idea of law as social policy. However, for now we need to elaborate a bit further on the question of "What is Law?" As Holmes famously declared in "The Common Law":

> It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic: it

[276] *See* Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 564-65 (1983) (offering, and critiquing, a conception of formalism broadly along these lines); *and* ERNEST WEINRIB, THE IDEA OF PRIVATE LAW (1985), p. 23-28. Weinrib accepting, and defending, a conception of formalism along Unger's lines).

> has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics. In order to know what it is, we must know what it has been, and what it tends to become.[277]

Holmes's view of "What is Law?" was not law (or norms) as "general axioms and deductions" as posited by Formalism, but instead the law as experience, "moral and political theories," "intuitions," and "prejudices." In sum, law could not be essentialized nor remain internal, but rather was defined by its function demonstrated in the experience of judicial decision-making in action in a social and political context. This is also further exemplified by his famous example of the "bad man" who cares not about what the law says in a given state formally in the books, but "does want to know what the Massachusetts or English courts are likely to do in fact."[278] For Holmes, law did not live in formal concepts or doctrine but in the prognosis, the interpretation, the de lege ferenda, of the actual decision that a court would make tomorrow. As is widely recognized, Holmes's influence on American Legal Realism was omnipresent and profound, both wide and deep.[279] Illustrative in this regard is the impact Holmes had on perhaps the central figure of the Realist movement, Karl Llewellyn,[280] both with regard to his

277 HOLMES, COMMON LAW, *supra* note. 260 at 1.
278 Holmes, *Path of the Law*, *supra* note. 261 at 461.
279 *See, e.g.,* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY at 109ff; and Thomas Grey, *Holmes and Legal Pragmatism*, STAN. L. REV. 41 /787(1989).
280 Credit here should also be given to the influence on Llewellyn of Rudolf Von Jhering, Holmes's German "purposive" counterpart, although he was never publicly acknowledged by Llewellyn as a major influence. *See* Shael Herman, *Llewellyn the Civilian: Speculations on the Contribution of Continental Experience to the Uniform Commercial Code*, TUL. L. REV.1125/1162 (1982).

scholarship as well as with regard to his legal policy project of the Uniform Commercial Code. For Llewellyn, socio-legal analysis consisted of two distinctly important steps. *The first, to interpret facts and law (concepts and rules) "functionally," in relation to one's purpose and context of inquiry. The second, to evaluate this understanding according to values, but to keep this separate from the initial inquiry.*[281]

The emphasis on the pole of facts in shaping socio-legal analysis, forged by Holmes and Llewellyn in the American context, had two functions in American Legal Realism. The first was as a kind of safeguard against over-emphasis on the "law" pole of analysis to the point of becoming so abstract as to likely smuggle ideology covertly into socio-legal analysis. The second was to include, as falling within the ambit of relevant legal sources, social science research – i.e., sociological descriptions of law as it "is" manifest in the behavioral patterns of individuals (for example on the living conditions of the plaintiffs as in the famous Brandeis brief). This second function was the result of a different influence than the Purposive/Pragmatic turn in law that influenced Holmes, but rather harkening from the positive social sciences by way of what was known as the "Sociological School" of Law, through the influence and often heated interaction with another proto-Realist, Roscoe Pound.[282] Llwellyn's clearest articulation of the Realist appropriation of sociology in law appears in the strict line he draws between "is" and "ought": one must first sociologically study the "is," the effects of law in the world as a matter of facts, and only after this first step of scientific study, bound

281 Karl Llewellyn, *Some Realism about Realism-Responding to Dean Pound*, HARV. L. REV. 44/1222 (1931). *See also* Karl Llewellyn, *A Realistic Jurisprudence – The Next Step*, COLUM. L. REV. 30/431 (1930).

282 For Pound as proto-Realist, *see* Pound, *Liberty of Contract*, *supra* note. 260; Pound, *Law in Books*, *supra* note. 261 ; and WILLIAM W. FISHER, MORTON J. HORWITZ & THOMAS A. REED, EDS. AMERICAN LEGAL REALISM (1993), p. xiii-xiv, p. 6-7. For the heated exchange between Pound and Llewellyn, *see* Llewellyn, *A Realist Jurisprudence*, *ibid.*; Roscoe Pound, *The Call for a Realistic Jurisprudence*, HARV. L. REV. 44/697 (1930); Llewellyn, *Some Realism about Realism*, *ibid*; Horwitz, *ibid.* at 170-180; and N. E. H. Hull, *Some Realism about the Llewellyn-Pound Exchange over Realism: The Newly Uncovered Private Correspondence, 1927-1931*, WIS. L. REV. 921 (1987).

like Ulysses to the pole of a systematic and empirical inquiry into law's "effects" and "consequences" in the real world, can one approach the second and separate normative step of making a value judgment about what is required to achieve the public interest – what "ethically ought to be."[283] Llwellyn was charged by critics within or close to Realism, such as Lon Fuller, of being naïve in upholding the "strict" line (as discussed below) between the "is" and "ought",[284] as well as outside of Realism, from scholars of more classical formalist schools such as Herman Kantorowicz, Carl Friedrich and Walter Kennedy, of banishing normativity from law and defining law as an "empirical reality."[285] Kenneth Casebeer defends Llwellyn from his critics: "[w]hen Llewellyn insisted the realists held no normative program, he meant not that each realist was unconcerned with morality in law, but that the way of improved law depended on fully knowing the operation of law."[286] As Casebeer points out, Llewellyn and the Realists did not banish morality from law; in fact quite the opposite: they were explicitly carving out a place for *Values* in socio-legal analysis. However, the emergence of the problem of the character, place, and weight of values in socio-legal analysis, and of *which* values ought to be invoked, proved to be a haunting specter over Realism.

283 Llewellyn, *Some Realism about Realism*, *supra* note. 282 at 1236.
284 Lon. L. Fuller, *American Legal Realism*, U. PA. L. REV. 82, 429 (1930), p. 451, 461.
285 Harry Jones defends Llewellyn's approach as being misunderstood by these critics: "[T]he analytic separation that Llewellyn chiefly wished to preserve was less that between the doctrinal Is of analytical jurisprudence and the ethical Ought than it was that between the Is of law in action (what courts are doing in fact) and the normative Ought of the law in the books." Harry W. Jones, *Law and Morality in the Perspective of Legal Realism*, COLUM. L. REV. 61/799 (1961), p. 808. For the criticisms, see Carl Friedrich, *Remarks on Llewellyn's View of Law, Official Behavior, and Political Science*, POL. SCI. Q. 50, 418 (1935), p.428; Walter Kennedy, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 147 (Julius Rosenthal Foundation 1941), p. 157; and Herman Kantorowicz, *Some Rationalism About Realism*, YALE L. J. 43, 1240 (1934), p.1243.
286 Kenneth Casebeer, *Escape from Liberalism: Fact and Value in Karl Llewellyn*, DUKE L. J. 671 (1977), p. 678.

4.3 The Emergence of the Problem of Values: The Is/Ought Distinction in Law

A fundamental problem of the Realist revolution in law was how to accurately and objectively study social reality: i.e., the debate over the possibility of separating the "is" – the description of law (or norms) as it currently exists in society – from the "ought"– the prescription of what the law should be. The status of a separate "is" from an "ought" presented a serious problem for Realism. [287] Some Realists argued that it was not possible to separate the two, that in fact everything is the product of interpretation and social construction, and therefore what there "is" is shaped by one's view of what "ought" to be. Others argued that this was a form of obscurantism: describing law (or norm) "as it is," and prescribing how it should be changed in view of one's values, could and should be entirely distinct steps.[288] The one step refers to one's positive description of the existence of something, the other commands how it should be transformed in the light of one's values – one's sense of justice, one's sense of an ideal democracy, as well as the social purposes and human interests connected to one's vision of the good life.[289] However, the divisibility of those two moves presented a constant unresolved tension, not only

[287] The problem itself, as argued below has lurking within it two quite distinct variants, neither of which is precisely the same as David Hume's famous "is/ought problem" in A TREATISE OF HUMAN NATURE (1739). Available at https://www.gutenberg.org/files/4705/4705-h/4705-h.htm (last visited January 5th, 2020). Hume's position, was that it was impossible to derive what "ought to be" from what "is." This remains distinct from the question of whether description of an "is" itself is always already conditioned by one's sense of "ought" which goes to what I label below as the "actual/ideal" version of the is/ought problem. Hume's problem lies closer to the second version of the issue, discussed below as the "fact/value" problem, concerning whether there is a distinction between things that can be known to be true and things which are merely the personal preferences of individuals. (Regarding this, however, there is a third option pursued below: things that are societally valued, or social preferences.)

[288] A succinct articulation of the two sides may be found in the debate that took place in the wake of Realism between Lon Fuller and Ernest Nagel. *See* Lon Fuller, *Human Purpose and Natural Law*, NATURAL L. F. 3, 68 (1958); Ernest Nagel, *On the Fusion of Fact and Value: A Reply to Professor Fuller*, NATURAL L. F. 3, 77 (1958); and Lon Fuller, *A Rejoinder to Professor Nagel*, NATURAL L. F. 3, 83 (1958).

[289] Alf Ross, *Tu-Tu*, HARV. L. REV. 70, 812 (1957).

because law's positive description involved the lens of a particular rational reconstruction, or an idealized version of law (or norm), which some Realists saw as the heart of the is/ought problem. What was also, and perhaps primarily, the concern for those preoccupied with the "is/ought" problem was the problem of whether covert human purposes and values were being presented as objective. In other words, the gnawing concerns were not only whether it was truly possible to describe, in some objective way based in purely positive description of a reality separate from one's subjective evaluation of said reality, but also what defined "subjective evaluation"? Was the mere invocation of Purpose and Values markers of "subjectivity"?

This is/ought problem had never before arisen in such a stark way in the legal discipline before, I argue as a result of the persistence of Formalism, although it had an older pedigree in disciplines such as philosophy and sociology.[290] Once the "emperor" of Formalism was discovered to be naked man and naked man alone, this led to a crisis: was naked man enough? And what external logic could clothe man again to maintain the appearance of dignity through objectivity? Hidden within the "is/ought" problem were two distinct problems: (1) whether the actual could be positively described, separate from the ideal – the problem of facts; and (2) whether prescription and evaluation could be objective rather than subjective – the problem of values. I argue that part of the confusion and paradox of the "is/ought" is that both were and continue to be discussed interchangeably.

[290] In philosophy, the problem is standardly traced back to "Hume's guillotine" between "is" and "ought" (although, as argued above in note 287, there remain differences between Hume's variant and the issues posed here). In the early 20th century, the problem was most forcefully pressed by logical positivism's revival of neo-Humean themes. *See* A. J. AYER, LANGUAGE, TRUTH AND LOGIC (1936). In sociology, the most influential discussion of the problem was provided by Max Weber. *See* Max Weber, *'Objectivity' in Social Science and Social Policy* (1904) *in* THE METHODOLOGY OF THE SOCIAL SCIENCES (1949) (E. SHILS & H. FINCH, EDS).

Consider first the problem of whether the actual can be positively described separately from the ideal, or whether any definition of what the law or norm "is" in any one moment threatens to become a "rational reconstruction," a more-or-less idealized version of what the law "ought" to be constructed in one's mind. Influenced by the social sciences, the Realists believed that if they made a description "scientific" and "empirical" enough then the actuality of law – the fact of law/norm – could be accessed, and not merely an idealized rational reconstruction.[291] Any "is" of law/norm, however, remains an "idea" of law, which can only be one of two things: either a rational positive reconstruction-an "ideational" construction-or a prediction based on a rational reconstruction of the present norms and facts, "a prognosis for a future actuality." Regarding the former, do abstractions and concepts always play a role in rational reconstruction? Yes, but does that mean such ideas always have to invoke a normative agenda? No. Why? Because the ideas may be based on purely theoretical, or epistemological, purpose

[291] See HANS KELSEN, PURE THEORY OF LAW (1960 2nd ed. [1930]). For an example of the type of "rational reconstruction" idealism of legal positivism that the Realists were avoiding. This critique of Kelsen is widely made, ranging from the Realists to scholars like Ronald Dworkin. For a similar version of this critique, but now regarding not Kelsen other positivists, see M.R. Cohen, *Positivism and the Limits of Idealism in Law*, COLUM. L. REV. 27, 237 (1927), p. 250. For another, see Alexander Peczenick in his *Juristic Definition of Law*, ETHICS 78, 257 (1968) where he critiques both Kelsen and Realists like Ross. Regarding Kelsen, Peczenick points out the idealized and normatively closed process of defining law: "In order to establish the legal validity of a single norm, we have only to examine whether it was properly created. According to the Pure Theory of Law, proper creation is the creation of a norm in the way prescribed in higher norms. The validity of higher norms can be established according to still higher norms, and so on. Thus, the legal validity of norms can be apparently established in a purely normative way. In order to establish a legal validity of a single norm, we do not refer to actual human behavior. We refer only to the contents of the higher norm of human behavior." Peczenick, however also criticizes the realists for their over social-scientized and institutionalized version of law, advocating instead his own understanding of the "internormative relation," or the co-existence between textual norms and the sources, of which sources there are three for Peczenick: "valid legal norms" (created in the way prescribed by any primarily valid legal norms that have not been repealed), behavior relevant to law, and legal consciousness. However, Peczenick's over-emphasis on texts rather than sociological descriptions makes him closer to Kelsen than he realizes, and his critique of legal positivism, while correct is somewhat misplaced because the enterprise of LP was rather more trivial than he realized, as discussed below.

(those of internal consistency, empirical adequacy, explanatory reach and simplicity, and so forth). Consequently, rational reconstruction can address the "actual/ideal problem" through reliance on a theoretical epistemological purpose of prognosis. On the other hand, a description of law – a rational reconstruction – that aims for "future actuality," rather than present rational reconstruction, avoids the problem of the "is/ought" dichotomy, while making use of the distinction. If rational reconstruction aims towards the actual – the combination of law and fact in a societal context, it has moved away from the "ideal" in the normative sense, and into contact with a "societal actual"[292] through the pole of fact. This anti-foundational foundation to law was offered through philosophical pragmatism as will be discussed later.

The "other" problem of the "is/ought distinction," is the problem of objective fact versus subjective and arbitrary value, or what I will call here the "fact/value" problem. In Formalism, this problem was hidden, in Realism the problem of values finally surfaced. What is important to bear in mind is that Realism did not create the problem, and it is not a sign of the weakness of its approach, which simply made an already present problem finally visible. But for many critics, the mention of a second distinct normative step rendered the entire approach seemingly weak. What the experience of the Realists, both Scandinavian and American, showed was that problem of values in law could never be explained away, it could only be bracketed[293] or confronted. Below I outline the two attempts in Realism, both Scandinavian Legal Realism (SLR) and American Legal Realism (ALR), to bracket the problem of values, although in completely different ways,

[292] Here I borrow from Dennis Töllborg of SLR and the Gothenburg School. Töllborg was an alternative legal dogmatician doing legal action research, See i.e. *Personalkontroll, En ideologikritisk studie kring den svenska peronalkontrollkungörelsen*, (1986).

[293] Here I am using the concept introduced by Edmund Husserl in his *Logical Investigations*, of suspending judgment about the nature of reality for the sake of focusing on experience. EDMUND HUSSERL, LOGICAL INVESTIGATIONS (1913[1901-1902]).

and two attempts to transcend that approach and embrace the role of values, one based in SLR, the Gothenburg school, and the other in ALR, in the work of Felix Cohen.

4.3.1 Bracketing the problem of Values in SLR

One strand of Realism, Scandinavian Legal Realism, embraced the separation between the roles of judges and the role of lawmakers in order to resolve the is/ought problem of law. In SLR, the goal became to stay as close to the "facts" of cases as possible, and cleanse metaphysical concepts from judgments, all in order to rid legal decision-making of ideology and better reflect the political will of the parliament.[294] The judge was not, in describing and interpreting law/norms, engaging in an act of prescribing "oughts," but rather simply carrying out the "ought" of the legislature through the "is" of norm-cleansed facts. This of course did not get rid of the "fact/value" problem so much as avoid it through a division and hierarchy of different law-making bodies, much like the American Legal Process school that succeeded Realism in the United States. However, SLR was less influenced by the Social Sciences than ALR, and was more deeply inflected with a legal positivist emphasis (influenced by Hart and the English tradition) on keeping issues of morality and politics out of socio-legal analysis, which led it to a stronger gravitation towards the "facts" pole and rejection of the "value" pole in socio-legal analysis. This strict adherence to facts, however, was not entirely empirically based, in the sense that Realism in Scandinavia did not open up the legal sources to include social science research, nor did it inspire a program of doing social science research related to law as it did in the US. Rather, adherence to facts in Scandinavia was much more like the first function of facts in American

294 *See* Alexander, *Comparing the Two Legal Realisms, supra* note. 224.

Legal Realism, of acting as a safeguard against the over-emphasis of the law pole of analysis with its potential for smuggling in hidden ideology.

4.3.2 Towards Acceptance of Values: Gothenburg School

One school that followed in the tradition of Scandinavian Legal Realism was the Gothenburg/Finnish School, which developed Realism in a direction that did not deny the pole of "values" in socio-legal analysis. The Gothenburg School, particularly in the works of Claes Martinson[295], Ulf Petrusson[296], Mats Glavå[297], Sara Stendahl[298], Håkan Gustafsson[299], Robert Påhlsson[300] and Eva Maria Svensson[301], as well as those of the Finnish school such as Juha Karhu[302], Kaarlo Tuori[303] and Thomas Wilhelmsson,[304] advanced an articulation of the acceptance of the "value" pole in a very distinctive variant of SLR.[305] In particular, Claes Martinson developed

295 CLAES MARTINSON, KREDITSÄKERHET I FAKTURAFORDRINGAR - EN FÖRMÖGENHETSRÄTTSLIG STUDIE (2002).
296 MATS GLAVÅ, ARBETSBRIST OCH KRAVET PÅ SAKLIG GRUND : EN ALTERNATIVREALISTISK ARBETSRÄTTSLIG STUDIE (1999).
297 ULF PETRUSSON, PATENT OCH INDUSTRIELL OMVANDLING. EN STUDIE AV DYNAMIKEN MELLAN RÄTTSLIGA OCH EKONOMISKA IDÉSYSTEM (1999).
298 SARA STENDAHL, COMMUNICATING JUSTICE PROVIDING LEGITIMACY. THE LEGAL PRACTICES OF SWEDISH ADMINISTRATIVE COURTS IN CASES REGARDING SICKNESS CASH BENEFIT (2004).
299 HÅKAN GUSTAFSSON, RÄTTENS POLYVALENS. EN RÄTTSVETENSKAPLIG STUDIE AV SOCIALA RÄTTIGHETER OCH RÄTTSSÄKERHET (2003).
300 ROBERT PÅHLSSON, RIKSSKATTEVERKETS REKOMMENDATIONER (1995).
301 EVA MARIA SVENSSON, GENUS OCH RÄTT : EN PROBLEMATISERING AV FÖRESTÄLLNINGEN OM RÄTTEN (1997).
302 JUHA KARHU (PÖYHÖNEN), SOPIMUSOIKEUDEN JÄRJESTELMÄ JA SOPIMUSTEN SOVITTELU (1988).
303 KAARLO TUORI, CRITICAL LEGAL POSITIVISM (2002).
304 THOMAS WILHELMSSON, SOCIAL CIVIL LAW: ON NEED-ORIENTED ELEMENTS IN THE GENERAL PRINCIPLES OF CONTRACT LAW (1987).
305 MARTINSON, KREDITSÄKERHET I FAKTURAFORDRINGAR - EN FÖRMÖGENHETSRÄTTSLIG STUDIE, *supra* note. 296 p.75. It is important to mention important proto-Gothenburg school figures of Dennis Töllborg and Kurt Grönfors. Töllborg was an alternative legal dogmatic doing legal action research and Kurt Grönfors was a formidable force in the legal discipline beyond Gothenburg, in Swedish Maritime and transport law in the 1950s and 60s, as well as in general contract law. Grönfors was responsible for major reforms in the areas of maritime and transport law, as well as for creating contractual templates that have remained significant in Sweden to this

what he called "the Norm-Fact-Value triangle" of socio-legal analysis, a method by which scholars across different legal fields could speak to one another however in reference to common concepts and language.

A major influence on Martinson was a collaboration in the 1980s with the members of the Finnish School who were pursuing a complementary project of "Alternative Legal Dogmatics," which attempted to substantially analyze and reform contract law from the perspective of the values of social democracy. This project, and in particular the work of Thomas Wilhelmsson, will be treated in some depth later in this chapter. The Gothenburg school was the most radical in SLR in embracing a view of law as social policy, for the pursuit of human interests and social values. Through the three basic building blocks of Norm-Fact-Value, the emphasis of the work of the different scholars involved became more explicit and developed, as there was now a language in which they could discuss their positions in relation to one another.[306] It is in the same spirit of this unique moment in which the analysis of Norm-Fact-Value was formed, and a deeper understanding of the common elements of socio-legal analysis came to be illuminated, that I argue for the need to further articulate the common elements of socio-legal analysis, in relation to two additional elements of *Theory* and *Purpose*.

4.3.2.1 Martinson: The Triangle of Norm, Fact & Value

day. However, while Grönfors was prolific in his substantive writings, he said very little about the method underlying his analysis of law, which clearly produced penetrating insights and demystified formerly opaque concepts in these areas of law. While clearly a realist, Grönfors intentionally did not reveal the "scaffolding" behind his analysis, as a strategy for making a greater impact on law reform rather than having influence as a theorist.[305] Grönfors's students, Claes Martinson among them, worked articulate the method of legal analysis at work in his mentor's texts, and which formed in part the basis for the Gothenburg school's version of Realism.

[306] In a workshop held on May 21st, 1996 in Majvik, Finland, Juha Karhu (at the time Juha Pöyhönen) was the first to draw the Norm (Law), Fact, Value triangulation and identified himself with the Norms (Law) pole; Wilhelmsson drew the triangle and identified himself with the Values pole; similarly Kaarlo Tuori identified himself with the Values pole; and Claes Martinson found himself convinced that it must be a triangle rather than one pole being more emphasized than the others.

Martinson differentiates between the typical "functional" approach of SLR and the approach of the Gothenburg School, although the latter clearly builds on the former. The "functional" approach of SLR addresses legal problems concretely, in relation to the interests of two parties, rather than starting with the legal sources.[307] This is the method by which SLR adheres to the "facts" over the pole of "law/norm."[308] Based on the interests of the two parties in a concrete instance, the jurist asks herself in relation to law: "What would be the function, the consequence, of adopting one norm over an another for the parties?" However, what I will boldly dub the "Gothenburg thesis," not only adopts functionalism, but evaluates consequences in light of what larger values are achieved by satisfying the individual human interests involved in a particular case. Without consideration of larger values, the preference for one interest over another is an arbitrary and subjective exercise. Instead, it is understood that societal values guide the choice of what legal doctrine should be applied to specific facts. Rather than reject the place of societal values in constructing law, the Gothenburg school embraced the social constructivist and value-driven nature of law making, captured by the triangle of Norm-Fact-Value.

307 This functional approach has many affinities with the functional approach in comparative law. KONRAD ZWEIGERT & HEIN KOTZ, INTRODUCTION TO COMPARATIVE LAW (TONY WEIR TRANS., 3D REV. ED. 1992).
308 Kurt Grönfors: interprets norms, from a rational angle, angle from what is reasonable (facts), p. 75

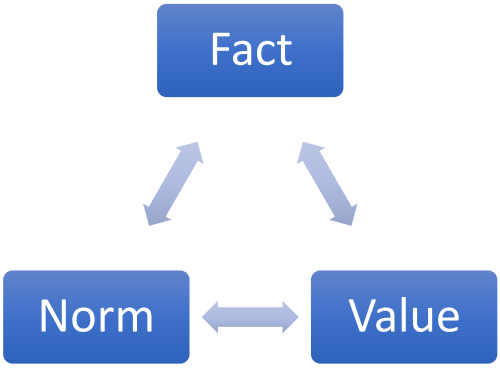


Figure 2 Martinson

Martinson applied the Norm-Fact-Value analysis to different areas of Swedish credit law, which became an important area of social justice in Sweden at the time Martinson was writing his doctoral dissertation: many Swedes who had taken on increased risk in borrowing during good economic times were brought to the brink of financial ruin and even to increased rates of suicide[309] during the severe economic recession of the 1990s. This was particularly true in the area of third party creditors, where regular people, parents that had had become co-signers in a mortgage for their children or spouses that had co-signed on their partner's business, were suddenly made responsible for the entire sum of the principle's debt without any exceptions made for situations of debt forgiveness.[310] In his work

309 *See* Claes Martinson, *Rättskonstruktören och borgensinstitutet*, Oikeuden Avantgarde, Juhlajulkaisu Juha Karhu (Festskrift till Juha Karhu), Talentum Media Oy, (2013) s. 177-196. It cites to Sundin, Krister, *Renegotiation of credit agreements - A study of debtors Situation, Employment Report*, Department of Economics, Law, Karlstad University, (1999), pp. 32-34. See also the Swedish Consumer Agency's report 2008: 16 s 5-6, and the KFM report, *Everyone Wants to Do the Right Thing*, (2008), chapter 6. And *Persson* (2007/08) 47 on pages 51-57.

310 *Ibid*, Martinson, p.641. "Credit involves risk-taking, and credit security leads to the debtor's being able to take greater risks than he should, in view of his or her chances of earning money. Market economy descriptions also point out that the spreading of resources in the market functions best in situations that can never completely exist in reality. It is the law's duty, the descriptions point out, to compensate for this if the individuals' spreading of resources is to be effective. Consequently, the descriptions deal with combatting interests, and point out that it is the credit law's duty to supply the balancing of those interests."

Kreditsäkerhet i fakturafordringar - en förmögenhetsrättslig studie Martinson's use of the law-fact-value triangle, as applied to credit security law, translates concretely into a method of analysis that balances the interests of all parties, the debtor, the third-party guarantor, and the creditor (bank) in view of societal interest in "risk-taking" behavior. However, in his article "Rättskonstruktören och borgensinstitutet," Martinson goes one step further and uses the triangle and the interest-based method for constructing alternate solutions to societal problems in law, where there was no precedent. This constructive approach takes into account the interests of third-party guarantors, in relation to societal values of providing proportional debt repayment based on the age and income of guarantors. However, unlike a straightforward "functional" analysis, the interests are not merely given by the "fact" and "law" poles of the analysis, but also shaped by social and economic factors contributed by the "values" pole.

What Martinson demonstrates is that "values" cannot be discussed in abstraction in socio-legal analysis, but instead must have a direct bearing on the specific legal actors and facts at issue.[311] In referring to the relation between the parties – of borrower, creditor and third-party debtor[312] – it became evident in his work that merely talking about the importance of "knowledge" as an abstract value

311 Martinson, *Kreditsäkerhet i fakturafordringar - en förmögenhetsrättslig studie*, *supra* note. 296, p 65-66, 74–86, 637-639.

312 *Ibid.* p.157. "Riskbegränsningsintresset är för låntagaren en fråga om att begränsa sitt åtagande till vad låntagaren kan klara av att betala, i bästa och värsta scenario. Intresset av kontroll handlar om låntagarens möjligheter att påverka sin situation och däri ingår möjligheterna att ta sig ur relationen med de övriga. För att låntagaren skall kunna göra det har han också intresse av skydd. Detta skyddsintresse är dock samtidigt den andra sidan av kreditgivarens intresse av makt. Låntagaren har intresse av att skyddas från kreditgivarens maktintresse." The risk-reduction interest is a matter for the borrower to limit its commitment to what the borrower can manage to pay, in best and worst scenarios. The interest in control is about the borrower's ability to affect their situation and includes the possibilities of getting out of business with the others. In order for the borrower to do that he also has an interest in protection. However, this protective interest is simultaneously the other side of the creditor's interest in power. The borrower has an interest in being protected from the creditor's power interest. (Translation: Saki Bailey).

for both the creditor and the debtor was not useful.[313] It is only by placing oneself inside the relation between the three actors that the concrete sense of "knowledge" is illuminated: knowledge as what it would mean for a third-party debtor, who does not directly receive the benefit of a given transaction, to have access to knowledge. Martinson demonstrated that knowledge cannot be understood as *abstract access to information*, but rather as *concrete knowledge of the responsibility one has knowingly taken on*. Martinson's work draws upon a conception of law, as not only black-letter "law" or "fact" but also "values," for a solution to the societal problem of protecting the third-party debtor, who neither received the benefit of the transaction, nor was made aware of the burden, and therefore in some ways was the weakest party of the three. In this sense, Martinson, like Thomas Wilhelmsson, who will be discussed later, exemplified the SLR embrace of values as opposed to its bracketing. The Gothenburg School, unlike the mainstream of SLR; approaches law as an act of construction, of institutional design for addressing societal problems, openly driven by law, fact and social values.

4.3.3 ALR: Bracketing "Actual/Ideal" through Purpose

Another way in which Realism attempted to resolve the problem of values was by avoiding it, rather than embracing it transparently as in the Gothenburg approach. A fertile source for a theoretical basis for avoidance was pragmatism, or the "purposive" turn in law, two somewhat distinct strands of thought that were connected and united in Realism. If law was a means to an end and should serve a "social purpose," the question of whether or not values shaped facts could be bracketed because the "truth" of a description of law, the "is," was evaluated not by whether or not it collapsed into an "ought," *the dichotomy there being actual vs ideal*, but whether it was *useful versus useless*. However, determining "is" from "ought" by

[313] Martinson, *Rättskonstruktören och borgensinstitutet*, *supra* note. 310.

the criteria of usefulness provided the mere illusion of a resolution, as the approach did not actually resolve the "is/ought" problem in the second, fact/value, sense, but only in the first, actual/ideal, sense as I will demonstrate below.

The pragmatic purposive turn had its roots in the late 19th century work of such legal scholars as Oliver Wendell Holmes, Rudolph Von Jhering, and Francois Geny, whose influence carried over into important legal movements both in the US and on the Continent, namely American Legal Realism and the German Free Law Movement. The purposive turn was characterized by the attack on formalism discussed earlier: even if the legal sources pointed to one solution, why should we accept that solution if it goes against social purpose? The primary aim of the purposive turn was to reframe law from the legal sources to the activity and purpose of lawmaking. As a result, law came to be defined not by its formal texts but the prognosis of the effect of decisions on society and, more concretely, on the interests of the parties to a controversy. Pragmatism, which made major philosophical contributions during the same period, had a direct influence on these purposive scholars, particularly Holmes, through such figures as William James, Charles S. Pierce and John Dewey, both through their writings, being developed in the same period, and through direct discussions and concrete collaborations. For example Holmes shared membership with these three in the Cambridge "Metaphysical Club," and spend much of his time both influencing and being influenced by them, in formative discussions.[314] Pragmatism played an important role in providing a philosophical foundation to the purposive turn, by offering a theory of truth as defined by its practical effects and consequences.

> If ideas, meanings, conceptions, notions, theories, systems are instrumental to an active reorganization of the given environment, to a removal of some specific trouble and perplexity, then the test of their validity and value lies

[314] *See* JOHN P .MURPHY, PRAGMATISM: FROM PIERCE TO DAVIDSON (1990), p. 13-21; *and* LOUIS MENAND, THE METAPHYSICAL CLUB (2002).

> in accomplishing this work. If they succeed in their office, they are reliable, sound, valid, good, true. If they fail to clear up confusion, uncertainty and evil when they are acted upon, then are they truly false. Confirmation, corroboration, verification lie in works, consequences. Handsome is that handsome does. By their fruits shall ye know them. That which guides us truly is true – demonstrated capacity for such guidance is precisely what is meant by truth.[315]

This idea of truth as defined by action came to define the "actuality" of law in contrast to its ideal reconstruction. It provided the necessary legitimacy for the "Purposive" School's view of the "is" of law (Holmes, Jhering and Geny)[316] and, later, for Realism. However, the pragmatic conception of truth did not resolve the "is/ought" problem in law, in the fact/value sense, but provided a cover for suspending the importance of the actual/ideal distinction. In one's purpose, through *the goal, the aim, the ideal* of social purpose, the law and facts selected in view of that purpose, the *"actuality"* of the law/norm in relation to the real world comes into being. Post-Realist legal scholars like Lon Fuller took pragmatic philosophy to mean precisely this, namely that in view of purpose the fact/value distinction collapses: "(fact) is not a static datum but something reaching towards an objective and that can only be understood in terms of that reaching."[317] However, I argue that what Fuller is in fact addressing is not the "fact/value" collapse but the "actual/ideal" aspect of "is/ought" that is suspended by pragmatism: a fact defined by purpose avoids the "actual/ideal" trap because in purpose, the actual is defined by the pursuit of the ideal without reifying either the actual or ideal as an absolute

315 JOHN DEWEY, RECONSTRUCTION IN PHILOSOPHY (1920), p. 156.
316This can be seen in the work of Rudolf Von Jhering particularly *See* RUDOLF VON JHERING, LAW AS A MEANS TO AN END (1999 [1913]) and also *See* FRANCOIS GENY, MÉTHODE D'INTERPRÉTATION ET SOURCES EN DROIT PRIVÉ POSITIF: ESSAI CRITIQUE ("METHOD OF INTERPRETATION AND SOURCES IN POSITIVE LAW - CRITICAL ESSAY") (1899, PREFACE BY RAYMOND SALEILLES). *See also* FRANCOIS GENY, SCIENCE ET TECHNIQUE EN DROIT PRIVÉ POSITIF: NOUVELLE CONTRIBUTION À LA CRITIQUE DE LA MÉTHODE JURIDIQUE, (4 VOLUMES PUBLISHED FROM 1914 TO 1924).
317 Lon L. Fuller, *American Legal Philosophy at Mid-Century*, J. L. EDUC. 6/457 (1954), p. 470.

and eternal truth. However, this did not do away with the "fact/value" problem, as in the problem of how one's arbitrary subjective values shape the second step of evaluation and prescription. That problem still remained even with Fuller's conflation of "is/ought" in view of purpose. What may explain Fuller's mistake is that he may have understood *Purpose* and *Value* to be the same thing, so that *Value* had no content outside of the Realist idea of "social purpose." It would take a few more decades before Law and Economics came to strongly reinforce this point, by adducing a social purpose that was defined in relation to a concrete prescriptive and evaluative value, efficiency. However, if one takes the problem of the "is/ought" distinction outside of the realm of jurisprudence and into legal scholarship, where the purpose of the researcher is not to adjudicate a specific individual claim in view of social purpose, but rather to undertake conceptual, theoretical and/or empirical study of law, are *purpose* and *value* for practical purposes the same? And alongside a "fact/value/purpose" filter isn't there also a "fact/theory/purpose" filter, which is distinct from the other?

At times, purpose coincides with value, but they won't always be the same thing, as discussed above. In research, legal scholarship, one can have an epistemological purpose that has nothing to do with values – this is what one could call *theory* – purpose in the "thin" sense. One can also have a social purpose which has only to do with values – justice, fairness, freedom, efficiency, democracy, a vision of the good life – purpose in the "thick" sense. Often these thin/epistemological/theoretical and thick/normative/societal purposes can coincide and co-exist, but they are entirely divisible: one can have a thin/epistemological/theoretical purpose of describing an "is" that never at any point involves a thick/normative/societal "ought." Is this relevant or interesting from the view of conceptualizing "law," which is a normative system of thick oughts? Arguably no: although the distinction between epistemic and normative

purposes is a basic, important one, to use it as the basis for a view of "law" that remains completely "value-free," in the sense of thick normative purposes, would stand condemned as simply too trivial a pursuit.[318] Building from Realism, law's subject matter came to represent not only the formal legal sources, but the process of jurisprudence, which inevitably required the weighing of different values. While the pragmatic and purposive approach avoided the problem by developing a new pole of *Purpose* in socio-legal analysis and thus bracketing absolute truths and through it, the fact/value problem, it failed to acknowledge the distinct roles of *Purpose* and *Theory* and their interaction with *Value*, and *Law*, and *Fact*. This was an issue that Felix Cohen, the best defender of Llewellyn's view and an advocate of pragmatic philosophy in Realist analysis, came closest to resolving which I will explore next.

4.3.3.1 Towards Acceptance in ALR: Cohen's Values-Based Approach

Starting from Holmes, American Legal Realism modernized law by transforming it into a tool for social policy and instituting a new evaluative criterion for adjudication: the criteria of whether or not a decision would serve a social purpose,

[318] This seems to have been the pursuit of contemporary "legal positivism" in the vein of Hart and Kelsen. Such legal positivism is often attacked by its critics for adopting an unduly formalist conception of legal reasoning, but arguably this is mistaken: positivism stands condemned less for adopting an interesting, but implausible, view of the content of legal decisions than for adopting a plausible, but trivial, view of one set of inputs into such decisions. The arc of this development can be seen clearly in the work of positivism's arch critic, Ronald Dworkin. In his early work, Dworkin attacks Hartian positivism for smuggling a hidden normative agenda concerning the content and justification of legal decisions into its definition of what could be considered valid law, but in later work Dworkin seems to have partly retracted this, this realizing that in fact what was at stake for legal positivists was not the denial of normativity or considerations of justice in the specification of law's content or legal decision-making, but rather merely what could be said about the process by which formal legal sources could be made "valid" so as to be recognized by legal officials as inputs to legal-decision-making. This latter concern, Dworkin came to realize, was a rather trivial matter, having "almost no practical importance," and thus he dismissed his disagreement with positivism as "sadly close to a verbal dispute." *Compare* Ronald Dworkin, *The Model of Rules*, *in* TAKING RIGHTS SERIOUSLY (1978), *with* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS (2008), p. 410 & p. 412.

or "the public interest." *Public interest* however was a vaguely set standard, and Felix Cohen argued that a more elaborate criterion of values should be specified. Cohen's program remains unrealized to this day; however, in a somewhat unfortunate way he was vindicated by history, in that the problem he identified contributed to the downfall of Realism.[319] In his famous article *Transcendental Nonsense and The Functionalist Approach*, Cohen inaugurated, or at least provided the most explicit and comprehensive statement of, the pragmatic/purposive turn in law, a turn that as discussed above was already underway courtesy of forerunners such as Holmes, but which Cohen took to the next stage, heralding a research program that incorporated the ideas of philosophical Pragmatism within ALR.[320] For Cohen, incorporating pragmatism meant, as already mentioned, constraining inquiries to the particular problems at hand, defining concepts by their effects, and focusing on the relationship of law as a function of human behavior.[321]

Cohen is famous for arguing in his article that law could only be defined by its interrelation with facts. Yet the article also passionately argues for the need for a "criterion of values" within ALR:

[319] As marked by the ascendance of the Law and Economics school. By contrast to Realism, the law and economics approach had a clear theory and method derived from economic principles: the law should either mimic or even just facilitate the market, and the correctness of a legal decision should be measured by whether or not it is "efficient" and reduces transactions costs. Efficiency often meant the Kaldor-Hicks variety of overall "wealth maximization," rather than the gentler Pareto measure of "at least one party being made better off without any other party being made worse off." This led to the promotion of the idea that so long as wealth was being maximized at the top (economically strong parties), the bottom (economically weaker parties) could be permitted to take a loss. The means of cost/benefit and transaction-cost analysis, with this criteria of efficiency as its end, became the unintended beneficiary of the social policy approach pioneered by American Legal Realism, whose aims were in fact quite the contrary, to redistribute downwards rather than upwards. The problem of a criterion of values that Cohen identified but left unresolved left a vacuum for Law and Economics to fill in with its value of "efficiency" (and theory of MI-based neoclassical economics).

[320] F. Cohen, *Transcendental Nonsense and the Functional Approach*, *supra* note. 177.

[321] Legal systems, principles, rules, institutions, concepts, and decisions can be understood only as functions of human behavior.

> The prospect of determining the consequences of a given rule of law appears to be an infinite task and is indeed an infinite task unless we approach it with some discriminating criterion of what consequences are important. Now a criterion of importance presupposes a criterion of values, which is precisely what modern thinkers of the "sociological" and "realistic" schools of jurisprudence have never had.[322]

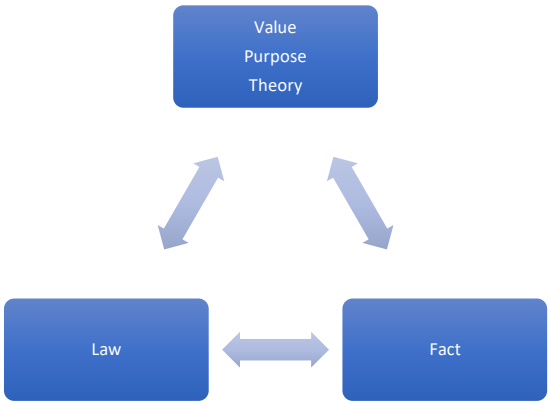


Figure 3 Cohen's Criterion of Values

As with Llewellyn, so for Cohen socio-legal analysis consisted in two steps, although now with significant modifications both to the content of each and their relative significance. For Cohen, the first was to interpret facts and law (concepts and rules) "*functionally*," i.e., in relation to one's purpose and context of inquiry. According to Cohen, the functional or pragmatic approach (understood by Cohen synonymously) was one that "seeks to discover the significance of the fact through a determination of its implications or consequences (in other words, effects) in a given mathematic, physical or social context."[323] Then in a second move that initially echoes Llewellyn, Cohen argues that one should evaluate the

[322] F. Cohen, *supra* note. 177 at 848.
[323] *Ibid.* at p.829.

understanding obtained in the first step, according to specified values, but to keep this separate from the initial inquiry:

> "Intellectual clarity requires that we carefully distinguish between the two problems of (1) objective description, and (2) critical judgment, which classical jurisprudence lumps under the same phrase. Such a distinction realistic jurisprudence offers with the double-barreled thesis: (1) that every legal rule or concept is simply a function of judicial decisions to which all questions of value are irrelevant, and (2) that the problem of the judge (or legal scholar in the second instance) is not whether a legal rule or concept actually exists but whether it ought to exist. Clarity on two fronts is the result. Description of legal facts becomes more objective, and legal criticism becomes more critical."[324]

As we can see, here Cohen demands a separation between "objective description," the interrelation between law and fact, and their interaction with values. However, later in the essay, Cohen, like Fuller, questions whether in socio-legal analysis it is truly possible to separate the first step from the second: "The positive task of descriptive legal science cannot, therefore, be entirely separated from the task of legal criticism. The collection of social facts without a selective criterion of human values produces horrid wilderness of useless statistics."[325] Here, Cohen argues, again like Fuller, that values are necessarily invoked in selecting which facts are relevant from the outset of socio-legal analysis. However, this is contradicted by the other parts of his proposed research program, which only considers values, like Llewellyn, in a second step after determining an "objective description" of law's function in human behavior. Perhaps, this is best explained by Cohen's desire to distance himself from the "obscurantism" of Fuller, and to cleanse concepts from their metaphysical nonsense and value-laden quality,

[324] *Ibid.* p.841.
[325] *Ibid.* p.849.

thereby reflecting a hesitation and ambiguity rather than clarity in the role that values play.

In view of this contradiction, how is Cohen's view of the building blocks of *law/norm, fact and values* reconciled? Cohen never articulates the exact content of the values to which he refers, nor how "values of the first instance" – those that shape facts – are different from those used at the end, or "values in the second instance" – those used for evaluation – or whether they are the same. I argue that the confusion stems from his lack of clarity either in thought or articulation between *Theory*, *Purpose*, and *Values*, conflating all three as the latter, and failing to distinguish between thin epistemological purposes – theory – and thick, societally defined normative purposes – values – and the unique relationship of law to both.

4.3.3.2 A Critique of Cohen's Value-Based Approach: Purpose as Background Driver of Socio-legal analysis

Although Cohen never uses the word *Purpose* explicitly in his arguments, it is clear from the beginning to the end of the article that he sees this turn in Legal Realism as closely related to the similar turn in philosophical pragmatism adopted by those of the "purposive" school of law as discussed above. Cohen cites Peirce's definition of pragmatism as consequences defining the meaning of a particular conception to clarify his point that "a thing is what it does."[326] Cohen's analysis to evaluate legal questions not according to some "rule essence" of logical deduction, but instead in relation to a concrete problem being presented (facts), a rule/case (norms/law) in relation to the context (social, political, economics) of a particular dispute or issue, and a determination of its consequences (effects) in that particular case, which all point to his view of socio-legal analysis as being a contextual inquiry

[326] *Ibid.* at 826

driven by an instrumental purpose.[327] This underlying view, which Cohen takes for granted is evident to the reader, may very well explain the lack of a general criterion of values in Cohen's article. How can one articulate a general criterion when it has been established that legal problems must be defined pragmatically, with regard to the effects that adopting one rule over another has on society? The pragmatic/purposive approach would seem inherently to reject a generalized criterion but rather dictate a case-by-case determination of what law, facts, and values may be relevant in any particular context. In the interrelation between law and facts there is the selective criteria shaped by the purpose and agent of the inquiry. A judge versus a jurist versus a scholar may have very different purposes to their inquiry, which will shape what legal sources and facts are selected, as well as the values invoked: the first and second necessarily must engage in a thick, normative societally defined purposive inquiry, while the latter is free to pursue a thin epistemological theoretical purpose, although, as mentioned, by itself, this likely will not provide particularly path-breaking insights, given that the contents of law are thick, normative and societally defined. However, nonetheless the purpose of studying law even when approaching it in its normative context from a theoretical position will be very different from the role of a judge or jurist.

I argue that Cohen's error in conflating values of the first instance with values of the second is akin to that of both Llewellyn and Fuller, in that all three are missing a clear concept of value as distinct from purpose and theory. One is charged with a task: the purpose of the jurist is to defend his client, to legislate, to adjudicate; the purpose of the researcher to clarify, investigate, and demonstrate – these are distinct purposes tied to wholly different motivations – the former normative, the latter theoretical. However, purpose can also be found or

[327]"A definition of law is useful or useless. It is not true or false." *Ibid.* at 835. "The meaning of a definition is found in its consequences." *Ibid. at* 838.

constructed in a text, in a field of inquiry, in the structure and routines of institutions. The choice of purpose, however, takes place within the constraints of theory. If one believes that law is discovered through logic (formalism) then one's purpose is internal to law, but if one believes that law is created through social policy, they would justify a purpose on the basis that serves social purposes outside of law (e.g., efficiency, justice, freedom). Purpose also has an important relationship, and often an overlap with "values," as we can see in the discussion of the work of Cohen. While purpose tends to be the "reason" for engaging in a task, as opposed to the "evaluative measure" by which one analyzes and critiques one's subject matter, they can at times be the same thing. One may have the thin theoretical and epistemological purpose of how to achieve environmental sustainability through law and to engage in a study of current doctrine and the necessary reforms for achieving sustainability, which serves as one's purpose, but it can also serve as the evaluative criterion by which one analyzes and critiques the current law from outside of law – "does current law achieve sustainability?" However, purpose and values could also be entirely distinct. One engages in an analysis of ownership within a particular property code with the purpose of revealing whether in reality judges do or do not apply these concepts in the way articulated in doctrine, and then in a second step to evaluate whether or not the current way in which judges deal with the concept of ownership ensures equitable access to key resources. The purposive inquiry about whether the law of ownership expressed in doctrine is applied by courts in reality and whether or not law ensures equitable access are distinct from one another: the theoretical inquiry does not begin with the value, but instead with (an epistemological) purpose, which defines the "is," the description of current law, while in a second step, we specify the "ought," the thick normative societal ideal that drives the inquiry of whether or not the current law achieves a specific value.

The most problematic concept, that of *Theory* – a conceptual framework – is being substituted here for what Cohen refers to as values in the first instance, which are involved in the selection of facts. The argument here is that what is missing from Cohen's (and Fuller's) analysis is that values are not the first filter, of relevant versus irrelevant facts, but rather that role is played by the latent conceptual frameworks – theory – triggered into action by any particular problem. A lawyer or judge looking at the facts surrounding a case will initially decide what facts are relevant according to a *legal theory* – doctrine and a framework of concepts related to doctrine – and also according to *socio-legal theory* – the relationship between law and society which dictates the distinct purposes of legal analysis (internal systematization versus external social policy) – and *social theory* – ideas and assumptions regarding the drivers and shapers of social order (MI versus some alternative frame). I argue that what Cohen calls *Values* in the first instance is actually *Theory*, or a "conceptual framework of relevance." Cohen, contrary to the accusation of contemporary critics,[328] did not resist the idea that one could think abstractly or conceptually, he simply objected to conceptions that did not bear in mind their consequences; e.g., asking "where" the corporation is, as if it could be located in a particular physical location, instead of asking how adopting one rule over the other regarding domicile would affect the interests of parties and purposes of law involved. The question is, how would locating the corporation at its primary place of business, as opposed to where it was headquartered, affect the parties? To what extent would one choice or the other more effectively realize the underlying aims of this area of legal policy or regulation? However, Cohen's fear of opening the door for the return of a formalistic dogmatic approach, one caught in the sway of "nonsensical" abstract legal conceptions (empty, circular or otherwise question-

328 MARGARET DAVIES, ASKING THE LAW QUESTION (2008), p. 165. Davies accuses Cohen of attempting to banish "concepts" out of law in his treatment of the "corporation."

begging ones), may have caused him to resist presenting concepts – *Theory* – as the initial starting point for filtering what facts to select and which facts to ignore.

4.4 The Invisible Role of Theory as Distinct from Purpose

I argue that the choice of which *Facts*, which *Law/Norm*, and which *Values* are relevant for socio-legal analysis will always be filtered through one's background *Theory* and *Purpose*. As explained previously, by *Theory*, I mean a conceptual framework that determines both the means – the mode of analysis – and the ends of one's inquiry – one's purposes – as well as the methods used (to be developed in the next chapter). As I have been explaining, theory takes place on three levels. A *legal theory* is internal to the law within a particular field, for example, internal to the domain of property law there is a theory regarding ownership of, or the entitlements that pertain to, external resources. There can also be a theory about law's purpose in relation to society, what I call here a *socio-legal theory* such as Formalism, Legal Realism, Law and Economics, or Critical Legal Studies. For example, Formalism's assumption of law, as a closed system through which objective solutions can be found through logic in relation to the hierarchy of legal sources, has consequences for the means (the legal sources used and facts analyzed), but also the end or purpose of socio-legal analysis (to systematize the law). On another level are theories about social order and the conditions for transformation, which also play a (until now largely submerged) role in law – *social theory* or grand theories about social order that underlie our understanding of the law. *Methodological individualism*, which posits a pre-social individual as the unit of analysis, has consequences for law, as I will later explain, in that this assumption of the unit of analysis underpins the entire structure of the study and discussion of law in terms of separate private and public domains, as well as the background ideas assumed by such a separation, about the differences sources of authority and

legitimacy – in the former custom, and in the latter the sovereign will of the state, as discussed in the chapter on the "Legal Institutional Character of the Market." This *social theory* of *Methodological Individualism*, also underpins the economic analysis of law, analyzing law in terms of its effects on the behavior of individuals (incentives and disincentives), using the narrowly self-interested rational actor as its basis.

Theory is sometimes consciously selected and other times it is unconsciously present, and in most cases, there are layers of both: one theory may be consciously presented, most often in socio-legal analysis that is a *legal theory*, while others, typically *socio-legal theory* and *social theory*, operate unconsciously or at least invisibly, determining basic premises and assumptions. For example, one may be conscious of taking a legal dogmatist position and present that theory as organizing the means and ends of the inquiry, but not be aware that one is also assuming a methodological individualist position, which determines what questions are interesting versus uninteresting, relevant versus irrelevant to ask vis-a-vis law. Taking the position of *Methodological Individualism* has consequences for how the researcher views the relationship of law to society: one may be non-formalist and instead a functionalist but still assume *Methodological Individualism*, in the sense that while the ownership concept is understood as a balancing of interests, on the other hand, larger social questions, for example the subject matter in this dissertation of property law's relationship to the capitalist market and whether or not ownership should be dramatically redesigned to transcend the particular historically-specific social relations of the capitalist market, are completely beyond the purview of what are considered interesting and relevant questions in the field. This was the case for the Legal Realists that attacked the formalism of the ownership concept, but then were blind to the social theory implications that followed. The *social theory* of *Methodological Individualism* is often unconsciously assumed in law (as well as the

social sciences more generally, especially economics), and that unconscious influence is one of "ideology" – a set of invisible but influential ideas that not only determine the means and ends of an inquiry but also its parameters, its boundaries, delineating the possible from the impossible and the interesting from the uninteresting questions to ask within the field. *Theory* in this way, consciously adopted by different schools of thought, as well as, *Social Theory*, operating as unconscious ideology, asserts a tremendous and invisible influence on the purpose of one's inquiry.

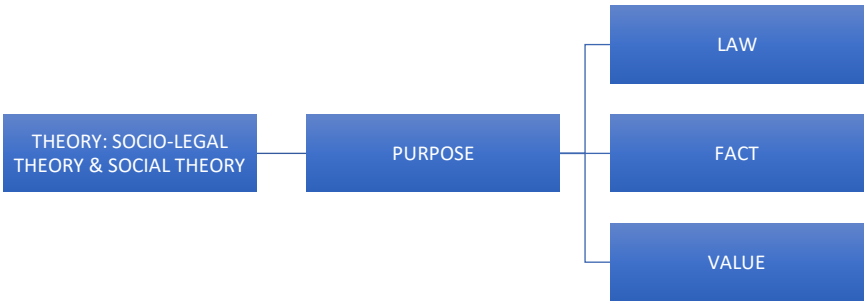


Figure 1 BAILEY

As we can see from the diagram above, *Theory* in the form of both socio-legal theory and social theory have an important impact on the *Purpose* of one's inquiry in the way just explained in setting the parameters of socio-legal analysis. *Purpose* provides the answer to the question "What is socio-legal analysis for?" Once that question is framed, in view of a specific purpose, then all elements of socio-legal analysis become clear: what law-legal sources- what facts, and what values, are relevant to that purpose. Without such a criterion of purpose (not *value* as Cohen

misstates as is discussed above) the selection of law, fact and value is arbitrary. As I have hopefully demonstrated, one knows from the Legal Realist critique of legal reasoning, the legal materials/source themselves are both under determinate and indeterminate. As we know from the pragmatists, any fact absent a framework in which it is given meaning is a "useless datum." And finally, as I argue here, any value used to evaluate the effects of law in the world is useless without a response to the question of what one thinks the law ought to pursue in the first place. It is only by arriving here that we may answer the question of: what is socio-legal analysis for?

4.4.1 Theory, Purpose, Law/Norm, Fact, Value Applied to Three Examples

Let us demonstrate, using a specific example, the distinct ways in which *socio-legal theory* together with *legal theory* determine the means and the ends of socio-legal analysis, before turning to the last level of theory, social theory, which determines and distinguishes the possible from the impossible question to ask in and of law. We will compare three types of analyses of a mundane everyday legal problem arising out of a conflict over the sale of a house,[329] departing from three different *socio-legal theories* – legal dogmatics/formalism, functionalism/realism, and law and economics. An owner of real property claims she remains the rightful owner of a home sold without her permission by her young niece, while she was away, to an unknowing buyer who registered title (either in a deed or land registry depending on the jurisdiction). The niece claims that her elderly aunt asked her to facilitate the sale, but her aunt may have forgotten due to her increasingly worsening

[329] This is a method often used in the functional approach in comparative law and specifically the Common Core of European Private Law (CCEPL), which begins with factual scenarios rather than an abstract investigation of legal sources, however unlike the CCEPL approach, I consider here socio-legal theory, which is never discussed within the CCEPL approach. http://www.common-core.org/ (last visited January 5th, 2020).

Alzheimer's disease. The unknowing buyer is a young first-time buyer whose entire savings were invested in the transaction and whose children have been enrolled in a school nearby, while the owner is elderly and likely soon to be moved into a retirement home.

1) Formalism: According to this theory the framework for understanding legal problems is that law is a closed system capable of producing objective solutions applying deductive and quasi-deductive methods to apply on a hierarchy of legal sources to a specific problem or dispute. The purpose of the jurist, from within this socio-legal theoretical framework, is to "systematize the legal sources" to arrive to one conclusive legal solution. Let us say that in *Jurisdiction 1* by legal dogmatic deduction, the legal sources determine that the property award should go to the buyer *who in good faith earnestly believed himself to be buying good title to land*. A judge initially may select only those facts that go to this version of the legal framework for solving the problem such as *the knowledge of the buyer of the potentially fraudulent act of the niece*. In this case, the ambiguity of the fraudulent act is a factor: does the elderly woman truly suffer from Alzheimer's? Did the niece earnestly believe she had the authority to carry out her aunt's wishes? Let us assume the law points in the opposite direction in *Jurisdiction 2,* and *title must belong to the person who effectuated the sale at the time of the sale or that person must have power of attorney over the person who has title*. In this case, the relevant facts are whether or not the niece was actually the one registered in the land register, or if she had the proper authorization – power of attorney – to effectuate the sale for the owner. The issue of whether or not the niece acted fraudulently is not at issue, only whether or not she had the official power of attorney. Different facts are implicated by different legal norms. In most

cases the judge would consider facts relevant to both because both norms would be implicated in *Jurisdiction 2* - probably in a different area of law, torts, for the damage caused to the buyer by potential fraud. However, the weakness of the approach in practical terms is that there is a possibility that the interests of the buyer may not be considered at all, or only much later in another proceeding, and meanwhile must suffer all manner of harms. Legal dogmatics/formalism suffers a clear weakness: what actually informs the choice of law is not as determinate as the dogmatist claims – the law is both indeterminate and under-determinate – and the same legal materials can offer different solutions and there is clear choice between different legal materials depending on the particular theory of law used. And behind each choice of fact and law are values. However, it is critical to the Formalist that the value choice remains hidden because of the invisible super-values that the dogmatic approach serves – *legal neutrality and certainty* – which are to be achieved by the appearance of scientific objectivity.

Figure 4 Formalism

2) Functionalism/Realism: According to this theory the framework for determining relevant facts is not in relation to logical deduction from the legal sources, but instead starts from the facts of a particular case, to evaluate the effect of adopting a particular relevant law on the interests of the parties accomplished by a balancing/weighing of interests in light of the value of the "public interest." In this case what would be considered relevant facts are factors such as the relationship of the parties to one another, their position in society (type of work, class, gender, age), and, where relevant, data about how people in that particular position are treated in society (social science research). In this case, the judge would consider facts relating to the interests of the party from the beginning in relation to the relevant law, so even in a jurisdiction where it is clear that the owner-elderly woman holds title, immediate measures may be taken in order to reduce the harm to the first-time buyer whose savings are tied up in the transaction, whose children must go to school, etc. Those measures might require the elderly owner to allow the young buyer to inhabit the home for a reasonable amount of time to find another situation. The balancing of interests allows for greater flexibility and possibility of serving the "public interest," through enhancing the welfare of the parties involved. However, note here that this conclusion shows the weakness of the approach, which is that ultimately, if it is not law that produces the result but the judge weighing different factors – according to what criteria is this weighing done? Is it to protect the weaker party? How is "weakness" determined? Is it to promote general welfare or public interest? And what does "in the public interest" mean and how should it be applied in each

case? For the answers to these questions one must invoke theory, not just at the level of socio-legal theory but social theory, as discussed later.

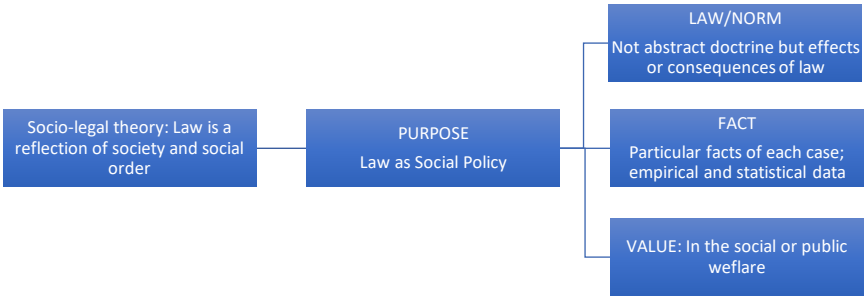


Figure 5 Realism

3) Economic Analysis: Economic analysis is a cost benefit analysis of the claim's damages – actual and potential – as well as any transaction costs in order to achieve efficiency. Efficiency is measured, in general, not by the Pareto but Kaldor-Hicks metric.[330] The apt approach here would be to adopt the legal interpretation that best promotes the efficient market solution, namely maximizing wealth and reducing transaction costs. Relevant to determining the selection of facts would be the market value of the claim – damages and the transaction costs implicated in the claim – as well the costs of litigation and the costs of enforcement of the decision. Let us assume that the laws of both *Jurisdiction 1* and *2* are both available

330 See the discussion of these above, *supra.* note. 320.

via an interpretation of the legal sources. Let us further assume that it is more costly – in terms both of damages and transaction costs – for the young buyer to leave the home than for the elderly woman to leave it to the buyer. An efficient solution might push, then, in that direction and strangely enough the market solution might look very much like the same result as that achieved balancing the interests of the parties. However, let us assume that the elderly woman, before her niece sold her house to the young buyer, had plans to tear down the home and to sell it to a developer who had promised her twice as much for the land and planned to build luxury apartments on the plot. In this case, the court may decide that title be returned and the young buyer move out, perhaps after being paid damages[331] since it would lead to "wealth maximization," both in terms of a greater market value for the elderly woman (than for the young buyer), and also for society as a whole: developers are paid, apartments are built thus creating work, and apartments are sold and more people –in this case the wealthy – have homes. Perhaps efficiency and justice are not competing in opposite directions, at least so long as the young buyer is compensated (which, again, efficiency neither requires or prohibits, being indifferent to the question). Everyone appears to be compensated, even if (in the case of the young buyer) he/she may be somewhat inconvenienced. However, let us return to the case where the niece sold the home to a developer. What would the court do here? The wealth maximizing solution appears to allow the developer to build luxury condos, to compensate the elderly owner and allow her a comfortable life in a retirement home. Neither the laws of *Jurisdiction* 1 or *Jurisdiction 2* explicitly permit such a solution, yet, from an

[331] Though, strictly speaking, this compensation consideration is irrelevant to efficiency analysis, going to the "distribution" of the surplus.

economic point of view, this should not prevent the judge from choosing the one that best supports his decision in view of efficiency. The indeterminacy of the law leaves it open not only to subjective interpretation but to instrumental purpose. If it is not instrumental economic value that we desire to remain dominant as the primary purpose of law, what other competing values can be rediscovered or newly developed and pursued?

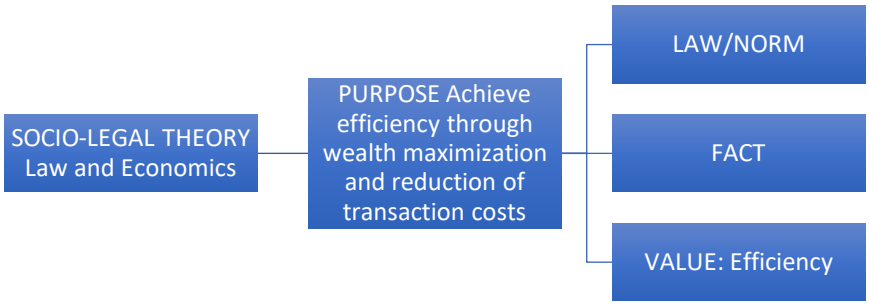


Figure 6 Law and Economics

As we can see from this simple (and somewhat reductionist) demonstration, one's theoretical framework greatly shapes what facts are selected and viewed as relevant or irrelevant and by what measure, the latter being determined by the value that a given framework aims to achieve: here, certainty versus public interest versus efficiency. Within the theoretical paradigm of formalism, many of the facts considered under the other two would be taken to be irrelevant and vice versa. All three analyses will have some facts in common, since all three must determine what laws, either in the books or "out there," might be invoked in a particular problem; however, on the latter two views (realism and

economic analysis) this is not the final arbiter or ultimate end of analysis. To call all of these particular theoretical lenses, "values," would seem to be a misnomer: for instance, is it merely efficiency in the LE analysis that determines the facts selected? Not really. Although the example is discussed in an intentionally simplified manner, to keep the discussion manageable, in reality a whole framework of concepts are at play in Law and Economics analysis – a theory of rational actors, how to measure the actors' preferences that are the inputs into "efficiency," how best to accomplish efficient allocation under conditions of scarcity, and the nature of transaction costs and how to determine them. These in turn determine the selection of facts, as well as provides, perhaps most importantly, the justification of the particular selection. Theory is difficult to perceive and explain, but without it, the way in which facts are filtered becomes completely arbitrary or, even more grave, it is assumed that the facts are not filtered or selected at all but simply just "there," as "objective," human-independent "givens." Where Formalism provided "objectivity" in law, Realism placed "objectivity" in facts. However, Cohen intuited this error (made by many Realists) and sought to clarify realism through pragmatism, which made no such claim to the objectivity of any facts, but rather suspended or bracketed the entire idea of "objectivity" with its purposive, context, and effects bound notion of limited truths. Perhaps what Cohen was proposing was not a "criterion of values" but instead *the naming of an alternative social theory – alternative to the theory that was an invisible source of power for the conservative judge, MI.* The conservative judge of Cohen's time could hide behind the metaphysical qualities of legal concepts and smuggle in conservative values without owning up to them, not only because of the indeterminacy of legal sources – i.e. their often vague and open character, which left much to the interpretation of the jurist – but also because their views had a foothold in an accepted reality, with a corresponding ideology, or set of influential ideas that had so deeply permeated

society as to become invisible, ideas about those who deserved entitlements and who did not, whose interests merit strong protection by law and whose merit less so. What criterion of values could protect those disadvantaged by existing social arrangements – the have-nots? This system of the rightful "haves" and the unfortunate "have nots" was so deeply entrenched in American society and the courts deciding cases in the period in which Cohen was writing, that it was not questioned, mostly because it was not seen. Similarly, today, with the dominance of the economic analysis of law, it is almost impossible to critique because the idea of efficiency is so deeply entrenched. Why? What gives the economic analysis of law its potency is not its value of efficiency, but rather its underlying theory that supplies an "objective" criterion for selecting what facts were relevant from what facts are not – the value of efficiency has value because of its seemingly uncontested universal relevance. The reason for the acceptance of this universal relevance is the result of an implicit *Social Theory – a set of ideas about the structure of society, its dynamics and conditions for transformation*. The question of what is this deeper structure of society is not one that appears on Cohen's horizon; indeed, it would be another half century before this level of theory would be addressed at all within law, by Roberto Unger, who built upon the purposive turn of ALR, to re-orient law and socio-legal analysis towards a project of understanding and evaluating societal architectures, for the purpose of institutional design aimed at transforming the deep underlying social structure.

4.5 What is Socio-legal analysis For? The Effect of Social Theory on Law

"To have no theory of these (social orders) is to possess no theory of law."[332]

[332] Roberto Mangabeira Unger, *The Universal History of Legal Thought* (Unpublished Manuscript, 2017), p. 46. http://www.robertounger.com/en/wp-content/uploads/2017/01/the-universal-history-of-legal-thought.pdf (last visited January 5th, 2020).

Roberto Unger argues in his most recent work that legal scholarship needs social theory in order to reimagine law as a critical site for reimagining alternative emancipatory forms of social order. Unger is one of the few legal thinkers who explicitly views *social theory – theories of the structure and sources of social order, the role of individual agency, and the dynamics for change* – as relevant to understanding the purpose of law today. In an earlier work *Social Theory and Its Task*, Unger argued for a new type of social theory, an "anti-necessitarian social theory,"[333] which will be further elaborated shortly. Armed with this anti-necessitarian social theory, Unger argues it is possible to remake society through "institutional imagination" – understanding law as the institutional architecture of society – towards the "adjacent possible," i.e., what steps are truly transformative in potential yet also possible today, in view of the prevailing arrangements (or existing legal doctrines) and ideas (or political climate).[334] For Unger, institutions are the interface between social structure and everyday routines. They are the place where ideas – theories – shape roles, expectations, and the rules (law and doctrine) for changing those roles and expectations. This "institutional" approach is central to Unger's work, both with regard to his critique of mainstream theory, as well as the possibility of crafting an alternative.[335] In Unger's approach, law is to be studied as the building blocks of institutional structure and one's inquiry into doctrine will relate to one's purpose (like Realism) shaped by one's social theory (one step beyond Realism). [336]

[333] ROBERTO MANGABEIRA UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK, POLITICS (1987).
[334] *See* ROBERTO MANGABEIRA UNGER POLITICS: THE CENTRAL TEXTS (1997); ROBERTO MANGABEIRA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (2017 2nd ed. [1986]).
[335] Ibid, "An institution is a set of rules and beliefs shaping a cluster of practices that is informed by a conception of how people, in a certain domain of social life, can and should deal with one another. The shaped practices are already mediated by representations; they are never unmediated by ideas. In speaking of institutions, we draw attention to the relation between representations and rules in imparting particular order to a form of social life it structured and its discontinuous character. The institutions amount to focal points of both order and meaning."
[336] Unger, *Universal History*, *supra* note. 333 at 14.

4.5.1 An Anti-Necessitarian Social Theory of the Structure and Dynamics of Society

Unger identifies two "universal" trends that organize the intellectual history of law: on one side the idea that law is immanent order, and on the other side, that law is the will of sovereign. Law as immanent order is the idea that there is "a moral order latent in social life, and revealed and refined through the work of legal doctrine."[337] Within the immanent order approach Unger includes schools of legal theory ranging all the way from legal dogmatics/doctrinalism to the historical schools of Savigny, to the policy and principle approach of the 21st century schools of "reasoned elaboration" (namely in reference to the work of Dworkin). Unger bemoans the incompleteness of these views of law, as doctrine alone can tell us nothing about social order, of which law is supposedly the source or at least a reflection. He uses the example of an alien being from outer space, first encountering the Romans during the Roman Empire, engaged in slavery, and how this being would be hard pressed to make sense of the social order from a study of the legal doctrine of that time alone. The entire sum of laws relating to the law of obligations and commercial law would still offer no idea about what they really meant: "of the way that free and slave labor coexisted, of the lives of slaves and freedman."[338] To know something about this one would have to view law in relation to an explanation of the social order: a deeper structure of society that relates to the economic order, its social relations of production, distribution and allocation, and how these relate to the available forces of production (or resources of nature, labor and technological infrastructure). An alien being only from having an explanation of the social order, the way that the surplus was created for the aristocracy by the slave who labored without compensation.

337 *Ibid*, p.1.
338 *Ibid*, p.19.

On the other side, Unger also critiques the view of law as the will of the sovereign, starting from the political theory of Hobbes, continuing through to the legal positivist schools, both Bentham and Austin's utilitarian-inspired 19th century approaches, and Kelsen and Hart's "pure" or "analytical" mid-20th century theories, and on to the procedural schools of the late 20th and early 21st century. Of this view he says:

> "Like the idea of law as immanent moral order, the conception of law as will of the sovereign is radically incomplete. In every real historical circumstance, given the institutional arrangements that have been adopted, the law made by the sovereign, even by the democratic sovereign under a regime of parliamentary sovereignty, has never been more than a series of episodic interventions in a real structure. Most of that "structure" has always been left undisturbed. Much of it has not even come into the sovereign's—or the nation's—field of vision."[339]

Unger argues that inherent in both views, lies a third view: "law is the implicit reference to the real structure of reality."[340] Intrinsic to the immanent moral order view and will of the sovereign view, is the view that law describes the underlying social order. The first view of immanent order sees in the current law not only a description but also a defensible view of social life, what Unger describes as the "miracle" of the oneness of the "is" and the "ought."[341] While in this latter view, social order is a reflection of the order made and remade by political institutions and sovereigns. What could possibly be inaccurate about this statement? For the former, when the absurdity of the "miracle" is revealed, it seems immediately preposterous, but for the latter it seems more or less correct even according to common sense. Unger argues against this common sense: "The

339 *Ibid*, p.37.
340 *Ibid*, p.3.
341 Unger, CRITICAL LEGAL STUDIES MOVEMENT*, supra* note. 335, p.3.

pretense that these routines and arrangements and the whole distribution of advantage and disadvantage resulting from them, subsist only because the sovereign consents to them is little more than a fiction. The sovereign is in fact powerless to change them except at the margin or when in crisis—usually in the form of war or economic collapse—broadens the room for change."[342] What is this mysterious structure that the sovereign runs against in instituting policy to which Unger refers? For Marx that mysterious structure was called "capital," but Unger seems to have more in mind than the constraints posed by the economic system as explained by Marx's social theory, and indeed he views this theory as problematic for its "necessitarian" character. Unger declares that he is in search of a counter-theory to both Marxism and the positive social sciences: an "anti-necessitarian" social theory. To understand what is meant by an "anti-necessitarian social theory" one must understand it in relation to contrasting traditions, what Unger names as the "positive social science" tradition and the "scientistic social theory" tradition. Unger argues that the social theory of the "positivist social sciences" collapses what is perceived through the empirical (routine activities, conflicts and deals) with the structural or institutional background, or, are at least, are "casually agnostic" about whether there is something called "structure." [343] The attitude of the positive social sciences, argues Unger, is that "facts" are taken at their face, and therefore we must accept that reality is represented by the facts one perceives, and that theory can be entirely inductive. What is problematic about

[342] *Unger, The Universal History of Legal Thought supra* note. 333, p. 3.
[343] UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK, supra note 334, p.3.
"disregards or downplays the contrast between the institutional and imaginative contexts, frameworks of structures of social life and routine activities, conflicts and deals that these frameworks help shape. The other tradition, accepts the distinction but subordinates it to unjustifiably restrictive assumptions about how frameworks change, what frameworks can exist, and what relations may hold between a framework and the freedom of the agents who move within it. (…) An anti-necessitarian social theory must reject the choice between a scientistic social theory and a causally agnostic understanding."

this? The positive social science view posits as natural what is in fact the influence of theory and values, however in an unconscious form. Another error is what he calls, somewhat misleadingly, since it is the opposing contrast to the "positivist social science" approach, "scientistic social theory." "Scientistic social theory" argues for a clear distinction between deep structural framework and empirical facts, but then subordinates what can be known – through the framework but also in its relation to "freedom of the agents" – in a way which Unger claims is "unjustifiably restrictive." Unger is referring here to Marxism,[344] and its theories about structural change as the result of the dialectic between the forces of production and the relations of production (and, at a secondary remove, between the economic "base" of relations of production and the political "superstructure" of the state, law and ideology). He accepts the Marxist claim to there being a deep structure as having merit, but rejects the "necessitarian" impetus of the claim, namely that the dialectic of the forces and relations "necessitates" changes from one economic system to the next in a sort of teleology – socialism as the inevitable result of capitalism, just as the latter was the inevitable result of feudalism.

For Unger, the stakes of social theory for law are both about recognizing a deeper structure while at the same time leaving its conclusions open and contingent to the potential for institutional change, which he views as capable of altering that deep structure in a somewhat incremental way ensuring lasting effects (but less incremental than law currently). Changes that are simultaneously piecemeal (contra deep-structure theory and like mainstream views) yet

[344] I am referring to Marxism here rather than Marx, because there are three periods of Marx, and it seems that Unger has reduced Marx to the second, middle-phase (represented most prominently by *The German Ideology*) which is characterized by its teleological stage approach that foregrounds the forces of production over social relations of production, whereas his later work, as referred to in The Social Institutional Character of the Market chapter and taken up by the Political Marxists, reverses and foregrounds social relations. See KARL MARX, THE GERMAN IDEOLOGY, (1994[1846])(LAWRENCE SIMON (EDS).

transformative (like deep-structure theory but contra mainstream views). Unger rejects the notion of "capitalism" as an essentialized idea, similar to the way that the proto-realist Hohfeld rejected "ownership." Hohfeld, as discussed in Chapter 3, in disaggregating ownership into a bundle of entitlements, freed property from its reification into a concrete institutional reality that could be broken down and then combined and recombined to serve social purposes. Similarly, Unger rejects "capitalism" and sees it instead in its "varieties,"[345] as the particular combination and recombination of different legal entitlements created through contract, property, and welfare. This view, unlike the Marxist view, offers law an important role in social transformation: the very foundations of the social institution of capitalism can be altered through the legal institutions of contract, property and welfare. [346]

4.5.2 Social Theory Consequences for Law: Redefining Purpose

What Unger suggests is that law offers the building blocks for the architecture of reshaping society in the image and purpose one chooses, through what he calls "institutional imagination," i.e., the institutional reconfiguration of the market, democracy and civil society. [347] For Unger, the content of that image, the purpose of "institutional imagination," was dependent upon the social theory that one embraces, either consciously or unconsciously. Unger suggests that whether unconscious (in the case of the classical liberal) or conscious (in the case of the

[345] Similar to Gosta Esping Andersen, *supra* note. 55. *See also* COATES, ED, VARIETIES OF CAPITALISM, VARIETIES OF APPROACHES, *supra* note. 72.
[346] This was the aim of my work in Chapter 3.
[347] Unger, *The Critical Legal Studies Movement*, *supra* note. 335 at p.23, "How can we nurture structural ambitions without succumbing to a structural dogmatism? Part of the answer lies in the development of institutions and practices that possess, in superior measure, the attribute of corrigibility, allowing us experimentally to discover the path as we advance. The implications for reshaping market economies, democratic polities, and independent civil society may be both numerous and tangible. As law and legal thought deal with structure in the details, they offer a preferred place in which to look for the equipment that the execution of this task requires."

Marxist socialist) both roads can lead to what he calls the danger of "institutional fetishism," which can take liberal and orthodox Marxist forms. The "classic liberal," "mistakenly identifies a particular group of makeshift compromises in the organization of representative democracies and market economies with the very nature of a free democratic and market order." [348] While, the orthodox Marxist, "subsumes these same unique institutional arrangements under a general type of social organization that supposedly represents a well-defined stage of world history. He then excuses himself from the need to describe in detail the next, socialist stage of social evolution.[349]

Both the classical liberal and Marxist socialist, as a result of their underlying social theory, but for very different reasons as explained above, are blind to the possibility of institutional transformation through law. Unger suggests that neither are ambitious enough, the former because he sees in nature what he believes to be freedom, the other because he sees in nature the laws of motion that will achieve this freedom. Neither has embraced the idea that it is not nature but humans that catalyze social transformation, in what Unger calls their "negative capability" – the restless human capacity to transcend every given context, whether in consciousness or practice, by putting existing ideas and practices into critical relief or suspension, for the sake of their evaluation and purposive transformation.[350] However, Unger's negative capability concept is problematic in that it focuses too much on individual agency – the will of pre-social individuals, the unit of analysis common to *Methodological Individualism,* and is thereby trapped by the same limits of that approach. According to Unger this negative capability is exercised through what he understands to be the alternative structure to Marxism, what he calls "formative

348 UNGER, SOCIAL THEORY: ITS SITUATION AND ITS TASK, supra note 334, p.12.
349 *Ibid.*
350 Unger, Politics*, supra* note. 335, p.27, 77-78, p.258-259.

contexts,"[351] loose institutional sites that regulate both "expectations and routine conflicts over the distribution of key resources."[352] Neither view, Unger posits, the classical liberal nor Marxist, truly recognizes the human capacity for achieving the ideals aspired towards through formative context, the ideals of freedom, democracy, and political and material equality.

4.5.3 Institutional Imagination Towards the Adjacent Possible

The content of Unger's project of institutional imagination is unique in that it both aims to fully realize the ideals of liberalism while at the same time also a re-distributional project that goes beyond the goals and aims of social democracy, suggesting that social democracy cannot be revived but instead that it must be transcended. Unger argues that Social Democracy is not enough and has not been successful in realizing neither its own values nor that of liberalism and in fact is a hindrance to the realization of such values. Unger's social democratic institutional project is much closer to a Marxist program of dismantling absolute property rights, than the theory on which he draws for his conceptualization of "negative capability." However with the qualification that Unger takes a major departure from Marxism, elaborated in his magnum opus *Politics*, in his rejection of the transhistorical and what he views as the necessitarian character of Marx's theory of history, relying instead on what he calls historically contingent "formative contexts," institutional sites that regulates both expectations and routine conflicts over key resources, as the driver of change.[353] What is the relevance of

[351] *Ibid.* p.125
[352] *Ibid.*
[353] *Ibid.* A formative context is Unger's replacement for the "mode of production" concept in Marx's work – whereby a strict "logic" of economic systems results in the downfall of one system and its transformation into another, a new social/economic form. However, according to Perry Andersen this turns out to be a looser term that Unger aspires towards, in that it seems to capture everything and nothing. *See* Perry Andersen, *Roberto Unger and the Politics of Empowerment*, 173 NEW LEFT REV. (1989). "The price for the looseness of configuration prized by its author is, in other

"institutional imagination" through "formative contexts" for law and socio-legal analysis today?[354]

In *What Should Legal Analysis Become?* (to which the title of this Chapter pays tribute) Unger argues that what is needed for an institutional and constructive approach to law, as opposed to a "rationalizing" one – one that takes for granted that the legal system reflects and pursues a defensible social order – requires us to abandon "the illusory belief in rational reconstruction as the necessary and sufficient antidote to arbitrariness in law," and rather to engage in the practice of "mapping and criticism."[355] Recalling our discussion above on the emergence of the problem of the "is/ought" with the advent of Realism, the idea that "rational reconstruction" can resolve the "arbitrariness" in law is a mistaken attempt to resolve the crisis of "fact/value" through resolving the problem of the "actual/ideal." The idea that one can rationally reconstruct the law through solving every social problem through the existent legal materials does not resolve the problem of the subjective value choices necessarily involved in every rational reconstruction. Regarding criticism, Unger says, "[i]ts task is to explore the interplay between the detailed institutional arrangements of society as represented in law, and the professed ideals or programs these arrangements frustrate and make real."[356] It is only through the "purposes" professed in ideals (values) that the "is/ought" distinction can be resolved through a transparent undertaking of the values involved in a particular reconstruction of law. Unger uses the word "ideals" while Cohen speaks about "values" but the program they articulate to evaluate law

words, vagueness of boundaries and indiscriminacy of elements. For the 'tangible and intangible' resources on whose control the whole definition of a formative context depends are never demarcated." *Ibidd.* at 101.

354 UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? *Supra* note. 259.

355 A novel application of Unger can be seen in Filippo Valguarnera's Presentation in Florence on Comparative Law 2016/09/17, extending Unger's ideas to Comparative Law methodology.

356 *Supra* note. 259 at p.130.

by the *effects* of particular arrangements (pragmatism – one could call it institutional pragmatism) through a purposive and evaluative criterion outside of law (values and in the case of Unger ideals) has striking parallels: Cohen's subject is not the "detailed institutional arrangements of society as represented in law," as per Unger but instead, "facts – made relevant through a criterion of values," or as I argue earlier, facts filtered through *Theory* and *Purpose*. However, unlike Cohen, Unger goes one step further in engaging law as a building block towards realizing what he calls "liberal ideals": through the recovery of what Unger calls "deviationist doctrine." Unger's program, in sum, is the evaluation of law in relation to purpose – ideals – framed by an "institutional social theory" that focuses on locating a formative context. Unger specifies four particular formative contexts, institutional sub-clusters or areas fruitful for such analysis of "mapping and criticism": "the work-organization complex,"[357] "the private-rights complex,"[358] the governmental-organization complex,"[359] and the "occupational-structure complex."[360] By "mapping and criticism," Unger means the project of locating current doctrine related to each institutional complex and to evaluate them according to the ideals of liberalism and social democracy. For example, Unger sees the liberal ideal of democracy as undermined by the "private rights complex" and in particular "the absolute property right." To carry out Unger's critique in concrete programmatic form would involve analyzing the professed Lockean ideals behind the absolute property right and to show how they are undermined, and then mapping "deviationist doctrines" – i.e., identifying legal doctrine that goes against the grain of the absolute property right in property law, by viewing property, not as a monolith, but as a disaggregated bundle of entitlements. A second step he

[357] Unger, Politics, supra note 335, p.152-159 & p.364-366.
[358] *Ibid.* p.111-122.
[359] *Ibid.* p.122-134
[360] *Ibid.* p.96-111

describes, like Cohen, is criticism – showing how the absolute property right occupies "the vital role of holding the space that any other generalized form of decentralized allocation of capital would hold"[361] and how the deviationist doctrine may offer steps towards filling that space with a new form of allocation. However, a shortcoming of Unger's work is in the details of how this may look in relation to specific legal systems which is not outlined by Unger: what particular deviationist doctrines offer such potential and in what legal systems? What political contexts?

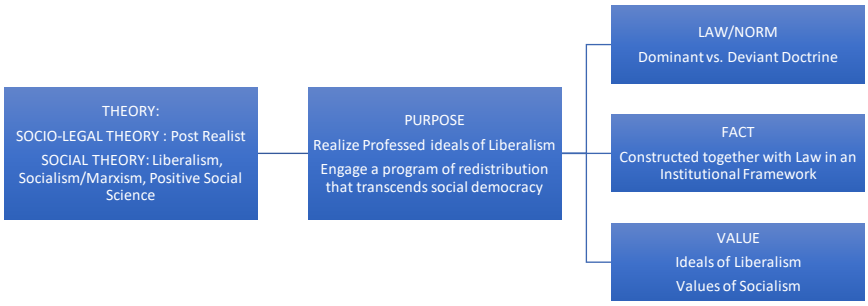


Figure 7 Unger: Social Theory & Purpose Orientation

In a sympathetic but skeptical review of Unger's book, Jeremy Waldron points to the crucial gap in Unger's proposed program for legal analysis: "Unger's radical analysis does not confine itself to the sort of relation between rules and ideals with which legal scholars are familiar (the sort of relation Dworkin sketches for example). Instead it involves elements of institutional understanding that go

361 *Ibid.* p.369-370

far beyond legal structure."[362] If the issue is about structure beyond a legal structure, Waldron asks, why are jurists in the best position to undertake this project? What particular extra skills and knowledge would jurists bring from analyzing the law from the point of view of the ideology of liberalism, towards the end point of social democracy or socialism? In fact, as Waldron argues, jurists may not be the best experts on the institutional context of the law – instead sociologists and political scientists may be better suited. Here, however, Waldron may be too naïve and optimistic in his assumption that the mainstream empirical approaches dominant in sociology and political science are apt for studying the relationship between social and political orders to the ideals of these orders. Perhaps what Waldron is suggesting instead is that social and political *theorists* – that deal with the theoretical assumptions and articulated ideals of different social orders and political systems – may be the better suited in dealing with these types of questions. As Waldron argues, jurists by nature and training tend to be the least radical, the most conservative, and the most blind to ideology.[363] However, it is not jurists -legal scholars, or lawyers and judges - at whom Unger's project is aimed. Unger views citizens who as the new "protagonists" responsible for "the making of society in the details of the law."[364] While it may be naïve and optimistic that citizen should be the new protagonist of law, this program has far more ambition than the one that Waldron's critique suggests of jurists becoming social theorists. Unger argues that law must be transformed from a closed, inaccessible and self-rationalizing system to a democratically accessible set of tools for the understanding, evaluating

362 Jeremy Waldron, *Dirty Little Secret* (*Review of* Roberto Unger, What Should Legal Analysis Become?) COLUM. L. REV. 98/510 (1998) p.524.
363 *Ibid.* at p.526-527.
364 Ibid. "We must change our conception of who doctrine addresses and of what it is for. The judge or the jurist could no longer be the defining protagonist of legal thought, nor could the question of how judges should decide cases remain its central issue. Much more important is the making of society in the details of the law."

and reconfiguring the architecture of a free society. However, to take this seriously, one must ask themselves how the citizenry could be equipped for such a task. Jurists already have enough difficulty in locating and utilizing deviationist doctrine as discussed in the next section. Much more plausible seems the collaboration between social theorists and jurists working together with citizens, or jurists and social theorists working together in their capacity as citizen policy makers, rather than only as academics and legal professionals.[365]

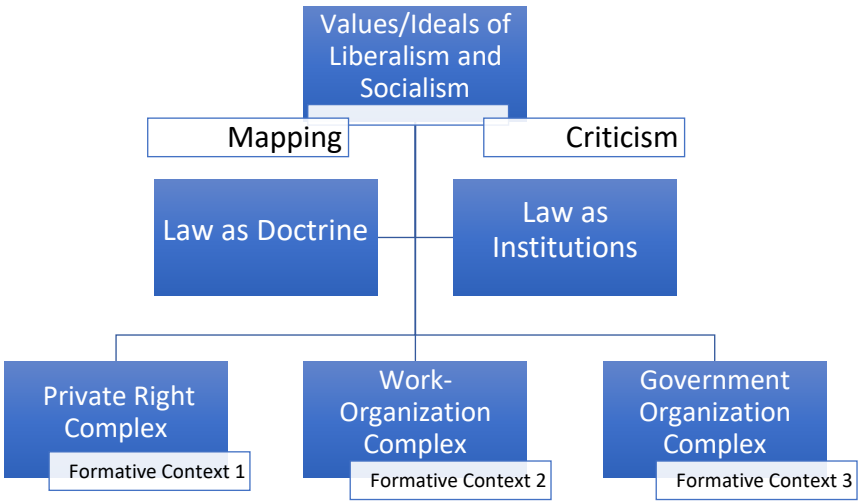


Figure 8 Unger's Institutional Imagination

As Unger elaborates in another book, *The Critical Legal Studies Movement*, the last step of his socio-legal analysis – "the deviant solutions can serve as new beginnings

[365] I have had the unique pleasure to witness and even to be a part of (in some small way) exactly this type of unique collaboration at the Sustainable Economies Law Center in Oakland, California where lawyers work side by side regular citizens in achieving a more equitable and just world by democratizing and decommodifying housing, energy, and food through cooperatives. https://www.theselc.org/.

of dominant solutions" – is to use the "small-scale variations in established law" as instruments not only for imagining but also developing concrete alternatives. This use of current law in deviationist form to develop concrete alternatives is what Unger characterizes as the "adjacent possible" – meaning to start from where we are, to move in the direction of where we want to go. While Unger's concrete proposals may be the compelling part of his work, they appear to be made from the point of view of the external utopian citizen policy-maker, rather than the strategic insider jurist, more along the lines of legislative proposals or a citizen's referendum. They include such proposals as the "Dualist Constitutions with Overlapping (as opposed to Division of) Powers,"[366] "The Rotating Capital Fund,"[367] and an "Inheritance-Free Property System."[368] Though Unger does not provide the outline for the realization of these projects through law, one would imagine it would require teams of legal experts in constitutional law, financial regulation, and property law. However, the biggest problem with Unger's proposals are that they are not concerned enough with detail: a deeper going engagement with how these proposals could be realized through legal theory and doctrine. In achieving great vision and ambition, Unger falls short of explaining how such reforms could be accomplished in relation to specific existing political and legal systems, which could potentially make them uninteresting and below the radar of the imagined agent catalysts of such reform, the citizen jurist or jurist citizen. This lack of engagement with specific doctrine or, more generally, the legal conceptual framework of different fields (contract and property), leads Unger's proposals to become much like his own critique of the Marxist socialist understanding of law as "we won't need such details when we rewrite history."[369]

366 *Politics*, p.526-527
367 *Ibid.* p.247-248
368 *Ibid.* p.359
369 *Ibid.*

However, this is not to say that his programs, particularly for democratizing the economy and disaggregating property, are not worthwhile to pursue, and in fact in ambition they edge closest to the "adjacent possible" of socialism pursued through law in our time. My claim instead is that Unger's proposals fall short because they need to be worked out in their detail in different domains of law, which is what I hope Part III of this dissertation accomplishes.

4.6 A Theory, Purpose, & Values Driven Analysis of Doctrine

While Unger works from within the commitments and problems of liberalism and the possibilities of moving toward another economic form (socialism) into law, Thomas Wilhelmsson of the Finnish school of "Alternative Legal Dogmatics," works from within law towards the social democratic ideals of what he calls the "welfare state ideology." Wilhelmsson's book, *Critical Studies in Private Law*,[370] a major original theoretical contribution in its own right, is also, in my view, the best example of something approximating Unger's *Institutional Imagination* worked out in the concrete doctrinal detail of a specific areas of law and national context, for Wilhelmsson being contract law in Finland. Wilhelmsson's approach to legal transformation mirrors Unger's idea of the "adjacent possible," but is more securely grounded in law and legal doctrine: "The law develops in small steps: too large a single step, and the legal scholar easily falls outside the field of what is legally possible."[371] Wilhelmsson makes significant contributions to the poles of socio-legal analysis of *Purpose* and *Values*, in articulating a program of rejecting formalism's closed normativity, while at the same time retaining its engagement with legal doctrine, as well as naming the values of the welfare state and translating

370 THOMAS WILHELMSSON, CRITICAL STUDIES IN PRIVATE LAW: A TREATISE ON NEED-RATIONAL PRINCIPLES IN MODERN LAW (1992).
371 *Ibid.*

them into a concrete "persons based/need based" analysis rooted in current doctrine.[372]

4.6.1 The Social Theory of Alternative Legal Dogmatics

Alternative Legal Dogmatics was a movement of the 1980s, of which Willhelmson was a central foundational figure, and which attempted to transcend and combine all the Socio-Legal Theoretical Traditions of Realism, CLS, Sociological (Law and), neo-formalist, Marxism, and Luhmann's systems theory and to take the best of each: purposive, value-driven, law as social policy (Realism), critical of liberal ideology and value-free schools of legal theory (CLS), connected to empirical realities (Sociological), engaged with internal legal theory and doctrine (neo formalist), the instrumental use of law for redistribution (social democracy) and edging towards decommodification (Marxism), theorizing law as a social system and its conditions for change not reducible only to the political system but deeper social structural transformations (Luhmann and Marx, of the late period).[373] Alternative Legal Dogmatics, while not explicit about this, is also an attempt to leave behind the worst tendencies of each: the tendency to assume liberal-individualist paradigms (MI), to be overly deconstructive, committed to ideas about objectivity and remaining value-free, too externalist and under-theorizing the role of law, and therefore not engaged from the inside in a transformative project of law. Wilhelmsson views law's relationship to society with sensitivity to the role of theory and to *socio-legal theories* and attempts to find a pluralistic appreciation of each.

372 Wilhelmsson is also the closest of all the schools and scholars discussed here to have an alternative social theory that informs and underpins his analysis, while at the same time assuming that law, like Martinson, operates between the poles of Law, Fact and Value.
373 *Ibid.*

Wilhelmsson's work also shows a clear sense of the importance of social theory, although it is not named as such explicitly, but rather discussed in relation to the close approximation of "welfare state ideology." Although there is a difference of terminology, Wilhelmsson's view of law is complementary to Unger's in that he analyzes the role of law in social transformation in relation to the premise of a deeper social order and processes of societal change not reducible to law. As a result of this view, Wilhelmsson argues for the importance of legal scholars to understand theories, what he refers to as the "grand narratives" of social order, as well as, theories about the dynamics for the transformation of that social order.

> "Alternative legal dogmatics (…) presuppose reliance on a general theory (a "Grand Narrative") of the development of society. Society changes tendentially in a certain direction and this pressure of change is reflected in elements of the law. Using his knowledge of the logic of development the researcher can create an adequate, future-oriented legal dogmatics. One could speak of a systematic-fundamental alternative legal dogmatics."[374]

Wilhelmsson makes reference here to social theory, but unlike Unger, he focuses specifically on its significance for jurists in determining the purpose of pursing "the welfare state taken at its word,"[375] for which strategically-located general principles and norms can be used towards accelerating transformations towards that end. Wilhelmsson appears influenced in equal parts by both Marxist social theory, through the work of Udo Reifner and Lars D. Eriksson, and Luhmann's social theory, through the works of both Luhmann and Gunther Teubner. Wilhelmsson oscillates between a class-based analysis of structure, and structure as produced by the interaction between "autonomous functional sub-systems," what is expressed here in the above quote in the idea of "systematic fundamental alternative legal dogmatics."[376]

[374] *Ibid, p.8*
[375] *Ibid*, p.14.
[376] *Ibid.*

In, however, the articulation of his *ability/needs*-based analysis in contract law, Wilhelmsson is clearly influenced by Marxist social theory, which views socialism as the transcendence of capitalism, albeit not at the level of historically-specific social relations as I argue in Chapter 2, but rather, like Unger, at the level of its ideals. However, Wilhelmsson, unlike Unger, has a commitment to the values of socialism rather than in its diluted form as merely a redistributive project, which is articulated in his commitment to a *value driven* analysis of law based on *aqbility/need person-related roles* in constructing "need-oriented general principles," which of course harkens back to Marx's idea of "to each according to his ability, to each according to his need."[377] Wilhelmsson explains this point as follows: "By need orientation is here meant the attaching of legal relevance to a party's actual needs arising from his poverty, low income, illness, unemployment etc. The question is whether such specific concrete and actual needs, of self-evident relevance in social security law, can be taken into account in contract law also."[378] Wilhelmsson develops this view into a classification of "person-related roles" to be applied in cases of Finnish contract law, according to a party's "technical knowledge, trade or profession, property status, social class, and sex."[379] These characteristics are then analyzed to determine to what extent they relate to the case in view of the facts and whether the criteria is "relevant because this gives the person particular skills,"[380] or if "it reflects a particular need." Wilhemlsson's analysis creates greater sensitivity of the law to the dynamic between parties – the social relation, which transcends the *Methodological Individualist* default position of private law discussed earlier. Whether or not Wilhelmsson has consciously undertaken this critique, his work offers a basis for an alternative social theory of

377 KARL MARX, CRITIQUE OF THE GOTHA PROGRAM (1875). Wilhelmsson cites this on p.93.
378 WILHELMMSON, *supra* at note. 371, p.73
379 *Ibid*, p.93.
380 *Ibid.*

historically-specific social relations (Marx, Polanyi/Wood/Brenner) in the field of private law. By addressing the person-related role criteria, a judge would be an actor in altering the distribution of wealth towards those in greater need through recognizing the historically-specific social relation, translated into legal relations in Wilhelmsson's criteria.

However, unlike the Marxists, Wilhelmsson, like Unger, offers an institutional and pragmatic approach to transformation, and opts for a view of an Alternative Legal Dogmatics that operates between the poles of structural social theory and piecemeal pragmatism. Wilhelmsson uses social theory about social structure, what he terms "extreme systematic," for the purpose of a "systematic-practical," pragmatic critical left project, which works to both hold social theory, and values and purpose in mind, while at the same time making targeted practical interventions from within law.[381] He utilizes legal theory, what I refer to as concepts, reasoning and doctrine, and Wilhelmsson refers to as principles, argumentation, and rules,[382] as the building blocks, which can be shifted in a piecemeal fashion, albeit in a strategic way informed by a broader background analysis that aims to realize the purposes and values or ideals of the welfare state.

Although Wilhelmsson does not have an explicit theory of "institutions," or in Unger's terminology "formative contexts," the great strength of his work lies in its less abstract character as compared to Unger's, taking specific domains of law as concrete points of institutional intervention. Consequently, the importance of Wilhelmsson's legal and socio-legal theory looms large. "Systematization of the

381 *Ibid*, p.8. "The question of what elements, if the concrete legal material should be taken as a starting point in the construction of the general principles, depends on the actual social situation, and the answer will thus be changeable. The general theories of society and law are considered merely to supply one group of arguments for the choice of strategy, a choice which in the last analysis is perceived as political-moral. A model like this for alternative dogmatics could perhaps be termed systematic-practical."
382 *Ibid*, p.23.

law affects not only the conclusion reached through legal reasoning but also its starting point. The legal conceptual apparatus controls the formulation of the problems that are perceived as juridically relevant."[383] He explains that by changing the legal conceptual apparatus at the level of general principles, new problems can be framed in juridically relevant ways. Similar to Unger, he takes up the example of the shift in the legal conceptual apparatus in moving to a "bundle of entitlements" view versus "absolute ownership," and how this shift alters the kinds of questions that can be asked of the domain of property law. However, while Wilhelmsson understand these as derived from differences in the "legal conceptual apparatus," meaning what I refer to as legal theory, I claim the reshaping of these concepts is actually derived from *social theory*. Hohfeld, as I argue in another chapter, to whom the "bundle" analysis of entitlements is owed, was able to analyze distinct legal relations of property only because he understood property not as a "thing" or a relation between a "person and thing" but as "relations between people about things." His legal relations are founded on the idea that property is first and foremost a social relation, and that social relation cannot be properly characterized by legal theory alone, but rather requires for its adequate understanding social theory, which Wilhelmsson comes just short of articulating, in favoring a value-driven approach internal to law rather than a social institutional analysis external to it.[384]

[383] *Ibid*, p.27.
[384] Syed, *Hohfeld in Europe and Beyond: The Fundamental Building Blocks of Social Relations Regarding Resources*, supra note. 179. *See also* C M Hann, *Property relations* in PROPERTY IN QUESTION, (KATHERINE VERDERY/CAROLINE HUMPHREY EDS.) (2004[1988]).

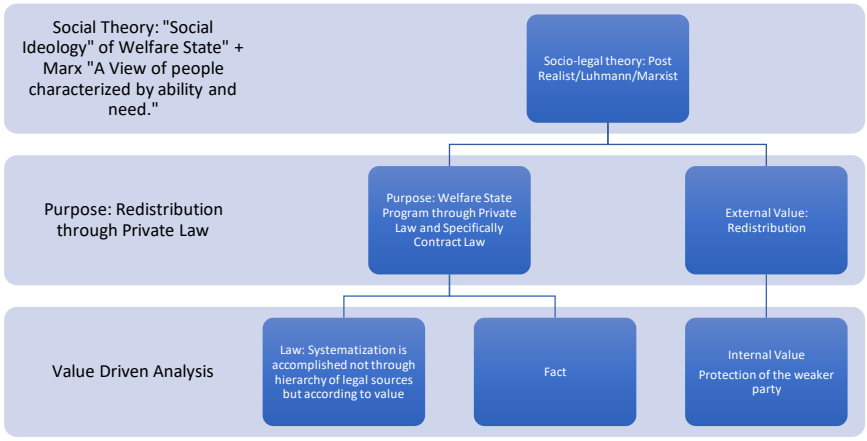


Figure 9 Wilhelmsson: Alternative Legal Dogmatics in Contract Law

4.6.2 Theory, Purpose, & Values Drive the Analysis of Law/Norm and Fact

As explained, above Wilhelmsson's transformative project of law is driven by a purpose outside of law, in a Marxist social theory which embraces the values of social democracy and socialism, while rejecting its hard and structural teleology in favor of an institutional and pragmatic approach to law. Wilhelmsson's goal is to transform law towards "social private law" through a radical judge who emphasizes the value of "need," while working within the legal framework and using legal ideology against itself.[385] However, I claim this is not the case: while the heuristic process may not require theoretical structures of argumentation outside the legal system, the identification of what kind of transformation to pursue, towards what end, requires social theory. Purposes and values cannot be derived internal to the legal system, lest they succumb to rationalization. Instead, the purposes and values

[385] WILHELMMSON, *supra* at note. 371. "One can imagine intermediate forms where one tries to reconcile the view that the law is a 'pragmatic instrument' for influencing society with the realization that the law as a whole must also be scrutinized at the level of a system. One can see the law as a box of tools the critical judge must work with in his practice, while at the same time noting that legal ideology (the system), both influences the use of the tools and is itself a tool."

of a left-oriented project of law, must be derived from an alternative social theory, as in Wilhelmsson's version of what he calls the "welfare state ideology," in order both to achieve greater transparency in scholarly work, as well as, greater success in realizing social change.

Wilhelmsson, unlike Unger, has a different agent (not the citizen) in mind for change, what he has termed the "critical judge" – the specificity of this agent within law also makes more practical the realization of the Alternative Legal Dogmatics project.[386] As guidance for the critical judge, Wilhelmson, similar to Unger's terminology of "dominant versus deviationist doctrine," argues for looking for the "contradictions" in particular domains of law, between related areas of law, and within the vertical hierarchy of law. However, unlike Unger, Wilhelmsson focuses on the internal value contradictions between and within different fields of law, rather than merely conflicting doctrine, and advocates for "heightening the value contradictions"[387] within and between fields. For example, within contract law, there may be a conflict between the value of "binding promises" and the value of "protecting the weaker party." Between contract law and for example labor law, there will also be value conflicts, the value of "binding promises" versus "protecting employees from being exploited by their employers." And an example of vertical contradictions may be public law provisions that limit the rights of contract and property where these goes against the public interest, or constitutional law restrictions based on equal protection. This approach allows the critical judge to speak from within law using the language of the law and even

386 In this respect, Wilhelmsson's project is both more and less exposed to the type of criticism leveled by Jeremy Waldron against Unger's project. See above, at notes 362 to 363, *supra* and accompanying text. It is less exposed in that Wilhelmsson directly supplies "the missing agent" problem facing Unger that Waldron is keen to emphasize; it is more exposed in that the character of that agent seems precisely vulnerable to Waldron's criticisms regarding the traditionally conservative character of legal professionals.

387 This is clearly mirroring the Marxist idea of "heightening the contradictions of capitalism."

specifically to particular domains of law – not redistribution but "protection of the weaker party" in contracts – thereby making it more likely for the judge's arguments to be accepted and institutionalized by current and future judges.

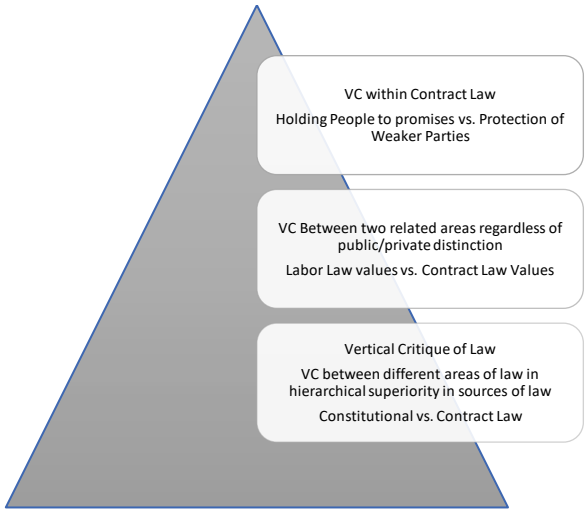


Figure 10 Wilhelmsson: Increasing the Value Contradictions of Law to Build New General Principles

The strength of Wilhelmsson's approach is that he articulates the values of the welfare state from within contract law as a specific value of "protection of the weaker party." This internal-to-law approach to values and to the specific value of a particular legal domain makes it more likely to be accepted by the legal community. However, this also can point to the weakness of the approach, in that what is legally acceptable may lag behind what is politically possible: legal principles and rules may significantly lag behind policy changes taking place at the level of the legislature or in larger macro-political shifts from one ideology (social democracy) to another (neoliberalism).

Another criticism is that while this approach may be appropriate for the critical judge, due to his clearly ideological role in constructing the law, in the scientific or scholarly context this approach has the tendency to hide too much, resulting in a lack of transparency about the theory, purpose, and values informing a particular framing of the socio-legal analysis being deployed, exactly what Wilhelmsson does so well in *Critical Studies in Private Law*. Wilhelmsson, however, argues that the contradictions within law also have a critical function, in that they reveal that "The systematization offered by traditional doctrine is only one possible systematization (…). The choice between different systematizations cannot be made using criteria from within the law: the key to the system must be found *outside the law*."[388] This should be the standpoint from which the legal scholar departs, to not only locate theory, purpose and values within law, but also to show how each systematization involves a particular *choice* of theory, purpose and values.

This also reinforces my view that Wilhelmsson, while not completely explicit about the alternative social theory that informs his work, as argued above, is clearly cognizant of the need for a social purpose according to which one systematizes the law: instead of merely seeking internal coherence, law must be reoriented towards human and social purposes to realize the needs of the most vulnerable segments of society. In this sense, Wilhelmsson is an "ultra-theorist" (as opposed to the super-theorist Unger): he accepts that deep structural logic analysis of systems must inform socio-legal analysis, but adheres more closely to the idea that "everything is politics" (influenced by CLS) by, seemingly paradoxically, asserting the autonomy of law as a separate institution. That, in other words, the interests of those disadvantaged under the current mode of economic organization can be foregrounded through specific existing legal doctrines or adaptations of current doctrine, detached from a structural theory of how change

388 *Ibid.*

takes place through politics or through the economy, but rather simply by naming social values as legal values. This is exemplified by his construction of the "social force majeure," as a solution to the problem of an individual monetary debtor's payment difficulties, where Wilhelmsson demonstrates how the legal scholar can engage in the construction of legal principle out of "fragmented concrete legal material" towards effectuating a "switching of principles" from one value internal to contracts to another value internal to contracts, which meanwhile doesn't challenge the entire institutional structure of law as autonomous from politics, and covertly, and therefore more effectively, actually engages in the work of transforming law through politics, the politics of values pursued through judge-made policy.

4.6.3 An Integrated Theory, Purpose, Value Analysis of Fact and Law/Norm: The Social Force Majeure

Wilhelmsson's strategic project of a Value driven construction of the *social force majeure*, as described above, remains, however, strongly informed by *Theory* and *Purpose*: "In the ideology of the welfare state, one of the chief goals given for social development is the attempt to increase citizens' security by creating safeguards against the consequences of illness, unemployment and old age. A principle of social force majeure appears to be a means, albeit relatively unimportant, of furthering this goal." His *value* of increasing citizen's security is derived from a *Theory* of the welfare state, regarding the social preconditions for the development of the citizen. His purpose in constructing the *social force majeure* – a collective term for the special rules on mitigation of sanctions in the case of subsequent needs[389] – is to achieve the purpose of the welfare state of achieving greater security towards socially enabling the development of the citizen. So, while his strategic project of

[389] WILHELMMSON, *supra* at note. 371, at p.191.

engaging in politics through law denies the need for anything more than the values internal to law, the integrated relation between the *Theory*, *Purpose* and *Value* poles is explicit from the very outset. He also makes it clear that the values of the welfare state, which the social force majeure embodies, are completely at odds with the general principle of private law that "each and every person is responsible for his ability to pay." Next, rather than turning to the *law/norm* pole, he turns to the *fact* pole's empirical research on law's effects: the effects of the general principle of private law that demands payment regardless of their inability to pay.

> A common misapprehension is that payment delays often depend on the debtor's unwillingness to pay. Empirical studies from a number of countries regarding the reasons why private persons have not fulfilled their debtor's obligations show, on the contrary, that delays are normally connected with the difficult economic circumstances the person has happened to fall into. In addition, the studies show that this economically vulnerable position is not as a rule a consequence of the person's incorrect financial planning (voluntary indebtedness) but of changes in his economic situation that are more or less independent of his own action.[390]

After framing the problem through social science, Wilhelmsson then turns to the law pole, not for the solution but the necessary tools for the construction of the solution. Through an impressive comparison between the US, England and Germany (West Germany), Wilhelmsson demonstrates that inability to pay is commonly the result of such changes to one's economic situation as those effected by "unemployment, illness, other reduction in income, divorce and other marital problems and/or, increased living or other costs."[391] Similarly, the work of Udo Reifner, to whom Wilhelmsson makes ample reference, demonstrated that provisions on contractual impossibility in the BGB could be used to construct a

[390] *Ibid*, p.181.
[391] *Ibid.*

social force majeure in German law.[392] Similarly, in France, there is an express statutory rule connected with social force majeure that allows deferment for up to a year when the debtor has been dismissed from his employment.[393] In Finnish law, Wilhelmsson locates concrete legal material on mitigation of sanctions where the legislation notes in cases of the "debtor's illness and unemployment."[394] Consistent with contractual theory, Wilhelmsson makes it clear that this social force majeure as it currently operates is not available at all times merely because one of these conditions is present, but rather only when it can be shown that the condition was *the cause* of the inability to pay. Furthermore, in most cases it would not forgive the debt, but rather postpone its payment. However, Wilhelmsson argues that "At least in some cases, one could imagine granting him the right to withdraw entirely from the contract on a plea of social force majeure."[395] While one could object that such a principle does not go far enough, neither from vantage of the internal value within contracts of protecting the weaker party, nor from the point of the view of ensuring security for the social development of citizens, Wilhelmsson's analysis, in its integration of *Theory*, *Purpose*, and *Value* as applied to *Fact* and *Law* asserts clearly the possibility of politics through law, via a socio-legal analysis that explores its limits in relation to all five elements crucial to exploring those limits in light of law's social, political and economic context. Wilhelmsson is transparent about: (a) his socio-legal theory, namely that the relationship between law and society are open and subject to human purposes and values; (b) his purpose of achieving from within law – contract law – the purpose and aims of the welfare states' values; (c) the values he draws upon, both the external ones of the welfare

[392] See i.e. Udo Reifner, Johanna Kiesilainen, Nik Huls, Helga Springeneer, *Consumer Overindebtedness and Consumer Law in the European Union Report* (2003).
[393] WILHELMMSON, *supra* note. 371 at p.189.
[394] *Ibid.*
[395] *Ibid*, at p. 213.

state and those internal to contracts; (d) beginning with law, as its premises and effects are demonstrated by facts; and (e) his analysis of law as an institutional building block towards the project of the "welfare state ideology," articulated in his analysis of *Theory, Purpose and Values*.

4.7 Commons as a Transformative Left Project: Commons Property Institutions

As the arguments provided thus far should demonstrate, an analysis of doctrinal materials can only make sense in relation to one's socio-legal theory, in order to know what is being assumed regarding: (1) one's view of the relationship between law and society (e.g., Formalism versus Realism versus Critical Legal Studies); (2) the purpose orienting socio-legal analysis (e.g., objectivity and internal consistency versus. social policy versus critique); and (3) the values by which law should be evaluated. I claim that in addition to socio-legal theory, one must also know and should make explicit the social theory one adopts: one's view of social order, the role of individual agency, and the dynamics for change. This social theory will influence not only the social purpose and values relevant for socio-legal analysis, but also the selection of doctrinal materials in relation to their legal institutional contexts. In between theory and doctrine, as Unger argues, is the interface of institutions – where theory "hits the ground" and is made manifest in the reality of routine practices and frameworks of roles and expectations. Doctrine - and specifically deviationist doctrine- is then studied as the building blocks of new institutional structures and one's inquiry into doctrine relates to one's purpose shaped by one's socio-legal theory and one's social theory.

In my thesis, the socio-legal theory adopted derives from the purposive turn in Realism, which views socio-legal analysis as a matter of social policy rather than as merely performed according to an internal logic or historical tradition. The social theory that I adopt is an alternative to what I name in Part I, as the dominant

social theory in the mainstream, of *Methodological Individualism*. In the alternative, "social relations" theory, the market is analyzed as a historically-specific social institution, of which property is one central component, as well as possible lever towards transformation of the economic system towards another social form – socialism or, as a transitionary step, social democracy. Commons, in the context of Part I, is explored in its historical, social and legal dimensions, which represents a contrast to both the dominant forms of public and private property, as a Commons Property Institution or CPI. The theory is that the intermediary character and role of the Commons, both historically as a social institutional precursor to welfare, as well as, a legal institutional opposition to public and private property, may present a way in which to decommodify access to fundamental resources through decentralized associations and group property regimes, in pursuit of the values of decommodification and democratization of fundamental resources. There in Chapter 3, I conceptualize my ideal type of Commons Property Institutions (CPIs) as multiple holders of the entitlement to use resources, with little to no ability to exclude other members from use while retaining the ability to exclude those outside of the community, and having restricted ability to transfer in whole or in part the resources outside the community. In Part III, I evaluate the potential of diverse legal institutions to decommodify (informed by my social theory in Part I) the fundamental resource of Housing. In Chapter 7 I analyze three institutions: Community Land Trusts, Housing Cooperatives, and Condominiums. In this Chapter and Chapter 8 I locate deviationist doctrine and legal institutions (Unger) in support of the decommodification of housing. I also attempt to name the purposes and values internal to law as contained in concrete legal materials (in terms of legal institutions and doctrine) in order to suggest ways in which they can be reformed internal to the legal system in order to better support the transformative left project of the Decommodification of fundamental resources. I

aim my project at jurists, judges, as well as, the average citizen (Unger), taking pains to democratize legal knowledge by creating what are hopefully accessible maps and tools for regular people to navigate.

Figure 11 BAILEY The Decommodification of Fundamental Resources Through Law

4.8 Conclusion

In this chapter, I make the claim that a fully integrated approach to socio-legal analysis, as the one I pursue in this dissertation, must necessarily include the components not only of *Law/Norm, Fact* and *Valu*e, but also of *Theory* and *Purpose*. I argue that without a discussion of *Theory* and *Purpose* in relation to social problems and legal doctrinal material, the aim of socio-legal analysis in legal scholarship, *what socio-legal analysis is for*, will remain unclear, or worse, act as a cover for ideological arguments masked as scholarship. I also make the ambitious, and perhaps controversial claim, that this approach will promote a more *rigorous*, *transparent*, and *scientific* study of law.

Starting with the first claim, I argue how the changing character of *Law/Norm* to *Fact* from Formalism to Realism brought about the "is/ought" problem. I characterize the "is/ought" problem as the emergence of two problems, rather than one. The Realists believed the "is/ought" problem to be the result of the emergence of the crisis of the role of *Values* in Socio-legal analysis, but I point out that their attempts to resolve it, show it also to be a problem of *Facts*. One problem was the *Fact* problem: "What is law?" if not the legal sources. In which case, this was a problem about how to describe the actual law in relation to real world *Facts*, instead of a rational reconstruction or "ideal" law. The way in which the *Fact* aspect of the "is/ought" problem, what I call the *actual/ideal problem*, was resolved for the Realists was through *Purpose* and *Pragmatism*: in view of purposes, the measure was no longer "actual/ideal" or "true/false" but "useful/useless." The "trueness" of law or "trueness" of facts was suspended in the marriage of *Purpose* and *Pragmatism*: so long as rational reconstruction avoided deploying empty abstractions and produced a useful solution – useful in the sense of clarifying the balance of interests involved, both of the parties and of society at large – whether or not there was some ontological basis for that particular rational reconstruction became moot. However, *Purpose* gave rise to its own distinct problem, the criterion by which that usefulness was evaluated, in a second step, through *Values*, which remained vague in Realism, while it temporarily appeared to have resolve the actual/ideal aspect of the "is/ought" problem.

I argue, the *Value* problem is the problem of whether or not one's interpretation of law could be divorced from the imposition of the interpreter's subjective and possibly arbitrary values – it was the "subjective/objective problem" not the "actual/ideal problem." The difficulty of the *Value* problem was the construction of a standard by which to evaluate which *Values* were objective/social values versus subjective/personal ones. I discuss in this chapter the different

schools of Realism (ALR and SLR) and how they attempted to resolve the problem. Two approaches attempted to bracket the problem, while two others sought to embrace the place of Values in socio-legal analysis. However, Felix Cohen, who I discuss as coming closest to addressing the problem in ALR, did not in the end articulate his promised "criterion of values." The Gothenburg School of SLR, I argue, came closer through its piecemeal interest-based analysis tied to larger societal values. However, ultimately, *Purpose*, could not solve the problem, in fact, it could only make it worse – a human purpose could always be accused of importing in the imposition of subjective personal values. *Purpose* had to be linked to a "non-human, scientific, and objective authority" in order for it to produce a *Value* which was beyond reproach. And for that, it had to be linked to a *Theory* of social order. I argue that this is in large part the success of the Law and Economics movement, with its value of efficiency, informed by a theory of social order derived from classical and neo-classical economics, of methodological individualism.

The Realists believed that in addition to the metaphysical cleansing of legal concepts, the turn to *Purpose*, social purposes, was what was needed to rid socio-legal analysis of covert ideological political projects, and to reorient law openly as a tool for social policy. In reorienting the law in this direction, Realist scholars had articulated a new *socio-legal theory* about the changing relationship between law and society and gave new purpose to law. However, their experience shows us that to give content to the ideal of "social purpose," distanced from personal subjective values, said purposes must be articulated either in light of the false veneer of objective positive science, or as a value within a framework of *social theory* – theories about social order, its dynamics, and its conditions for transformation. This is what *Law and Economics* has accomplished with little detection. The value of efficiency has value because it is embedded in a theoretical paradigm of relevance for explaining the social and economic system around us. It is relevant to talk about

the world in terms of the scarcity of resources and the need for allocation, which reduces waste and promotes wealth, not because scarcity is the most important variable when it comes to the production and consumption of resources, at least in the sense that neoclassical economics (on which LE is based) would like us to believe, nor because "efficiency" measured as "wealth maximization" has much to commend it as a value, but rather because our social and economic system operates on these principles.

Our view of reality, the social theory we hold unconsciously or consciously, shapes the world around us, and it, in turn, shapes us. If we believe that the world can be explained by the aggregate behavior of pre-social rational actors, the world will be explained that way until that view no longer has explanatory power and a period of crisis sets in until a new, improved social theory can be developed and made hegemonic. For most of modern human history, the accepted social theory has been of *Methodological Individualism*, as I develop in another chapter on the *Social Institutional Character of the Market*. I argue that this theory has also set the parameters for what is possible to discuss within law. It has determined that the purpose of law is to serve the value of neoclassical economics "efficiency" or to serve an unnamed master, to remain priests of the current social order under the pretense of "precedent," "custom" and "tradition." Until that social theory is replaced with another, it will remain an open question, what else socio-legal analysis could be for.

We turn now to the second claim, regarding a more rigorous, transparent and scientific study of law enabled by this integrated socio-legal analysis of *Theory* (Socio-legal theory and Social Theory), *Purpose*, *Value*, *Law/Norm* and *Fact*. By "rigorous" I mean the commitment to some theoretical frameworks and to demonstrate the coherence and explanatory power of those frameworks; by "transparent" I mean the "naming and taming" of the theoretical frameworks employed, the purpose for which the analysis is being done, and the *Values* which

the author believes to be relevant in evaluating results; and finally by "scientific" I simply mean a demonstration of how the analysis builds from the work of other scholars to explain some phenomena in the world.[396]

The "naming and taming" requires that theory be broken down into its component parts of *socio-legal theory* and *social theory*. *Socio-legal theory* tells us what is assumed about the relationship between law and society, which is crucial to supplying us with the first part of what purpose socio-legal analysis is for, but then as I explain above, we must consider the second part of *social theory*, which informs us of the imagined parameters for social change and where law fits into that picture. Is law a tool for social policy? If so, for what? What kind of change? How dramatic? How does that change happen? CLS came closest to addressing this issue through the work of Unger: law is the building blocks of the institutional architecture of society. By moving the blocks – for example disaggregating property – one can transform the very foundation of the institutions of society – the economy. By altering ownership, we can produce a very different pattern of economic organization, as argued in Chapter 6 by Robert Hale. Unger shows us that the theory (his "super theory") of how change occurs is key, and it need not be

[396] The issues of whether a theory ought to or can relate to a real world "out there," the methods by which the "real world" can be accessed through observation (e.g., interviews versus numbers and statistics), and whether one can really "know" something "real" and "a priori," existing beyond and prior to limited human cognitive perceptions and frameworks of knowledge, indeed whether we can even speak of a reality beyond those limited human cognitive perceptions (debates about ontology versus epistemology), are issues of great contention in the philosophy of science, epistemology and metaphysics. Here, however I have side-stepped these debates, in order to focus on theory as related to the study of law. This is not to say that these issues have no bearing on legal theory and method, especially once one leaves behind formalism, but rather it is important not to treat these topics in a cursory manner. Here they have been taken up primarily in relation to the debates within law regarding the "is/ought" and "fact/value" distinctions, which grapple with the problem of how facts are shaped and whether reality as it "is" can be described independent of the normative activity of judging, evaluation, and prescription. This discussion, however, has been limited by the task at hand, and hence to the function of clarifying the role of Purpose and Values in legal analysis, in contrast to the other elements proposed of Theory, Law and Fact.

necessitarian and evolutionary. However, in taking such an approach the precise content of those building blocks matter. If society is to be transformed through law, one must not only have good grasp of the exact doctrine, but also the values within different domains of law as a starting point. This is what Wilhelmsson accomplishes in his Alternative Legal Dogmatics in the field of contract law, and which I believe should be attempted for other domains, and specifically which I pursue in my dissertation in property and associational law, which would provide a concrete "working out" of the proposals by Unger. *Values* could act as one possible bridge, a bridge to another world, towards the articulation of an alternate *social theory*, that we have yet to fully imagine, of which we can only see the faint outlines. Wilhelmsson's work demonstrates that by connecting the poles of *Purpose-Law-Fact-Value*, *Theory* emerges *as legal theory, socio-legal and social theory* – to explain the choice of *Purpose, Law/Norm, Fact and Value*, in socio-legal analysis. I attempt to apply the fruits of this integrated analysis on my socio-legal analysis of commons in the coming Chapters. I then attempt to reveal how the alternative social theory I develop in Part I relates to the production of external values by which to evaluate current law, and in Chapters 6 & Part III as to how they correlate to values internal to the legal institutions related to housing.

CH 5 On Method: Designing Commons Property Institutions (CPIs) Through Resource Specific Analysis

5.1 Introduction

The purpose of a Commons Property Institution (CPI), in view of the alternative social theory developed in the previous Chapters, is to counteract the negative effects of disembedded markets by reverse engineering the process of the transformation to capitalism and to re-embed the market in social rules in order to transcend capitalism to a new social form. I argued in Chapters 2 and 3 that this process was catalyzed in part by separating people from direct access to their means of subsistence,[397] what I have been referring to as fundamental resources. In order to reverse this process through law, I argue for creating greater non-market access to the means of subsistence, through the decommodification of fundamental resources accomplished through bottom-up legal institutions. It is this aim—of expanding circles of decommodification—that is the central purpose delivered by the preceding social theory, and that will guide the analysis of the present chapter. The theorization of CPIs requires connecting social theory to law: (1) by bringing purpose through social theory to normative or value-driven resource-specific analysis; and (2) integrating Hohfeld's socio-legal theoretical insight of *property as a*

[397] By "reverse engineering" I do *not* mean to suggest that our aim should be actually to "go back" to a pre-capitalist social formation. Rather, the point is that "the way forward" can only be discerned by first understanding "how we got here," i.e., by a socio-historical analysis of the formation of present social relations out of previous ones. The practical upshot of such analysis, when used critically, is to denaturalize existing social relations *and* to delineate their crucial points of strength or significance, those relations the socio-historical consolidation of which provide the lynchpin of the system or focal points for real transformation. It is the pinpointing of these relations, in the form a social theory that can inform a practical strategy of "transforming by undoing" such points of consolidation, that the terminology of "reverse engineering" is meant to invoke. The central point to emphasize here is the difference between this view of the way forward—one drawing on an analysis of the "history of the present" in order to orient toward "adjacent possible" steps forward—and a contrasting approach that seeks to outline a way forward simply by specifying values in the abstract and then fashioning institutional designs in their service. This latter being a more classically "utopian engineering" approach.

social relation with the social theoretical insight of the *social property relations* of capitalism. By bringing social theory and law together in this way, it becomes possible to design legal institutions aimed at creating universal access to fundamental resources, thereby transforming the underlying social relations of capitalism.

Without purpose, the analysis of resources and the design of property institutions in support of certain values (liberal, socialist or otherwise) threatens to become weightless—disoriented and ineffectual— as well as becoming harder to evaluate in terms of relevant effects and advances forward. In connecting a purposive socio-legal analysis to an alternative social theory it becomes possible to analyze and evaluate property, and property law, in its full legal institutional detail as a pivotal point or "pillar" of the market, and therefore a strategic lever on the transformation of capitalism towards another social form. As conceptualized in the last chapter, the socio-legal theory of "formalism" reduces law to rules or norms (and possibly their reasons in some iterations), while the "institutionalist" socio-legal theory instantiated in the work of Unger and Wilhelmsson views law as having an intrinsic relationship to social and economic institutions. In contrast, a radical structuralist (Marxist) view approaches law as subservient to social, political, and economic institutions (the mere superstructure of the economic base), while an "institutionalist" view (that of Unger and Wilhelmsson) views law as a related, though independent, field of contestation in negotiating the rules which structure social, political and economic institutions. A socio-historic and social relations driven approach to the analysis of resources, as will be developed here, also takes this view of law as an important field of contestation, but also pushes in the direction of "structure" (like the Marxists) by its insistence on changing the unit of analysis from the aggregate of individuals and towards the ensemble of social relations—these relations being at the root of the concept of "institutions"

deployed here.[398] Institutional analysis in this sense is to understand that while each social form may have a "hard structure," in the sense of distinct sets of roles, dynamics and logics, at the same time, each institutional form is related to another by merely a matter of degrees, and in that sense the "hard structure" is not immutable towards "adjacent" institutional forms, to use the language of Unger, but requires social, political and legal intervention to realize such adjacent transformation. However, understanding what is "adjacent," and what is truly beyond the horizon of current possibilities requires not only knowing what current sets of social relations are relevant to analyze, in terms of their explanatory significance, but what they are relevant towards, in terms of their programmatic direction.

When institutionalist legal thinkers turn to purpose to provide that measure of relevance, they tend to frame purpose merely in terms of values, as discussed in the previous Chapter. When institutionalists like Ostrom ask the question: what is the best property regime, the optimal legal-institutional design for managing a good with the resource features of a private, public, toll/club good or common good? What is "best" is evaluated according to certain values, mostly procedural, like cooperation and participation, and sometimes, though less so, substantive like justice, fairness, and efficiency. The problem with this approach is that it appears quite arbitrary as to why in certain cases one set of values are invoked, while a different set of values in others. For example, if I take the analysis of the legal regime design of a tennis court, one could analyze it according to many different

398 As we will see in the discussion of the different Institutionalist traditions, this unit of analysis remains lost or at best confused, leading much of Institutional analysis to remain at the level of individuals. Furthermore an alternative social theory, that of the market as a social institution, among many other possible social institutions disposing of its same functions (of regulating production and distribution), one consisting of socio-historically specific social relations, is lost upon the entire Institutionalist tradition with the exception of Polanyi and possibly Esping-Anderson and Roberto Unger.

values: generating as much wealth from the courts, maximizing access to as many people as possible, maximizing access to those who are most talented, etc. There are a number of distinct purposes and values which one could interrogate the material characteristics of any given resource, but how should these purposes and values be selected? Out of thin air? Which purposes and values are the most relevant to analyzing the distribution and governance of a resource like tennis courts or, more to the point for our purposes, fundamental resources like housing? One approach to this question is that "it depends" on the lens, the purpose by which we analyze a particular resource: in this approach different characteristics emerge as different questions are asked without any sense of the priority of certain questions over others. Another way to frame the question, which I developed in the previous Chapter and adopt here, is: "What does our social theory and transformative political aims tell us about which human purposes and values matter?"

As argued in Chapter 1, Ostrom evades addressing the way that people access fundamental resources through the market under capitalism rather than through the commons. Rather than point to the social relations of capitalism, which lead industries to pollute in a ceaseless effort to make more and more profit through cheap plastic goods for human consumption at the lowest possible price, Ostrom describes the pollution of the oceans as a "collective action problem." Common goods or Common Pool Resources (CPRs), conceptualized by Ostrom, are characterized in economic resource analysis as both highly subtractable—in that my use subtracts from your use—and also very difficult to exclude others from. Characterized this way, fish in the ocean are a CPR because my consumption of a fish precludes your consumption of a fish and because the "cost," in terms of physical barriers as well as legal transactional costs, of excluding you from fishing in the ocean are high and therefore it is difficult to exclude you. Put simply, the

"collective action problem" with regard to fish in the ocean is that the difficulty of excluding others—in terms of cost— makes it difficult to create a governance regime for its sustainable use which places limits on individual consumption that prevent the resource's depletion. However, is it really individual consumption that we are worried about? Doesn't individual consumption of fish have its own natural limits in that there is only so much fish that one human can consume in a day and in a lifetime? And even if individuals were fishing for sale rather than their own consumption in the market-place, there would only be so much one man can fish in a day, and so much he needs to sell in order to make a livelihood. The framing of the issue as a "collective action problem" utilizing the individual as the unit of analysis is problematic because it is not individuals (nor even firms) that make it difficult to set limits on consumption but rather the incentive structure around *fish production* not on *fish consumption*. This analysis ignores the root of the "collective action problem," the primary unit of analysis of the social relations of capitalism as a productive system through which humans consume. It ignores the way that fish in our "global commons" of the oceans have become multi-million dollar businesses, where businesses have strong incentives —better, market-driven imperatives— to harvest fish at the lowest possible cost in the shortest possible time. The "consumption" we are concerned about is market consumption driven without human and social limits. Does framing the problem of "common goods" as a "collective action problem" provide us with insights into how to change the social relations which drive individuals to act as homo economicus? Taking a more complex resource like housing which is typically thought of as a private good rather than a common good (the subject of Part III) illustrates this point even more deeply. It is impossible to ask, "what are the resource-specific characteristics of housing?" without asking "in view of what purpose?" or "in view of what values?" and, as I will advance here, "in view of what social relations?" Therefore, in

addition to the economic analysis of resources advanced by Ostrom, we must add values-driven analysis and social relations driven analysis.

A central insight offered by Ostrom is that understanding the characteristics of resources is the first step towards designing their optimal legal regime, and yet at the same time the characterization of a resource as a private, common or public good does not automatically indicate its property regime. Or, as is argued here, it does not automatically deliver the apt "purpose" to guide the design of a legal regime. It is rarely considered by legal scholars that a resource-specific analysis needs be performed once a resource is labeled as "property," as the word "property" seems to suggest that all things with this label, no matter their unique characteristics or the human purposes relevant to them, are and ought to be treated similarly. However, it is a clear and obvious point to anyone outside of the legal discipline who isn't under the spell of the word "property," that toothbrushes and personal computers, much less nature, culture, and knowledge, do not have the same characteristics as food, water, and housing and vice a versa, which does not change merely by organizing them under the rubric of "property." Indeed, as others like Ostrom point out and I will advance here, resource analysis does not start with the property regime, but instead with the characteristics of the resources.

As argued in Chapter 1, Ostrom while understanding the importance of this two-step process in the analysis of the optimal design of commons governance regimes, did not view law as a normatively driven enterprise. This led her to ignore, not only the social relations analysis relevant to the design of a legal regime in providing a clear purpose for legal institutional design, but also the issue of values: what human values are implicated by different resources and should inform communities engaged in structuring commons based governance? Here I will attempt to build upon but also beyond Ostrom by developing the method of

resource-specific analysis in these three modes: economic analysis, values-driven analysis, and social relations driven analysis. Regarding the positive economic analysis of resources, I present the methods of Ostrom and Yochai Benkler for analyzing the material characteristics of resources (5.2 and 5.3). Second, I examine values-driven analysis, as advanced by Anna di Robilant (5.4), which attempts to go beyond the positive analysis of resources to consider the values implicated by and used to evaluate resource governance regimes. Building on this approach I attempt to develop a "social relations driven analysis" as a complementary approach (5.5). Finally, I outline an approach to the design of a legal regime — a Commons Property Institution (CPI) — by integrating Hohfeld's insight into property as a social relation with the resource-specific analysis developed under the aegis of positive economic, value-driven and social relations analysis (5.6). These methods pave the way, as discussed in the final section (5.7), towards the purposive design of a legal institution, a Commons Property Institution (CPI), aimed at the reversal of capitalist social property relations. As explained in Chapters 2 & 3, modern private property, characterized as *social property relations* (Brenner and Wood), demonstrate the importance of private property relations in not only the distribution of wealth in society, but in structuring the very social relations of production, and specifically the social relations of production necessary to the creation of a surplus absent direct coercion. This is accomplished via disembedded markets, both premised upon and leading to the further deepening of the commodification of access to fundamental resources and thus the separation of people from their means of subsistence and complete dependence on the market for their access. What this narrative reveals for law is that at its root, property is a social relation about resources, and therefore each legal question pertaining to any resource, but especially with regard to fundamental resources, must be considered in relation to an analysis of the social relations such property arrangements reflect

and further foster—in particular by disposing, in a concrete way, the sets of competing interests in a given historical moment embodied in a particular controversy or conflict over that resource. This *social-relations driven* approach opens up the possibility of utilizing law to design collective legal institutions (CPIs) aimed at decommodification, by adopting an entitlement structure that prioritizes use over exchange, and specifically use-entitlements over those of transfer.

5.2 The Institutionalist Approach to the Economic Analysis of Resources

Elinor Ostrom made three major contributions to the economic analysis of resources, advanced by her neoclassical economic predecessors Paul Samuelson and Richard Musgrave, which will be discussed in the following sections: 1) Ostrom offered an analysis of resources on a spectrum related to one another by a matter of degree determined by their subtractability (rivalrousness) and difficulty of exclusion; 2) furthermore, she added "renewability" to the concept of "rivalrousness" with regard to common goods; and finally 3) she adds to the analysis of "excludability" the analysis of "costs" as encompassing both the cost of physical barriers as well as of relevant legal instruments.[399]

Paul Samuelson developed the concept of "rivalry" (relabeled by Ostrom as "subtractability"), through a contrast between private (consumption) goods and public goods—which Samuelson labeled "collective consumption goods."[400] For

[399] Elinor Ostrom & Vincent Ostrom, *Public Goods and Public Choices*, in ALTERNATIVES FOR DELIVERING PUBLIC SERVICES: TOWARDS IMPROVED PERFORMANCE (E. S. Savas ed., 1977). This is where Ostrom's table showing the spectrum and relation between exclusion and jointness of consumption first appear, p.168. *See also* Ostrom & Ostrom, *The Quest for Meaning*, *supra* note. 42.

[400] *See* Paul A. Samuelson, *The Pure Theory of Public Expenditure*, THE REVIEW OF ECONOMICS AND STATISTICS, 36/4 387–389 (1954). Paul A. Samuelson, *Diagrammatic Exposition of a Theory of Public Expenditure*, THE REVIEW OF ECONOMICS AND STATISTICS, 37/4 350–356 (1955). Paul A. Samuelson, *Aspects of Public Expenditure Theories*, THE REVIEW OF ECONOMICS AND STATISTICS, 40/4 332–338 (1958). Paul A. Samuelson, *Pure Theory of Public Expenditure and Taxation*, In PUBLIC

Samuelson, private goods were characterized by the variable that "each individual's consumption of such a good leads *to no subtraction* from any other individual's consumption of that good."[401] To this Richard Musgrave added a second variable: public goods were not only nonrival, but also nonexcludable.[402] This latter referred to the possibility—as determined by the material characteristics of the resource—of making the good available for consumption by one while still preventing or excluding others from consuming it. Public goods, then, were goods where consumption by one does not subtract from others *and* where accessibility for one requires accessibility for *all.* The classic example offered by Samuelson and Musgrave of such public goods was a "defense fund."[403] My consumption or enjoyment of the good of "security" offered by a defense fund, does not subtract from my neighbor's consumption of the same. Moreover, my ability to consume the good of a defense fund depends on my neighbor's ability to consume the same: if the neighbor was to be excluded from the security offered, then effectively so would I. A defense fund can only be consumed jointly, not by one individual alone.

To illustrate that this analysis is a positive analysis completely separate from the legal-policy implications of the resource, let us consider a common objection one might point to: if the US has a defense fund for the benefit of its citizens within its territory, such that it does not provide security to anyone except its citizens within its territory, then the fact that—Swedes are not protected by the US

ECONOMICS: AN ANALYSIS OF PUBLIC PRODUCTION AND CONSUMPTION AND THEIR RELATIONS TO THE PRIVATE SECTORS (Julius Margolis and Henri Guitton (eds.)) (1969).

401 *Ibid.*

402 *See* Richard A. Musgrave, Cost-Benefit Analysis and the Theory of Public Finance. *Journal of Economic Literature* 7/3 797-806 (1969); Richard A. Musgrave, *Provision for Social Goods. Public Economics*, In AN ANALYSIS OF PUBLIC PRODUCTION AND CONSUMPTION, (Julius Margolis and H. Guitton (eds.)), (1969).*Also See* for earlier versions: Richard A. Musgrave, *The Voluntary Exchange Theory of Public Economy*, THE QUARTERLY JOURNAL OF ECONOMICS, 53/2 213–237 (1939); RICHARD A. MUSGRAVE, THE THEORY OF PUBLIC FINANCE: A STUDY IN PUBLIC ECONOMY (1959).

403 *Ibid.*

defense fund is really a policy choice. Such that the concept of "consumption of the good by all" in this case is limited by the policy choice regarding the criteria of inclusion for those intended to enjoy/consume the good. The criteria for inclusion depends on social policy decisions, and therefore the criterion appears to muddle a clear-cut positive analysis of the material characteristics of the resource. However, this is not the case being illustrated by Samuelson and Musgrave and points not to a flaw in their analysis but the flawed logic of those who attempted to critique their view conflating a positive material analysis with normative analysis. A clearer example for demonstrating their analysis, as a purely positive material analysis, is a lighthouse. The good of "light" for ships to find their way into a harbor produced by the lighthouse's physical characteristics are such that providing the light to Ship A means that it is also available to Ship B sailing nearby. One cannot by virtue of the necessity of a constant stream of light for Ship A to make it into the harbor, exclude that light from Ship B. The analysis of the impossibility of excluding B from the light for A does not require us to consider anything about the criteria for inclusion. One could say, "well what if the regulations of the harbor are that only English ships are allowed in while Belgian ships are not allowed to enter." This in no way affects the analysis of the nonexcludability of the light produced by lighthouse: (1) the policies concern "the good" of the harbor –a secure place to dock/transport goods etc. (one that is both relatively excludable and relatively rival)—not the light of the lighthouse; (2) even if they affected the lighthouse, there is no way for the light of the lighthouse to benefit Ship England while leaving out Ship Belgium: in order for Ship Englad to consume/enjoy the light produced, it must also be available to Ship Belgium. Even if the Harbormaster turns Ship Belgium around once they reach the dock based on their exclusionary policies, this will not affect how people will enjoy the good of "light" provided by the lighthouse.

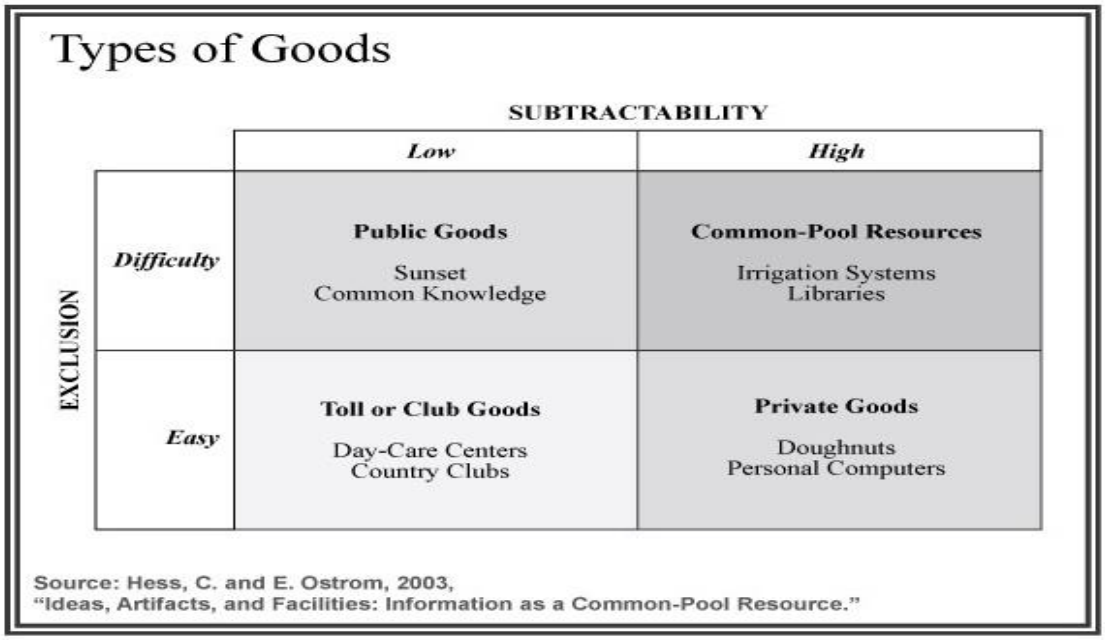
Musgrave and others following in his wake, including Taylor (1987)[404], Cornes and Sandler (1996)[405], and Bowles (2003)[406], further developed this analysis of both nonrivalry and nonexcludability of good, with the effect of transforming an original dichotomy between private and public goods into a spectrum of goods, adding two more categories of (3) club/toll goods characterized by their medium rivalry and relatively high excludability characteristics, and (4) "common goods" or common-pool resources, characterized by their high rivalry and relatively low excludability. According to Musgrave, club/toll goods were like private goods in respect of being relatively easy to exclude others from access, while also like public goods in that one's use of the good does not "subtract" that much from another's use of the same.[407] However, it is important to note that their approach reveals that there is no one-size-fits-all category for each good, every good requires a case by case analysis on spectrum of goods and to analyze the degree to which they are rivalrous and excludable.

This is where Ostrom's work on developing the conceptual spectrum deepened the analysis of goods, as demonstrated in the table below. While Musgrave in 1973 produced a much more rudimentary version of this table, Ostrom was the first to present them on a spectrum, comparing each as related to

404 MICHAEL TAYLOR, THE POSSIBILITY OF COOPERATION, (1987) p. 5-8.
405 RICHARD CORNES AND TODD SANDLER, THE THEORY OF EXTERNALITIES, PUBLIC GOODS AND CLUB GOODS, (1996) p. 8-10.
406 SAMUEL BOWLES, MICROECONOMICS: BEHAVIOR, INSTITUTIONS, AND EVOLUTION, (2003) p.127-130.

407 It is important to note that club goods and toll goods should also be differentiated from one another on the spectrum. Club goods are more subtractable and easier to exclude than toll goods. An example of a club good is a tennis courts, while an example of a toll good is a highway. Tennis courts are very different from highways in terms of allowance of simultaneous use. Players must take turns using the court, while many more drivers can drive on a highway simultaneously. It is also much easier to exclude someone from a tennis court by building a tall fence, whereas a highway has many more potential entry points.

one another as a matter of degree (developed in the discussion below), and to provide accompanying examples of each.



Ostrom offers as an example of a club good, a "country club": it is easier to exclude someone from a country club than a sunset (a public good), but it is not as easy to exclude others as from one's donut (private good). Goods are compared in her table along a spectrum according to the degree of their rivalry (what she calls subtractability) and excludability.[408] With regard to excludability, a country club might require building a fence, the donut requires simply holding it firmly in one's hand. With regard to subtractability, a country club is less subtractable than a donut in the sense that we can simultaneously use the facilities of a country club like a tennis court or take turns in sets of players, but it is evidently harder to

[408] Hess and Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, *supra* note. 50 at p.120.

simultaneously eat a donut. On the other hand, a country club is more subtractable and excludable than a sunset: millions of people in the same time zone can enjoy the sunset at the same time, and my enjoyment of a sunset does not preclude your enjoyment of a sunset, while maybe a maximum of a hundred people can enjoy the amenities of a country club at one time (of course depending on the size and capacity). "Common goods" or "common pool resources," on the other hand, are like private goods in that they are highly subtractable: each fish harvested in a lake, each resource unit, will deplete another's ability to harvest in that same lake, affecting the entire resource system at least for some time. At the same time, this remains different from the high subtractability of non-renewable goods: once I have eaten the donut in the office coffee room, I have deprived you of eating that same donut, and the donut is not renewable in the same way that fish in the lake are. This concept of the resource unit and renewability of the resource system will be explored in further depth in relationship to the work of Yochai Benkler, who places dynamic considerations such as these as central to his analysis. Before doing so however, we consider Ostrom's two major modifications to the original economic analysis of resources of her predecessors.

Ostrom departed from the earlier work of Samuelson and Musgrave in two ways. First, her concept of "subtractability," although deriving from the earlier Samuelson concept of the "jointness of consumption" or "non-rivalry," also further deepened it. In joint work with her husband Vincent, Ostrom clarified the conceptual variables at work in rivalry/non-rivalry as "jointness of consumption."[409] Rivalry exists when "when one person's use or consumption of a resource precludes another person's use or consumption." In this conceptualization of "jointness of consumption," the idea of "one person's use" precluding "another person's use" is central. This is different from what Ostrom

409 Ostrom & Ostrom, *Public Goods and Public Choices*, *supra* note. 400.

later named "subtractability," which replaced "jointness of consumption" with "the benefit consumed by one individual subtracts from the benefit available to others."[410] The former notion of "jointness of consumption" conveys both the aspects of (a) "congestion": how my use conflicts with your use at one point in space and time; and (b) "durability": how my use may preclude your ability to benefit from the same use of the same resource once I have used it. "Subtractability," however, only conveys "durability": my eating the apple reduces the amount of apple available for you. It does not say anything about the problem of congestion: my eating the apple makes it impossible or difficult for you to eat the apple at the same time. Or an example which illustrates this point better: I can read a newspaper now and you can read the same a little while later (congestion in time) or, perhaps, over my shoulder (congestion in space). This may not be that important when it comes to goods with limited "consumable benefit" like a daily newspaper, but with something like a car, as we will see in Benkler's analysis, Ostrom's reduction of rivalry to subtractability as durability, without the issue of congestion retained, may present gaps in her analysis, which may overlook the "shareable" capacity of certain goods standardly labeled as "private," which will be discussed below.

With regard to "common goods" Ostrom ostensibly resolves this issue of congestion by referring both to "resource units" *and* "resource systems," the former being subtractable in one moment in time by consumption by one individual or one entity, the latter being renewable and allowing for "jointness in

410 I note the two different versions and the original idea of "jointness of consumption" vs "subtractability" because they represent slightly different ideas which reveals the ambiguity of the concept. Jointness of consumption makes clear that there can be no joint consumption when it is prevented by multiple user congestion of the resource or the simultaneous use, whereas subtractability only suggests the idea that is my consumption-even if it was a completely different moment in time- detracts from your consumption- then there is a high degree of subtractability. The consequence of this lost nuance in these conceptualizations is discussed later.

consumption" by multiple individuals and multiple entities, thereby integrating into subtractability the dynamic analysis of a resource over time. In this way, Common Pool Resources, are distinct from private goods, according to Ostrom, in having the potential to renew themselves, depending of course on the legal governance and technical improvements in place to ensure their renewability. However, here in the CPR analysis, Ostrom conflates the analysis of the use of a resource in one moment in time versus over time, which goes to its rivalrousness, by seeing it as a variable not of its substractability (her term for rivalry), but as going to the difficulty of exclusion. In distinguishing between resource units, which can be individually consumed up or exhausted in one moment in time, versus those which are subject to joint use over time, she states:

> It is costly (and in some cases infeasible) to exclude one appropriator of a resource system from improvements made to the resource system itself. All appropriators benefit from maintenance performed on an irrigation canal, a bridge, or a computer system whether they contribute or not. [411]

However, this point rather than going to the difference between resource units and resource systems, rather points to the difficulty of excluding users from CPRs, the second characteristic. What Ostrom views as a problem of exclusion created by an improvement of the resource system, is instead an issue of how the improvement to the resource system improves "jointness of consumption," making it easier for resource system to confer benefits simultaneously to more than one individual at a time, thus lowering (although always in relation to its durability) its subtractability over time. What Ostrom means to convey with her analysis of

[411]She goes on to explain: "The fish harvested by one boat are not there for someone else. The water spread on one farmer's fields cannot be spread onto someone else's fields. Thus, the resource units are not jointly used, but the resource system is subject to joint use. Once multiple appropriators rely on a given resource system, improvements to the system are simultaneously available to all appropriators." ELINOR OSTROM, GOVERNING THE COMMONS, *supra* note. 35 at p. 31.

"resource systems" versus "resource units," then, *is that "substractability," whether one is dealing with a common good, private good or public good is* ***always*** *a factor of a resource's ability to renew itself, whether by natural or artificial means, which alters the way in which my benefit from a resource substracts from your benefit of that same resource*. This has important implications for the way in which one conceptualizes certain private goods where the subtractability of the resource is not so high after all when taking into consideration its renewable capacity. As I mentioned earlier, this will be discussed when analyzing the contributions of Yochai Benkler, who revealed this very point of highlighting the renewable capacity of private goods rather than common goods, ignored by Ostrom, offering important implications for the *shareability of many private goods.*

Ostrom's second departure from the standard neoclassical analysis goes to the way she deepened the analysis of excludability. Ostrom clarified that Musgrave's notion of difficulty of exclusion was the result not only of static physical or material factors of the resource but also of the "price" of physical barriers ensuring exclusion and the legal-transactional "costs" involved, thereby bringing in the analysis of legal governance into the economic analysis though more narrowly than in her second step of legal institutional design.[412] Ostrom characterized the "high cost to exclude individuals from the flow of benefits" as something operating "either through physical barriers or legal instruments."[413] Returning to our example of harvesting fish from a lake, unlike a donut, it is not easy to exclude people from

412 This includes social costs as discussed in Chapters 1 and 2- the cost of excluding someone from a water source is not just the cost of building a fence, but the cost to human life if one were excluded from water. This means that "resource analysis" in Ostrom's tradition is not just a factor of efficient allocation and use of resources depending on subtractability and cost (material/monetary) as in the neoclassical paradigm, but according to social norms and possibly also human values, which will be addressed in the discussion later on the third dimension of Commons as the "common good."

413 Hess & Ostrom, *Ideas, Artifacts and Facilities: Information as a Common Pool resource*, *supra* note. 50, at p. 119. The ambiguity and normative conceptualization of high cost is highlighted in Chapters 1 & 2 of this dissertation.

fishing in a lake. I could build a fence on the shores, but the larger the lake and shoreline, the more difficult it will be for me to enclose it physically and prevent others from entering and potentially fishing in it. Rather than remaining with the purely material or physical characteristics of the resource, Ostrom defines exclusion by the "cost of exclusion," and according to her this includes not only the cost of building the fence but also the cost of creating and enforcing legal arrangements to enforce restrictions in the use of the resource.

In contrast, the analysis of Samuelson and Musgrave assumed nothing about costs, neither those of creating a physical enclosure nor the legal transactional costs. Their analysis, although always presupposing markets, was not only purely static—in that it treated goods as if they fell from the sky without any consideration of how they were produced in the first place—but also abstract from other economics aspects that even a static analysis must take into account. For Samuelson and Musgrave, the question was not: when is the cost (of exclusion) too high? Rather, it was, when is exclusion impossible? A public good for Musgrave (building on Samuelson) presented a case of market failure by virtue of the simple impossibility of exclusion:

> "[S]ince the same amount will be consumed by all, individuals know that they cannot be excluded from the resulting benefits. This being the case, they are not forced to reveal their preferences through bidding in the market. The 'exclusion principle', which is essential to exchange, cannot be applied; and the market mechanism does not work."[414]

By contrast, Ostrom's conceptualization views excludability not as an on/off feature, as something that is simply present or absent, exemplified by her table discussed above, but rather as a matter of relation on a spectrum of goods and as a matter of degree related determined by each good's substractability and

[414] Richard A. Musgrave, *A multiple theory of budget determination*. Finan- zarchiv, 17(3): 333–343, (1957), p.334. *See* Maxime Desmarais-Tremblay, *On the Definition of Public Goods*, Documents de travail du Centre d'Economie de la Sorbonne (2014).

the extent of difficulty or ease of exclusion. Further, for Ostrom that matter of degree is not understood simply in terms of purely physical or material characteristics, but as a matter of cost. In a nutshell, for Ostrom the question is not whether something simply "is" or "is not" excludable, but rather: (a) *how* excludable is something; (b) which is a function of how "costly" or "inefficient" exclusion will prove to be. Inherent in her view is that with public goods, it is "inefficient" to exclude people from the resource even if exclusion is feasible because the transactions costs of exclusion are higher than the value of the good, as determined by people's willingness to voluntarily pay for the good based on individual preferences. This is a significant in that one's understanding of what is "inefficient" is very different from what is "impossible": it may be inefficient to build a fence around a lake to protect the resource of fish is difficult but it is not impossible, whereas preventing people living within a nation's borders from the good of security provided by a commonly funded defense fund, or the light of a lighthouse, is an impossibility. By including cost in the criteria of defining "difficulty of exclusion," Ostrom made it applicable to not only defining public goods in contrast to private goods, but public goods in contrast to common goods, where the difficult of exclusion hinges entirely on the high cost rather than on its impossibility, and toll and club goods, where the difficult of exclusion is low in cost and certainly not an impossibility.

5.3 Addition of "Production" to Institutionalist Economic Resource Analysis

Yochai Benkler's analysis folded a further dynamic layer building upon Ostrom and her predecessors' analysis: adding to the analysis of rivalry both the "cost of production," as well as, extending Ostrom's factor of "renewability" beyond CPRs to resources standardly understood as "private goods." In doing so, Benkler's work

forged an additional category of goods, what he calls "shareable goods."[415] The core notion at work here is that of excess capacity: the "slack capacity" of goods created by a significant gap between the costs of production, owing to economies of scale, of an individually consumable unit of good (and hence in the individual's purchaser's ability to purchase the good at relatively low price), and the good's capacity to meet consumption needs, which goes beyond a single purchaser's to extend to those of multiple individuals.[416] Such "mid-grained lumpy goods," typically understood as private goods in the classic analysis, like cars and computers, are instead identified by Benkler as "shareable goods."[417] This is because unlike other types of private goods, "large-grained goods" such as steam engines, which require aggregating demand across many individuals to make purchase cost effective, and also unlike "fine-grained goods," where "granularity" in the control of the amount produced/purchases allows "consumers to buy precisely as much of the goods as the amount of capacity they require,"[418] such "mid-grained lumpy goods" are "small enough for an individual to justify buying for her own use, given their price and their willingness and ability to pay for the functionality she plans to use."[419] Cars, personal computers, and books may all be categorized as such mid-grained lumpy goods because they hold such excess capacity: these goods encourage "over-investment" by individuals, who likely will never use the full capacity of the good in relation to what they paid for it.[420]

415 Yochai Benkler, *Sharing nicely: On Shareable Goods and the Emergence of Sharing as a Modality of Economic Production.* YALE LAW JOURNAL 114, 273-358 (2004).
416 *Ibid.* at p.207-303.
417 *Ibid.* at p. 303.
418 *Ibid.* p. 297.
419 *Ibid.*
420 Such "overinvestment" is not being used to suggest that the person overpaid. "An agent will invest in owning a unit of a lumpy resource if the utility the agent achieves over the lifetime of the resource is greater than the price of the unit for its lifetime. The fact that resource can produce more utility over its lifetime than the agent needs over that lifetime is irrelevant to his decision

"Capacity," here is defined by Benkler as "the degree to which the functionality of a resource can be used."[421] In other words, there is more use-value in the good than captured by its exchange-value (the value of the good on the market set by its equilibrium price). If enough individuals in society buy and use such mid-grained lumpy goods, society will have a large amount of slack capacity "out there," in the hands of individuals.[422] Thus Benkler's analysis opens up Ostrom's concept of subtractability beyond "my benefit precludes your benefit," to asking closer to the original "jointness of consumption" concept, "when does my benefit preclude your benefit in a given moment in time and when does it *not* preclude your benefit in another given moment in time" utilizing both the characteristics of "congestion" and "durability" to reveal benefits and uses of a resource that generate welfare to more than one user over time, demonstrating that reduced congestion depends directly on the higher durability of the resource.

Allow me to demonstrate by way of example the significance of Benkler's contributions by considering a pair goods that are typically understood as "private goods" according to standard economic analysis, but which according to Benkler have excess carrying capacity and hence are better understood as "shareable goods." I buy a book and read it, yet after reading it my consumption does not deplete your (subsequent in time) consumption of it, and thus the book continues to have a high degree of functionality even after my use, or "excess capacity" beyond what I invested in it. It would have been more efficient if I could have borrowed the book from the library for free, or paid a small charge for its function for a limited period of time, but because it wasn't so expensive and perhaps it wasn't readily available at the library when I needed it, or available for less—such

whether to invest in a unit or not. That decision is made purely by comparing the value over lifetime, expressed as the capacity to produce a functionality flow, with the cost of the unit."

421 *Ibid.* at p.298

422 *Ibid.*

as an online e-book "rental"—I could justify buying it for my own use. Similarly, a car due to its price may allow an individual user to justify purchasing it for simply driving to the grocery store or day trips on weekends even if public transportation is better for getting to work during the week.[423] Consequently, though I have bought the care, I only really use it on the weekends, and thus during the week my car has excess capacity, capacity beyond my use of it and what I paid for it.

What the example of these two goods, both having excess capacity, demonstrates, is that how much further utility of welfare they generate will vary depending on considerations of durability in light of relevant uses. Suppose I decide to share my car during the week with a cousin who works where there isn't much public transportation available and therefore the welfare generated by my sharing my car with her is increased. My use of the car on the weekends hardly depletes the use of the car for my cousin and vice a versa regarding her use on the weekdays. However, over time, due to use both during the week and during the weekends, the car might wear out in less than half the time that it would if I only used it on the weekends. In the 1st, 2nd, and 3rd year of the car that extra use will likely have little effect on the car's functionality, however in the 12th, 13th, and 14th year of a car's life the extra use has a much higher deteriorating effect. It may be the case by year 20, even in the life of a well-made car (let's say like a Toyota), I may feel that the excess capacity vis-à-vis its durability has been depleted and it should only be used for my personal use on the weekend. Similarly, a book, depending on its binding quality, may be read again a 100 years after I first read it; however, if its read by someone every week, it probably won't last more than 10.

[423] *Ibid.* at p.304. Assuming that this is an individual in the West where cars are considered "affordable." As Benkler explains, the proportion of the "graininess" is relative to the "extant wealth in a society and its distribution—that is, how many people are able, as well as willing, to pay its price. A PC is a shareable good in North American and Europe, but may be a large-grained capital good in an Indian or Brazilian village."

This illustrates that a good's "usable capacity," the "capacity it can deliver within the time frame necessary for use of the functionality *to generate the welfare* sought by its users" may not be the same as its durability, or what Benkler calls, "lifetime capacity," "the total amount of functionality it can deliver over its usable life."[424] It is important to take stock however, that instead of two cars (one for me and one for my cousin), sharing one car provided both me and my cousin with use functionality to generate the welfare sought by both of us over a 20-year period, even if eventually limits of the car's lifespan would put an end to that use functionality. Similarly, the book provided multiple users in let's say its 50-year life rather multiple books for each individual reader.

According to Benkler such shareable goods can be further broken down into those having "renewable capacity" versus those having "rapidly decaying capacity." A single resource can, with respect to the "welfare sought by its users," have multiple functionalities, with it displaying a high degree of renewable capacity in respect of one functionality, but a higher degree of "rapidly decaying capacity" in respect of the other. The point here is that the characterization of the resource in terms of the welfare sought by its users requires analyzing it beyond "benefit" in a narrow sense, as in simply a paradigm use at a given point in time, in view of the (multiple) human purposes the resource may serve (and which of these it is useful for an analysis to foreground, in light of *its* purposes). A car, as a resource with a weekend user and a weekday user over a period of 20 years (supposing that by year 20 it becomes limited to weekend use), still has a much higher "renewable capacity" relative to the car as a resource for "carpooling," where the car's availability as a resource is limited to the time between point A and B for its users. Once the car trip from A to B is finished, there is no "welfare" offered to additional carpoolers, therefore a carpool trip has "rapidly decaying capacity." On the other

424 *Ibid.* at p.298.

hand, cars for weekend and weekday use, as deployed in the first example, are according to Benkler, a shareable good that display "renewable capacity." As Benkler explains, giving examples, "renewable capacity" is to be understood on a spectrum, similar to Ostrom's analysis of substractability and difficulty with exclusion, with between "perfectly renewable" on one pole, "nonrenewable" at the other end, and various forms of "imperfectly renewable" arrayed in between.[425] Benkler's analysis of shareable goods on a spectrum of their renewability offers us important resource-specific characteristics as to the *amount* of excess "use value" or "slack capacity" can be present in shareable goods *at one time*. According to Benkler, public goods and "perfectly renewable shareable goods" are both characterized by their low rivalrousness and high difficulty of exclusion, with the exception that for "perfectly renewable shareable goods" simultaneous use is time contingent.

Benkler's analysis then, is, unlike the original economic and Ostrom's resource analysis, *dynamic* in two senses: it treats goods over the dimension of time both by looking at the good from before it came into being (production as a dynamic element) captured in the concept of "slack capacity", and by tracking the use-value of the good and how it may change over time captured in the spectrum

[425] *Ibid.* A perfectly-renewable good is capable of delivering exactly the same amount of functionality over time, irrespective of whether its functionality was used in full at a prior moment in time. Its expected lifetime is unaffected by use. An imperfectly-renewable good either delivers some, but not all, of the amount of its functionality with each successive use, or loses expected lifetime with each use. A nonrenewable good is one that can deliver its functionality only once. "Spectrum" (radio or broadband) is a perfectly-renewable good. Dining tables, computer processors, and automobiles are slightly less perfectly renewable, but still almost perfect renewable. Rubber bands, soccer balls, and lithium ion batteries are imperfectly renewable. Apples and matches are strictly nonrenewable. Renewability is equivalent to nonrivalry, but now along the time dimension. A perfectly-renewable good is like a nonrival good as among all and only those uses that can be timed to occur asynchronically without loss of value. Perfectly-renewable goods are, in this sense, impure public goods, where the limitation on their use by marginal users is the requirement that time pass before they can deliver additional units of desired functionality.

of "renewability." Furthermore, and perhaps most importantly, he expands the factor of "renewability" in the analysis of subtractability, from CPRs to ostensibly private goods. Benkler reveals that what is missing from Ostrom's concept of subtractability (with the exception of CPRs) is the time dimension, which arguably was previously accounted for in Ostroms' original analysis by the concept of "jointness of consumption," but lost in the final iteration of "subtractability." To repeat, "jointness of consumption" is distinct from "subtractability" in that the former refers to the limits of a resource to be consumed jointly at one point and time, which is a factor of congestion—more than one consumption is occurring at the same time or close in time—whereas subtractability refers without any time dimension to the "the benefit consumed by one individual subtracts from the benefit available to others."

The implications of excess-use capacity created by folding in the dynamic production element of the resource, to add "shareable goods" to the standard scheme of private, club/toll, common and public goods, offers us important additional insights in our positive economic analysis regarding the use-values of specific resources as well as the multiple use-values contained in one resource (cars as carsharing, cars as carpooling, etc.), which offer functionality beyond that of the use of the purchasing individual and the price set by the market. However, while making important contributions, similar to Ostrom's analysis, Benkler's analysis is confined to the same neoclassical premises of her predecessors: it is important to recognize that slack capacity is created by the difference in use value and its exchange value on the market. Unlike the purely materialist positive analysis of Samuelson and Musgrave, both Ostrom and Benkler's versions move from the analysis of the physical characteristics of the resource to a cost-related analysis of the resource. However, in both Ostrom's "cost of exchange/transaction" and Benkler's "cost of production," there is assumed a particular form of the market,

which may or may not be present, and a neglect of serious discussion of the social policy choices inherent in the shaping of those costs (though Benkler engages a bit on this issue in his discussion in the last part of his article on the transaction cost of exclusion and market selection vs. social selection). It seems somewhat remiss not to highlight in their analysis that the decision of whether or not someone uses the slack capacity for sharing or for sale on a secondary market becomes, when our default conception of the institution for organizing economic life is a market, an individual rather than social policy choice, a fact that is not "natural" but the result of underlying social relations, and social relations not being just merely social norms (as Benkler refers to it in his article) but instead the relations which have been elaborated in Chapters 2 and 3, preceding law as social norms, which gave birth to the capitalist market. With a different set of *social relations of the market*, that decision could just as well become a public social policy choice.[426] This applies not only to private goods but also to goods characterized as club and toll goods.

Consider the following example: An individual wants to build a tennis court in his backyard, but a tennis court is relatively costly to build and maintain, and as a result this leads the individual to subject the decision to an economic cost-benefit analysis: he will only build the court if he thinks the court will get enough play to warrant its cost. He may consider opening the court up to his friends and sharing the excess capacity of the court if the cost of the court doesn't exceed his

[426] More recent work by Yochai Benkler highlights the importance of the social relations of capitalism in the analysis of goods. See for example a recent lecture: Challenges of the Shared Economy, World Economic Forum https://www.youtube.com/watch?v=mBF-GFDaCpE, emphasizing the social embedded in the economic with regard to the lack of legal institutions and regulation which could shift the sharing economy (characterized by shared solidarity and trust and a new form of economic production emphasizing peer to peer networks) to an "on-demand economy" where firms appropriate the surplus created by the lack of regulation (for example with regard to employee conditions) under the aegis of the sharing economy. Another lecture at Harvard "Productivity and Power: The Role of Technology in Political Economy," https://www.youtube.com/watch?v=1iimVd-2Fx8

ability to pay for it. He could let people play for free or he could charge for the use of the courts. The latter option creates what we might call a "tragedy of the private," as opposed to the more commonly-feared "tragedy of the commons." Rather than share the excess capacity of a potential club good, individuals are incentivized under the market to capture excess capacity in a secondary market governed as private property, rather than as freely available for use under a public or common property regime. Thus, *the particular choice made with regard to whether or not the extra use capacity in these unique goods ought to be made available freely or sold on the market is NOT the result of a social policy choice but is instead preconditioned as an individual choice made on the basis of an individual transaction cost analysis*. Utilizing the individual as the unit of analysis, rather than the social relations, obscures from view the narrow parameters in which all individual choice is made, and further threatens to naturalize those choices by reaffirming the market as an immutable natural order one must take as a given rather than a social institution which can be altered by social policy and thus altering the structure of incentives and disincentives around access to particular goods. For example, it is not an accident that in Benkler's analysis, shareable goods are those private goods which allow for certain individuals (wealthier individuals) to comfortably "overinvest" in a way that does not threaten their means of subsistence and to allow those less well off (as in not having the means to overinvest themselves) to benefit from the slack capacity available. The analysis of slack capacity subtly reinforces that it is completely off the table to consider whether the entire structure of ownership in such goods could be altered through social policy to determine to what extent their use values are fundamental to human life, and whether those use values should be decommodified.

Can the underlying social relations be altered, and the legal institutions which govern them, to free excess capacity as use value, as opposed to exchange

value on a market? As Ostrom makes explicit, there is nothing that "naturally" follows from the resource analysis phase to the governance regime choice, however what is not underlined is that this "choice" is set within the narrow parameters of particular set of social relations of the market, as opposed to being purely by the design of legal governance mechanisms or specific purposes and values. Normative analysis pertaining to policy choices in the design of legal regimes, which we will turn to next, is absolutely necessary because it asks the important question: *should this excess use value capacity be converted into greater exchange value or retained as use value*? "Shareable goods" in a way offers an important critique of the way that capitalism allocates solely according to exchange value, thus producing excess use values, the decision over which how they are used rests with the individual. However, without making this critique clear, it dangerously implies that the only options available for an alternative allocation of goods is at the level of revealing their excess capacity and allowing individuals to choose (social norms) or the market to decide (depending on the transaction costs) whether or not to convert the excess capacity into exchange values, as opposed to challenging the very social relations of production in which these goods are produced, re-appropriating their value and shareability through social policy.

These critiques aside, the economic analysis of resources as developed by neoclassical economists and deepened and expanded by Ostrom and Benkler, do important work in providing tools for analysis of the material characteristics of resources, albeit under the conditions of the market. This is indispensable for a positive analysis of fundamental resources, both in thinking about the characteristics of resources in relation to human needs *and* under market conditions today by revealing their subtractability (both with regard to their jointness of consumption over time and their slack capacity) and difficulty of exclusion (both with regard to cost of materials and of legal instruments). However, as we have

begun to discover here, and as I will further argue below, resource-specific analysis cannot merely stop at economic analysis if one is interested in undertaking the second step of engaging in design of an appropriate property regime for the governance of resources aimed at achieving specific purposes and values that go beyond the individualized allocation of goods through the market as assumed in Ostrom and Benkler's analysis.

5.4 Value-Driven Resource-Specific Analysis

"Resources differ not only in the degree of rivalrousness and excludability but also in the values, interests, and social meaning they involve."[427] So declares Anna di Robilant in her article *The Virtues of Common Ownership*.[428] In this work, di Robilant outlines an important two-step approach to the analysis of resources, one that goes beyond the positive economic analysis to advance a values-driven approach, one that highlights the impossibility of avoiding normative analysis in the design of property regimes for resources. Di Robilant asks "what is the purpose of common ownership, as opposed to individual ownership? And, in turn, what are the virtues and values common ownership rewards?"[429] Building upon the normative analysis of Michael Sandel, di Robilant attempts to push the values of liberalism to their outer limits, opting for community solidarity over liberal autonomy in advocating for affordable housing cooperatives as an optimal legal institution that protects important interests in providing access to ownership opportunities for those of low- and moderate-income. In her analysis di Robilant deploys value-driven analysis to go beyond the limits and assumptions of the standard economic analysis of resources, in order to evaluate commons institutions for the provision of

427 di Robilant, *The Virtues of Common Ownership*, *supra* note. 7, at p. 1371-1372.
428 *Ibid.*
429 *Ibid,* p. 1365.

housing as a unique resource, in light of the extent to which they further such values as "equality of autonomy" (synonymous for her with "equality of self-respect").[430] By subjecting resources like housing to a normative analysis, di Robilant's value-driven analysis does important work in highlighting that the notions of "use" and "benefit" underpinning the concept of "rivalrousness" are determined by "human use" and as such implicate human interests and thus human values as determined by social meaning. A building may have the very basic functional use of placing a roof over one's head, but to be used as and understood as "home," it must confer other benefits: the quality of the structure, the ability to use the space in the way one sees fit, the freedom to exit when one wants/needs to, and the well-being produced by the guarantee, or at least potential, of permanence within a neighborhood and community without the threat of involuntary exit (such as eviction or being priced out). Homes analyzed merely between the poles of subtractability and the difficulty of exclusion, or between the poles of renewable/nonrenewable or shareable/nonshareable cannot truly capture the relevant individual and social interests intrinsic to homes as a resource for human use.

In attempting values driven analysis one is left with an elusive question: what is the theory of social order that informs our orienting purpose(s)? These questions can only be answered by looking to a social theory of existing social relations of production, i.e., a theory of capitalism such as that presented in

430 Anna di Robilant, *Common Ownership and Equality of Autonomy*. MCGILL LAW JOURNAL, 58/2, 263–320 (2012). Here di Robilant develops the value of "equality of autonomy," as "equitable access to the material and relational means that allow individuals to be autonomous." This conceptualization lies close to the idea of decommodification, in that decommodification pertains to equal access to the material means that allow individuals to be (more) free from the imperatives of the market. However, for the reasons given in the text, di Robilant's analysis of "equality of autonomy" remain limited, like all other value analysis, absent a social theory.

Chapters 2 & 3, and then within that context taking up the (possibly central) role therein of the commons, marrying the analysis with the tools and aims of legal-institutional analysis. How can the commons—i.e., commons property institutions—pursue the decommodification of fundamental resources through law? To address this, I argue that one must view the commons through both the lens of law and social relations simultaneously: the commons are not only a form of governance that emphasizes the direct democratic participation of all users of a given resource, but are also a set of alternative social relations *prior to, and possibly recoverable again as outside of, capitalist social relations*, ones that prioritize *use-value* over *exchange-value*. Law can be utilized to structure these social relations, by codifying and institutionalizing the preference for entitlements that support the current social relations of capitalism as they now stand or instead to alter them towards the social relations of the commons. The use values of the commons vaunt the entitlements of privileges-to-use, while disabling rights of exclusion within the commons and the power of transfer outside the commons. By contrast, capitalist social relations vaunt exchange values, through relatively unencumbered property entitlements to exclude and transfer. However, as di Robilant's value-driven approach highlights, the design of legal institutions cannot be done merely in the abstract, it needs be done with regard to specific resources, and in view of their specific characteristics, in not only their economic but values dimensions. This approach to legal institutions itself contains a social relational method, which I explore later.

Di Robilant's value-driven approach, while different from the approach of Thomas Wilhelmsson analyzed in Chapter 4, shares a similarity in that both locate their values not from within but outside a social theory. The key difference is that Wilhelmsson locates his values within law, while di Robilant finds them outside in political philosophy. Both approaches nonetheless result in an internalism in the

following sense: in the case of Wilhelmsson, although the values are derived from within private law, one is never told why one should push these values internal to different domains of law to the edge of what is necessary to "developing the social citizen," within what he calls the "welfare state ideology." He does not elaborate a social theory that would tell us why achieving that end might be important. Di Robilant, on the other hand, while making abundantly clear that one must look for values outside of private law, however derives her values from the political philosophy of liberalism and/or within the *telos* of the concept of "common ownership" or the *telos* of a group of people pursuing common ownership (there is some ambiguity between these two distinct *telos*, perhaps because "common ownership" is not explicitly conceptualized in detail at least in the article discussed here). Similar to how we critiqued Wilhelmsson as lacking a social theory in Chapter 2, although being among the closest in law (along with Unger) in reaching that approach, di Robilant similarly lacks consideration of social theory in her analysis. Her values-driven approach is derived internal to the commons communities themselves or by the parameters of liberal values, ultimately compromising between the aspirations towards the ideal with the realities of the constraints of the market. In this way, as a default, it naturalizes the market rather than proposing how it ought to be altered, assuming that it cannot be changed, only compromised with, in an effort to be more fair and more equitable, however within the rules of housing supply and demand without getting at the root cause of the inequities. I suggest that the reason for this is because ultimately this value-driven approach to the commons is not clearly informed by another controlling purpose for which commons institutions might be utilized. While di Robilant's approach is completely original in that it heralds crucial contribution of the normative layer of resource analysis, it nonetheless does not go far enough.

5.5 Towards Social Relations Driven Resource Specific Analysis

I attempt here to take a modest step beyond the economic and values-driven analyses of resources, by attempting to integrate value-, purpose- and effects-analysis within a framework of social theory, as anticipated in Chapter 4, in order to derive concrete values and purposes tied to historically-specific social transformations, for which commons ownership can take on new and transformative potential. The purpose of decommodifying and democratizing housing, which will be pursued in Part III is, I claim, distinct from an analysis and application of a purely values-driven approach, because decommodification is not an attempt to foreground values located outside of law nor an attempt to evade them nor to locate them internal to law, but is an entirely different lens of analysis altogether. To utilize social theory, one must ask themselves a different question than the one posed by di Robilant of the commons: "What is the purpose of common ownership, as opposed to individual ownership? And, in turn, what are the virtues and values common ownership rewards?" In its stead, I propose that we must ask of the commons: "How could the generalization of commons property institutions (commons ownership) alter the social property relations of the capitalist market, by creating non-market access to fundamental resources?"

As discussed in the previous section, di Robilant's value-driven analysis applied to commons housing institutions appears poised to answer this line of questioning, in that she asks directly how a commons institution can either (1) improve the overall distribution of wealth in society, or (2) alter the very structure of the market that determines that distribution. The first part of her article, before turning to evaluation, according to the values of equality of autonomy and community, weighs the benefits of "community solidarity" unearthed by her private lawyer in the telos of a community pursuing commons ownership, over the benefits of the liberal value of autonomy, in light of their effect on the distribution

(and quality) of resources. "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 (choosing solidarity over autonomy)."[431] One can interpret her argument to say "by choosing to protect solidarity over autonomy we enhance the ability of a commons regime to create access to good quality housing and thereby improve the overall distribution of housing." In the next Chapter, I will take up this value-driven analysis in relation to thinking about home equity, in particular the tension between solidarity, as limiting equity in order to keep commons housing available for multiple generations of buyer, and autonomy, allowing people to exit with the highest amount of equity possible in one generation in order to facilitate greater purchasing power and mobility. This framing of "solidarity" versus "autonomy" offers us excellent insights, even though ultimately it has its limits: it takes as a given that the purpose of commons ownership is to improve the overall distribution of wealth, to decrease the negative effects of the market, all the while continuing to take the market and its constraints as a given, so that in order to provide quality housing to lower-income people, one must accept that some people will not have access to such housing at all.[432] If the goal is to provide unconditional access, in other words, to decommodify housing for the sake of true universal access, and not through politics alone but also law, it is necessary to have a theory of how commons institutions are relevant to such a transformation of the structure of the

431 *Ibid.*

432 This is one illustration of a basic limit that is all too common in liberalism, its accommodation of the capitalist market. Such liberalism simply does not go far enough in its central concern with "equality of opportunity" for all to gain access to the basics and more, all the while understanding that the terrain of market process in which such "opportunity to compete" is given free reign is such that some people will not be able to gain access at all. This typically taken to be an acceptable price for a "fair process," where no one is given any preference over another, all the while ignoring not only the very different starting points of individuals, in their initial access to the resources to compete effectively, but only the in-built structural limits on equitable outcomes that are part-and-parcel of capitalist markets.

market through law. Until then, the analysis of commons institutions will reduce to half-hearted attempts at ameliorating while also rationalizing the present system, appeasing the capitalist market while providing little island sanctuaries for those lucky enough to be sheltered from its destructive effects.

In another work, wholly unrelated to the commons, di Robilant recognizes the importance of social theory for property law and reform, drawing upon Brenner's concept of *social property relations* to argue for a critical assessment and investigation of the way that property doctrine determines class structure. She argues there that work along the lines of Brenner's inquiry into the relationship between property relations and economic development are crucial for, "a full historiographical account of the development of property law and the role property has played in society, as well as for its implications regarding contemporary debates about equitable and sustainable access to resources."[433] One can infer from this that this historiographical account not only has great potential in terms of social scientists and legal scholars collaborating in "formulating further hypotheses and formulations,"[434] but also holds important implications for legal scholars in designing institutions to reverse engineer the social property relations that set capitalism into motion: namely, to place under social control the emergence of private property over land, in the modern sense, of dispossessing others of it in order to create dependence on the market.

The design of a property regime to counteract the negative effects of the market by reverse engineering the process of the transformation to capitalism is the purpose of a commons property institution (CPI), which I began to explain in

433 *See* Anna Di Robilant, *A Symposium on Ran Hirschl's Comparative Matters: The Renaissance of Comparative Constitutional Law*, B.U. L. REV. 96, 1325 (2016), p.1337. *See also* Anna Di Robilant, *A Research Agenda for the History of Property Law in Europe, Inspired by and Dedicated to Marc Poirier*, SETON HALL LAW REVIEW 47, 751 (2017), p. 754.
434 *Ibid.*

the previous Chapter. This theorization of CPIs requires connecting Hohfeld's socio-legal theoretical insight of *property as a social relation*[435] with the social theory of the *social property relations* of capitalism. Without bringing the two concepts together the design of property institutions in support of certain values (liberal, socialist or otherwise) has no controlling purpose and becomes impossible to evaluate, in regard to its effects and possible advances. In connecting socio-legal analysis to an alternative social theory it becomes possible to analyze and evaluate property and property law in its full legal institutional detail as a pivotal point or "pillar" of the market, and therefore as a strategic lever on the transformation of capitalism towards another social form. As I argued in Chapters 2 & 3, building upon the work of Robert Brenner and Ellen M. Wood, private property in land, in its modern sense, emerged for the *first time* out of England's agrarian revolution, as an institution facilitating a completely new form of surplus extraction: *surplus extraction absent direction coercion*. "Freeborn Englishmen," unlike their French counterparts, were "free in the double sense": they were both made "free" from the yoke of feudal domination (and its distinct mode of coercion-based extraction of surplus), but also "free," as in, unencumbered by property rights, and thereby "free" to labor for a wage in order to gain access to the basics.[436]

Commons as commons property institutions, in addition to the values of "solidarity" vs. autonomy, offer important insight into both how transformations in social property relations occurred historically in the past in order to illuminate

435 In another article di Robilant & Syed, *Hohfeld in Europe and Beyond: The Fundamental Building Blocks of Social Relations Regarding Resources, supra* note. 179. Di Robilant uses this concept of property.

436 As discussed in Chapters 2 & 3, this latter transformation was facilitated by the existence and generalization of the legal institution of a *lease-hold*, which unlike the legal institution of *cens-tenure* of their counterparts in France, did not give the peasantry full property rights, and most importantly no transfer right, allowing the English aristocratic class to charge a rent for continued use and exclusion entitlements to their land. It was this separation, reinforced (however not originated) by the enclosure of the commons, which, by the end of the 18th century, resulted in the peasantry being effectively cut off from direct access to their means of subsistence, and

how to catalyze transformation through the insight of property as a social relation programmatically going forward.

5.6 Property as a Social Relation: Designing Legal Entitlements to Advance Use Value over Exchange Value

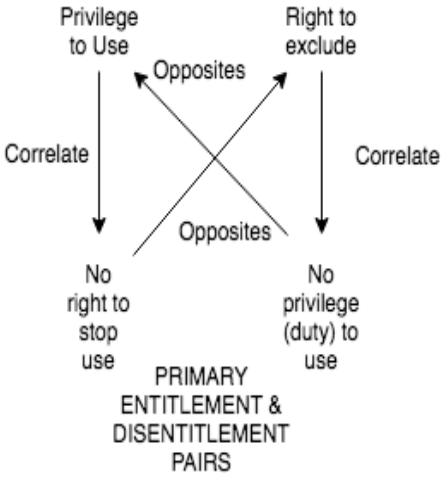
As argued by Talha Syed & Anna di Robilant, Wesley Hohfeld's analysis of property, discussed in Chapter 2, displaced a preceding "Blackstonian" concept of property as the "absolute and sole dominion" of an individual over a thing, by undermining it in two fundamental respects. First, and the foundation of the Hohfeldian analysis, was the insight that property pertains not to the relation between a person and a thing, but to the relation between persons regarding things. In other words, to a social relation between people regarding resources. Second, and directly following from the first point rather than as some disjointed additional insight, since property pertains to a social relation involving competing interests of different individuals with respect to a resource, it simply cannot consist of any kind of "absolute right," but instead must consist of a "bundle" of distinct entitlements, with each entitlement relating to a distinct kind of interest (more precisely, to distinct pairs of competing interests). This "social relational" and "disaggregated" view offered by Syed and di Robilant of property offers an important basis for an analysis of the character of modern private property—which as argued in Chapter 2 is a "central pillar" upon which the capitalist market depends for its functioning, and which facilitates the commodification of goods—that has at its aim reconfiguring capitalist social property relations in the pursuit of decommodification. Here, however, we will not focus yet on this potential of Hohfeld's work, but rather simply on elucidating clearly his method, which as Syed and di Robilant illuminate is the paradigm form of legal-institutional analysis.

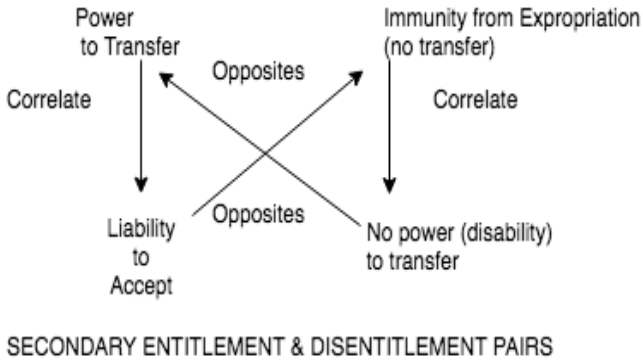
Hohfeld disaggregates property entitlements into primary and secondary entitlement/disentitlement pairs, consisting of property-specific versions of the distinct "privileges, rights, powers, and immunitites" enabled by law more generally. These property-specific entitlements are those of "use, exclusion, transfer, and expropriation." With regard to primary entitlements and disentitlements in resources: (1) a privilege for "A" to use a resource correlates to a "no-right" for "B" to prevent or exclude "A" from their use; and (2) while a right for "A" to exclude "B" in their use of the resource correlates to a "no-privilege" for "B" to use the resource or, what is the same thing using more common vocabulary, a "duty" for "B" not to use. With regard to the secondary entitlements (entitlement that work upon the primary entitlements):[437] (3) the power of "A" to transfer their entitlements over a resource correlates with a "liability" for "B" to accept the transfer; and (4) "A"'s "immunity from expropriation" of their other entitlements correlates with a disability for "B" to transfer away from A. With each privilege, right, power or immunity, exercised by an individual there are correlative no-rights, duties, liabilities, and disabilities in others.

What do these mental gymnastics offer in illustrating the social relational character of property? For Hohfeld, much like Ostrom above with respect to her resource analysis, the characterization of a legal entitlement is not a fixed essence, but rather defined in contrast to other entitlements and in their relation to other entitlement holders. This method—which Ostrom credits to John R. Commons but was actually first developed by Hohfeld (whom Commons duly credits in in his work)[438]—aims to conceptualize via a system of contrasts and relations, which

[437] The entitlements to transfer and expropriate work upon the primary entitlements of use and exclusion. When someone transfers "ownership" they are transferring the bundle of use and exclusion entitlements. When someone is expropriated from their "property," it is their use and exclusion (and possibly transfer) entitlements that are being expropriated.
[438] HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note. 178.
HOHFELD, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note. 178.

themselves are specified in light of underlying purposes, be they analytical or practical. This "dialectical analysis," of which the focus is not only on contrasts *but dynamics*—captured in the idea that there are not only opposites and correlatives (as in a relational analysis) but also that the opposite and correlatives themselves consequently— result in their own opposites and correlatives which relate back to the original concepts (see below).





As discussed in Chapter 2, an influential American Legal Realist who appreciated Hohfeld's work and developed it in the direction of a critique of private property and its relation to the market was the Institutional Economist Robert Hale. As discussed there, Hale points out that property law, while supposedly only governing the private transactions between individuals, in fact has very public outcomes and systemic social effects, which require government coercion for their enforcement and institutionalization—what is discussed in

Chapter 2 as the "critique of the public/private distinction" in law.[439] Hale shows how freedom and coercion are internally related, paired concepts, whereby one's "freedom" to use one's property in a multitude of ways, which may be clearly guaranteed formally and in courts, is only made operational by all the less explicit aspects of those same laws, of imposing or "coercing" duties onto others (non-property owners) to respect the "rights" of the owner. The duty side of rights is often left unenumerated by the property law of a nation, and yet it is strictly necessary to effectuate the protection of the rights of the owner, as explained above in the context of explicating the Hohfeldian analysis of entitlement/disentitlement pair structures. Hale uses this analysis of property entitlements to forge his own "institutional analysis" of markets: with slightly different property rights we could have a "very different pattern of economic relationships,"[440]edging towards different types of "markets," similar to the analysis Polanyi developed.

The fundamental shift from previous forms of property to modern private property, as explained in Chapters 2 and 3, was the priority given to "exclusion" and "transfer" over "use" and "immunity from expropriation," which was part-and-parcel of transforming property entitlements into a tool for the extraction of a surplus absent direct coercion. It is fundamental to the market-as-imperative logic to institutionalize through law the right to exclude and the power to transfer. Going back in history, without the right to exclude peasants from their direct means of subsistence, the necessity or the imperative of having to labor for access to the basics would not have been set into motion. Peasants could have continued to sustain themselves from their feudal plots and the commons without any compulsion to labor for a wage. Without an unencumbered power to transfer, the

439 *See supra* note. 178.
440 Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, *supra* note. 20 at p. 628.

capitalist rentier could keep others from using his land or eating his corn (exclusion-right to prevent others from use), but he wouldn't be able to "freely alienate" the land itself, what is needed to sell it on the market to the highest bidder. Instead, exclusion and transfer were central features of private property in the modern sense which emerged in the transformation from feudalism to capitalism, thus setting in motion competition for rents and freeing land for profit-based/driven accumulation. In other words, a good would have no "exchange value" absent the power to exclude and transfer. Use and immunity from expropriation, on the other hand, presented important limits to exclusion and transfer but for very different reasons, which will be explained below.

"Exclusion," is an entitlement which only has functional operation with "use" in mind: without "use" all the right to exclude confers is the ability to prevent others from using a resource without any corresponding ability to benefit yourself from the "use value" of the resource, whether directly (though consumption) or indirectly through exchange. The "value" in "exchange value" is a function of "use value," the value to others to use what is being exchanged, with "use values" transformed into a hieroglyph of "price" representing (in part) the consumption needs or preferences of people. An important point here, however, is that use value does not require exchange value in the same way: I can eat the corn in my garden without ever having the corn become something exchanged on the market. Similarly, to be effective, the exclusion entitlement requires use but use does not require exclusion to the same extent: if I would like to maintain a cornfield's yield for my consumption purposes, it may require some limits on others' use, but those limits need not require total exclusion from the field or even the corn, even if they may require rules—entitlements—about which parts of the corn field are for my consumption and which parts are for yours. In this sense "use" and the resource-specific analysis of "uses," which Ostrom, Benkler and di Robilant's analysis offers

(though in respectively different and critical ways), provides important parameters or limits to the amount of exclusion actually necessary to gain a benefit for users (and even simultaneous consumption, and even over time captured in durability). Similarly, the entitlement of immunity from expropriation, in view of the disentitlement of others being disabled from transfer (expropriation), can act as a limit or restraint on transfer. Immunity from expropriation means different things depending on the resource, but in general it prevents anyone from usurping the use, exclusion and transfer entitlements of those that hold them. Generally, in view of the social relations of capitalism, this is seen to protect owners from the government's exercise of the power of eminent domain, i.e., the power to limits rights of private property for the sake of public needs. However, it can also be used to prevent the extension of exchange value into the commons through government enclosure of the commons as was done in England in the 18th and 19th century.

Through combining Brenner and Wood's *social property relations* with Hohfeld's *property as a social relation* it becomes possible to use disaggregated property entitlements in constructing a new form of property institution, a commons property institution aimed at the decommodification of specific fundamental resources such as housing, the example which I have selected to elaborate throughout the following chapters. In Part III, and in particular Chapters 6 & 7, I will compare legal institutions in light of a specific conceptualization and corresponding criteria for what I call "commons property institutions" (CPIs).

5.7 Forging CPIs: Method of Analyzing Housing as CPIs

A CPI is both a commons group-property regime and a collective association aimed at decommodification and democratization of fundamental resources. As a property regime, it is conceptualized using Hohfeldian analysis as a community of 1) multiple entitlement holders of use to a resource, with 2) no entitlement holder

having the right to exclude the others nor 3) to transfer the resource outside the community. As a collective association, CPIs require rules around (1) the criteria for inclusion in the collective; and (2) the process of decision-making on the specific parameters of property entitlements. In Chapter 7 I will analyze the extent to which these processes of decision-making are democratic or not, in the sense of enabling wide participation within the housing community regarding important decisions pertaining to use, exclusion and transfer entitlements. Therefore, in Chapter 7, I will evaluate the features of distinct CPIs (Community Land Trusts, Housing Cooperatives, and Condominiums) in view of their ability to both decommodify and democratize housing as a resource. Decommodification, as explained above, is the resultant purpose and value from the social theory of the social relations of the capitalist market and its undoing through commons advanced in Chapters 2 & 3. Investigating the extent of decommodification accomplished through a given commons property institution in the housing context requires understanding the extent to which legal structures of the CPI disable transfer at market rate by capping equity through limited equity. This will be explored further in the next Chapter. The measure of democratization depends on other factors pertaining to the extent that legal structures enables diffused decision-making and involvement of actors from diverse groupings: residents, community members, and people involved in housing planning such as technical experts and local representatives (explored in Chapter 7).

Institutions in Chapter 7 will be numbered in order to place them in relation to one another on each spectrum not to evaluate their individual "weight" according to any quantified criteria. Numbers are used, but they could have just easily been lettered as "A", "B", "C," and so forth. The spectrum is intended to communicate a relationship, with a "1" more closely resembling a "2" than a "3" with respect to certain features, and "1" being high in its decommodification

measure. One could say, "this is highly subjective!" Indeed, it could be. Therefore, this analysis is not an end in itself, but a means to thinking clearly and conceptually, and for laying out all possible institutional variations and degrees of relation. It is used simply to say, (a) these institutions seem to bear a resemblance according to a criteria I have set and therefore can be compared, (b) each however is slightly distinct from the other and those distinctions can be named, but (c) their distinctness, just like their similarity, is not the result of some property inherent to the institution but the result of my particular purposes and values (as in the values driven analysis) informed by a social theory (social relations driven analysis). The specification or definition of an institution is not the end goal, but instead my goal is to consider how institutions grouped under the same conception can be evaluated according to a set of purposes and values. I argue that it is only with this kind of clarity at hand, it becomes possible, based on one's particular purposes and values, to make a selection as to the best spectrum of *legal institutional options* to meet those purposes and values.[441]

5.8 Conclusion

In this Chapter I develop my method of "social relations driven resource-specific analysis," which will be applied and demonstrated in the following Chapter to housing as a unique resource. I develop my method by building upon the contributions of resource analysis as economic analysis (Ostrom and Benkler) and values-driven analysis (di Robilant). I argue that the economic analysis of resources yields an important set of insights concerning the material characteristics of a resource, and I explore the way in which Ostrom and Benkler further develop the

[441] This to say that a particular theoretical institutional option could be undermined by some empirical evidence to the contrary.

economic analysis forged by their neo-classical predecessors. I argue that Ostrom makes three key contributions to resource analysis: 1) by emphasizing that the conceptualization of goods lie on a spectrum determined by their degree of subtractability (rivalrousness) and difficulty of exclusion; 2) highlighting the important role of not only durability but congestion through the "renewability" of CPRs as not only resource units but resource systems in shaping the rivalrousness or subtractability (Ostrom) of a resource; and finally 3) determining the difficult of exclusion as both through "costs" (as opposed to an impossibility or market failure as her predecessors) through the physical characteristics of the resource as well as the cost of legal instruments. I further argue that Benkler similarly makes important contributions by highlighting the important role of time, both in the production of a resource, as well as in its renewability, and not just pertaining to CPR goods as Ostrom's analysis but also to private and club goods, thereby creating a new category of "shareable goods."

Ultimately, however, I argue that the economic mode of analysis does not go far enough in challenging the assumptions of the market that underpin the original economic analysis of Samuelson and Musgrave—with the result that policy choices are often relegated, by default, to be made by individuals rather than collectively as *social* policy. While neither Ostrom nor Benkler deal with legal-institutional design at the resource analysis level, without considering normative factors that are inherent in the human use of a resource, I argue it is impossible to design legal institutions that are capable of embedding and counteracting the naturalization of the market as argued in Chapters 2 & 3. The values-driven analysis developed by di Robilant, highlights the social and human (as opposed to market) nature of the analysis of resources, by revealing the extent to which resources advance important human interests, and hence purposes and values. Her work discloses that without consideration of the normative level of analysis, I cannot ask

what type of human values are implicated by a specific use of a resource and thus advanced by a particular configuration of legal entitlements over that resource. By applying a values-driven analysis, she is able to evaluate commons institutions for housing such as the Cooperative and Community Land Trust by asking to what extent housing as a resource is central to advancing such values as the "equality of autonomy" and "community solidarity." I argue this is a crucial second step in resource-specific analysis, following that of positive of economic analysis, in thinking about the design of legal institutional regimes that support certain human values and purposes. However, I argue that we must also take one further step beyond values-driven analysis, to a social relations driven analysis, which not only evaluates legal institutions vis-à-vis values, but also according to evaluative measures gleaned from one's theory of social change or *social theory*. At this point I connect the social theory presented in Part I with designing institutions to pursue the purpose of decommodification of fundamental resources. Again, as discussed in the previous Chapter 4, without social theory, it is impossible to identify plausible criteria by which to evaluate legal institutions, in what they fail and succeed in advancing. With the social theory advanced in Part I in hand, we turn to the design of a legal institution, and specifically a commons property regime for advancing the decommodification of fundamental resources through law. Utilizing the social theory analysis of Part I, I argue that in order to transform capitalist social relations, we must alter social property relations by capitalizing on the Hohfeldian analysis of *property as a social relation* advanced by Syed and di Robilant. By understanding the social relational character of property, we can comprehend the social property relations of capitalism in its full legal institutional detail: modern private property as social property relation: the extraction of a surplus absent direction coercion, which depends on unfettered entitlements to transfer and to exclude. In order to design legal institutions to reverse this transformation, we

must design CPIs as property institutions that significantly disable transfer and exclusion entitlements, for the sake of advancing use entitlements in resources. In the next Chapter I attempt to design CPIs for housing beginning with a resource specific analysis of housing in the three modes developed here.

CH 6 A Toolkit for the Decommodification of Housing through Commons Property Institutions

6.1 Introduction

Institutional imagination in designing affordable housing policy must innovate beyond both traditional public planning and private market models in order to provide financially feasible and attractive alternatives to market-rate housing. Affordable housing policy cannot not be viewed simply as a black and white choice between market or state—in fact, quite the opposite. Historically, it has always been the battle of politics against the market, in the form of such measures as public housing, rent control, and inclusionary zoning, all of which require significant public and government intervention. However, these types of programs require mass mobilization and widespread political support for their creation, as well as time to institutionalize—i.e., to scale and to become entrenched—in order create a meaningful alternative to the market, which requires surviving political regime changes from left to right. Institutional diversity and flexibility of options for experimentation through third way commons property institutions in housing can, I argue, lead towards a path of successively embedding the market through the institutionalization of the decommodification of housing through law. Pursuing decommodification of housing means the removal of land and housing off an unfettered market, accomplished through Commons Property Institutions (CPIs). CPIs structure the provision of housing with legal restraints on transfer at market-rate through limited equity returns from transfer entitlements, set at reasonable rates, rather than allowing for market facilitated real estate profit windfalls.

When one uses the word "housing," one is not merely speaking of a house—the structure itself—but also the land beneath the house, and the home equity or real estate investment of the owner. In this sense, housing must be

analyzed as three distinct but interconnected resources: structure, land and investment. It also must be analyzed along three different lenses of resource-specific analysis offered in the last Chapter: (1) the economic analysis of goods; (2) the social relations analysis of goods; and (3) the values driven analysis of goods (in this order since, as I argue in the previous Chapter, values must follow from a social theory with an orienting purpose). Each lens brings to bear different aspects relevant to rethinking the legal institutional design of housing and to constructing innovative legal regimes aimed at its decommodification. Due to time and space limitations, I have chosen to apply the analysis deemed most relevant to each of the distinct resources of building, land, and home equity, rather than attempt a comprehensive analysis of each under all three approaches. Thus, each of the sections below focuses on a particular subset resource – structure, land and investment- of housing as a resource.

6.2 Institutionalist Economic Analysis: Congestion, Durability, & Shareability

One generally thinks about a home as a building or structure, which can be understood in an economic goods analysis as having the characteristics of medium subtractability and low difficulty of exclusion. According to this analysis, housing is less rivalrous than an apple or even a personal computer (private goods) because use by one does not fully deplete, though it does somewhat degrade, use by another of the space (medium congestion), and it also does not deplete someone else's use thirty years from now (high durability).[442] It is also much easier to exclude someone from using one's house than, say, using Ostrom's examples, an irrigation system (common good) or library (club good) or sunset (public good) or knowledge (public or toll good), as the cost of enclosing my home, placing locks on the doors,

[442] For reference to the table using these examples See Hess and Elinor Ostrom, *Ideas, Artifacts, and Facilities: Information as a Common-Pool Resource*, *supra* note. 50 at p.120.

etc. is not particularly high. In this sense housing lies somewhere between a private good and a club/toll good on the spectrum of goods with regard to subtractability, as well as, with regard to the difficulty of exclusion.

To be sure, housing may be more or less subtractable depending on the type (single-family home versus multi-unit) and organization (architectural design) of the structure, and thus less like a private good and closer to a club or toll good with the presence of: (1) multi-unit buildings which house multiple households in the same square footage as a single-family home or duplex; (2) private and communal spaces that promote more simultaneous use which does not subtract from another's use; and also, (3) incentives for maintaining and improving buildings, thereby promoting greater use for more people over time. With more common spaces in a building, such as a communal kitchen or yard, there is less need to use the available square footage for the construction of private kitchens and private yards, thus potentially freeing up space to increase the number of individual private units, allowing more households to live in the same square footage. This is something being done by a housing institution called "Baugruppen" in Germany, Australia and New Zealand which I will discuss in Chapter 7, which emphasizes "living beyond the nuclear family" and has utilized cutting edge architectural firms to build multi-unit buildings with both functional and aesthetically pleasing communal spaces, in order to reduce the square footage of individual units while maintaining a sense of privacy and space. Furthermore, by providing incentives, such as increased equity, for the maintenance and improvement of individual spaces, this can increase the durability of the building overall.

By analyzing the characteristics of congestion and durability, one gets at not only the ability to increase simultaneous use, but also to increase the resource's renewability, what Ostrom calls the analysis of the "resource system" as opposed

to "resource unit," or what Benkler refers to as "life-time capacity," as discussed in the previous chapter: the amount of functionality offered by the resource over its lifespan, something that is largely a function of its "renewable capacity," or ability to self-renew after previous uses. The potential of decreasing congestion and increasing durability may allow buildings to have greater shareability than other private goods, like apples and computers, by opening up their "slack capacity," the existing underutilized capacity of the building created by the "overinvestment" of the owner to greater simultaneous use as well as use over time. However, to open up such slack capacity towards enhancing the shareability of the housing structure, an incentive structure must be designed to both: (a) promote multi-unit construction, as well as, (b) the creation of common spaces and also (c) to provide incentives for owners to share units as rentals or separately owned units at levels below market rate (perhaps as limited equity discussed later in this Chapter) rather than to use the structure purely for their own use or to place it on a secondary market at full market-rate. Towards enhancing durability, incentives must be structured for individuals to maintain and improve the building both with regard to individual and common spaces. Both require policy intervention, which will be discussed, not here, but in the last section where we turn to legal institutional design.

The economic analysis of housing, while valuable in thinking about design, only tells one so much. While extremely useful in thinking about how to enhance simultaneous use of the resource, as well as its durability or renewability over time, it tells one little about the social relations of capitalism or about the relevant values and purposes in thinking about housing as a fundamental resource for human life. It says nothing about the way in which housing, like many other fundamental resources, are subject to market imperatives and one's ability to pay, thus preventing so many from having adequate access to housing at all, much less

housing of high quality. Furthermore, it tells us little about the imperatives on the development of the underlying land and on the demand for particular areas of urban space that may make the physical and economic characteristics of a particular building almost irrelevant in contrast to the pressures on the underlying land. One could develop a building utilizing a non-profit model, and thereby reduce the market imperatives in the construction of the building, however if the cost of the land beneath embodies not only labor and opportunity costs (price), but also the inflated value of speculative capital from global real estate investment companies, each housing unit will reflect this value and will become less affordable or more likely, financially infeasible for the non-profit to develop. As such, land is a unique resource which requires a social relations analysis, as explored next.

6.3 Social Relations Analysis of Land: Decommodifying Socially Created Value

What, in light of the purpose of decommodification, are the relevant socio-historic characteristics of land for the purposes of analyzing housing? Land in a sense was the first fully commodified good, even before labor as explained by the social theory presented in Chapters 2 and 3. Land is unique in that it played a central role in the transformation from feudalism to capitalism, both in the sense that it set into motion the imperative of competition over productive land, but also in that those that had it, the landed aristocracy, could live off its surplus in the form of rents, while those who didn't were forced to labor for a wage. Moreover, land is what Polanyi called a "fictitious commodity" (like labor and money), because unlike other goods that require human labor for their creation before being placed for sale on the market, land is not produced by man but by nature.[443] Classical

[443] POLANYI THE GREAT TRANSFORMATION, *supra* note. 17, at 75. "But labor, land and money are obviously not commodities; the postulate that anything that is bought and sold must have been produced for sale is emphatically untrue in regard to them. In other words, according to the empirical definition of a commodity they are not commodities. Labor is another name for a

political economists, most prominently Ricardo, attacked this form of surplus extraction as "parasitic," contrasting it to the "productive" way in which capitalists extracted surplus from labor, viewing the ownership over the means of production, and the role of maintaining and improving upon the means of production as "productive" and legitimate ways in which to create economic value. By contrast, rents from land were understood as an entirely passive process of generating value requiring no productive activity by its appropriators.[444] Ricardo's followers such as Henry George and John Stuart Mill took this even one step further by arguing passionately for a tax on land, even going as far to argue that the value of land and of rents was unearned income usurped by the landed class.[445] Marx on the other hand, unlike Ricardo, Mill and George, understood land not to be an exception, but like all goods produced under the social relations of the market, hiding its social character while appearing as the result of the invisible hand as working on the substrate of an aggregate of individuals.

For Ricardo, the process by which one plot of land becomes more valuable than another plot depended on the demand for productive uses of the land. Initially productive uses were understood as agricultural uses: one plot of land was more valuable because of the quality of the soil and its ability to grow a crop like wheat, what was called "corn" in his time, in high demand for human consumption.[446]

human activity which goes with life itself, which in its turn is not produced for sale but for entirely different reasons, nor can that activity be detached from the rest of life, be stored or mobilized; land is only another name for nature, which is not produced by man; actually money, finally, is merely a token of purchasing power which, as a rule, is not produced at all, but comes into being through the mechanism of banking or state finance."

444 DAVID RICARDO, ON THE PRINCIPLES OF ECONOMY, AND TAXATION, CH. II, p. 67-84 *in* THE WORKS AND CORRESPONDENCE OF DAVID RICARDO, VOL. 1 (Piero Sraffa, ed.) (1951[1817]).

445 *See* HENRY GEORGE, PROGRESS AND POVERTY, Bk III, S. 2, (1871 [1955]) p. 165-172. *See also* JOHN STUART MILL*, Property and Taxation*, ESSAYS ON ECONOMICS AND SOCIETY, (1873 [Volume 5 of Mill 1963]), p. 1824-1879; See also JOHN STUART MILL, *Testimony before the Select Committee on Income and Property Tax (the Hubbard Committee)*, HOUSE OF COMMONS. VOL. 2 OF BRITISH PARLIAMENTARY PAPERS, NATIONAL FINANCE: INCOME TAX. (1861 [1968-69]).

446 RICARDO, ON THE PRINCIPLES OF ECONOMY, AND TAXATION, *supra* note. 446.

Ricardo's point was that the "price" of land or rent—was socially generated, not created by an individual owner or even merely by some material characteristic-fertile soil—but rather the social demand for that type of soil, which, again, did not owe to any specific labor or contribution of the owner. George's analysis (and similarly Mill) converted this analysis into a prescription: as a result of this socially, not individually, generated value, what he called the "social increment" land should be subject to taxation and the proceeds redistributed.[447] Marx's point, however, was that it was not merely the value of the land that was socially generated, but that the entire productive process of capitalism was a social process, the result of a transformation in social relations discussed throughout these Chapters.[448] Paradoxically, Marx initially thought that this unique feature of industrial capitalism was the very reason it should have made the socially contestable character of production under capitalism (as opposed to feudalism) more apparent than in feudalism, which in contrast claimed itself as based on an transcendental (and beyond reproach) natural order of superiors in blood-lineages chosen by god. The imperative to turn a profit and technologically improve and save labor time, on the other hand had no such reified but incredibly compelling authoritative religious ideology, and furthermore concentrated workers in one factory, day by day, and side by side, thus making the social nature, and revolutionary potential, of their labor and fruits of their labor abundantly transparent for all those involved. However, in his later analysis Marx discerned that in fact a crucial feature of capitalism is how this relationship remained for the most part, obscured, hidden behind a veil of individuated exchanges on the market, reifying relations between

447 GEORGE, PROGRESS AND POVERTY, *supra* note. 447.

448 For the social character of all production in capitalism, see KARL MARX, CAPITAL (1867 [1976]), VOL. I, CH. 1, p. 125-177 and chs. 5-7, p. 258-306. For the historical emergence of this system, see MARX, *id.* at Part 8 on "So-Called Primitive Accumulation." And for specific treatment of "rent" under capitalism, as part of the (veiled) "trinity" of "profit, rent, and wages," see KARL MARX, CAPITAL vol. III, ch. 48, (1883 [1959]).

goods rather than that between men, what is known in his analysis as the "fetishism of commodities."[449]

In view of these social relations of land, in order to analyze the resource specific characteristics of land as "land for housing" as a fundamental resource, it is necessary to consider the way in which land has historically been treated as a commodity in order ascertain how these social relations can be transformed. Land rents for agricultural purposes was the first instance of the development of "land as commodity," "land for housing" as a commodity, subject to the same market imperatives for competitive rents did not develop until the increased demand for land sprung up around cities as they expanded in the wake of industrialization in the 1800s.[450] While there had already been in the 17th and 18th centuries a "rental market" in the sense that people (mostly from the middle and upper classes) who did not own their homes, or owned their home in a less desirable location, rented from others, a market in land for the purpose of housing construction for those working in the cities did not develop until the mass migration of the working class from the countryside and towns to cities.[451] During this period, a real estate market

[449] For the early view of Marx that capitalism may render relations of exploitation more explicit, by stripping its "halo" of "idyllic relations" and substituting "the motley feudal ties that bound man to his 'natural superiors'" with "naked self-interest" and the "callous 'cash payment'" as the only "nexus between man and man," see KARL MARX & FRIEDRICH ENGELS, THE COMMUNIST MANIFESTO (1848 [1998]), P. 5-6. For Marx's mature view that in fact capitalist relations conceal the social character of production behind the veil of individuated market exchange, see the discussion of "the fetishism of commodities" in MARX, CAPITAL vol. 1, *ibid.* at 163-177.

[450] *See* ALAN HOLMANS, HISTORICAL STATISTICS OF HOUSING IN BRITAIN (2005). Holmans shows that there is a clear rise in rents from almost non-existent levels which continue to rise through the 1800s-1900s until the 1915 rent control act. *See also* WILLIAM ASHWORTH, THE GENESIS OF MODERN BRITISH TOWN PLANNING: A STUDY IN ECONOMIC AND SOCIAL HISTORY OF THE NINETEENTH AND TWENTIETH CENTURIES, (1954).

[451] *See* ENID GAULDIE, CRUEL HABITATIONS; A HISTORY OF WORKING-CLASS HOUSING 1780-1918, (1974), in particular Chapter 13. *See also* FRIEDRICH ENGELS, THE CONDITION OF THE WORKING CLASS IN ENGLAND, (2005 EBOOK[1845]), p. 58-59 http://www.gutenberg.org/files/17306/17306-h/17306-h.htm; FRIEDRICH ENGLES, THE HOUSING QUESTION, (1887 [1872]). https://www.marxists.org/archive/marx/works/download/Marx_The_Housing_Question.pdf

Engels offers a wonderful history in THE CONDITION OF THE WORKING CLASS which explains the way in which land is leased to contractors who pay a rent, very similar to the way that farmers pay rent to their aristocratic owners for use of arable land, contractors would pay a rent and then develop housing at the lowest cost (and quality) possible to house early industrial workers. These workers are forced to rent such housing because of their proximity to the mill/factory and because there is no other housing offered in such proximity. "All such cottages look neat and substantial at first; their massive brick walls deceive the eye, and, on passing through a *newly-built* working-men's street, without remembering the back alleys and the construction of the houses themselves, one is inclined to agree with the assertion of the Liberal manufacturers that the working population is nowhere so well housed as in England. But on closer examination, it becomes evident that the walls of these cottages are as thin as it is possible to make them. The outer walls, those of the cellar, which bear the weight of the ground floor and roof, are one whole brick thick at most, the bricks lying with their long sides touching; but I have seen many a cottage of the same height, some in process of building, whose outer walls were but one-half brick thick, the bricks lying not sidewise but lengthwise, their narrow ends touching. **The object of this is to spare material, but there is also another reason for it; namely, the fact that the contractors never own the land but lease it, according to the English custom, for twenty, thirty, forty, fifty, or ninety-nine years, at the expiration of which time it falls, with everything upon it, back into the possession of the original holder, who pays nothing in return for improvements upon it. The improvements are therefore so calculated by the lessee as to be worth as little as possible at the expiration of the stipulated term. And as such cottages are often built but twenty or thirty years before the expiration of the term, it may easily be imagined that the contractors make no unnecessary expenditures upon them.** Moreover, these contractors, usually carpenters and builders, or manufacturers, spend little or nothing in repairs, partly to avoid diminishing their rent receipts, and partly in view of the approaching surrender of the improvement to the landowner; while in consequence of commercial crises and the loss of work that follows them, whole streets often stand empty, the cottages falling rapidly into ruin and uninhabitableness. It is calculated in general that working-men's cottages last only forty years on the average. This sounds strangely enough when one sees the beautiful, massive walls of newly-built ones, which seem to give promise of lasting a couple of centuries; but the fact remains that the niggardliness of the original expenditure, the neglect of all repairs, the frequent periods of emptiness, the constant change of inhabitants, and the destruction carried on by the dwellers during the final ten years, usually Irish families, who do not hesitate to use the wooden portions for fire-wood—all this, taken together, accomplishes the complete ruin of the cottages by the end of forty years. Hence it comes that Ancoats, built chiefly since the sudden growth of manufacture, chiefly indeed within the present century, contains a vast number of ruinous houses, most of them being, in fact, in the last stages of inhabitableness. I will not dwell upon the amount of capital thus wasted, the small additional expenditure upon the original improvement and upon repairs which would suffice to keep this whole district clean, decent, and inhabitable for years together. I have to deal here with the state of the houses and their inhabitants, and it must be admitted that no more injurious and demoralising method of housing the workers has yet been discovered than precisely this. **The working-man is constrained to occupy such ruinous dwellings because he cannot pay for others, and because there are no others in the vicinity of his mill; perhaps, too, because they belong to the employer, who engages him only on condition of his taking such a cottage.** The calculation with reference to the forty years' duration of the cottage is, of course, not always perfectly strict; for, if the dwellings are in a thickly-built-up portion of the town, and there is a good prospect of finding steady occupants for them, while the ground rent is high, the contractors do a little something to

for land for the expansion of housing consolidated, with such land coming to be treated as a commodity subject to market imperatives in its production.[452] However, land for agriculture production obviously has, and had historically, different competition and profit imperatives placed on it than land for housing, as different uses placed different demands on the characteristics of the resource. While arable land with fertile soil was the focus with agricultural land, the relevant feature which makes land for housing valuable—what I will call "proximity to public and private resources"—is not as straightforward. To explain this idea, one can simply refer to the familiar mantra in real estate of "location, location, location," however one rarely contemplates what factors determines the degree of attractiveness of some locations over others and thus high demand on some locations over others. "Proximity to public and private resources," (PPPR) captures what one has in mind with the idea of "location," which is really a conglomerate based on a variety of different factors such proximity to public resources like schools, public parks, museums, transportation, but also hospitals, police stations, fire stations, as well as proximity to private resources like restaurants, shops, art galleries, and theaters.

PPPR attempts to capture the social character of how price is determined for land related to housing in a concrete sense. It reveals that the attractiveness of, and demand placed on, land, is the result not of individual labor, but rather of socially produced factors, which some name as the appropriation of the value of the commons or "commonwealth."[453] As Hardt and Negri illustrate through an example which captures this point:

> The dilemma is illustrated by the classic dialectic of urban artist neighborhoods with low property values because they cannot afford

keep the cottages inhabitable after the expiration of the forty years. They never do anything more, however, than is absolutely unavoidable, and the dwellings so repaired are the worst of all."

452 *Ibid.*

453 MICHAEL HARDT & ANTONIO NEGRI, COMMONWEALTH (2009).

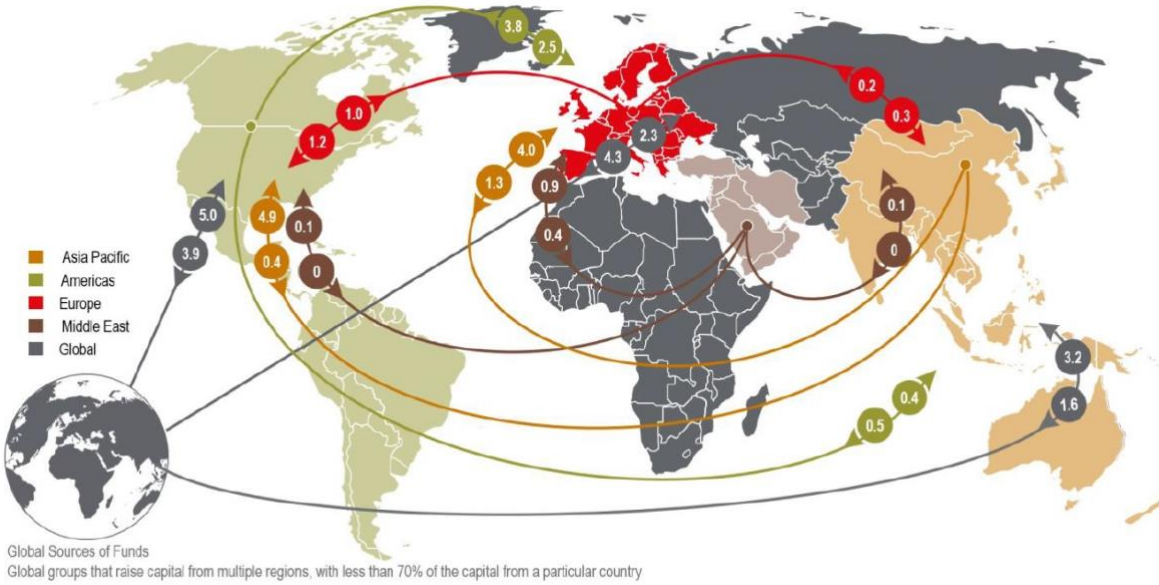
> anything else, and in addition to producing their art they also produce a new cityscape. Property values rise as their activity makes the neighborhood more intellectually stimulating, artists can no longer afford to live there and move out. Rich people move in, and slowly the neighborhood loses its intellectual and cultural character, becoming boring and sterile. Despite the fact that the common wealth of the city is constantly being expropriated and privatized in real estate markets and speculation, the commons still lives on there as a specter."[454]

Hardt and Negri suggest that PPPR is in fact the product of the commons, socially generated wealth which is individually captured in land values. They also argue that post-capitalist economic production depends more and more on the commons localized in cities, as labor shifts from industrial to "bio-political" production which parasitically feeds off of the commons. The number one feature of "location" that is not well-captured by the concept of PPPR is proximity to work, work which is typically concentrated in cities. Post-Marxists like Hardt and Negri, as well as David Harvey,[455] take Marx's insights (sometimes slipping into the Ricardo and Georgist versions) and analyze the modern city as the central site of production of post-industrial capitalism: high tech and pharma, banking and finance, and of course real estate, represent the new landscape which utilizes the city as a central site of production. As such, land in and around cities is extremely scarce and expensive, increasing the cost of housing to unprecedented levels. This is further exacerbated and explained by another development in the post-industrial landscape of capitalism: the increasing role of real estate investment companies, and the emergence of *global* real estate investment firm which have developed an unprecedented global speculative market in land and housing. Global real estate investment companies, companies of which more than 70% of their capital is

454 *Ibid.* at 156.
455 *See* David Harvey, *The right to the city,* International Journal of Urban and Regional Research 27, 939-941 (2003). *See also* David Harvey, *Future of the Commons*, Radical History Review 2011/109, 101-107 (2011).

sourced from multiple countries, have poured billions of dollars into investments in what are now being called "hedge cities," cities like the San Francisco (SF) Bay Area, New York, London, and Paris where real estate is expected to continue to increase in value.[456]

Figure 8: **Inter-Regional Flows, Q1 2017 (US$38 billion in total)**



Global Sources of Funds
Global groups that raise capital from multiple regions, with less than 70% of the capital from a particular country

Source: JLL
Property Data (UK); Real Capital Analytics (USA)

As a result, the price of land in any one of these cities not only reflects housing demand locally, as well as, the trends of postindustrial capitalist production, but also the global speculative market in real estate. As such it is critical, from the point of view of legal institutional design for the decommodification of housing, to consider the importance of delinking land value

456 *See, e.g.,* David Ley*, Keynote: Mapping the Hedge City: Vancouver and Global Capital* , UNIVERSITY OF BRITISH COLUMBIA SYMPOSIUM(September, 2016); James Surowiecki, *Real Estate Goes Global*, THE NEW YORKER (May 26, 2014). https://www.newyorker.com/magazine/2014/05/26/real-estate-goes-global (last visited January 5th, 2020).

from housing value in order to not only remove it from the market *simpliciter* but also from the increasingly global and speculative market. However, delinking land from these factors requires initial subsidies, subsidies which must increase with every year that real estate speculation continues to increase land values to astronomical heights. In the SF Bay Area where home prices have more than doubled in just a decade, in order for governments to create affordable housing they must do so now before the required subsidies needed to purchase land in the area are so high that taxpayers will not be willing nor able to pay for them. As I will discuss later in another chapter, legal restraints which remove housing from the market not only prevent transfer at market-rate but can also result in retaining subsidy funds, with the specifics depending on whether one uses "subsidy retention" versus "subsidy recapture." However, before turning to legal institutional design, the fact that land values reflect not only local housing demand but instead also local and global investment in housing causes everyone, not just firms, but individuals, to purchase homes in view of the investment value they represent. Homes today, unlike the parasitic landed classes drawing unearned incomes from rents, has today come to be viewed as an important investment vehicle, not just for the wealthy, but for *everyone* in building individual wealth—what I refer to here is homes as "home equity": the most common form of investment that individuals from the wealthy to those of middle income have a stake in. The commonly held view of "home as investment" is at odds with an increasingly popular notion of "home as a human right." Ensuring the maximum ability to create wealth directly competes with ensuring everyone a basic minimum. In order to analyze the characteristics of housing as home equity in view of this value tension, one must leave social relations analysis and address the "value" characteristics of housing.

6.4 Value Driven Analysis of Home Equity: Home as a Human Right

What characteristics does home equity have when viewed through the contrasting lenses of "home as a human right" versus "home as investment?" In analyzing these competing conceptualization of home equity, I will deploy the values applied by di Robilant to commons housing of "solidarity" vs. "autonomy." The "right to a home" is tied to the deeper value of "solidarity," while "home as investment" could be seen as tied to the deeper value of "autonomy." The values that underlies the idea of right to a place to live for every person is both the value that "every person by virtue of being human deserves a home"—"as a human right"—as well as the notion that "we are all in it together and what I deserve you deserve too": in other words "solidarity." The first necessarily requires the second for it to be meaningful: my right must correlates to a duty in others to ensure my right.[457] Autonomy, on the other hand, as related to home equity, is the idea that "my home and my community is my choice" and "if I choose to exit, I should be able to do so," and most importantly "intrinsic to my full ability to exit, is the ability to cash out my investment and take my equity with me." Now an issue that arises in this framing is whether or not the equity one should walk away with should be the maximum allowed by the market or by some other social metric. This is an issue that will be picked up later in this Chapter as well as in the following Chapters: the issue of limited equity and limited equity for all.

The values of "in solidarity with others" and the value of "autonomy as exiting with market-rate equity" may be in tension with one another while "autonomy as exiting with limited equity" potentially less so. My ability to sell my

[457] di Robilant, *supra* note. 432, at 309. "The "right to housing" claim is distributive in essence. Socio-economic rights claims are distributive claims packaged in politically palatable rhetoric. The term "right" suggests a correlative duty on the part of an- other party, usually the state, to recognize and provide for what the right entails."

home and reap market-rate value on my home equity, so that I can purchase another home of equivalent quality, would further my autonomy but this may be in tension with an agreement to voluntarily limit equity so that future generations of home owners can buy a home of equivalent quality (solidarity). Similarly, when analyzing CPI housing, this tension between autonomy and solidarity arises: CPI housing is by its collective character, "shared equity," and therefore subjects exit of individual equity to collective decision-making. This collective decision may be as simple as in a condominium or stock cooperative—examples of CPIs—where the cooperative board or homeowner's association merely approves the buyer. However if the CPI adopts a "limited equity" approach, as with the limited equity housing cooperatives or the community land trust (two additional examples of CPIs), the transfer of equity is also determined by rules around the restraint on transfer, in particular: (1) restrictions to transfer only to those of low- and moderate-income; and (2) caps on the maximum equity one reaps upon sale and transfer usually pegged to a social metric like the Consumer Price Index or Area Median Income.

Homeowners of such income and equity restricted properties are of course aware of the trade-offs involved in these restrictions: in view of being able to afford home-ownership that they would not otherwise be able to, these homeowners enter into the agreement to limit equity and sale to those of low and moderate income. Thus, in this sense one can be taken to choose the terms of exit in agreeing to cap equity and to sell to only low and moderate income buyers upon purchase. However, di Robilant challenges this argument in her article *Common Ownership and the Equality of Autonomy* as ignoring the background "economic and social constraints on consent."[458] Rather, she advances a resource-specific design, which

458 *Ibid.* p.271.

privileges, "greater equality of positive and relational autonomy over full negative freedom."[459] In other words, design that balances both solidarity and autonomy, but in a choice between the two, prioritizing the advance of the former. Consider the case of a homeowner of an affordability-restricted property who may be faced with the decision to continue the agreement they bargained for or to opt out for market-rate transfer. This can happen when government programs to create affordable housing through regulatory agreements expire (as we will see with the case of the Chicago land Trust or Bostadsrätt in Sweden), or when Cooperatives with prior commitments to affordable housing abandon those commitments. At this point, individuals are faced with the very decision of solidarity versus autonomy: do I think about future buyers of low- and moderate-income, or do I focus on my own ability to use this as a stepping stone in my own personal mobility and wealth creation by making a profit on my home just as those who owns market-rate housing? Di Robilant would suggest looking at the trade-offs between "full negative freedom" and "greater equality of positive and relational autonomy for the present and future generations of lower-income buyers."

> Limits on the right to transfer make exit more costly and curtail owners' ability to build wealth. In other words, the design of shared equity co-ops involves a trade-off between full negative freedom for current co-owners and greater equality of positive and relational autonomy for the present and future generations of lower-income buyers. I believe that grounding the commitment to equality of autonomy in the context of housing as a specific resource helps us to discern which of these trade-offs may be minimized and which are unavoidable but can be justified with normatively appealing arguments.[460]

Equality of autonomy, which di Robilant conceptualizes as "the equitable access to the material and relational means that allow individuals to be

459 *Ibid.*
460 *Ibid.* at p.303.

autonomous," could be another way to describe "solidarity in the means" or what we have discussed here throughout this dissertation as "decommodification": "solidarity in the material means," however as a value rather than as a purpose as I have been using decommodification throughout. This leads one to the question: "Towards what do we aim this solidarity?" "Towards what is this autonomy aimed at realizing?" Di Robilant answers the latter question by conceptualizing "autonomy" as a thicker version than that conceptualized in the liberal tradition as "negative freedom": rather she includes within it the substantive freedom of access to "basic material resources" which she suggests is aimed at "human flourishing."[461] If we return to our example of the affordability restricted homeowner faced with the choice of converting to market-rate or retaining the affordability restrictions in place for the benefit of future low income buyers, one would have to ask how "selling out" advances autonomy, not just as the ability to exit with the maximum amount of wealth possible for the individual, but the access to decommodified housing, housing as a "basic material resources which supports human flourishing." At the level of the individual, selling out seems to enhance their personal autonomy: "I will come out with more wealth than I had going in, and possibly more wealth than I could ever have made through my income alone, which will allow me to achieve greater purchasing mobility, which may also catalyze my greater economic and social mobility." However, in enhancing autonomy for multiple individuals, autonomy cannot be viewed merely as "greater purchasing power" but instead as autonomy created by such things as security, permanence, and well-being which are also fundamental to the freedom provided by the "freedom of the means." Knowing that one cannot be evicted or priced out of their home, offers a deeper sense of economic freedom, to take more interesting

[461] This conceptualization seems to be an attempt combine the liberal tradition with the Marxist tradition, however absent Marxist social theory.

work which may not be as well compensated, to spend time with one's children, or to go back to school. In enhancing the autonomy of low-income people as a class, for whom these restrictions were intended to benefit, one individual co-opting out of the agreement means less autonomy, in this second sense, for a greater amount of people than previously. A home which could have served generations of low-income people to seek greater levels of autonomy, though perhaps not as much as what the one individual would achieve by selling out, would no longer be used for that purpose. "Equality of autonomy," as "equitable access" suggests that resource specific design in this instance would lead one to opt for access for the many with small to medium size impact (not allowing individuals to sell out), as opposed to a large impact for the few (allowing individuals to sell out).

Voluntarily capping equity within this model (offered by limited equity coops and community land trusts) targeted at those of low to moderate income, offers a sound rationale: reasons rooted in values which appeal to many people. However, the idea of extending a voluntary cap on equity to those of all incomes, applied universally on the other hand sounds like an outrageous idea to most. The general ideology of private property, so deeply entrenched particularly in the United States, is that private property in land and housing is synonymous with the ability to sell to the highest bidder, to transfer at market rate, and to accrue annual home equity appreciation at market-rate. As analyzed in the previous section, while increases in land value have little do with any productive activity generated by a homeowner, and much more to do with socially created wealth and economic growth in other sectors that place increasing pressures of demand on nearby land, the notion that the wealth created by your home is not your own is a fundamental challenge to one of the most deeply rooted beliefs about the rights of private property, and as a result very difficult to undo.

However, rather than view these assumptions as immutable, as merely just part of "human nature," (similar to the naturalization of the market as a whole) it is critical to assess the deeper structural issues and the *human needs* which drive the commitment to private property such as *the need for future purchasing mobility* and *the need to save for retirement*. A nation without a guaranteed social welfare system like the United States makes it imperative on its citizens that housing is viewed as not only a place where one lives, but as an investment to ensure one's long-term well-being. Overcoming this means not merely changing hearts and winning minds, but to actually address the very structure of *market as imperative* by raising wages, increasing social security pensions, and decommodifying more fundamental resources in order to alter *the need* to maintain homes as investment vehicles, rather than as a place where one lives. As di Robilant suggests: "'Right to housing' claims often take the form of simple assertions. By contrast, "housing as a need" engages a series of informative questions: How intense is this need? How much housing is needed? How relative or idiosyncratic should the standard to determine whether the housing is adequate be? And further, how absolute should the assurance that this need will be satisfied be?"[462] Similarly, rather than point to "greedy homeowners," we need to ask, *"how much home equity is enough equity to meet existing human needs?"* The fact that people, especially in places like the United States, view homes as the only way to save and/or augment meager individual and government retirements plans, reflects deeper structural market failures to keep up wages in relation to inflation and economic growth, as well as government pensions programs, which have failed to adjust to take into account increases in the cost of living. We cannot merely insist that some people are just "too greedy" when real needs underly the view that home is more than a place to live, but a stepping-stone

462 *Supra* note. 432 at p. 310.

towards a next home in a better neighborhood with a better school or as retirement savings.

In order to delink the ways in which homes as investment serve important needs for many as a way to catalyze economic and social mobility, one must consider the reasons for wanting economic and social mobility as a person of low-income who owns an affordability restricted home. A recent study shows that most CLT homeowners use their first CLT owned home as a stepping-stone into market rate housing.[463] What this shows is that while those living in CLTs see it as an opportunity to build wealth while living in stable housing, the majority do not treat it as a permanent abode but rather as an investment. This suggests that for people to stop treating homes as investment vehicles, limited equity for some, rather than limited equity for all, does not achieve this shift. It suggests that until shared limited equity is universal, it cannot actually change the way that people view homes as home equity. If one looks to the many reasons why people move in general from market-rate homes to other market-rate homes, the biggest reasons tend to be: 1) for more lucrative work elsewhere, 2) for better neighborhoods and schools for kids (this is probably quite US specific), 3) major life changes like death, divorce, more children born in the family and the need for more space, and 4) financial reasons such as unemployment, bankruptcy, and foreclosure. Given the extremely low rate of foreclosure in limited equity owned homes, one can assume that the first three factors have more to do with people leaving limited equity homes just as with market-rate homes. Regarding the third, these are changes which will occur regardless of any reforms made so I will refrain from discussing it further. The first two reasons suggest that people move for reasons of economic mobility (better paid work) and social mobility (better neighborhoods and schools). However, the

[463] Ruoniu Wang, Claire Cahen, Arthur Acolin, & Rebecca Walter, *Tracking Growth and Evaluating Performance in Shared Equity Homeownership Programs During Housing Market Fluctuations*, Lincoln Policy Institute Working Paper (WP19RW1) (2019).

whole concept which underlies the need for home equity to serve as a wealth building vehicle is the need for well-paid work, attractive and safe neighborhoods, and quality schools, where one currently lives. If more equitable access to these were guaranteed, few people would have any reason to leave the first home they buy except for the major life changes beyond human control, which will affect all human beings at some point or another.

Similarly, in order to delink homes from retirement savings, it is necessary to propose deep structural changes to other sectors of the economy and government programs, namely to address the deep inequality in wealth which has resulted in the failure to increase incomes for the majority of Americans in relation to economic growth, as well as, the failure to increase government social security with the cost of living. By addressing these two prong concerns, we alter at the level of social relations, the entire incentive structure, rather than particular incentives, around housing as a home with reasonable rates of equity rather than as an investment vehicle from which one reaps windfall profits. It is by addressing the very root of the insecurity about one's future that one delinks the market as imperative so that it can begin to act once again as opportunity. If people are able to save more through higher incomes and a secure and generous social security system, the pressures around housing as an investment can be alleviated. By increasing people's well-being and outlook on their long-term futures, not just as a function of their individual responsibility, but the social relations in which they are embedded, the pressure to create wealth from home equity is decreased and reasonable rates of return can become more attractive and feasible. Currently homes as investments is understood by many not as a *luxury* but as meeting real *human needs* met by housing as an investment tied to the nexus of access to good quality primary education, forced savings in case of illness, unemployment and other person catastrophes or needs, and a secure future retirement.

6.5 Commons Property Institutions (CPIs) for the Decommodification of Housing

In this section I begin the process of bringing together resource specific analysis with legal institutional design of Commons Property Institutions (CPIs) utilizing a Hohfeldian analysis of property in the context of US law in order to design a property regime for housing as a structure, land and investment which serves the purpose of decommodification and democratization. To do so, I use existing law and existing tools. I do not claim to have invented the community land trust nor limited equity housing coop, as will be discussed in the following chapter, but rather I will use the tools we have developed here to describe, analyze and conceptualize them in relation to the aims of decommodification and democratization.

Commons Property Institutions for access to housing confer entitlements to multiple entitlement holders who meet the criteria for group inclusion to use individual and common areas, exclude others within the group from individual areas, and exclude all others outside the group, and transfer according to the criteria set by the group. The criteria for inclusion is set by associational law and the parameters of use, exclusion and transfer through a combination of associational law- in the form both of the purpose of the incorporating entity, as well as terms written into group bylaws- and also through property entitlements. The CPIs discussed in the following chapters exist as both associations and collective ownership regimes, and the criteria for transfer is governed by both property law and associational law. For example, a community land trust, explored in the Part III, is made up of a combination of the following legal mechanisms:

1) Incorporation as a 501(c)(3) non-profit entity with the purpose of creating affordable housing for those of low to moderate income (association and tax law).

2) The creation of a managing board through bylaws which set the criteria for inclusion in the board and in the community more generally. The board being made up of 1) residents 2) community members 3) technical experts.
3) And finally, diverse legal mechanisms to create permanent affordability through restraints on transfer at market rate:
    a. A 99-year covenant which prohibits transfer at market-rate (property and administrative law)
    b. A ground lease which splits title of the home and land beneath (property & associations law)
    c. Resale restricted formula for equity (sometime written into the deed or the bylaws of the association holding title to the home)

However, before turning to specific doctrine in the US context, I will now recap the insights regarding the resource specific characteristics of housing - buildings/structure, land, and investment or home equity- revealed from my resource specific analysis above, which I will use in the design of CPIs for the decommodification of housing:

1. Economic Analysis of Buildings/Structure: (1) the need to incentivize maintenance and improvements of homes in order to increase their durability and renewability; as well as, (2) to create new developments with more emphasis on communal spaces in order to increase simultaneous use in order to relieve issues of congestion and enhance the shareability of building space; (3) the need to create incentives for home-owners to use existing space as shared spaces available to people at limited equity rates rather than at market rate.

2. Social Relations Analysis of Land: The need to delink land values from the value of the homes. Home values are generally calculated as both land and housing, rewarding individual homeowners to profit from socially -as opposed to individually- created value. This is also being exacerbated by the more recent phenomena of real estate investment companies and global real estate investment companies and the speculative market in land. By delinking land value from home value and removing land from the market -and the speculative market- home prices can remain more affordable for generations to come.
3. Value Driven Analysis of Home Equity: The analysis of human needs to increase home equity in view of enhancing "equality of autonomy aimed at human flourishing," or in other words, decommodification, and the current need to utilize homes as investment vehicles, which must be structurally addressed in order to change the underlying conditions in which people operate: namely as a way to ensure quality access to K-12 education, forced savings in case of illness, unemployment and other person catastrophes or needs, and a secure future retirement.

I argue in the following section, that this analysis translates into the following principles for legal institutional design of Commons Property Institutions: 1) incentives for building common spaces in relation to individual spaces in new developments; as well as, 2) incentives for owners to offer space in their homes or other property at below market value; 3) incentives for individuals to maintain and improve the housing stock; 4) permanent removal of land from the market- and speculative market- through legal restraints on transfer, which as I will explain is best accomplished by splitting title deed between land and housing; 5) subsidies that stay with the land accomplished through resale formulas which facilitate

subsidy retention; and finally, 6) structural reforms aimed at delinking home as abode vs. home as investment. I will combine the discussion regarding (3) incentives for individuals to maintain and improve the housing stock with (5) the discussion on subsidies since they are often in contrast and tension with one another. I will also refrain from discussing the issue of incentives for building common spaces in relation to individual spaces in new developments (1) and (2) incentivizing owners to offer space in their homes or other property at below market value and leave these topics for Chapter 7 & 8 where I discuss the role of specific CPIs (like the Community Land Trust) that act as democratic organs in the larger community to influence housing policy, land use, zoning and new development decision, as well as, to provide specific examples to illustrate this point.

6.5.1 Legal Restraints on Transfer & Caps on Equity: Mechanisms for Creating Resale Restrictions

Most countries in the Civil and Common Law tradition utilize property law- the law of real property or immoveable goods- to create voluntary agreements on transfer (and possible restraints on transfer)- between a seller and a buyer.[464] Most countries in both traditions also utilize association law (also called corporations or non-profit law)- the law on the form, functions and limits of private for-profit, civil/charitable, and economic organizations- as a way in which to create collective entities to pursue different (for profit or non-profit) purposes, and often having the ability, like individuals, to collectively hold title to land.[465] Here, we will discuss

464 *See i.e.* SAKI BAILEY, LUZ MARTINEZ, & ANDREA PRADI (EDS.) TRANSFER OF IMMOVABLE GOODS IN EUROPEAN PRIVATE LAW, (2017).
465 *See i.e.* KLAUS J. HOPT & THOMAS VON HIPPEL, COMPARATIVE CORPORATE GOVERNANCE OF NON-PROFIT ORGANIZATIONS (2010); *See also for* Comparative Corporate Law; SEE ALSO CARSTEN GERNER-BEUERLE & MICHAEL SCHILLIG, COMPARATIVE COMPANY LAW (2019). For an excellent manual covering innovative new forms of organizations/associations and how to use them as regular citizens of social justice oriented lawyers interesting in building a more just and

different forms of legal restraints effectuated by both property law, as well as, associations law focusing on the US Legal System.

6.5.1.1 Property Law: Legal Restraints on Transfer

A covenant in US law (and also UK law) is a restriction on use of land, a form of servitude, which "runs with the land," usually written and recorded into the deed title, which present and future users must respect otherwise they will be subject to ouster.[466] The covenant, however as innovated by Community Land Trusts, specifically creates a prohibition on transfer at market rate through a restraint on market-rate transfers called the "ground lease" which, combined with their non-profit purposes, ensures that the land will: 1) not be resold at market rate for a term of 99 years (or something similar) and often, though not always; and 2) to only to those of low and moderate income. As one can see, a covenant is a promise not to do or to do something on the land for a term of years, for example racial covenants in the United States, now outlawed, prevented the sale of homes in certain neighborhoods to people of certain races and ethnicities.[467] It can also be used to make enforceable a promise such as "this building will be used to house non-profit workers for a term of 99 years." An easement, on the other hand, is a type of narrowly prescribed interest in real property which is typically a legal agreement between two individuals for a particular use of land for a specific

sustainable world through cooperatives and social enterprises See JANELLE ORSI, PRACTICING LAW IN THE SHARING ECONOMY: HELPING PEOPLE BUILD COOPERATIVES, SOCIAL ENTERPRISES, AND LOCAL SUSTAINABLE ECONOMIES (2012).

[466] Ouster is to be removed without it necessarily automatically defaulting or "reverting" to the previous interest-holder as with other contingent remainders. For a very good treatment of Covenants and other servitudes: *See* JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON, PROPERTY LAW: RULES, POLICIES, AND PRACTICES (2017), Chapter 8 on Servitudes.

[467] For an interesting history on Racial Covenants in the US *See* RICHARD R.W. BROOKS AD CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS, (2013).

purpose codified outside of the deed itself. A typical type of easement is an easement to a neighbor to use a road crossing over one's property because their ingress/egress depends on access to that road, however they could in theory also be utilized to retain certain uses- such as for maintaining affordability- even as the land changes owner- for example, an "affordability easement."[468] Covenants and easements while typically used to permit or prohibit certain uses of the land, can also be utilized to created restraints on transfer, and for our purposes restraints on transfer at market-rate. By writing a covenant into the property deed not to transfer the property upon re-sale at market rate for a term of 99 years effectuates a binding legal instrument which prohibits the re-sale of that property for that term length regardless of how many times that property changes hands. However, one important consideration in the use of covenants and easements is whether or not there is the presence of a mortgage in the purchase of the land/housing. Typically, lenders will not provide a mortgage if the restraints on transfer effectuated by the covenant or easement prevents them for being able to foreclose on the property. It may also be the case that even if the covenant it is recorded in one generation (let's say while there is no mortgage), in another generation the owners could go to court to have the covenant invalidated and removed. A covenant which is not for a term of years but instead in perpetuity could also be invalidated because of the Rule Against Perpetuities[469] in some jurisdiction, which prevents restraints on

[468] This is a legal tool currently being developed by the Sustainable Economies Law Center.
[469] This term was inserted by state regulation in order to avoid the problem of Real Property laws in most states of the rule against perpetuities, which prevents perpetual restraints on alienation. "However, deed restrictions in the United States have generally been designed to be short- to medium-term—generally between five to 20 years—and enforcement beyond those terms can be problematic. Some states expressly limit the duration of covenants 'and in almost every state, 'perpetual' deed restrictions are considered invalid as an unacceptable 'constraint on alienation' or violation of the 'rule against perpetuities.'" *See* David Abromowitz and Kirby White, *Deed restrictions and community land trust ground leases: Protecting long term affordable homeownership.* HOUSING NEWS NETWORK, JOURNAL OF THE FLORIDA HOUSING COALITION 22, 7–10 (2006), p. 24. In response, several states have enacted laws expressly permitting perpetual deed restrictions to

transfer without a term of years. This is why all restraints on transfer must be effectuated through a 99-year term (55 years is also used), which has the possibility of being renewed sometimes automatically and sometimes by fulfilling certain conditions. Therefore, the layering of several different legal mechanisms can improve the enforceability and likelihood that the restraints will be upheld, rather than a covenant being used alone.

An example of a covenant-only model is *Foundation House*, in the Richmond District of San Francisco, which uses a deed covenant to restrict the use of the building for nonprofit employees and rents at 30% of the market rate. *Foundation House* is structured as a 501(c)3 non-profit association: the association owns the building and the deed explicitly reserves the use of the building for the housing of non-profit employees, and specifically the employees of non-profits that are participating donors, which for the moment is the SF based non-profit Internet Archive that started *Foundation House*, although there are plans to expand.[470] With regard to the sustainability of enforcing the deed covenant, examples like *Foundation House* may find the restraint on transfer is not as "self-enforcing" over time as expected, and combining it together with an association model like the CLT or the Limited Equity Housing Cooperative model may be useful in ensuring affordability over the long term.

6.5.1.2 Association Law: Legal Restraints on Transfer & Equity through Corporations vs. Non-profit 501(c)(3)s

preserve the affordability of publicly-subsidised owner-occupied housing such as that provided by CLTs. Initially, deed restrictions were perceived to be self-enforcing; however, the failure of self enforcement has led to the creation of dedicated agencies to monitor and enforce deed restrictions." *Ibid*, p.19.

470 https://www.shareable.net/blog/foundation-house-brings-affordable-housing-to-nonprofit-workers (last visited January 5th, 2020).

Legal restraints on the manner of transfer of real property as we learned above is not only a factor of property law, and the type of restraint captured in a deed, but also a "ground lease" which depends on non-profit or associations law, and in the case of the CLT and other non-profit housing organizations on their status as 501(c)(3) non-profit, which allows the CLT to hold title to land. A 501(c)(3) is a type of non-profit entity, one of 29 types of classified nonprofits under Title 26 of the United States Code (The Internal Revenue Code) which are exempted from certain tax laws.[471] The 501(c)(3) applies to organizations which operate exclusively for a religious, charitable, scientific, literary or educational purpose. CLTs and other affordable housing non-profits fall under the "charitable purpose" category and which meet the guidelines of a "low income housing organization" are required to serve, according to the IRS "Safe Harbor Rule" Housing Guidelines,[472] "the poor and distressed." This specifically translates into the requirement that at least 75% of the units developed in any project serve those of low-income (below 80% Average Median Income). Therefore, CLTs are dedicated (and limited) to the purpose of providing housing to those of low and moderate income. This has two effects: 1) to create a non-profit entity that can hold title to land and housing to serve the purpose of "the poor and distressed," and 2) to limit the group that can benefit to those of low and moderate income. This effectively allows CLTs to create restraints on land and housing owned at sale below market-rate in order to serve their purpose of creating affordable-below market rate- housing. Absent this non-profit status, legal restraints at below market rate would more likely be challenged both from owners of CLT homes, as well as, from without, by banks

[471] https://www.irs.gov/charities-non-profits/charitable-organizations/exemption-requirements-501c3-organizations (last visited January 5th, 2020).

[472] Internal Revenue Service, Rev. Proc. 96-32, 1996-1 C.B. 717, 1996-20 I.R.B. 14.

and other financing entities. However, the non-profit is not necessarily the only way to "layer" legal restraints in order to retain below-market rate housing.

One such layered form of legal restraint on transfers at market-rate is facilitated by a legal mechanism called the "ground lease." Ground leases[473] are used for the purpose of splitting ownership over land and improvements in order to preserve affordability by community land trusts (CLT), an example of what I conceptualize as a Commons Property Institution, which will be explored in some depth in Chapters 8 & 9. A CLT splits title to the land beneath a home from the "improvements" above the land- the building or structure itself. The CLT owns the land while the "tenant-owner" owns the structure above land. The splitting of title is what renders housing as permanently affordable in the sense that: a) an owner of the structure cannot sell the structure at market rate because that owner does not hold title to the land beneath it, and b) a bank cannot foreclose on the homeowners and sell the home since they do own the land beneath the home. The "ground lease" is not a leasehold interest in property law, in that it does not represent an agreement between a landlord and a tenant to meet certain obligations in exchange for use of the premises and for the payment of a rent, as in the classic "rental lease," but instead through associations law, representing the relationship between the non-profit CLT entity service provider and the "tenant-owner" client. The "tenant-owner," by payment of a nominal administrative fee, enters into a relationship with the CLT, which in exchange for this nominal fee, provides oversight in the form of technical, financial and legal services in the management and maintenance of the property for the purpose of creating permanently affordable housing. In this sense, the ground lease does nothing more than establish a relationship between the CLT and the tenant owner and does not act

473 This is very different from a commercial ground lease, which utilizes a lease instead of ownership to develop improvements on a vacant parcel to which the developing entity has entitlements for a terms of years.

as a lease agreement in the classic sense: if the tenant-owner fails to pay their ground lease, or more problematic, fails to pay their mortgage on the structure, the CLT does not evict them on the basis of the agreement created by the ground-lease like a landlord evicting a tenant for failure to pay rent. Instead the ability of the CLT to intervene and regain title to the property is based on their title to the land, the agreement between the CLT and tenant owner in the purchase of the home, and the agreed upon "oversight" function it plays as a non-profit entity which holds title to land for the purpose of creating permanently affordable housing.

Another way of organizing a collective entity for the ownership of land, aside from the creation of a nonprofit is to utilize corporations law in order to form a Limited Liability Corporation (LLC). While typically an LLC is used for holding title to market-rate housing, it can also be utilized to form a Limited Equity ownership structure to cap equity to below market rate like a Limited Equity Housing Cooperative (LEHC), which will be discussed in Chapter 8, though typically LEHCs are formed as non-profits or a specific breed of non-profit, for example in California the non-profit public benefit corporation or mutual benefit corporation.[474] Briefly, an LEHC is made up of share-members just like a shareholder corporation, and holds title to land and housing (usually a multi-unit building) either as an LLC or a non-profit 501(c)(3). The "shares" represent some portion of equity in the property, which is capped to certain level (to retain affordability of entrance fees to ownership) as well as, the appreciation on those shares being capped to an index like the Consumer Price Index.

An LEHC whether it is an LLC or a 501(c)(3) is bound by state statute to

[474] California Civil Code S. 817(a)(1). https://www.davis-stirling.com/HOME/Statutes/Civil-Code-817 (last visited January 5th, 2020).

certain requirements. For example, in California LEHCs are defined in Section 817 of the Civil Code as a collective cooperative form of ownership and governance of land and housing which must restrict its equity appreciation to 10% per annum, and as outlined in the Business and Professions Code Section 11003.4, resident purchasers of shares can contribute no more than 10% of the total development cost per individual in the purchase of their ownership shares.[475] It is also defined in Section 817, as a non-profit public benefit corporation, requiring the dedication of any profits from sale of the property to a public or charitable entity.[476] These requirements read together 1) limit the amount of down payment required by residents to buy-in, thus lowering the barriers to home ownership and 2) also limiting the ability of members to sell at market-rate, as any profits made are required to be donated to charity. These LEHC laws in California provide important ceilings to equity and equity appreciation, as well as on profits, however often share prices and appreciation are even calculated at lower rates in order to create greater access to affordable housing, and to make the projects more financially feasible and sustainable over time. Typical LEHCs cap shares to "five times the carrying capacity" resulting in shares around or less than $5,000, as

475 California Civil Code Section 817 (b)(1)(C): "Accumulated simple interest, an inflation allowance at a rate that may be based on a cost-of-living index, an income index, or market-interest index, or compound interest if specified in the articles of incorporation or bylaws. For newly formed corporations, accumulated simple interest shall apply. Any increment pursuant to this paragraph shall not exceed a 10-percent annual increase on the consideration paid for the membership or share by the first occupant of the unit involved." California Bus. & Prof. Code Section 11003.4 "(2) No more than 20 percent of the total development cost of a limited-equity mobilehome park, and no more than 10 percent of the total development cost of other limited-equity housing cooperatives, is provided by purchasers of membership shares."

476 California Civil Code S. 817(d): (1) "So long as any such encumbrance remains outstanding, the corporate equity shall not be used for distribution to members, but only for the following purposes, and only to the extent authorized by the board, subject to the provisions and limitations of the articles of incorporation and bylaws:(A) For the benefit of the corporation or the improvement of the real property. (B) For expansion of the corporation by acquisition of additional real property. (C) For public benefit or charitable purposes."

compared to the 10% of the development cost (which on a unit where the development cost is $200,000 could result in a $20,000 share) and also limit the amount of equity appreciation to less than 10%, and is often pegged to an index like the Consumer Price Index (1-2%) or Average Median Income (3-4%).[477]

6.5.2 Limited Equity Resale Restriction & Appreciation Formulas: The Tension between Subsidy Retention & Equity Incentives to Maintain & Improve Housing Stock

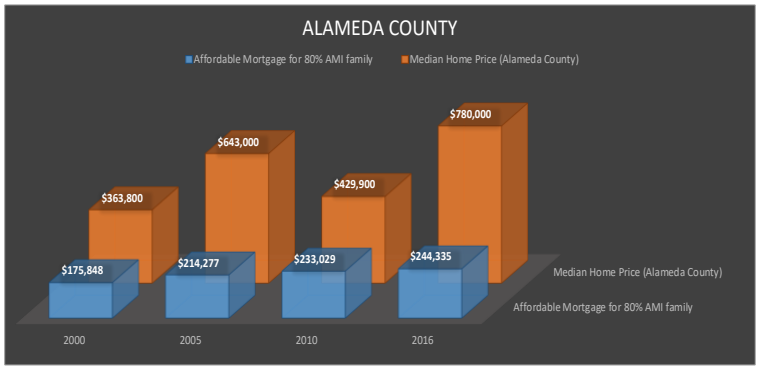
An extremely important and unique way in which decommodification, or more commonly referred to in housing policy as "permanent affordability," is forged through the retention of affordability over generation not only through restraints on transfer at market rate, but in capping equity appreciation in order retain as much of the initial subsidies used to purchase land and housing in the first place. Subsidy retention is far more successful than subsidy recapture in providing a sustainable financial model for the creation of affordable housing. Subsidy recapture programs work in the following way: a local government provides a loan with 0% interest for $20,000 for down-payment assistance to those of low and moderate income with the expectation that when the home is sold that they will be paid the $20,000. While $20,000 may be enough to assist a low or moderate income household in 2008, by 2020, let's say home prices have doubled and those at 80% Average Median Income will need a far larger subsidy than in 2008 to purchase the same home of the same size and quality. In hot markets like the San Francisco Bay Area, the increase in subsidy required in 2020 might be up to two or three times the amount needed in 2008. Subsidy retention, on the other hand, utilized by CLTs and LEHCs, works in a far more effective way to address gaps in

[477] Conversation with Rick Lewis, Executive Director of Bay Area Community Land Trust, October 21st, 2019. Rick Lewis has set up multiple LEHCs and is an expert on LEHCs in California.

affordability by retaining the initial subsidy to purchase the land and housing in a way that makes it permanently affordable. Take the same scenario, the City invests $20,000 of subsidy in 2008 into a CLT owned home to make it affordable to those of low and moderate income, however rather than allowing the price of resale to float on market value, it is set at a price restricted value pegged to an affordability index like AMI. This price-restricted value actually reflects the % increase for those at 80% AMI, thus making the property affordable by pegging it to increases in income in that target income group, thus making it permanently for this income group into the future. Thus any increase in the sale price in 2020, does not reflect the increases in the surrounding real estate market, by instead the increases in income available to the target population. This latter approach is called "subsidy retention" rather than the earlier example of "subsidy recapture." What this comparison demonstrates is that in subsidy recapture, subsidies must be increased to fill the gap in the difference in market price of a home in 2008 vs. in 2020, while in subsidy retention the subsidy invested in 2008 stays with the property in 2020 with the only increase in price reflecting increases in the average median income. In some areas, like the San Francisco Bay Area, the gap in home values can require an astronomical amount of subsidies from one year to the next. An example of this is demonstrated in the below Chart,[478] which shows the increasing gap in subsidies needed in Alameda County (the County where Berkeley & Oakland are located).

[478] Created by Francis McIlveen of Northern California Community Land Trust (NCLT).

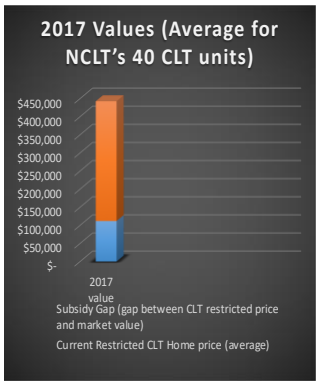
What Low income families can afford v.s. the Market Median Price

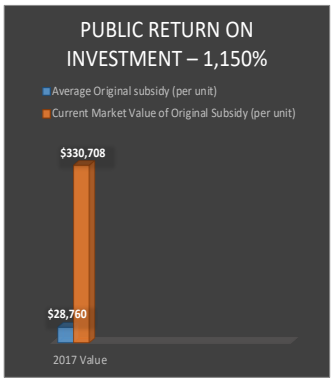


As once can see from this Chart, in 2000 the gap between the mortgage that a household of 80% AMI could obtain and the median home price was $187,952, but by 2016, that gap had widened to $535,665: this means that almost three times more subsidy was needed to buy the same home just sixteen years later. As Northern California Land Trust discovered in a study of 40 of their properties, where an initial subsidy of $28,760 per unit was utilized for the purchase of the property over forty years ago, today the same property has a market value of $442,567. With subsidy retention programs because the value of these properties has been pegged to AMI, they have a resale restricted value of $111,860. As this second Chart[479] shows below, there is a "subsidy gap" of $330,708 between the resale restricted price and the market price. This means that there was a return of 1,150% on the initial public subsidy and rather than the subsidy being merely "retained" it grew exponentially!

479 *Ibid.*

How Community Land Trusts have given governments a 1,150% return on public investment.





Subsidy retention formulas, however are not all created equally, and sometimes can become financially unsustainable by allowing equity to appreciate at a rate that is higher than the % increases of affordability indexes such as CPI or AMI thus sometimes resulting in payouts, which must be calculated into the price for the next buyer, and thus decrease the affordability for future buyers. However, a number of factors must be considered in designing a subsidy retention formula beyond affordability, for example a sense of fair return and incentives to maintain and improve the housing stock. A sense of a fair return is important in incentivizing people to buy into the model and ensure a sense of ownership. Furthermore, extremely low equity gains may not incentive maintenance and improvement of the housing stock. These are however two very different types of incentives: the first is about the incentive to buy into the model in the first place, while the second is not to degrade the quality of the home, and thus relate as discussed earlier in our resource analysis, to the issue of increasing the lifetime capacity and renewability of the home for more users over time. John Emmeus Davis, a scholar on CLTs and ex-director of Burlington Community Land Trust

adds additional considerations when selecting a resale formula. He names the primary goals as: 1) ensuring fair access for future CLT homeowners who are buying CLT homes, and 2) ensuring a fair return for present CLT homeowners who are selling CLT homes.[480] He also names the following relevant secondary goals which I will analyze in detail in the discussion on the advantages and disadvantages of different formulas:

• promote homeowner stability/longevity
• promote homeowner mobility
• promote maintenance and repair of CLT homes
• encourage capital improvements that increase the use value of CLT homes
• discourage capital improvements that decrease the affordability of CLT homes
• allow full and easy understanding of the resale formula by those who are buying or financing CLT homes
• allow easy, inexpensive administration of the resale formula and the resale process
• intrude as little as possible on a homeowner's privacy and "sense of ownership"
• allow the resale of a CLT home to occur as quickly as possible once a homeowner decides to sell
• avoid conflicts between CLT homeowners and the CLT

A resale model that balances these many competing interests is no easy task, and there are necessary trade-offs of each approach, which are explored below. Here we present the four types of resale restriction formulas utilized by CLTs as explained by Davis.[481]

[480] John Emmeus Davis, *Designing Resale Formulas: Goals* http://www.burlingtonassociates.com/#!/resources (Last accessed on October 24, 2019).
[481] "Four Resale Formulas" http://www.burlingtonassociates.com/#!/resources (Last accessed on October 24, 2019).

Table 1 Comparison of Subsidy Retention Formulas

Type of Formula	Narrative Description	Resale Price Formula
Itemized-Based Formula	Itemized formulas adjust the original purchase price by adding or subtracting factors that affect the value of the owner's investment in a home and the value of the home itself. Factors included in an itemized formula: an inflation adjustment, subtraction of public or private subsidies, a credit for the value of later improvements, a deduction for depreciation (if the home is not maintained) a penalty for unusual damage.	Purchase Price + Homeowner equity invested or earned to date x inflation factor + Value of improvements added by homeowner - Depreciation - Damages beyond normal wear and tear - Public or private subsidies = Resale Price
Appraisal-based Formula	Appraisal-based formulas adjust the original purchase price of a CLT home by adding a certain % of any increase in the home's market value, as measured by market appraisals at the time of purchase (Appraisal 1) and at the time of resale (Appraisal 2). The % of this appreciated value allocated to the homeowner is stipulated in the formula (25% is commons, although some CLTs allocate a higher%). Appraisals are done for the building alone, not for the combined value of the land and the building. Variations: - Some CLTs have added a credit for later improvements - Some CLTs have used a % that increases over time, so that the longer a homeowner stays, the	Purchase Price + Appraisal1-Appraisal2 x % = Resale Price

	more appreciation s/he gets when s/he leaves.	
Indexed-based Formula	Indexed formulas adjust the original purchase price by applying a single factor- the change in a particular index between the date the homeowner purchases his/her home and the date s/he resells the home. This index, which is a specified formula, can be a measure of incomes in the CLT service area (e.g. change in median income) or a measure of rising costs (e.g., the CPI for housing). Although indexed formulas are not as common as appraisal-based formulas among CLTs, they are quite common among public programs that subsidize low-income rentals and low-income homeownership. Indexed formulas pegged to AMI are increasingly being used in rapidly appreciating markets.	Purchase Price x Change in Index =Resale Price
Mortgage-Based Formula	Mortgage-based formulas adjust the resale price based on the amount of mortgage financing a purchaser of a given income level will be able to afford at the then-current interest rate. Factors that must be specified in designing a mortgage-based formula must include: -the income level for which the home must be affordable -what is to be included in monthly housing costs -the % of the resale price that is to be covered by mortgage financing -the index or benchmark that will be used to determine the exact "current interest rate" for the type of	Resale price = price affordable to household at __% of area median income adjusted for family size assuming the following conditions: housing costs = principal, interest, taxes, insurance, lease fee & any HOA fees __% front-end ratio __% of resale price to be covered by mortgage

	mortgage in question for the time in question.	at prescribed terms and requirements for mortgage (e.g., 30-year term, fixed rate, etc.) at "current interest rate", as defined

Each of these formulas have their advantages and disadvantages, which are evaluated below and in the table at the end of this Chapter using the criteria of: 1) decommodification as retaining permanent affordability; 2) ensuring a fair return and encouraging a sense of "ownership" (privacy and equity); 3) incentivizing maintenance and improvement. Each has its trade-offs regarding legal institutional design, and the choice between trade-offs is determined not only by one's values, but one's purpose. While the second and third concerns are important, for the purpose of what is relevant to this thesis, I prioritize the issue of design developed in the following Chapters 7, 8, & 9 vis-à-vis the aim of decommodification or permanent affordability, and as a result the Indexed-based formula for subsidy retention based on CPI and AMI, which both accomplishes this aim, as well as being, financially feasible, are discussed there. However, if one were to instead have the aim of any of these other purposes, they would want to consider the below advantages and disadvantages.

6.5.2.1 Retaining Permanent Affordability: Advantages and Disadvantages

- The Itemized-Based Formula has advantages with regard to retaining affordability because the purchase price is not set according to an appraisal value, but rather on what the owner has invested in terms of the initial

down payment plus any additional improvements minus inflation, depreciation in value, and/or any subsidies invested. This has the advantage that the purchase price is completely insulated from any valuation based on market value. Furthermore, only "useful improvements" as opposed to "luxury improvements" can be compensated, further limiting the amount of equity to be paid out with each generation. However, this approach also has the disadvantage that if such "useful improvements" build up over time they could result in the final value being higher than that is affordable by the next generation of buyers. Furthermore, the inclusion of inflation could result in unaffordable sale prices depending on how much inflation increases in relation to AMIs.

- Appraisal-Based Formulas, on the other hand, offer advantages with regard to retaining affordability because the purchase price is not set on market-value but rather an appraisal which takes into account the value of land and housing together with deed restrictions thus insulating the price from the market. Furthermore, this formula caps equity at 25% of this appraised value. This approach has the advantage that the valuation of the home is not based purely on the market but the market plus affordability restrictions with a further cap of 25%. So long as the real-estate market remains stable, the appraised value will also remain stable, however it does have the disadvantage that in a more rapidly appreciating market, if the second appraised value is considerable higher than the first, it may result in decreasing affordability. It is also important to note that the valuation of home and property including affordability restrictions may not be an exact science and may result sometimes in subjective and arbitrary valuations, which could also threaten the affordability of the home.

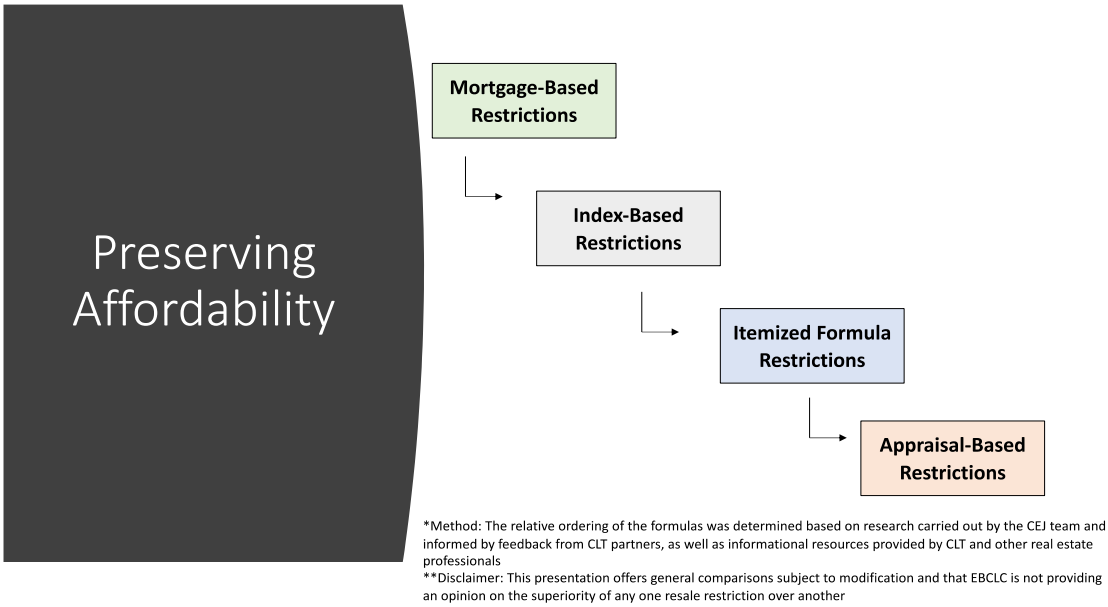
- The Indexed-Based Formula has the greatest advantage with respect to permanent affordability in that it is pegged to the income of the very people for whom the CLT is trying to keep housing affordable. In this sense, this formula (next to the Mortgage-based formula) is the best way to ensure that the resale price will remain affordable for the same target population of those of low to moderate income in the future. However, it also has the disadvantage that everything hinges on selecting the "right index." The Consumer Price and Average Median Income indexes are not a perfect science in capturing all relevant factors: the CPI in terms of failing to capture all household costs and AMIs in failing to account for economic trends that increase median income for the region or county but may not increase incomes for those of specific cities and neighborhoods where incomes may be much lower.
- The Mortgage-Based Formula has the advantage that it is completely targeted at keeping the property affordable for the buyer by setting the resale price at the level that the buyer can afford depending on his/her assets and the mortgage he can get for the purchase of the home. This can have the downside however that if the resale price is too low it can result in: 1) costs which are higher than the mortgage, 2) sellers not being compensated for the sale in terms of equity put in as well as equity appreciated and, 3) buyers being unwilling to invest due to the history of not compensated previous sellers fairly. These factors may result in the overall unsustainability of the model resulting in the inability to retain affordability.

In conclusion, the Mortgaged-Based Formula is the best formula for guaranteeing decommodification in that the resale price is based on affordability

for the buyer, on the other hand the lack of the financial feasibility of the model, makes it less attractive than the Indexed Model, which is also an excellent guarantee in that it is pegged to indexes which are reflective of what low and moderate income people can afford. The least effective formulas for achieving decommodification or permanent affordability are the Appraisal-based and Itemized formulas. The Appraisal-based formula may become unaffordable due to the way that the appraisal is based somewhat on the market value of the home, although with resale restrictions included. The quality of the valuation may depend on the appraiser and the method of taking into account the restraints, however, if restraints are adequately taken into account, even in rapidly appreciating markets, this approach may still be able to guarantee permanent affordability. Finally, the Itemized formula, on the other hand, may become unaffordable due to the inclusion of rates of inflation in the calculation.

Comparison 1[482]

[482] This chart was created by Ezekial Wald, UC Berkeley School of Law JD Candidate 2021 for the East Bay Community Law Center Community Justice Clinic Project. I have slightly modified the chart by dropping "fixed % formulas" comparison.



6.5.2.2 Ensuring a Fair Return, Encouraging A Sense of Ownership (Equity & Privacy)

- Itemized-Based Formula: Since equity is calculated as a factor of the time and money invested by the owner rather than some other valuation based on the market or an index, the equity correlates directly to the actions (or lack thereof) of the owner: if they work to maintain and improve the property this will result in an increase, whereas the failure to do so can result in reductions. Since the owner is put in control of how equity increases or decreases, he/she is more likely to find it fair, as well as, to promote a sense of ownership. However, one disadvantage that may undermine this sense of ownership is the need for the CLT or other entity to make valuations as to increases and decreases in value, which may impinge on the owner's sense of privacy and fairness.

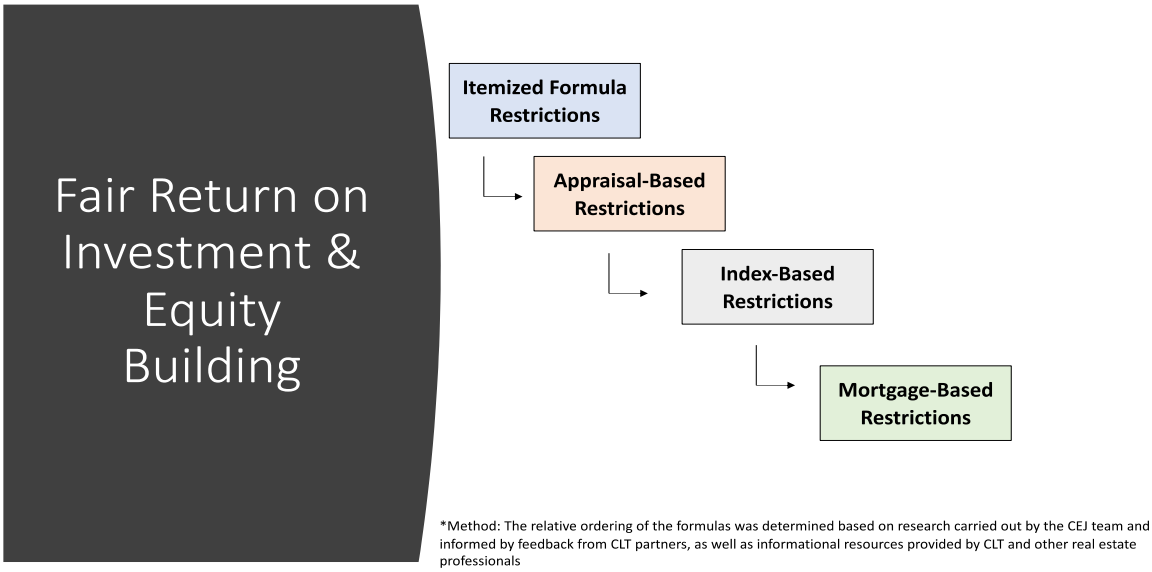
- Appraisal-Based formula: A 25% cap on equity is somewhat higher than the % returns of other formulas (compare to CPI around 1-2% and AMI 3-4%). Also, since this valuation is somewhat pegged to the market, in hot markets this can result in a higher return on equity. Psychologically, even in more stable markets, 25% (of the different in the initial purchase appraisal and appraisal at the time of sale) may sound somewhat more like "homeownership" than 1-4%. Furthermore, unlike the Itemized Formula there is no need for the CLT or other oversight entity to evaluate wear and tear and improvements in making the valuation which might enhance the owner's privacy and sense of ownership. One downside however of this model is again the fact that the appraisal is not an exact science, and the owner may feel that the valuation is "unfair" since there may be very few "comparable" homes of the same size and location with deed restrictions to compare to in the area.
- Indexed-Based Formula: Depending on the index used, these formulas can provide a sizable return to homeowners who sell their homes, promoting a sense of fair return and a sense of ownership. The Average Median Income index tends to yield more (3-4%) than the CPI (1-2%) and also may be more reflective of affordability in that particular area where the home is situated. Index formulas also offer the advantage that they are transparent and easily calculated by owners and CLTs (or another oversite organization) alike. It is also easy to understand and occasions for misunderstandings and disputes are minimized. A disadvantage however is that the formula is delinked from what the owner does or does not do towards the appreciation of the home. This can lead some to benefit richly, while others may feel undercompensated, particularly those that invested time and money into maintenance and improvements. Also since the index

% does not change based on factors like 1) the amount of mortgage paid down and 2) the length of tenure, it may result in a feeling that the equity paid out is unfair for longer term tenant-owners, and may also result in encouraging shorter occupancy.

- The Mortgaged-Based Formula: As discussed previously, since the price is entirely calculated on the buyer's ability to pay, sellers may be undercompensated and may feel that ultimately the rate of return is unfair. Since the formula is based on factors over which the seller has no control, the process for deciding when to sell may become distorted. Sellers may avoid selling in times of higher interest rates since that would affect the amount of mortgage and terms awarded to the buyer resulting in potentially lower pay-out for the seller. This may lead the seller to violate occupancy requirements in order to wait for the most advantageous time to sell. Furthermore, while the principle of how the price is set based on the affordability for future buyers is easy to grasp, the formula by which the final equity is calculated for the seller depends on the year of sale and may be too complex and unfamiliar for sellers resulting in distrust and a sense of unfairness of the manner and process by which equity is calculated.

In conclusion, the best formula for ensuring a sense of a fair return and sense of ownership seem to be the Indexed, Itemized, and Appraisal-based formulas due to their simplicity in calculating the equity, as well as the lack of oversight by the CLT or other entity in making the valuation, which may take away from the owner's sense of fairness and privacy. The formula which seem to perform the worst in this regard seem to be the Mortgage-based formula due to the focus on the buyer's ability to buy rather than the seller's return.

Comparison 2[483]



6.5.2.3 Incentivizing Maintenance & Improvements

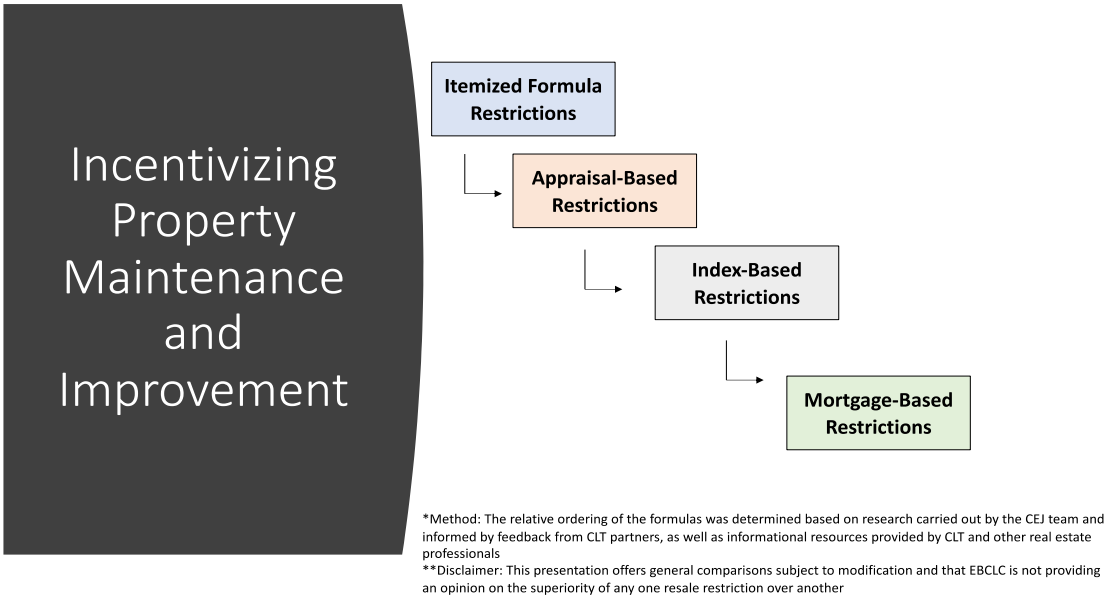
- Itemized-Based Formula: Due to the fact that individual items of improvement are added to the appreciation of the home, there is a very good incentive for making repairs and improvements. However, repairs must be "useful" as opposed to "luxury repairs," the assessment of which may result in conflict between the CLT or other oversight organization and the owner. There is a good incentive for sound maintenance and repair because penalties are levied for deferred maintenance and damage. However, again the valuation of normal wear and tear may be elusive and difficult to calculate resulting in conflicts between the owners and CLT.

[483] Ibid.

- Appraisal-Based Formula: Due to the fact that equity is calculated based on the appraised value of the home in view of the market and resale restrictions, it does not distinguish between value added by the owner and value added by the market, thus potentially disincentivizing maintenance and improvements on the home, as well as potentially undercompensating those who do make improvements in stable markets while overvaluing improvements in appreciating markets. However, one upside of this is that it avoids the difficulties involved in distinguishing repairs from improvements, in assessing the value of the improvements and in gauging "wear and tear."
- Indexed-Based Formula: Since indexed formulas are based on an index, which is wholly delinked from the individual's contributions to the property whether in the form of improvements or a lack of maintenance, there is little incentive to maintain and make improvements. One upside however is that since neither improvements nor wear and tear are evaluated by the CLT or other oversite organization, this reduces the likelihood of disagreements.
- Mortgage-Based Formula: There are no major advantages of this formula in incentivizing maintenance and improvements because the resale price is not set on factors which take those into consideration, therefore there is little motivation on the part of the owner to concern themselves with maintenance in making improvements.

In conclusion, the best formula for guaranteeing incentives to maintain and improve is the Itemized formula because of the way that it takes into account all useful improvements, as well as of wear and tear depreciation. All the others seem about equal in their lack of equity building rewards for maintenance and

improvements. Some Appraisal-based formulas however do include a provision for increases in equity through improvements, in which case it would likely to be able to guarantee these incentives as effectively as the Itemized formula.



6.6 Designing Structural Reforms for Encouraging Voluntary Caps on Equity

The central reasoning for why caps on equity must be placed on the homes of those of low to moderate income who buy affordability restricted homes is that there is trade-off: individuals of low and moderate income are able to afford a home they would not have otherwise, and meanwhile the model stays sustainable so that affordable homes are also available for future generations of those of low and moderate income. However, if one rejects this means-tested as opposed to universally decommodified housing for the reasons discussed in our values driven analysis, and if one wants to expand caps on home equity for all in order for everyone to have access to housing, as I will attempt to pursue in Chapter 8, it is

necessary to appeal to other reasons to cap equity voluntarily. There are three possible strategies for encouraging a voluntary cap on home equity by everyone, the first two focus on individuals as the unit of analysis and the third on structural changes needed to alter social relations or the "structure of the situation" in order to alter the very background conditions under which the current need for housing as an investment vehicle is generated, namely that of mobility and retirement saving discussed in the previous section.

One way is to appeal to the moral conscience of citizens by demonstrating through evidence, the negative impact of a speculative housing market on their households and local communities and urge them to "divest." While this may seem unlikely, we see a similar trend in people's attitudes in recent years towards investments with regard to both the environment/climate change and financial markets. There is a movement to divest from such activities as a strategy for ending the destructive effects of Wall Street and the fossil fuel industry. "Invest in Main Street, not Wall Street," is becoming a more and more common place slogan, and the growing sector of "impact investments," like crowdfunding discussed earlier in this Chapter goes even a step further towards embracing a moral economy measured by other markers of success other than profit, such as by social and environmental impact. A guaranteed 3-4% annual return is much higher than the average rate of holding a Certificate of Deposit (CID) or other such modest investment products. For those of higher incomes, who have the luxury not to depend on growing their wealth through their homes and instead to utilize their wealth in socially and environmentally conscious ways, this first strategy may be an important way to drawn in those of higher incomes to a program of shared-limited equity for all.

A second strategy works on individual incentives by inducing people to buy in by emphasizing or providing other forms of benefits such as tax exemptions

and reductions. Property tax is a major addition to the monthly cost of housing, which could be decreased for equity capped properties. Furthermore, transfer taxes at the time of sale, another major cost which decreases the overall take-away could also be decreased. This approach emphasizes a kind of quid pro quo, but unlike with the required cap on equity imposed on those of low to moderate income, it works as an enticement: "Give up windfall profits on land by capping equity and you can buy a home for less money than what is required by the market." In hot real estate markets, a growing demographic which is emerging is the "missing middle," referring to those who make too much to qualify for government and private subsidies, but also cannot afford market-rate housing. For this growing demographic, the ability to buy a home using tax incentives could be attractive enough that a equity cap may appear fair and reasonable.

Ultimately, however working at the level of individual incentives will not be enough alone to change behavior universally. This is because what drives people's motivations to build wealth from home equity is the way in which it is tied to deeper structural issues about the role that it plays in building wealth, economic and social mobility, and how it is tied to good schools and acts as a forced savings for personal catastrophes and retirement. In order to address these deeper structural issues, programs of reform for the kind of changes discussed above in our values drives resource specific analysis must be made such as: increases in wages, increasing social security pensions, and providing quality access to other fundamental resources like food, water, healthcare and education. These are issues for example not addressed by Lee Anne Fennell discussed briefly who also advocates for a disaggregation of property entitlements in homes in order to alleviate risk burdens on individuals.[484]

[484] LEE ANNE FENNELL, THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES, (2009). I do not have the space or time to elaborate my proposal in relation to Fennell's however her work on housing and specifically her disaggregation of ownership entitlements with

6.7 Conclusion & Decommodifying Fundamental Resources through CPIs

In this chapter, we began to analyze housing as three distinct resources, which I claim must be analyzed together in order to decommodify housing: land, buildings & home equity. I also attempt three different types of resource specific analyses in order to discern the different characteristics of housing as a unique resource: 1) the economic analysis of goods, 2) the social relations analysis of goods, and finally, 3) the normative analysis of goods. How a particular good is conceptualized and falls on the spectrum of rivalry/non-rivalrous, excludable/non-excludable, is a matter of degree, as we highlighted in Chapter 5. These degrees can be altered through legal institutional design to transform the incentive structure in place for the governances of resources like housing. Related specifically to buildings, this may depend on enhancing the sharing of space in order to decrease congestion and therefore the simultaneous use, as well as, maintenance and improvement of the structure. The characterization of a good along other lines: social relations and value driven approaches can reveal other aspects of design guided by specific purposes and values. In expensive metropolitan areas, land values have become astronomical due not only to high demand on housing in cities but the impact of speculative capital. I argue that the best way to remove land and housing from the speculative market is to remove it completely from the market- not only for those of low and moderate income- but by delinking the value of homes from land, while allowing for limited equity with a reasonable rate of return to meet human needs in wealth building from home equity.

I argue, the project of embedding the market and undoing capitalist social relation by decommodifying access to fundamental resources, like housing,

a view towards relieving individuals of undue risk by spreading risk to other external institutions appeals to me and I hope to engage her work further in the future in relation to my proposal for a Shared Limited Equity Housing Policy for all.

requires the legal institutional redesign of private property into Commons Property Institutions. CPIs facilitate the greater decommodification of fundamental resources through restraints on transfer at market rate through property and associations law, as well as, to create limits on equity appreciation. In Part III, I will attempt a deeper analysis of Commons Property Institutions in housing- Commons Housing- to demonstrate that the analysis of "how to undo" requires detailed and concerted efforts both conceptually and institutionally to redesign decommodifed access to housing. By applying this approach to housing, I hope to demonstrate a method of analysis, which can be utilized to decommodify other fundamental resources which constitute man's means of subsistence: food, water, healthcare and education for example. Each resource will involve a different resource specific analysis for decommodification, as each resource has unique characteristics and unique legal forms which must be named and analyzed to render them more accessible. The aim of my analysis with housing is to create a blueprint or road-map for the decommodification of all fundamental resources.

Table 2 Evaluation of Subsidy Retention Formulas

Type of Formula	Retaining Affordability	Ensuring a Fair Return & Sense of Ownership	Incentivizing Maintenance & Improvements
Itemized Formula	<u>Advantages</u> -Purchase Price is not set according to an appraisal value thus insulating the value completely from the market. -A distinction can be made between "useful	<u>Advantages</u> -The equity that an owner receives is tied directly to the measure of her personal choices and personal investment of time and money. <u>Disadvantages</u>	<u>Advantages</u> -There is an incentive for sound maintenance and repair- and penalties for deferred maintenance and damage.

	improvements" and "luxury improvements," with only the former adding to the resale price. <u>Disadvantages</u> -The inclusion of inflation can result in unaffordable resale prices. -Accumulation of improvements over time can similarly result in unaffordable resale prices	-The CLT's oversight role in reviewing and approving proposed improvements and calculating their value may diminish the owner's sense of privacy.	- "Useful improvements" are compensated thus incentivizing improvements. <u>Disadvantages</u> -The valuation of normal wear and tear can be elusive and difficult to calculate resulting in conflicts between the owners and CLT - Similarly the valuation of useful vs. luxury improvements may also be difficult to distinguish leading to conflict.
Appraisal Based	<u>Advantages</u> -Appraisals are not based entirely on market value in the sense that they do not consider the value of the land and housing together thus insulating the price somewhat from the market. -Equity is capped to 25% of this value so, so long as the appreciation over the time of the ownership	<u>Advantages</u> -A 25% cap on equity offers slightly more equity than the other formulas compared here and can yield much more in hot markets. -Psychologically the idea of 25% of the total equity vs. 3-4% annually of your down payment (as in the indexed formulas) feels more like making an investment in one's home as opposed to	<u>Advantages</u> -This formula avoids the difficulties involved in distinguishing repairs from improvements, in assessing the value of the improvements and in gauging "wear and tear". -This formula does not distinguish between value added by the owner and value

	appreciated by this amount, while the real estate market remains relatively stable, it remains affordable for future buyers. -This formula discourages the accumulation of expensive improvements over time thus keeping them more affordable. <u>Disadvantages</u> - Appraisal of the building without the land is not an exact science and may result in subjective and arbitrary evaluations. - In rapidly appreciating markets when the % equity is too high and the second appraisal price is much higher than the original, this can result in a lack of affordability.	a kind of forced savings. -There is no need for the CLT to evaluate the value of wear and tear and improvements but rather this is part of the appraisal process, thus providing the owners again with greater privacy and possibly a greater sense of ownership. <u>Disadvantages</u> -Again, appraisals of the building without the land is not an exact science and therefore may result in subjective and arbitrary evaluations which may feel "unfair" to the owners.	added by the market thereby potential dis-incentivizing maintenance and improvements and overvaluing poor repair in appreciating markets and undervaluing good repairs in more stable markets .

Indexed Formulas	<u>Advantages</u> -If the index is pegged to the income of the people for whom the CLT is trying to keep housing affordable, these formulas do a good job of ensuring that the resale price will, indeed, be affordable for this target population in the future. <u>Disadvantages</u> -Everything hinges on choosing the "right" index. Even median income can prove to the "wrong" index, since low-income people often do not benefit from economic trends that increase median income for the region or county and may not account for cities and neighborhoods where incomes may be much lower.	<u>Advantages</u> -Depending on the index used, these formulas can give a sizable return to homeowners who sell their homes, promoting a sense of a fair return and sense of ownership. -Depending on the index used, the information needed to calculate resale prices is readily available-and verifiable- by homeowners and staff alike. -The formula is relatively simple and comprehensible and do not require judgments by CLT staff or professional appraisers. Occasions for misunderstandings and disputes are minimized. <u>Disadvantages</u> -These formulas do not distinguish between appreciating value produced by the owner and value produced by other factors. Some owners may not	<u>Advantages</u> -Do not require appraisal of improvements or distinction between useful vs. luxury, as well as disagreements between the CLT and owner regarding depreciation of wear and tear. <u>Disadvantages</u> These formulas may provide scant incentives for repairs and improvements. A change in the index gives owners an automatic increase in price, even for a poorly maintained, unimproved home.

		receive a reasonable return on their investment while others may benefit richly from appreciation they did little to produce. -These formulas allow shorter-term owners with little equity and a large mortgage debt to capture the same appreciated value as longer-term owners who have paid down their mortgages. This may encourage shorter occupancy.	
Mortgage-based Formulas	<u>Advantages</u> -The mortgage-based formula is the only formula that can guarantee a given level of affordability at resale to a house-hold at a given income level- regardless of what happens to interest rates, property tax levels, increases in market values and the like. <u>Disadvantages</u> -Since affordability is adjusted depending on the	<u>Advantages</u> -The basic principle- to make sure each successive buyer has monthly housing costs at the same level of affordability- is easy to grasp for homebuyers. <u>Disadvantages</u> -These formulas base the resale price entirely on what works for the buyer; therefore, these formulas are less likely than the others to give the seller a fair return- and may	<u>Disadvantages</u> -As the resale price has no real basis in value, there is little motivation for owners to make improvements to the home.

	ability of the purchasing household to get a mortgage, it is not clear what % of the resale price is covered by the mortgage as well as other costs. This may result in paying the seller less than what he paid and or less equity appreciated.	give a return that is dramatically unfair. -As these formulas are based on factors over which the seller has no control, the process for selling tends to become distorted. If interest rates are high, sellers would be penalized-prompting them to delay selling or tempting them to violate occupancy requirements. -Homeowners are likely to be unfamiliar with how to calculate resale price-potentially creating distrust and eroding homeowner's sense of controlling their own homes.	

PART III Decommodifying Housing Through Commons Property Institutions

Chapter 7 Decommodifying & Democratizing Housing: A Comparison of Limited & Shared Equity Housing Institutions

7.1 Introduction

The lack of access to affordable housing is an intensifying crisis worldwide, and not only for those living in developing countries, with rising populations and high rates of poverty, but also in the first world, despite declining rates of both. This can be explained in part by rising inequality, which, as argued in a previous chapter, is in large part the result of the decline of the welfare state and the dominance of neoliberalism. It can also be explained as part of the trend of demographic changes in reaction to capitalist production over the past two centuries: the mass migration out of the countryside into cities, creating high demand in cities while rural towns and villages have been left all but abandoned. As has been argued throughout these chapters, the inequality produced by the social relations of capitalism can be at least partially reversed through the decommodification of access to fundamental resources like housing. Housing should, at least in theory, present a strong candidate for gaining political support for universal decommodification in both the US and Europe, since it effects not only the poor but also the working, middle, and even upper middle classes. Those moving between urban centers in the US and Europe, across all income strata, face astronomical costs for housing, as well as, an overall shortage of supply. Many are being forced to relocate far from their places of work or study, increasing commuting times to unprecedented levels. The crisis intensified to the point that in 2015 the European Court of Justice ruled that in the case of workers without a fixed office (such as plumbers, electricians, and care workers), employers must compensate their employees for their travel time

not only between work sites but also from their home and back.[485] However, this ruling does not apply to office, service, and manufacturing workers, who comprise the majority of the European workforce. Similarly, in the United States, the housing crisis is also intensifying in particular urban centers, a case in point being the San Francisco Bay Area. The recent tech boom of "Silicon Valley," home to tech giants like Google, Apple, Twitter and Facebook, has catalyzed a local housing crisis so dire that tech companies are now sponsoring their own multi-million dollar construction developments to create more affordable housing options, not merely out of charity, but a growing sense that slowing rates of growth may be tied to a decrease in recruiting as the Bay Area affordable housing crisis reaches a breaking point.[486] Homelessness has become so rampant in the Bay Area that in 2017 UN Special Rapporteur Leilani Farha called the conditions in the San Francisco Bay Area as "systemic cruelty," and represented one of the worst conditions in the world for unhoused people in the form of: problems of sanitation, health, rodent infestation, disease and drug use. She suggested that the conditions in the San Francisco Bay Area, and particularly Oakland, were as bad or worse than in places like Manila and Mexico City (other places visited by Farha on her tour).[487] Her conclusions in her 2018 UN Report on "Adequate Housing as a Component of the Right to an Adequate Standard of Living," explicitly states that the homelessness crisis, "witnessed by the Special Rapporteur in San Francisco

485 http://www.bbc.com/news/uk-34210002 (last visited January 5th, 2020). *Federación de Servicios Privados del Sindicato Comisiones Obreras (CC.OO.) v Tyco Integrated Security SL & Anor*, CJEU, C-266/14 (2015).

486 https://www.theguardian.com/business/2017/mar/17/startup-boom-fizzle-san-francisco-housing-investment (last visited January 5th, 2020), https://my-voice.com/news/2017/02/22/report-more-people-leaving-silicon-valley (last visited January 5th, 2020), https://newsroom.fb.com/news/2017/07/investing-in-menlo-park-and-our-community/ (last visited January 5th, 2020).

487 https://www.sfgate.com/bayarea/article/rapporteur-United-Nations-San-Francisco-homeless-13351509.php (last visited January 5th, 2020).

and Oakland, California, United States of America, constitutes cruel and inhuman treatment and is a violation of multiple human rights, including the rights to life, housing, health and water and sanitation. Such punitive policies must be prohibited in law and immediately ceased."[488]

Additionally, in the US, a place which historically has placed emphasis on home ownership for even those of middle and moderate income has shifted dramatically to a land of renters. This is demonstrated by recent data which shows that number of renters in 2019 hit an all-time high in the US, and even more significant, renters are carrying a higher "rent burden" than ever before historically to date. In just a 14-year period between 2001 and 2015, the total amount of renters paying 50% or more of their income on rent rose to 38% of all renters.[489] Furthermore, the amount of renter households with college degrees rose for the first time ever, indicating that this is a phenomena effecting not only those of low-income but also those of typically higher incomes. Data also shows that while rents have increased by 165% since 1960, wages have only grown by 120%. In the last seven years rents have outpaced wages by 11% nationally, and even more so in expensive urban centers. In this context, the benefits of ownership are more than about one's ability to build equity, it is about not living on the edge of financial collapse from month to month.

This is explained in part because the costs of owning a home have become more expensive. In many urban centers property prices have climbed to

488 *Report of the Special Rapporteur on Adequate Housing as a Component of the Right to An Adequate Standard of Living, and on the Right to Non-Discrimination in this Context,* United Nations, (September 19th, 2018), p.12.

489 Tony Roshan Samara, *Rise of the Renter Nation*, Right to City Alliance Report (2014). Also, for an excellent report on the current Bay Area housing crisis and possible solutions beyond just producing new housing *See* Leslie Gordon, Mashael Majid, Tony Samara, Fernando Echeverria and Seema Rupani, Rooted in Home: Community Based Alternatives to the Bay Area Housing Crisis, Urban Habitat & The East Bay Community Law Center Report (2019).

astronomical rates: to own a 2 bedroom/1 bath home in San Francisco today cost at least $2 million, which means with at least 20% down on a mortgage, the mortgage rate costs somewhere between $8-10,000 a month. This is far beyond the reach of most households in the area where for example those that are at 80% of the average median monthly income in San Francisco for a household make $98,500 or around $8,000/month, and for those of low and very low income (60% and 30% AMI) their monthly salary amounts to somewhere between $6,000 to $3,000/month respectively.

> The National Low-Income Housing Coalition reports that the gap between supply and demand for rental units affordable and available to very low-income households is 7.7 million. This shortfall could become much worse given the threats to the affordable supply. Unsubsidized low-rent units are continually lost to upgrading or removal, while subsidized units with expiring contracts are at risk of shifting to market rate. Indeed, affordability restrictions on 533,000 LIHTC units, 425,000 project-based Section 8 units, and 142,000 other subsidized units are set to expire within the next 10 years.[490]

This scenario begs the question: why aren't the people and governments of the San Francisco Bay Area and California working to create an affordable housing policy for all if people of almost all socio-economic backgrounds from the lowest- like the homeless- to the upper middle -like tech workers- are being effected by the crisis? Part of this is explained by the dominance of the "common sense" that market laws of supply and demand should and will take care of the crisis. This may be true for tech workers with upper-middle incomes, as developers and construction companies accelerate their production to meet their needs, however, for those of low and moderate income, it will take new construction at least one decade before they become affordable. This is because of the "trickle

490 *State of the Nation's Housing 2018*, Report from Harvard Joint Center for Housing Studies, (2018).

down" effect of the laws of supply and demand around the rental market, which requires people of higher incomes to vacate older less expensive housing, leaving those units available for those of lower income, in order to move into newer more expensive housing. Meanwhile in that time span, thousands are displaced, forced to leave their homes, communities, schools and jobs for other less expensive places. Why is it so difficult to create affordable housing, rather than merely new housing, for all social classes through purely market mechanisms? A necessary component of the explanation must be analyzed on a country-by-country basis, however the issue of astronomical land values (as explored in the previous chapter) calculated into the price of housing is a critical component of the story in many urban places. This explains why it is so much more expensive to build in places like Stockholm or San Francisco rather than Bakersfield or Umea. Another critical component can be explained by the high costs of construction – in the form of labor and materials – as well as meeting the requirements presented by complex administrative, tax, labor, and environmental regulations. New construction includes all of these costs and is therefore more expensive. Some argue that even in a deregulated construction industry, such as the United States with the lowest wages in construction compared to all other nations of comparable development, municipal regulations on permits and zoning requirements present significant costs and hurdles to new construction.[491] The reality is that the only way to make new construction affordable now, rather than in ten years, is to invest some form of subsidy whether that is accomplished through taxes or private philanthropy. In sum, production of housing must be complemented with a policy of preservation of affordability, and even more critical, of permanent affordability which retains the subsidies invested, as discussed in the previous Chapter, in order to meet the

[491] E. Glaeser and J. Gyourko, *The Impact of Building Restrictions on Housing Affordability*, FRBNY ECONOMIC POLICY REVIEW, (June 2003).

housing needs of low, moderate and middle income today and forever rather than a decade from now and possibly only for one generation.

However, before advocating for the virtues of government subsidies, it is important to consider that those countries like Sweden which have adopted an expansive public and social housing policy are not in a much better situation today. Sweden achieved one of the most ambitious government housing programs historically to date between 1965-1974 in the form of the "Million dwellings program." Under this program as the name suggests, a million homes were built, 100,000 homes built annually in a ten-year span – four-fold the number of homes built in the US during the same period. Access to homes under this program offered close to full universal decommodification of access to housing, as everyone was eligible to apply regardless of income, and some 20% of these homes were dedicated to social housing, either partially or completely removed from the market.[492] However, today, forty-five years after the miracle of the Million Dwellings program, Sweden, like the US is experiencing one of the worst housing crises to date, particularly in urban centers like Stockholm, Gothenburg and Malmö, for which Sweden is being considered for the Guinness Book of World records for the longest waiting times for its rental housing queues.[493] In Stockholm and Gothenburg wait times in queues have climbed to 11 years and 9 years respectively. The City of Stockholm, in recent years has been threatened by the tech company Spotify and other startups that moved their headquarters to the City, that (among other demands) the government must find a way, and quickly, to

492 L.J. Lundqvist, I. Elander, B. Danermark, *Housing policy in Sweden—still a success story?* INTERNATIONAL JOURNAL OF URBAN AND REGIONAL RESEARCH 14/3, 445-467 (1990), p.446.
493 http://www.bbc.com/capital/story/20160517-this-is-one-city-where-youll-never-find-a-home (Last visited March 23, 2019). According to the Confederation of Swedish Enterprise (Svenskt Näringsliv), 61% of Swedish companies have experienced recruitment problems over the last year, with firms citing the housing shortage in 31% of cases.

house their tech workers otherwise they will be forced to leave Sweden.[494] This could mean not only an instant loss of thousands of jobs, but a message to the entire tech industry that Sweden is not an attractive place to move their business, potentially leading to crippling losses for years to come, in a sector which makes up 19% of all jobs in Stockholm.[495] The city has responded by promising 40,000 new constructions for completion by 2020, and in the meantime they are looking to short terms solutions such as temporary modular housing and co-living.[496]

In the case of Sweden, an explanation for the shift from an over-supply of housing, as was the case by the close of the Million Dwelling program, to a shortage, four decades later, can be explained by several factors. Government planning could not anticipate employment growth in relation to housing needs accurately, constructing an oversupply of housing in some areas, some of which remained vacant, while other places suffered from an over-demand. Another factor is that many of the homes built in the Million Dwelling period were never renovated and now face serious rehabilitation costs, leading to a phenomena of gentrification and displacement of low income groups that some are calling "renoviction."[497] Finally, another important factor in the landscape of the Swedish

494 https://qz.com/661319/sweden-must-change-quickly-spotify-threatens-to-leave-the-country/, (Last visited March 23, 2019)
https://www.forbes.com/sites/hughmcintyre/2016/04/19/spotify-may-soon-leave-sweden-according-to-its-ceo/#21c59dfe46e6 (Last visited March 23, 2019)
http://www.independent.co.uk/news/business/news/spotifys-threats-to-leave-sweden-spur-startup-protest-in-stockholm-a6996431.html(Last visited March 23, 2019).

495 https://techcrunch.com/2016/01/26/sweden-is-a-tech-superstar-from-the-north/. (Last visited March 23, 2019).

496 http://snabbahus.nu/. (Last visited March 23, 2019).

497 E. Pull, *Renoviction and Displacement Violence: the new Neoliberalisation frontier of the Swedish housing regime*, INTERNATIONAL CONFERENCE ON CONTESTED CITIES, MADRID (2016). Renoviction occurs when private developers initiate major renovations, which could in fact take the form of smaller piece-meal improvements, but however then bundle them or exaggerate the need for a complete overhaul, in order to justify raising the rent of each individual unit, sometimes by up to 25%. This has led to those unable to afford the higher rents, mostly the elderly, to be effectively evicted and forced to move.

housing crisis, is the complex rent regulation and queuing system,[498] which contributes to the shortage of labor responsive rental housing. The queuing system, while a central feature of universal decommodification of housing, not just for those of low and moderate income but everyone, is not responsive to the fluctuations in the labor market. Rather than housing priority being granted on the basis of employment relocation needs, it operates by one's place in a queue, leaving it to pure chance as to whether the allocation of housing in a given moment correlates to employment opportunities at the time of the allocation, therefore encouraging a black market in rental contracts. As explained, people wait in queues sometimes for years before housing becomes available, and as a result people waiting in the queue accept rental contracts entirely divorced from the nexus of employment and housing in order to "get into the system," which makes it easier to barter or swap for the contract they need or even in some cases to get on the black market, and use the contract as "informal" collateral towards buying a home closer to their actual place of employment.[499]

On the other hand, market mechanisms such as regular market-rate ownership of housing do not lead to the creation of affordable housing either, as discussed in the US situation. This is also demonstrated by the current Swedish housing crisis, which is in part, a problem of planning mentioned above, but also the result of neoliberal policies of deregulation and privatization, which converted social housing into market housing, and in particular public housing rentals and market regulated housing cooperatives (Bostadsrätt) into market rate housing. The

[498] The queuing system is a fundamental aspect of Sweden's previous commitment to decommodification in housing policy, that it should not be means tested but instead available to all. It presents then, however, a signal case in point for why decommodification must be dynamic.
[499] There are reports of people handing over rental contracts in attractive places for 100-200 hundred thousand kronor off of the selling price of a new home elsewhere. *See* B. Christophers, *A monstrous hybrid: the political economy of housing in early twenty-first century Sweden*, NEW POLITICAL ECONOMY 19/6, 995-911 (2013).

conversion of rentals and coops to private ownership created tremendous benefits for those that went from being tenants of publicly subsidized housing to suddenly being their owners. Public subsidies originally invested to provide affordable housing over generations, provided affordable housing for only one or two generations, with the remaining subsidy pocketed by individual tenants when their homes were sold on the market – taking place to such a degree that some argue it constituted a form of "moral hazard."[500] There is a clear failure of Sweden's housing policy to retain public subsidies to create permanently affordable housing, a subject explored in these Chapters.

Furthermore, market rate coop conversion in particular has contributed to the overall decrease of rental housing in relation to ownership, both in the public and private sector, resulting in a shortage and lack of flexibility of the rental market. Sweden, even with its plethora of institutionally diverse housing options, at least in formal legal structure, is effectively an ownership-dominant market, which makes it less responsive to the signals of the labor market. Buying and selling a house or co-op unit takes time and involves higher transaction costs than rentals, and it also requires a commitment on behalf of the buyer to remain where the home is located, which is contingent upon long term employment. From the affordability standpoint, an ownership-dominant market would not be so problematic except for the fact that it is compounded by the problem of barriers to ownership for many: although interest rates in recent years have remained low, there are also more stringent borrowing restrictions in place since the global

500 H. Donner and F. Kopsch, *Housing Tenure and Informational Asymmetries*, Stockholm KTH ROYAL INSTITUTE OF TECHNOLOGY, WORKING PAPER SERIES, DEPARTMENT OF REAL ESTATE AND CONSTRUCTION MANAGEMENT & CENTRE FOR BANKING AND FINANCE (CEFIN) 16/3 (2016), p.1. "We find strong support towards a behavior concurrent with moral hazard; as such insiders mismanage the cooperatives by setting monthly fees artificially low in order to increase the probability of a conversion as well as apartment values. Lastly, market participants seem to discount this informational asymmetry as recently converted apartments sell at lower prices."

financial crisis of 2008/2009, particularly for first time home buyers, which has both made it difficult for particular segments of the society, in particular young people/families and immigrants, without well-established lines of credit to buy homes.[501] Furthermore, the ownership dominant model is also problematic because it contributes to deepening social and racial stratification: upper and middle-income people buy into co-ops and single-family units, while poor and working class people rent, and new immigrants (often refugees arriving from war torn countries) are not uncommonly placed in insolated public housing ghettos without employment opportunities, sometimes with over 2/3rd of the population in those communities subsisting off of welfare benefits alone.[502]

Universally, whether in Sweden or the US, the housing market is not only key for ensuring affordable homes to meet human needs but is also linked to the stability of other markets and the economy as a whole. What the experience of countries like the US in the 2008-2009 mortgage crisis, and Sweden in its 91-92 crisis demonstrate, is that problems in the housing sector contribute to overall macro-economic instability. While these two crises of housing and foreclosure in the US and Sweden are distinct from one another in a number of ways, they both demonstrate the devastating effects of an unstable housing market on the population. When housing prices rise too quickly, as a result of over speculation, and then fall as a result of income stagnation, households find themselves unable to make their payments, either as a result of being overleveraged or because of steep hikes in interest rates, which can lead not only to mass displacement and foreclosure, but to suddenly catalyzing the entire economy to crash and banks to

501 R. Andersson, & L.M. Turner, *Segregation, gentrification, and residualisation: from public housing to market-driven housing allocation in inner city Stockholm*," INTERNATIONAL JOURNAL OF HOUSING POLICY, 14/1, 3-29 (2014).
502 *Ibid.*

fail.[503] In these cases, governments depend on a limited tool kit of interest rate hikes and banking regulation to increase capital-ratio requirements, but often these measures come as too little too late.[504]

Furthermore, some scholars like Lee Anne Fennell are suggesting that homeownership in today's climate may present more risk than benefit to individuals as evidenced by the 2008 foreclosure crisis.[505] Just as positive externalities like proximity to public and private resources (PPPR), discussed in Chapter 6, offer windfall profits to those lucky enough to have benefited from their enhancement and access, negative externalities create community deterioration for others where those public and private resources are shrinking rather than expanding during their homeownership tenure. As Fennell says, "Homeownership is widely viewed as one of the most important stabilizing forces in society, but it comes packaged with an enormous dose of investment risk that homeowners are almost entirely powerless to insure against or diversify away."[506] She goes on to explain that most homeowners have little other source of wealth other than their homes, and when the value of that plummets, they can be left with next to nothing.

[503] There are some signs in Sweden that this could be happening again, as the housing market shows signs of depreciation from 2017 – 2019, which hasn't happened since the global financial crash of 2009, and while other economic indicators such as inflation and unemployment are holding strong, many economists are weary of whether this is the tip of the iceberg-as instability in the housing sector can reveal the first signs of trouble. https://www.globalpropertyguide.com/news-swedens-house-price-boom-is-officially-over-3786 (Last visited March 23, 2019).

[504] For example, this was done recently in Sweden, causing Nordea, originally a state bank, to flee to Finland. Meanwhile in Sweden, the window for activating interest rate hikes as a tool for checking a downward spiraling economy, could be closing as depreciation in the housing market kicks in. While it is unlikely, given other economic indicators that this will happen in the near future, what this demonstrates are the direct macro-economic effects of a poor housing policy that fails to control speculation bubbles in the real estate market. https://www.reuters.com/article/us-sweden-nordea/nordea-shareholders-approve-plan-to-move-hq-from-sweden-to-finland-idUSKCN1GR37B (Last visited March 23, 2019).

[505] FENNELL, *supra* note. 485. At p. 174.

[506] *Ibid.*

Governments must begin to recognize that the short-term gains of a speculative housing market are not only at odds with guaranteeing a basic minimum for all citizens, but also go against the interest of ensuring long-term sustainable economic growth and macro-economic stability, as well as, resulting in over burdening individuals with too much risk that often outweigh the benefits of ownership. Housing policy lies at the intersection of two central features of the economy: employment and financing. Housing has a direct relationship to employment: where there is work, people will need housing. Similarly, it has a direct relation to credit: where there are homes to buy, financing will need to be obtained. In this way, housing is both the engine (in its effect on labor) and the fuel (in its effect on credit) on which the entire economy depends, and yet maintaining the stability of the housing market through a decommodified housing policy is never considered as macro-economic preventative line of defense. A decommodified housing policy however could and should play a key role in providing an important check on inflated real estate prices and rents, the extreme fluctuations of which, can contribute to short term growth, but often at the cost of more long-term sustainable growth as created by productive sectors of the economy.

The question then remains: how does one create affordable housing in way that it is insulated from the market? The answer we explore in this Chapter is how to decommodify housing, and to do so in a way that survives political swings from right to left from social democratic and progressive governments to neoliberal and market driven governments. This is not to say that politics has no role, but rather that macro-level politics at the levels of the national arena cannot be the final word. Decommodified housing requires long-term institutionalization across the span of at least one progressive government, as well as the ongoing participation of citizens, not merely at the level of the nation-state, but at the level of localized

collectives and communities shaping democratic collective structures both internal to their housing communities, as well as externally in local community development. This is why decommodification requires democratization, as it requires the concerted effort citizens to demand control and ownership over their housing destinies and to create and experiment with collective housing solutions which are neither based on the market nor government planning and attempts to take the best of both. Democratizing housing works at two levels: 1) within the housing community by giving people opportunities to make important decisions within their community, and; 2) mobilizing and organizing to demand more democratic decision-making with regard to local development, land use and new constructions. The first is discussed in this Chapter, while the second is taken up in Chapter 8. Law plays an important role in both processes: in the first to create Commons Property Institutions aimed at decommodification (and thus transformation of the capitalist market) through property and associations law, as discussed in the previous Chapter, which structure democratic decision-making in the housing community through property entitlements and associational entities (like a non-profit). And in the second instance, law also plays an important role indirectly through constituting intermediary community/public organizations with the specific purpose of involving local citizens in the decisions pertaining to land use and community development, as well as, providing them with services to engage in meeting their housing needs. The community land trust is the only institution among the CPIs analyzed that performs both of these functions and will be explored here and in the next Chapter.

7.2 Decommodifying and Democratizing Housing Through CPIs

In the next sections, I analyze existing legal institutions as Commons Property Institutions for housing, what I will refer to from here on as "commons housing"

on a spectrum of different institutional configurations to drive home the social relational character of property. These existing legal institutions are all structured as associations through which property entitlements – "ownership" – are conferred collectively, where the social relational character of property is abundantly more transparent than in the case of individual ownership. Individual ownership over housing makes it appear as if all entitlements are held by one person - giving rise to a mirage or optical illusion of that person living alone on an island, isolated from all others, and able to do whatever they want with their Blackstonian kingdom of absolute ownership. In collective ownership, the fact that my use and exclusion of a particular space in a building or home depends entirely on your duty not to use that space, makes the social relational character of property almost instantly transparent. From a social theory perspective, these institutions are of special interest owing to the fact that they place restrictions on the transfer entitlement, thereby challenging the very basis of the capitalist market – the free alienability of property and the ability to do so at market-rate. As such, CPIs represent a crucial strategic lever of the entire market through law, and with this social theoretical perspective in mind, these legal institutions become relevant, not merely in their doctrinal details as an immutable historical deposit which sets the parameters of any possible reform, but instead as one step closer in the search for institutional forms that reach beyond the market, towards decommodification, and towards the human pursuit of alternative values, which resist obedience to market imperatives.

The cases discussed originate from diverse groupings of western nations (US, Sweden, the UK, Australia, Germany, Austria, and Belgium) with some in Common Law (US, UK, and Australia), and others in Civil Law (Sweden,

Germany, Austria and Belgium).[507] What Part III asks and hopes to answer is the questions of: how can law - in its multi-faceted institutional layers- be analyzed, reformed, revived, and/or reclaimed to support, enhance, or catalyze decommodified access to fundamental resources? To answer this question, one cannot answer it in the abstract,[508] one must delve deeper into a particular unique resource and a particular legal institutional form in a particular national legal institutional context, which is the focus of Chapter 8 where I analyze the challenges and potential of one CPI: the community land trust in the U.S. In the following sections, I analyze CPIs or commons housing on a disaggregated spectrum: the community land trust, the housing cooperative (LEHCs, Stock Cooperatives and Bostadratt), the condominium, and baugruppen. In this chapter I provide the background and history of these different CPIs and analyze each according to the criteria developed in Chapter 6: (1) CPIs as collective ownership; (2) decommodification as restraints on market-rate transfer and caps on equity; and; (3) democratization of housing as democratic structures enforced through legal structures within the housing community. The examples considered in this chapter and the recommendations later pursued will be focused on decommodified housing in urban centers (and therefore focused on multi-unit housing prevalent in cities), will be the central focus of this four-part analysis. The spectrums discussed attempt to answer the following research questions: *to what extent do the legal restraints of a CPI effectuate the removal of housing from the market, therefore rendering it decommodified or partially decommodified? To what extent do these restraints promote or limit*

507 The purposive approach used to compare is an intentional attempt to shew the generalized mapping and taxonomical approaches which are the hallmark of Comparative Law, for an approach that requires substantial depth into the many institutional layers which make "law," adopting something more akin to Schlesinger Common Core approach of "legal formants" to incorporate an exploration of how administrative, financial, and social institutions alter and shape law in specific national contexts.

508 Or at least that method of approaching it would not have the function of catalyzing the real-world change which I ambitiously seek to enable.

equity incentives to improve and maintain the housing stock? And finally, to what extent to do they promote democratization of housing as a fundamental resource both internal to the housing community as well as in the larger community?

The first of the spectrums analyzed here is the conceptual analysis of the CPI as a legal institution structured by entitlements which depend on: the extent to which legal entitlements, in terms of both the associational form it takes and the particular configuration of the *property entitlements bundle,* structure collective ownership through: use by all, exclusion only outside the community, limits on transfer (not necessarily at below market-rate) and expropriation. Below they are rated (1 as the highest and 5 lowest) by the complexity of the legal structure and the presence or layering of multiple legal mechanisms to ensure rules on use, exclusion, transfer and expropriation.

Figure 1 Commons Property Institutions: Legal Structure of Collective Ownership

With regard to decommodification, one end of the spectrum is full decommodification, and in the middle, partial decommodification – understood as removing access to housing partially from dependence on the market which in housing takes the form of "permanent affordability" removal of housing from the speculative market, and on the other end, affordability, where housing is still on the market but greatly reduced in price.

Figure 2 Decommodification Explained

An example of full decommodification is universally available public housing rentals as offered during the time of the Million Dwellings Program in Sweden, while the Community Land Trust (CLT) and Limited Equity Housing Cooperative (LEHC) achieve partial decommodification of housing- housing which is removed from the market not universally but for those of low to moderate income. As discussed in Chapter 6, the CLT and LEHC accomplish this through 1) restraints on transfer at below market rate and 2) caps on equity. Instead all of the other CPI's analyzed here, while enhancing collective ownership, do not generally integrate restraints on transfer and equity though there is nothing about their legal structure which prevents them from integrating such restraints on transfer at market rate and caps on equity. Therefore, the CPIs are analyzed on a spectrum of the affordability produced comparative to market rate housing.[509]

509 For example Baugruppen which is 30% more affordable than market-rate housing: http://www.metropolismag.com/architecture/residential-architecture/dont-call-it-a-commune-inside-berlin-radical-cohousing-project/ (Last Visited January 5th, 2020). http://www.spur.org/news/2017-09-21/could-germany-s-co-developed-urban-housing-be-model-bay-area (Last Visited January 5th, 2020). https://www.archdaily.com/597590/coop-housing-project-at-the-river-spreefeld-carpaneto-architekten-fatkoehl-architekten-bararchitekten (Last Visited January 5th, 2020). https://www.australiandesignreview.com/architecture/housing-revolution-lessons-from-berlin/ (Last Visited January 5th, 2020).
Baugruppen in Australia: http://www.baugruppen.com.au/ (Last Visited March 23, 2019). http://nightingalehousing.org/nightingale-model-projects/ (Last Visited March 23, 2019).

*Figure 3 Decommodification as Partial Decommodification and Affordability * Only the CLT and LEHC can be considered Partially Decommodified*

The final spectrum is an assessment of the extent to which the CPI facilitates democracy in the form of increasing democratic decision-making within the housing community. This is a factor of the extent to which the CPI enhances not only collective ownership, as in the first analysis, but also in the form of decision-making which is diffused amongst individuals through associational law- namely through bylaws or some equivalent legal mechanism. Important decisions in CPIs are subject to collective decision-making such as: the use of the land and structures (use), who can and cannot live there, and the criteria for inclusion in important decisions (exclusion) and sale (as a whole or individual units).

https://www.australiandesignreview.com/architecture/housing-revolution-lessons-from-berlin/(Last Visited March 23, 2019).

Figure 4 Democracy within the Housing Community

However democratic decision-making within housing communities does not have a direct relationship to the decommodification of housing. A condominium's housing association or a stock cooperatives's board may make collective decisions regarding use and exclusion all on the basis of increasing the "elite profile" of their members (as we will see in the case of many NYC stock cooperatives) thus aiming their democratic powers to exclude low-income people from these housing communities. Furthermore, they rarely if ever, question the ability to transfer at market-rate, instead the tendency is for limited equity cooperatives to democratically decide to permit the sale of units at market-rate. Democratizing housing as a resource, therefore means not only democratically designing housing institutions to act democratically on the inside, but in order to also advance decommodification, this requires that decision-making bodies at the level of government and community regarding the larger landscape of housing and housing development- issues of land use, zoning and new development-are subject to democratic decision-making mechanisms. As will be demonstrated, the CPIs discussed have differing degrees of the factors discussed above. By placing CPIs on a spectrum, each component part can be viewed as discrete tools to be disassembled and recombined to achieve decommodified and democratized housing which enhances: collective ownership, restraints on transfers and equity at below market-rate, incentives to maintain and improve, and collective decision-

making both within the housing community and outside pertaining to land use, zoning and new construction.

7.3 Community Land Trusts: History & Origins

> A community land trust (CLT) is a form of common land ownership with a charter based on the principles of sustainable and ecologically sound stewardship and use. The central principle of the community land trust is that homes, barns, fences, gardens, and all things done with 'or on the land should be owned by the individuals creating them, but the land itself-a limited community resource-should be owned by the community as a whole. A community land trust takes land off the speculative market and places it in a regional, membership-based, nonprofit corporation.[510]

The original purpose of the Community Land Trusts (CLT) was the pursuit of community control of land for the benefit of the community. Robert Swann, an important figure in the development of the CLT was a major catalyst for its development and implementation in the US in the 1960s and 70s.[511] The first CLT, created by Swann in the US state of Georgia, was a civil rights and racial and economic justice tool to enable African American farmers gain ownership to productive farming land. Swann intentionally modified previous similar land ownership models he had experimented with, like the Co-op, whose membership was limited to occupants, by opening the membership of CLTs to the entire community.[512] In recent years, it has become a relevant legal institution for creating

[510] Robert Swann, founder of the CLT movement & Ex-Director of the Schumacher Society.
[511] Swann was following in a long American tradition that viewed land speculation as the first form of oppression above beyond ownership over the means of production. This legacy begins with the works of Henry George, Ebenezer Howard, Lewis Mumford, Jane Jacobs, Ralph Borsodi, and Arthur E. Morgan. For an excellent History *See* John Emmeus Davis, *Origins and Evolution of the Community Land Trust in the United States*, in THE COMMUNITY LAND TRUST READER, (2010).
[512] The origins of Swann's model for the CLT came from his knowledge and experiences of the Gramdan movement in India and the Jewish National Fund in Israel.

affordable housing, although its purpose is not *only* limited to housing.[513] The primary purpose of the majority of CLTs today is to increase home ownership to low and moderate income people by permanently removing land from the speculative market.[514] The CLT reached its height in the US in the 1980s & 90s, with the creation of CLTs in the US cities of Boston (Dudley Neighbors, Inc)[515], Burlington (Champlain Housing Trust)[516], Portland (Proud Ground)[517], San Francisco[518], and Chicago,[519] and eventually spreading beyond the US, which continues to have the highest number of active CLTs to date (some 260 CLTs in 46 States). Outside of the US, the model spread in the 80s and 90s to rural parts of Scotland, the UK, Australia, and Canada.[520] In recent years, in the wake of the 2009 financial crisis, the CLT experienced a renaissance both in the US and abroad; this revival also brought the model back to life in urban centers in the UK (East London Community Land Trust, 2016)[521] and Continental Europe (Brussels, CLT

513 B. Paterson & K.Dayson, *Proof of Concept: Report on CLTs in the UK*, University of Salford (2011), p. 9. "The purpose of a CLT is to create community asset ownership in the form of affordable homes, workspace, food growing and conservation etc for the benefit of present and future generations. This ownership of community assets is a resource for people to steward, rather than for speculation on the market."

514 Speculative market is a misnomer, though often used by CLTs to describe the model, since the model removes land and housing completely from the market not just the speculative market.

515 https://www.dudleyneighbors.org/ (Last Accessed March 23rd, 2019). B. Baldwin, Marie Gay, Rachel Nagin, Victoria Kulwicki, & Joel Wool, *Development without Displacement*, Tufts University, "Working Group on Community Land Trusts."

516 http://www.burlingtonassociates.com/#!/resources (Last visited March 23, 2019). http://www.getahome.org/ (Last visited March 23, 2019).

517 https://proudground.org/ (Last visited March 23, 2019).

518 http://sfclt.org/index.php, (Last visited March 23, 2019).

519 Stephen R, Miller, *Community Land Trusts: Why Now Is the Time to Integrate This Housing Activists' Tool into Local Government Affordable Housing Policies*, JOURNAL OF AFFORDABLE HOUSING & COMMUNITY DEVELOPMENT LAW 23/3-4, 349-371 (2015).

520 The origination and early adoption of the model in Common Law, as opposed to Civil law countries, is not surprising, given that they share similar developments in associational law and property law. The trust does not exist in Sweden, and the closest comparison may be an Association or Foundation. A very good treatment of the new emerging role of foundations in Swedish society in the decline of the Welfare State, FILIP WIJKSTRÖM AND STEFAN EINARSSON, FOUNDATIONS IN SWEDEN: THEIR SCOPE, ROLES AND VISIONS, (2004).

521 http://www.londonclt.org/, (Last Visited March 23, 2019).

Bruxelles 2015),[522] and even as far as Kenya (Bondeni Community Land Trust)[523] and Bolivia.[524]

7.3.1 CLTs as a Commons Property Institution

A CLT acts as a CPI because it 1) allows multiple entitlement holders use entitlements with none having an entitlement to exclude the others from their use within the community, and 2) it places restraints on the entitlement to transfer outside of the community. CLTs constitute a form of common land ownership where land is held by a *private non-profit or other charitable organization* (a kind of trustee) and leased to members of the community (fiduciaries) or other organization for the benefit of moderate to low income households. Qualified households buy or rent the buildings (previously existing or newly constructed) at subsidized rates, and the buyers hold a "ground lease" and pay a modest rent for the lease of the land with certain restrictions on the transfer entitlement related to the purpose of decommodification.[525]

The "ground lease" functions to allow the beneficiary to retain most of the property entitlements of the classic bundle (use and exclusion), however with clear limits on the transfer entitlement. Property entitlements to homes bought by households on land held by a CLT can be passed onto the leasee's survivors after the leasee's death and can also be transferred/sold within the limitations set by the governing board and the articles of incorporation of the non-profit. Therefore, the ground lease combined with the subsidized purchase of the home provides

522 https://communitylandtrust.wordpress.com/notre-histoire/ (Last Visited March 23, 2019).
523 https://www.world-habitat.org/world-habitat-awards/winners-and-finalists/tanzania-bondeni-community-land-trust-project/. ((Last Visited March 23, 2019).
524 https://www.world-habitat.org/world-habitat-awards/winners-and-finalists/habitat-para-la-mujer-the-maria-auxiliadora-community/ (Last Visited March 23, 2019).
525 L. Crabtree, Peter Phibbs, Vivienne Milligan, and Hazel Blunden, *Principles and practices of an affordable housing community land trust model*, AUSTRALIAN HOUSING AND URBAN RESEARCH INSTITUTE (2012), p.19.

something akin to a property interest in both home and land rather than a rental contract to the land. These limits are outlined by State regulation on CLTs, the State where it is located, and the CLT's *Articles of Incorporation*, as well as, amendments by the governing board, in the form of *Bylaws*, which subject the homes to four primary restrictions: 1) a limited term lease, which can range anywhere from 5-99 years, and in some states the lease can be renewed automatically and in others for only one additional term of another 99 years to avoid the rule against perpetuities; 2) homes must be sold at below market value, though most CLTs employ the principle of limited equity or "shared equity homeownership,"[526]which allows for some amount of the appreciation of the home to be paid at the time of sale usually 25% or pegged to CPI or AMI; 3) homes must be resold to moderate to low income qualified household buyers; and 4) conformity to occupancy and use restrictions set forth by the CLT board. The reason for these different types of restrictions is to ensure the original purpose for which the CLT was created: to provide affordable housing continuously over generations of homeowners, while at the same offering each generation an opportunity to accumulate equity. In order to achieve the purpose of providing low income households with homeownership opportunities, the households must occupy the homes as their primary residence. This acts both to prevent the household from making a profit by renting the entire home, though some homes

526 David Abromowitz and Kirby White, *Deed restrictions and community land trust ground leases*, in THE COMMUNITY LAND TRUST READER (Davis ed.)(2010), p. 7. "The resale formula by which the price of the home is calculated frequently uses either some objective growth index or a percentage of the home's market value of appreciation to calculate a fair return for the departing homeowner." For example in Maryland's Affordable Housing Land Trust Act (Maryland Annotated Code, Real Property § 14-501), the resale value can also differ based on if the CLT is using an "itemized formula," which adds to the original purchase price such factors as the value of improvements made by the owner and adjustments for monetary inflation vs. "indexed formulas," which allows resale prices to exceed the original purchase price only in proportion to increases in indexes such as the consumer price index of area median income. https://dat.maryland.gov/businesses/Pages/Affordable-Housing-Land-Trust.aspx (Last Visited January 5th, 2020).

may have parts that may be rented, depending on the CLT, and also to force the owner to sell the home to other moderate to low income households if they have moved out. Below I will focus on the restrictions on transfer with the purpose of creating affordable housing offered over generations.

7.3.1.1 Restraints on transfer: The Role of Ground Leases & Covenants in the CLT model

As explained in Chapter 6, the ground lease is not a typical leasehold property interest in real estate, but instead is a nominal fee paid by the tenant-owner of homes on CLT land for the use of the land during the term of their tenure to the CLT non-profit.[527] It also operates as one part of effectuating the split of title between the land beneath the home and the home itself. In the case of a typical single-family home stewarded by a CLT, the CLT holds title to the land beneath the home, while the tenant-owner own the home with restrictions on use, transfer and expropriation, as explained above (use and transfer) and below (expropriation). The restraint on transfer at below market rate and to moderate to low income households is accomplished furthermore through two additional mechanisms: 1) through a restriction in the title deed called a Covenant and 2) the non-profit purpose of the CLT to provide affordable housing to those of low and moderate income. To review Chapter 6, a Covenant is a restriction on use of land that "runs with the land," is attached to the deed title itself, rather between individuals (as in an Easement) that present and future users must respect otherwise they will be ousted. The Covenant states that the land will 1) not be resold at market rate for a term of 99 years (or something similar) and often, though not always, 2) to only to

[527] In this sense, the ground lease is more a product of 501(c)3 associational law specific to CLTs in that is establishes a relationship between the CLT as a non-profit and their non-profit client rather than as a landlord/tenant relationship in property law.

those of low and moderate income. For those that do not incorporate the second element, the 501(c)3 purpose of the CLT, as owner of the land with a Covenant ensures the second restriction for sale to only those of low and moderate income. Usually the Deed with the 99-year Covenant is recorded in the local or state land registry, which can be useful if title is every challenged by a future buyer ignorant of the restriction.

As explained in Chapter 6, any CPI can incorporate a covenant into their model to restrict sale at below market rate, whether it is a CLT, Coop (limited equity), or condominium (limited equity), however most do not. Furthermore, not all CPIs are created equally in their ability to decommodify housing or even to guarantee affordability due to the inability to enforce the Covenant due to the lack of monitoring and enforcement mechanisms, this is why the CLT, with its multi-layered legal mechanisms, as well as, its purpose and practice of offering continual support and assistance for the homes they steward, guarantees more than any other CPI that land and housing remain permanently off the market .[528] The major difference between the CLT (and as I will demonstrate with the LEHC) with housing cooperatives and condominiums, is that while the latter two do not necessarily incorporate such restraints on transfer at below-market rate, the CLT

528 *Supra* note. 470 at p.7. On deed only models: "A key weakness faced by this model has been the loss of affordability conditions through activities such as banks offering financing to mortgagors on the basis of a market—rather than a restricted—valuation of the property. A secondary weakness has been the lack of oversight of deed covenants, especially when imposed by local governments. In many places, there was once widespread belief among public officials that deed covenants were 'self-enforcing'—that is, they required no dedicated body to monitor and enforce resale controls designed to preserve the housing's affordability. Many affordable units were lost, however, when self-enforcement proved to be ineffective. In many other places, an agency of local government was charged with overseeing resale controls, but their response time was slow. The agency had the first right of purchase whenever a restricted property was being sold, but if there was no government response within a certain time (usually 30–60 days), the resident was free to sell on the open market. Because of such failures, municipalities began looking to dedicated non-profit institutions to monitor and enforce affordability controls over time; this can also help build and maintain familiarity and capacity amongst local real estate agents."

always utilizes restrictions on transfer. The covenant restricting transfer is combined with a resale restriction formula,[529] as discussed in Chapter 6, administered by the non-profit association which holds title to the underlying land (and possibly buildings depending on the CLT). The resale restrictions and formula maintain permanent affordability over generations while offering residents limited equity returns. This formula in 55% of CLTs is based on the initial valuation with subsequent valuation and a 25% appreciation rate.[530] The second most popular valuation, and possibly the most popular valuation in Cities, is the index-based formula, which again, is based on such indexes as the area median income, which guarantees that the home stays affordable to target households of low and moderate income. The legal mechanisms of the ground lease combined with a covenant, the non-profit purpose of the organization, and a resale restriction formula ensure greater enforceability of the restriction on transfer at below market rate and to those of low and moderate income because if one legal mechanism fails when challenged in Court such as the covenant, the ground lease and non-profit purpose of the CLT entity which owns the land can prove the intent to restrict the resale value of the land.

7.3.1.2 CLT Restrictions in cases of default on loans: Entitlement to expropriation

In some states, like Maryland, a CLT retains a preemptive option to buy back the leasehold in the case of default of loans to purchase the house. This prevents the homes from falling into predatory home buying practices by companies of foreclosed below market value homes. This expropriation entitlement makes the CLT effective in retaining homes with restraints on transfer related to the aims of

[529] There are four types of resale restriction formulas: 1) appraisal-based; 2) itemized 3) mortgage-based and 4) indexed formulas.
[530] *Ibid.* p. 11.

decommodification. However, CLTs have a very low rate of foreclosure in comparison to conventional market rate housing. In fact, in the worst of the US home mortgage crisis between 2009-2010, the delinquency rates and foreclosure proceedings of CLT leasehold mortgages declined.[531]

As the graph shows above, at the end of 2010, conventional homeowners were 10 times more likely to find themselves in foreclosure proceedings (respectively 4.63% versus .46%) and 6.6 times more likely to be seriously delinquent than CLT homeowners (respectively 9.57% v. 1.3%).[532] The success of payment rates and home retention has been credited to the comprehensive education that CLT leasehold buyers are subject to before and after the purchase

531 Emily Thaden, *Stable Home Ownership in a Turbulent Economy: Delinquencies and Foreclosures Remain Low in Community Land Trusts*, LINCOLN INSTITUTE OF LAND POLICY, (2011), p.1. "While the rate of seriously delinquent mortgages reported by the MBA increased from the end of 2009 to 2009, with a slight decrease from the end of 2009 to 2010, serious delinquency rates steadily declined every year between 2009 and 2010 in mortgages held by CLT homeowners. While the rate of foreclosure proceedings reported by the MBA climbed every year from 2009 to the end of 2010, the foreclosure proceedings rate among CLT homeowners declined every year."

532 *Ibid.*

of a home, which informs them not only of their responsibilities related to repayment, but also informs of them of the resources available for buyers to retain their homes, or in the worst case, assistance to seek a better outcome than foreclosure.[533] In addition to these resources and assistance, CLTs also often play an active role in securing loans from lenders together with moderate to low income families; contribute to local and democratic community driven development and city planning; and finally, also contribute to the sustainable development and conservation planning of the surrounding natural environment. All of these features are in large part the result, in substance and procedure, of the governing board, which will be discussed in the section on democratization.

7.3.2 CLT's Decommodifying Effect

The CLT was created explicitly for the purpose of removing land off of the market and this commitment expresses itself un restraints on transfer facilitated through multiple layered legal mechanisms: the Covenant and ground lease dual ownership model, the democratic non-profit association which is dedicated to the purpose of affordable housing for those of low and moderate income, and finally the resale restriction formula. These multiple mechanisms integrated into one legal institution ensure a greater guarantee of housing removed from the market. Furthermore, the entitlement to expropriate in the case of a default further reinforces this function by ensuring that homes are not lost to market-sale even in the case of default by the tenant owner. As will be discussed in Chapter 8, this model is sustained through a combination of self-generated funds, government subsidies and private charity, which permit the CLT to cover both the costs of development of CLT owned properties, as well as, its overhead and staff.

533 *Ibid.*

7.3.3 Democratization of Housing: Resident control & Increasing participation through local and democratic community driven development

The major contribution of Robert Swann, as mentioned before, to the CLT model was the design of the CLT board to include the larger community, making the CLT not only a community for housing provision, but a vehicle for the development of the surrounding area and for promoting social integration. Integration of non-resident community members was a key emphasis for Swann, who developed the CLT after experiencing the socially segregated "enclaves" of the housing co-ops, whose governing boards consisted only of residents themselves. Most CLTs have a "tripartite board," made up of 1/3 residents living in the organization's housing, 1/3 other residents living in the organization's service area, and 1/3 "public representatives" that have expert knowledge, skills, and relationships and can acts as important resources for the CLT. The "classic" CLT membership is that 1/3 of the total board must be non-resident dues paying members from the community. The tripartite board model enhances democratic engagement within the CLT by encouraging residents to participate in important decision-making pertaining not only to their communities but also the role of the CLT in the wider community. However, as will be discussed in Chapter 8, CLTs face a number of problems with regard to the actual practice of the tripartite board with regard to resident participation and representation.

One way in which to unite CLT residents is through a common political and/or values driven mission. This was the case with the East London, which was born out of a political movement which used the CLT for advancing housing democracy more generally beyond specific CLT communities, and Brussels CLT, which utilized the CLT to advance an alternative vision of life beyond the nuclear family by combining housing with a daycare and an elderly persons home. CLTs are not only the legal basis for the underlying land and association, but also can be

deployed as the platform for the political movement and campaign against the negative effects of speculation, often emphasizing the importance of social integration- both with regard to race and class- as I will explain in the example of the East London CLT discussed next, and US Dudley Neighborhood Inc in Boston discussed in Chapter 8. Utilizing the CLT as a platform for political activity and an common can stimulate both greater participation within the community, and as will be discussed in Chapter 8, transform the CLT into a truly grassroots community driven organization working to democratize housing as a resource more generally. This can lead to increased affordable housing opportunities; the development of the surrounding area with regard to nature conservation and employment opportunities; and a powerful coalition of actors to pursue important local issues related to the concerns of members both related to housing affordability but also social justice and advancing alternative values as I hope to demonstrate next.

7.3.5 The CLT in the UK & Europe: East London & Brussels CLTs

In England, a number of important steps in legal enactment have assisted to create a strong institutional structure for the CLT, with regard to both recognition by law, as well as, political and economic support: the Housing and Regeneration Act of 2009 legally recognized the CLT; in 2010 a National CLT Network was established; and finally in 2014, CLTs became recognized for registration as an official charity. The majority of CLTs in England are in rural areas, however in 2007, the East London St. Clement St. CLT became the first CLT in a major metropolis and plans for a second location London were approved in 2016, with the first 23 households moving into the St. Clement location in Summer 2019. St. Clement includes a total of 252 new homes, 35% which will be sold at below market rate (1/3 of the price

of a flat of comparable size and location), as well as, 59 homes for "social" rent at below market rates.

The East London CLT embodies all four innovative aspects of CLTs: 1) a commitment to offering ownership opportunities at below market rates 2) contractual limitations that requires residents to sell their home to the next household at a price according to the local earnings formula as established by the CLT[534] in order to maintain affordable housing options over generations; and 3) an open membership system that includes not only the residents but anyone who resides in London and aimed at the inclusion of socially and racially/ethnically diverse groups (representative of the diversity of the City) 4) decisions made by the classic tripartite board consisting of a) resident representatives b) local community representatives and c) local expert stakeholders with skills and knowledge needed by the CLT. The way the East London CLT characterizes their target population is unique in that they are not strictly do not label the group as merely "low income."

> London CLT provides genuinely and permanently affordable homes, offering one way to address the growing gap in the housing market between people who qualify for social housing and those who can afford to buy a home on the open market. Furthermore, we do so in a way that does not require government subsidy or a reduced profit margin for developers.[535]

The target population is characterized this way in recognition of the astronomical costs of living in large cities like London, which effect not only low income households but also middle income households. The funding model, similar to CLTs in the US depends on a combination of government conveyancing of the land and contributions by philanthropic foundations for construction, upkeep, and

[534] This resulted in housing which is half of the market rates of homes of comparable size and location.
[535] http://www.londonclt.org/about-us/ (Last Visited March 23, 2019).

administration, and as it states above, no direct government subsidies were utilized. The Land on which St. Clements stands was bought and gifted to the CLT through the Greater London Authority and a construction company- Galliford Try. Other funds were raised out of a national fundraising campaign launched by activists through the charity Citizens UK, and finally the initial overhead and costs of administration were donated by the Oak Foundation. However, this collaboration between citizens, philanthropy, construction companies, and the city, did not come about by accident. The initial catalyst was the 2012 Olympic Bid: the bidding team that wanted to bring the Olympic Games to London asked local communities for support, which offered it in return for a condition that the Games have direct benefits for local people in terms of creating affordable housing. The proposal was to convert the Olympic Park and other municipally owned land into CLTs, however when London won the bid, the Municipality required running a successful test pilot at St. Clements before approval of other CLTs in the City. St. Clements began hosting their first 23 families in 2018 and it seems that the pilot has been deemed a success, as there are now other approvals of CLTs in the Greater London area in Lewisham, Croydon, Redbridge and Southwark. What the example of St. Clements reveals, above all else, is the commitment of local citizens to decommodify housing and to achieve this through mobilizing its own constituents and engaging in local politics. The engagement of citizens from the outset in the creation of the CLT is a unique and powerful aspect of the success of CLTs.

Since 2015, Belgium is pioneering its first CLT project called "Ecluse" in Brussels. This was soon following the recognition of CLT Bruxelles (a central organization for the administration of CLTs in the area) as a nonprofit organization and public utility foundation in the Brussels Housing Code in 2012. In addition to "Ecluse," three more CLTS are to be completed by the end of 2019: an elderly care home, a daycare, and 63 residential homes. The momentum towards the

completion of these projects was stimulated in large part by community organizing between city associations, local citizens and the municipality. Another element, which contributed to this sudden increase was the Alliance Habitat of regional governments, which recognized the CLT as a valid tool for increasing social housing and allotted 2 million Euros for their development in their 2014-2017 budget. The primary source of funding for Ecluse, as well as the three others, unlike in the case of East London CLT, are government subsidies. The success of Ecluse as a pilot recently had ripples throughout the Francophone world, and France based on the success of the Brussels experience launched their own CLT project: the Community Land Trust France.[536] What is interesting about the Brussels CLTs is that two of their projects have been planned with care facilities embedded within the housing complexes. This instantly creates a generationally mixed community advancing an alternative vision of home beyond the nuclear family. Furthermore, the integration of such care facilities within the housing provision, also creates the possibility of work opportunities for those living in the complexes themselves as caretakers. While it is early to discuss the outcomes of Ecluse, the experience suggests very promising results for the purpose of anticipating the difficulty of transplanting the CLT from Common Law into Civil Law. In the case of Ecluse, the inclusion of CLTs within the definition of nonprofit organizations and public utility foundations within the city Housing Code, as well as, its recognition by Regional Governments, was an essential aspect of its ability to receive funding and thus a major catalyst for its development.

7.4 Housing Cooperatives

The housing cooperative (HC) is the oldest and most widespread of the CPIs considered in this chapter when taken from a global rather than national (US-

536 http://www.communitylandtrust.fr/index.php (Last Visited March 23, 2019)

based) perspective. The purpose of HCs however, depends on specific historical time periods of particular nations. HCs provide housing options across a range of income groups, and the minority of HCs, facilitate decommodified access to housing, for example in the case of Limited Equity Housing Cooperative (LEHC) where equity is capped at below market rate as I will demonstrate below. HCs exist predominantly in dense urban areas, and in the majority of HCs, much like with Condominiums, it is perceived no differently from regular home ownership in a single-family home. In the US, the HC began in New York City with HC communities consisting mostly of middle and upper income families, it was only later in the HCs history of NYC, that other HCs (and eventually LEHCs) were formed to serve those of low to moderate income like teachers, firemen, policemen and other City workers, and it moved closer towards the purpose of providing affordable and even partially decommodified housing. In Sweden, the development of the HC was the polar opposite, it grew out of the 1930s depression era into an institution for the provision of affordable housing, and in its middle period in the 1960s became an integral part of the unique housing policy in Sweden which pursued the universal decommodification of housing mentioned earlier in the "Millions Dwellings Program." However, in 1971, the Swedish Parliament voted to allow for the deregulation of HCs and opened HCs up to sale at market rate. Later in the 90s, in the full swing away from social democracy towards neoliberal policies, the HC sector grew as it was used more and more as an intermediary institution to convert public housing into market mediated access to housing (away from decommodified access). While in the US, only small pockets of HCs existed initially for the middle and upper class but later developed into a tool for providing affordable housing, in Sweden, the HC which began as affordable and eventually decommodified housing, in its most contemporary phase, became a tool for encouraging individual ownership in the middle classes.

What these very different trajectories of the HC in the US and Sweden reveals, is that the legal organization of the Housing Cooperative is only one aspect of understanding the significance of this CPI in terms of its decommodifying effect on access to housing. Instead the HCs legal structure must be viewed with careful attention to its purpose in each historical, political, economic, and national context. This is in complete contrast to the CLT, which has a much clearer nexus between the components of its legal structure and its purpose of decommodifying access to housing. In view of this, I will first consider the HCs legal organization as a CPI more broadly, and then its function/purpose relating to the purpose of decommodification and democratization in the context of both the US and Sweden.

7.4.1 HCs as CPIs

A Housing Cooperative (HC) in legal institutional structure is quite different from the CLT in that it primary aim is not the removal of housing from the market and therefore to restrain transfer at market-rate and create democratic structures for decision-making, but instead to facilitate multi-family owner driven membership and development. However, there are some similarities between HCs and CLTs. An HC, like a CLT: 1) allows multiple entitlement holders use entitlements with none having an entitlement to exclude the others from their use within the community, except as outlined by the Articles of Incorporation, bylaws, and decisions of the governing board; 2) it places restraints on transfer outside of the community by individual entitlement holders (though not necessarily at below market-rate but pertaining to other selective categories discussed below). Under the general umbrella of HCs, there are three specific categories of HCs I will explore below: the Stock Cooperative (akin to the Cooperative in Sweden called Bostadsrätt), the Limited Equity Cooperative, and the Rental or Zero-Equity

Cooperative. The difference between these three depend on three key factors: 1) whether or not equity is offered, 2) if so, whether or not it is at below market rate; and 3) whether there is a particular criteria for membership.

The original and most widespread HC in the US is the stock cooperative or "stock corporation" (as it was originally called), where each individual owner pays a monthly fee (like rent paid by a tenant) and by payment of that fee controls a "share" in equity of the entire housing stock. A tenant-owner or "shareholder" has the ability to exercise certain decision-making powers over the future membership and development of the community. The cooperative holds title to all the housing units, land, and common areas, rather than its individual members, and then leases individual units to its shareholders. The cooperative is managed by a board of directors, who according to their articles of incorporation and bylaws, makes the following types of decisions: the criteria for membership in the HC; approval of all new membership; the parameters of each shareholder/tenant-owner or tenant (where the shareholder has rented the premises) entitlements of use, exclusion, and transfer, as well as, other responsibilities (voluntary or mandatory) such as budget and maintenance fees, maintenance of common areas and amenities, and resolution of disputes amongst shareholders and/or tenants. In Sweden, this board of directors takes the form of a management board, called the *bostadsrättsförening,* which has similar powers and responsibilities to those described.

On the other hand, as I hope to demonstrate in the next section on the history of HCs in the United States, the limited equity housing cooperative (LEHC) and another variation, the zero-equity coop (ZEC), are markedly different from the stock cooperative (SC), in that the purpose of the LEHC and ZEC was to create affordable housing primarily for those of low to moderate income. Zero equity coops (ZEC), are similar to LEHCs in that their primary purpose is to create affordable collective housing. ZECs are an invention of CLTs in that forming a

Coop whether as a 501(c)3 or LLC is functional to organizing housing on CLT land in urban context where the majority of CLT housing stock is made up of multi-unit buildings. ZECs unlike SCs and LEHCs are rental housing where the CLT effectively acts as a non-profit landlord. Sometimes ZECs are seen as a transition to LEHCs after tenants feel ready to take on more responsibility in terms of decision-making, maintenance and finances.

The LEHC, while never defined in federal law, was defined for the first time in the United States in California State Law in 1979 in Civil Code Section 817, later amended in the California Business and Professions Code to be exempt from the laws on Stock Cooperative[537] so long as they were: 1) incorporated as a non-profit entity, 2) did not offer more than 10% of the development cost in the form of membership shares, and 3) share values in form of annual share dividends cannot exceed more than 10%. Unlike the CLT, the LEHC has no requirement for serving those exclusively of low to moderate income. However, for some LEHCs, particularly in California, which exist on CLT owned land, the CLT has imposed additional affordability requirements on LEHCs in order to comply with 501(c)3 safe harbor requirements, which mandate that 75% of the units serve those of low to moderate income under 80% AMI. In order to keep initial share-rates affordable, CLT developed the practice of further limiting the 10% of the development cost cap to less than $10,000 for each individual's total shares. In most cases being 50% below what State Law allows. Furthermore, CLTs

[537] Additional legislation was passed in 2014 in California exempting certain types of LEHCs (where board members were constituted by the entire group of residents) from other real estate regulation like the Subdivided Lands Law (Sections 11000 - 11200 of the Business and Professions Code), Subdivided Map Act (Government Code Sections 66410) & the Davis Stirling Act https://echo-ca.org/the-law/civil-code-new-davis-stirling-act (Last Visited January 5th, 2020). New legislation is being pursued by the California Community Land Trust Network this year which reforms the formula of tax valuation as being set by the share prices as opposed to market-rate value of the property.

implemented the practice of pegging the annual share dividend to an index like the CPI or AMI.

While a CLT and LEHC appear completely distinct from one another in legal organization, this is an illusion created by confusion producing concepts like "possession" and "ownership." While the "ownership" entitlement to the home in HCs appears more abstract than in the CLT, in actuality there is little difference functionally in the entitlement packages they offer. In the CLT individuals are subject to restrictions to transfer the home itself, and completely disabled from transferring the land beneath the home, and yet there is still some appearance that the home itself is in the "legal possession" of the owners, although subject to the same restrictions of both transfer and use as the LEHC. In a LEHC, individuals are in "physical possession" of the premises just like in the CLT, and while it appears that their "legal possession" is not in the home itself but in a "share" of the whole home stock, the entitlements are no less direct or more precarious. This in some ways reveals the complete lack of usefulness of the entire "possession" concept both as "legal possession" and "physical possession", that in fact is what is at issue in conflicts over "ownership" (another confusing concept) or property (yet again a confusing concept) whether in an LEHC or CLT, are conflicts between people – over the social relations and the distinct entitlements implied by those relations labeled by their functions of use, exclusion, transfer and expropriation. In both the CLT and LEHC there are restrictions on use, exclusion and transfer: both can contain restrictions relating to the *use* of the home, for example use as a place of business is forbidden in most jurisdictions; it can also contain restrictions relating to *exclusion* of others from certain commons areas that are shared by all; and finally both can contain restrictions on *transfer* at below market rate sale in some cases and/or only to those who meet the criteria of the governing board.

7.4.2 Decommodifying Effect of HCs

Functionally, once the confusion produced by formalistic concepts of property are removed, there are only two true distinctions between CLTs and LEHCs: 1) the composition of the governing board, and 2) the purpose of removing land and housing from the market for exclusively (or mostly in the case of LEHCs on CLT land) of those of low to moderate income. On the first, in an LEHC, the board is composed of its resident shareholders, while in a CLT it is composed of 1/3 residents, 1/3 non resident community members, 1/3 public "expert" representatives. As discussed earlier, the structure of a CLT board intentionally includes non-residents, in order to not only remove land and homes from the speculative market, and decommodify the resource, but also to develop the CLT as a vehicle for wider community engaged development. However, when one compares CLTs and HCs more generally, the purpose of HCs like the Stock Cooperative and in Sweden bostadrätt depends very much on the historical time and context and requires a historical comparative analysis of the very different purposes for which the HC has been used. To illustrate this, I will consider the historical development of the HC in the US from a purely market mediated legal institution into one aimed at affordable housing for a small minority of the poor, and the development of bostadsrätt in Sweden, which demonstrates a completely opposite trajectory in purpose, from a legal institution embedded in a national housing policy of decommodified housing for all into market mediated housing for middle and upper classes.

7.4.2.1 A History of HCs in the US Context: From market to decommodification

The original form of the HC, the stock cooperative, had its peak between the 1920s and 1970s in dense urban centers like NYC in the United States where housing was mostly comprised of apartment buildings. LEHCs, on the other hand, blossomed in the 1960s and 70s, in the period in which HCs had declined for

middle and upper income households as those housing developments targeted to these groups increasingly moved towards the Condominium model. The rise of LEHCs can be attributed in large part to the "War on Poverty," a program launched under the aegis of the Department of Housing and Urban Development (HUD) together with grants from the Farmers Home Administration Agency (FmHA). This program resulted in the creation of 27 LEHC cooperatives by the 1970s, providing 2,900 units of LEHC housing with federal government subsidies towards shareholder loans.[538] However, with very little guidance on how to maintain affordability in the LEHC codified in law at the time, LEHC shareholders were able to pay-down their mortgages rapidly with federal assistance, and with the enticement of the equity built in areas with rapidly rising real estate values, it resulted in units being resold at rates unaffordable to the target population in the next generation of moderate to low income households. This resulted in the break-up of many LEHC cooperatives towards its unrestrained Stock Cooperative predecessor. This flaw was ameliorated in the second phase of the development of LEHCs at the state level. After the decline in federal funding, states nationwide began projects to both codify and fund the LEHC. For example, as mentioned earlier California was the first to pass LEHC legislation with the passage of Assembly Bill 1364 in 1979,[539] which defined the LEHC and approved it for

[538] Gerald W. Sazama, *Lessons from the History of Affordable Housing Cooperatives in the United States: A Case Study in American Affordable Housing Policy,* THE AMERICAN JOURNAL OF ECONOMICS AND SOCIOLOGY 59/4, 573-608 (2000).

[539] States such as NY and Washington DC also enacted LEHC/LEC legislation. Washington D.C. Act 22-338 http://lims.dccouncil.us/Download/37351/B22-0099-SignedAct.pdf (Last Visited January 5th, 2020). For NY, *See* Bryan Mallin, *Limited Equity Cooperatives: A Legal Handbook* (p.9-10). "Most limited equity cooperatives in New York, however, are created as corporations under the combined provisions of the Business Corporation Law and the Private Housing Limited Equity Cooperatives a Legal Handbook Page 9 of 53 Finance Law. Under Article XI of the Private Housing Finance Law, a corporation may be created for the exclusive purpose of developing a housing project for persons of low income and for the benefit of persons and families who are entitled to occupancy in the housing project by reason of ownership of shares in the corporation. These corporations are known as Housing Development Fund Corporation

government funding programs tied to the fulfillment of conditions outlined in the Bill. This legislation attempted to resolve three primary flaws of prior LEHC models: 1) solving the problems of the equity structure of its predecessor 2) related to this, creating legislative restraints (as opposed to merely membership restraints) on transfer in order to preserve the continuation of the LEHC, and 3) removing burdensome supervisory requirements by both state and federal agencies for the protection of consumers, which had a negative freezing effect on the development of LEHCs in the past-standards meant for other models of housing development were being applied to LEHCs- leading to their dissolution.

On the first, the original LEHC equity structure was completely discarded in favor of a *shared equity ownership* scheme (discussed in the context of CLTs), where the initial share prices were limited to a maximum of 10% of the development value of the unit to be occupied by the shareholder. Secondly, instead of tying equity to pay down of the principal, appreciation was calculated based on the original share cost and an annual percentage increase to be capped at 10%. Thirdly, legislative safeguards were created to prevent shareholders from making a profit by disbanding the cooperative and selling at market prices. Finally, regarding removing supervisory requirements, the 1979 Bill determined that so long as a public agency, namely Housing and Urban Development (HUD) and Farmer's Home Administration (FmHA), provided "significant financing and exercised regulatory oversight" LEHC's were exempt from other forms of state and federal review. As a result of the passage of this legislation, 44 LEHC's were created offering 3600 units of housing nationwide.[540] With the passage of California's legislation, many states like the District of Columbia and ten others, passed similar legislation and created state-based funding of the LEHC. In DC, as we will discuss

[540] While this can be considered significant in the American context, compared to other countries, and in particular to Sweden where there is a strong history of public housing, these were pyrrhic gains towards the decommodification of housing.

in Chapter 9, over 100 LEHCs have been created since the 1980s. Even in States that did not pass such legislation, there were still LEHCs in effect, although they were not legally incorporated as such. Those LEHCs functioned more like the CLTs in that the restrictions on sale and membership were set by one or any combination of the following mechanisms: 1) deed restrictions reflected in a mortgage agreement with a financial institution providing part or/all of the loan (this became more relevant later in the HCs history as we will soon discuss), 2) deeds with land covenants to restrict land and building use, and 3) the HCs articles of incorporation or bylaws as a non-profit organization.

The optimistic outlook for LEHCs in the late 70s/early 80s came to a halting crash very soon under the Reagan era when the budget of HUD was reduced from 27 billion to 9 billion. However, in this period, similar to the Swedish context, which I will discuss next, there was a third phase of HCs in which HCs became a transitionary move away from public housing towards market mediated access. In the 1980s and 90s, 19,000 units of public housing were converted into LEHCs.[541] While, this was not a complete privatization given the public and charitable purpose of many non-profit LEHCs, the dramatic reduction in financing of HUD, and specifically for LEHCs, led to many of these newly created LEHCs being disbanded into stock cooperatives. Others survived by relying on a combination of State and local funding, loans from private institutions, and private funds. This phase of HCs came to be known as the period which some refer to as "Third Sector Housing," and in this phase the role of private individuals and financial institutions became a prominent feature of HCs. Today, HCs in the US (combining both the Stock Cooperative and LEHCs) play an extremely marginal

541 A. Lindom, *Dismantling Swedish Housing Policy*, 14/4, AN INTERNATIONAL JOURNAL OF POLICY AND ADMINISTRATION, (2001), p.503-526).

role in housing policy and represent less than 1% of the US housing stock.[542] A study on HCs in California, which has the second largest presence of HCs after New York, showed that 12,517 units of housing were provided by HCs (both SCs and LEHCs).[543] Stock Cooperatives make up the majority (9,352 units) and LEHCs another 3,165 units. Interestingly enough the study shows that even for the majority of SCs (not just LEHCs), share prices were within reach of moderate to middle income households as compared to non-HC apartments of comparable size and location. What these three phases of the HC in the US demonstrate is that whether the HC has the potential to decommodify housing by permanently removing it from the speculative market depends on the purpose for which the HC is designed. If it is designed to act as housing, akin to all other market housing, without restraints on transfer at market rate, it may provide greater affordability as the case of California Stock HCs show, but it will not decommodify housing. On the other hand, the LEHC and ZEC of CLTs are aimed specifically at the non-market valuation of land and housing facilitated by significant government subsidies invested in the model, thus creating greater affordability. Furthermore, in places like California and DC which have set clear limits on the allowable value of membership shares and equity appreciation, as well as the requirement that any profits must be donated for a public or charitable purpose, the LEHC creates an even deeper level of affordability and even extends towards the partial decommodification of housing.

7.4.2.2 HCs in the Swedish/Scandinavian: from decommodification to market

542 https://www.housinginternational.coop/co-ops/united-states-of-america/ (Last Visited January 5th, 2020).
543 California's Lower-Income Housing Cooperatives, Center for Cooperatives, UC Davis (1992), p.3-4.

HCs in the Swedish context, or *bostadsrätt*, had a significantly different trajectory from the HC, and can also be explained in three phases: the first from the early 1900s to the 1930s where the Housing Cooperative in Sweden was born as a means to provide non-speculative rental housing;[544] a second phase between the 30s-70s as a highly regulated housing institution with a commitment to maintaining affordable rates not set by the market but other factors;[545] and finally a third phase with the passage of new legislation in 1971 (Law 479), which replaced the legislation of 1930, making it possible to sell Housing Cooperative shares at market speculative rates. In Sweden today, *bostadsrätt* is equivalent to market-rate housing, and represents a transition away from public housing, similar to the "second wave" of HCs in the US. However unlike the US where public housing did not represent a significant % of the housing stock, in Sweden, where public housing comprised 23% of the housing stock (at its peak in the crisis of the 90s), this policy shift led to mass conversion to a market mediated orientation in housing policy. Meanwhile for the US in contrast, the conversion of public housing to HCs led to the expansion rather than reduction of affordable housing programs as the US public housing program was quite marginal- less than 1%. The large public housing stock in Sweden was in large part the result of the "Million Dwellings Program," described earlier of the 1960s and 1970s, which achieved the completion of 1

544 Sukumar Ganapati, *Enabling Housing Cooperatives: Policy Lessons from Sweden, India, and the United States*, INTERNATIONAL JOURNAL OF URBAN AND REGIONAL RESEARCH 34.2 (2010), p.369. "Housing cooperatives emerged in major urban areas of all three countries in response to the housing crisis after the first world war. In Sweden, the Cooperative Housing Association of Stockholm (Stockholms Kooperativa Byggnadsförening, SKB) was established in Stockholm as a non-speculative rental cooperative in 1916. After this, two significant cooperative organizations were formed: the Swedish Central Organization of Tenant Ownership Cooperatives (Sveriges BostadsrättsCentrum, SBC) in 1921, and the Tenants' Savings and Building Societies (Hyregasternas Sparkasse oc Byggnadsförening, HSB) in 1923. Although their activities were initially limited to Stockholm, they became active in other urban areas during the interwar period."

545 Rates were set by a formula based on a point system, similar to the public housing rental system.

million homes- some 20% of these homes of devoted to public housing. HCs were also an important component of this policy even prior to the 90s conversions and even at their lowest point in the 90s (right before the conversions took place) they still constituted 10% of all newly completed multi-family constructions and 17% of the country's entire housing stock. To put this in perspective, this means that even at their all- time low, there were 17 times more *Bostadsrätt (HCs)* in Sweden than in the US where HCs have never exceeded more than 1% of the country's entire housing stock. Today, in Sweden, HCs (in their market-rate form) constitute 23% of the entire housing stock and the largest share of new multi-family constructions (almost 60%) while public housing has decreased to 19% from its previous 23% in the early 90s and only accounts for 25% of the new multi-family constructions.[546]

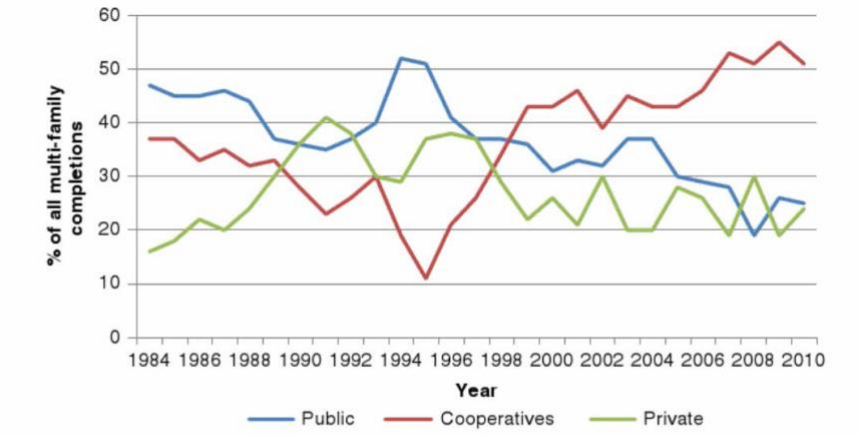


Figure 6.1 Dwellings in newly constructed multi-family buildings by type of ownership (1971–2010).
Source: Swedish official statistics, Yearbook of Housing and Building Statistics 2012.

[546] Housing in Sweden (An Overview) Terner Center for Housing Innovation at UC Berkeley. (2017), p.16; *See also* H. Ruonavaara, *How divergent housing institutions evolve: a comparison of Swedish tenant co-operatives and Finnish shareholders' housing companies. Housing*, THEORY AND SOCIETY 22/4, 213–36 (2005).

The legal structure of the Swedish HC, the *bostadsrätt,* is similar to the US Stock Cooperative, with the greatest difference being that the founding organization is not a Corporation, but instead the *bostadsrättsförening*, a type of "economic association" *ekonomiska föreningar,* closer to a non-profit association than a company. However just like the Corporation model, there are shares and shareholders with the association "leasing" the units, however this "lease" is indefinite and provides all entitlements to use, exclude, and transfer in relation to the unit, and is referred to as "tenant ownership," with little to no exclusion entitlements in the common areas vis-à-vis other shareholders. The entitlements of tenant owners are regulated through an ensemble of national laws[547], most of which are codified in different sections of the Swedish Code of Statutes (*svensk författningssamling*), the central sources being: the Law on Real Estate Cooperatives (*bostadsrättlagen*) and the Law of Cooperative Associations (*lag om ekonomiska föreningar*).

The most important aspect of the Swedish HCs, which is distinct from the US Stock HC, is the legal structure and powers of the Association, the *bostadsrättsförening.* As in the Stock HC, tenant-owners pays a monthly fee for maintenance costs and overhead, which is managed by the association. Similarly, the *bostadrättsförening,* is represented by a management board comprised of resident representatives. The association makes decisions regarding maintenance and upkeep within the annual budget, as well as, mediates conflicts of non-compliance

547 *See* C. VAN DER MERWE, EUROPEAN CONDOMINIUM LAW (2015), p.xxxvi.
Laws relevant in the planning and early stage: Law on Planning and Building (Plan-och bygglag), Swedish Code of Statutes (Svenks föfattningssamling) 2010:900; Law on insurance for construction defects etc. (Lag om byggfelsförsäkring m.m), Swedish Code of Statutes (Svensk författningssamling) 1993:320; Laws relevant in the management phase: Law on Real Estate Property (Fastighetsbildningslagen), Swedish Code of Statutes (Svensk författningssamling) 1992:1212, Law on Real Estate Cooperatives (Bostadsrättslagen), Swedish Code of Statutes (Svensk författningssamling) 1997:667; Law on the acquisition of ownership on conversion to real estates cooperative tenancies.

with association regulations regarding the use, exclusion and transfer entitlements of individual tenant owners. Decisions regarding use and exclusion regulate a number of different types of activity: prohibitions against use as a place of business, the use of common areas as a community garden, rules about children and pets on lawn/gardens, noise complaints, and modifications/renovation plans to individual units, just to name a few examples. And like the Stock HC, decisions regarding the transfer entitlement are very limited since the 1971 law and relate mostly to the quality of the buyer's finances, *however* the Swedish HC is *less exclusive* in setting its criteria for membership than the US stock corporation. While in the US stock HC, particularly in places like New York and California, which constitute the majority of HCs in the nation, stock HCs are often very restrictive in their membership, either because they are designated for specific groups like unions or municipal workers, but in most cases, because they aim to create a predominantly white wealthy elite community without explicitly stating such discriminatory criteria and instead smuggling them in under a myriad of not particularly convincing subjective reasons as court precedent reveals.[548] Instead in Sweden, HCs are popular mostly among middle income people, and a denial of a transfer to a person belonging to a particular background or group is unusual by the *bostadrättsförening*,[549] so long as the person demonstrates a reasonably solid financial portfolio.

Like the US stock HC, in Sweden there are some additional powers that the Management board can exercise with regard to defaults and approval of new tenant-owners, which have been outlined in a more recent 1991 law, which clarified the role of the association in relation to tenant-owners. The *bostadsrättsförening* can

548 Rosemarie Maldonado and Robert D. Rose, *The Application of Civil Rights Laws to Housing Cooperatives: Are Co-ops Bastions of Discriminatory Exclusion or Self-Selecting Models of Community Based-Living?* FORDHAM URB. L.J. 23/ 1245 (1996).
549 This may however be somewhat inconclusive as it may present an area of study where not enough empirical study has been performed.

deny applications for transfer of a tenant-owner where it is deemed that financial portfolio of the prospective buyer is not secure. They can also evict tenants that fail to pay their monthly assessments to the association (Law on Real Estate Cooperatives Ch. 7 s. 19), and if payment is not received within three weeks after the notice, then his right to the apartment can be forfeited (Ch.7 s. 23). In the case of a default, the association can take out a lien on the share of the member, which gives the association priority in recouping the monthly assessments owed over the security right of a mortgage creditor in case of proceedings for a forced sale. The association also must notify the mortgage creditor if the tenant-owner is more than two weeks late with their payment of the monthly assessments (Ch. 7 s. 31). These laws outlining the relationship between the association, tenant-owner, and mortgage creditor is the result of the financing structure of the *bostadsrätt*, which is similar to the US Stock Corporation. Underlying each share is a master loan, of which each share carries a %. With older HCs, the % of the master loan can be quite low, and hence the monthly assessments as well, however with newer developments, the loan payment is a large component of the monthly assessment leading sometimes to extremely high monthly fees, making them less attractive for buyers. Priority of associations over creditors may have a destabilizing effect on the credit mortgage market, however on the other hand if priority is not given to the association, it risks that the entire HC becomes insolvent, causing the loss of value of all the shares of the association, and even rendering them totally worthless leading to possibly bankrupting the individual tenant-owners. What this demonstrates is that there is an element of risk involved in the sharing of a master loan, however this risk also presents an opportunity for risk sharing and risk solidarity as discussed below.

7.4.4 The Democratizing Effect of HCs

Housing Cooperatives should in theory, due to the powers and responsibilities of the Board in setting the membership for criteria, as well as, involvement in day to day decisions, rank high in democratizing housing. However, the criteria for membership in many HCs prevents it from being truly democratic: tenant-owners constitute the membership of the board and exercise power to determine the future membership in the Cooperative community. In an LEHC, the criteria for membership is based on income and family size, while in an SC, criteria for membership depends on whatever the existing board members decide, and can often include such factors as their credit and financial portfolio, employment and income, and, most controversially, criteria which get at- though often indirectly- their social status. The criteria for some very exclusive SCs in the US have been challenged for civil rights violations in relation to the systematic denial of some racial groups.[550] In Sweden, the actions of the *bostadrättsförening* in setting the criteria for membership must conform to the Law on Real Estate Cooperatives (*Bostadsrättslagen*).[551] Criteria that are unacceptable according to the law are "terms that requires that the entrants must be of a certain nationality or not certain

[550] Maldonado and Rose, *The Application of Civil Rights Laws to Housing Cooperatives: Are Co-ops Bastions of Discriminatory Exclusion or Self-Selecting Models of Community Based-Living? See supra* note 549. While in general courts takes the view that Cooperatives are entitled to self select, in some cases where the reasons for denial clearly mask other reasons, most likely related to the race of the potential buyer, Courts often find the criteria as unreasonable. For example, p.1259 reference to the case of *Robinson v. 12 Lofts Realty* 610 F.2d 1032 (2d Cir. 1979) "The Second Circuit outlined the legal framework for analyzing cooperative board decisions. The plaintiff in Robinson was a black prospective purchaser who was rejected by the defendant cooperative despite being financially qualified. Plaintiff sought preliminary and permanent injunctions permitting him to purchase shares in the cooperative. The defendant cooperative did not dispute plaintiff's financial qualifications. Instead, the cooperative justified its decision to reject plaintiff based on what the court described as subjective factors. For example, despite plaintiff's vehement denials, the defendant relied on rumors that the plaintiff planned to use the apartment as an after hours club and put plumbing lines through another shareholder's ceiling. The court found these defenses noncredible and concluded that 'a Fair Housing Act claim cannot be defeated by a defendant which relies on merely hypothetical reasons for the plaintiff's rejection.' Some board members also cited plaintiff's alleged hostility, arrogance and uncooperative behavior as a basis for the rejection. The court also found these proffered reasons to be insufficient."

[551] In Swedish Code of Statutes (*Svensk författningssamling*): 1991:614. Ch. 2, s. 2.

specified nationalities; that the entrant's sexual orientation must not be of a specific kind such as homosexuality" however, just as in the US, it does allow for criteria that "the entrant's income must be of a certain level."[552]

In Stock HCs, community solidarity and intrinsic sociality dimensions across different social and racial stratas is reduced within the confines of the self-selection of an elite wealthy community, and therefore ranks quite low. In Bostadsrätt, the democratic element of HCs should also be in theory quite high, however information here is quite conflicting, while some studies pointing to a lack of participation in real terms although formal requirements are met, while others insisting that the democratic aspect is quite high.[553] One recent study of Management Boards of bostadsrätt in Stockholm, revealed a tendency towards mismanagement, apathy, and a lack of foresight and planning in view of cutting down individual costs.[554] In order for HCs to reinvigorate their communities and encourage greater participation in decision-making it may be necessary to reassert a commitment to affordability, as the original HCs in Sweden or the LEHC in the US (which shows higher rates of participation) within a proposal as the one above. If may also require the opposite, that LEHCs rather than uniting its members through affordability, unite on the basis of a common alternative vision of collective living beyond the nuclear family.

[552] *Ibid.*

[553] Henry Muyingo, *Challenges in Property Management within the Cooperative Sector*, ROYAL INSTITUTE OF TECHNOLOGY, STOCKHOLM (2016). A series of 12 interviews were performed with Böstadrätt in Stockholm relating to the participation in management. The study shows overall that participation is quite low. This is also corroborated by Bo Bengtsson, *Solving the Tenants? Dilemma: Collective Action and Norms of Co-operation in Housing*, HOUSING, THEORY AND SOCIETY, 17/4, 175-187 (2000); also in Bo Bengtsson (together with Stefan Svensson) in DEMOKRATI OCH EKONOMI I BOSTADSRÄTT (DEMOCRACY AND ECONOMY IN TENANT-OWNERSHIP) (1995), where he describes that apathy towards management is discussed as the norm. However, this is somewhat contradicted by the findings of an earlier publication by the same author that suggest that in fact the Democratic function is working quite well.

[554] *Ibid.*

7.4.4.1 Lessons for HCs from Baugruppen and other Intentional Communities in Increasing Community and Participation

In Germany, experiments with the housing cooperative have been taking place in Berlin and other metropolitan areas historically, and more recently in the form of consumer driven developments of housing called *baugruppen. Baugruppen* are literally "build groups," groups of citizens initiating building projects stimulated by frustrations over the lack of responsiveness of both private developers and the municipality to provide housing. In *baugruppen* citizens working together with developers and architects to buy public land for the development of intentional communities that are involved in the management from design to move-in, which is usually a period as short as 3 years. *Baugruppen* are intentional communities in the sense that they have specific ideas about the ideal home in terms of the kind of community and sociality desired beyond the nuclear family unit, which can be facilitated both through its strong normative commitment translated into its legal structural and architectural design. Many *Baugruppen* have many communal, as well as mixed work spaces in addition to individual units and have teamed up with *avant-guard* architectural firms like Heide & Von Beckrath with expertise in sustainable design, making the building not only aesthetically beautiful in facilitating new kinds of spaces for community socializing and work but also energy efficient utilizing green technology reaching levels that qualify as a *passivhaus*- the highest levels of green efficiency.

The *baugruppen* model has also been adopted overseas in Australia in places like Fremantle and White Gum Valley and urban centers like Melbourne.[555] The Melbourne *Nightingale* is a combination *Limited Equity Housing Development* combined with a *baugruppen* model. Its *Limited Equity Housing Development* operates

[555] http://www.baugruppen.com.au/ (Last Visited March 23, 2019).

like the CLT by utilizing a *deed covenant* to maintain prices at below market rates for resale with a reasonable amount of equity paid to the seller. More recently the *Nightingale* adopted the *baugruppen* model for some of their housing development projects, and like the German models, suggest a savings of up to 30%-from a combination of the unique financing structure, as well as a reduction in taxes due to the nonprofit nature of their activity recognized by the municipalities.[556] However, there are a number of challenges ahead for Australian *baugruppen*, most importantly related to their acceptance by municipal regulation and financing institutions. One of the crucial elements to the *baugruppen*'s success in Germany is related to the open Institutional setting for housing design, both in the sense of creative finance institutions, but the encouragement through government of self-help housing solutions in the form of organizations like *Statbau*. For Australia to continue in its adoption of the model, they will similarly need to create such institutional backing and support.[557]

Other intentional communities exist within the framework of the Cooperative form as well as those more loosely pursuing "co-housing or co-living," co-housing is where people either formally or informally co-habitate in view of common values, purposes, and/or identity. Some of them are driven around the pursuit of alternative lifestyles like Co-living.org,[558] while others are more focused on bringing together people of similar professions like Techfarm[559] (which is another temporary solution being utilized in Stockholm to house tech workers), while still others are focused on the particular needs and group identities of individuals. For example, *CoAbode*,[560] brings together single mothers for

556 http://nightingalehousing.org/nightingale-model-projects/ (Last Visited March 23, 2019).
557 https://www.australiandesignreview.com/architecture/housing-revolution-lessons-from-berlin/ (Last Visited March 23, 2019).
558 http://coliving.org/ (Last Visited March 23, 2019).
559 https://www.techfarm.life/about-2 (Last Visited March 23, 2019).
560 http://www.coabode.org/ (Last Visited March 23, 2019).

cohabitation and by pooling their resources together they can afford better housing and lighten the burden of daily chores and childcare activities. Their motto is: "two single moms raising children together can achieve more than one going it alone." Along the same lines is *Babagayas House* in Paris, a self-managed social housing for female senior citizens that would like to pursue "empowering independent living in a community."[561] The linking together of the housing cooperative legal structure with these kinds of purposes would likely enhance democratic participation in the managing board and more generally within HC communities.

7.5 Condominiums

Condominimums, while collective housing in the sense that they are organized as an association, are generally not a housing institution aimed at shared limited equity. However, the condo form has been combined with limited equity in some places to facilitate a balance of individual ownership over the unit, while retaining collective control over the criteria for membership and in some cases limited equity aimed at creating greater affordability. Condominiums, in its modern form, dates back to the late 20s and 30s in Europe, and in the US and Canada to the early 60s. Europe, during and after the World Wars, experienced an acute shortage of housing, as a result of the destruction of much of the housing stock, as well as, the displacement of populations as a result of war. This led to an increase in the construction of multi-unit complexes and the need to place these new constructions, as well as the status of existing multi-unit complexes on stable legal footing.[562] As a result, many countries codified the condominium in that same

561 http://en.rfi.fr/france/20130305-babayagas-house (Last Visited March 23, 2019).
562 VAN DER MERWE, EUROPEAN CONDOMINIUM LAW, *supra* note. 545 at p. 21, 33. "The Unsatisfactory operation of Stockwerkseigentum in practice, coupled with the acceptance of the maxim superfices solo cedit, jeopardised the institution of apartment ownership. (…) the Civil Codes of the Netherlands (1939), Germany (1999) and Switzerland (1909) implicitly prohibit the creation of condominiums by accepting the maxim superfices solo cedit."

period: Belgium (1924), Greece (1929), Italy (1935). Scandinavia however did not pass such legislation until much later in the 60s in Norway and Denmark, and Sweden, only recently in 2009 in the direction of a condominium like scheme called *Ägarlägenheter*, which is still, as of yet, highly underutilized. The reasons for this, in addition to the fact that they apply only to new constructions, is most likely the result of the prevalence of Housing Co-ops. Legislation supporting and governing Co-ops are already in effect, and there is already a strong institutional structure both in the public and private sector for the creation and maintenance of Cooperatives.

The purpose of the condominium in its early days was to facilitate the governance of multi-unit complexes with ownership entitlements resembling as closely as possible single unit homes, for the purpose of making it the least administratively complicated from the point of view of the buyers, developers, and land registrars.[563] In this sense, it was intended to facilitate little to no restraint on the transfer entitlements as in the ownership of single unit homes, as compared with the previous CPIs discussed, while at the same time functioning more like a Housing Cooperative with regard to the jointly owned common spaces where management decisions regarding maintenance is necessary. In fact, in New York City, where the Stock HC was born, condominiums are understood as a better investment since their valuation tend to fluctuate more directly with the market than the Stock HCs.[564] Therefore, it is the least effective of those considered on the spectrum in decommodifying housing in its impact on the affordability dimension. In the

563 In most European countries, a Condominium regime is established through the registration of the condominium scheme in a land registrar, usually by the developer. *Ibid*, p.69-70.
564 See M. Schill, I. Voicu, and J. Miller, *The Condominium versus Cooperative Puzzle: An Empirical Analysis of Housing in New York City*, 35/2 THE JOURNAL OF LEGAL STUDIES, UNIVERSITY OF CHICAGO LAW SCHOOL (2007).

United States and Canada where the condominium came into use in the 60s, the model has overtaken the HC. In the US it came to dominate over co-ops, ever since it came into general use through the 1961 Amendment of the National Housing Act, which allowed the Federal Housing Administration to insure mortgages on condominiums authorized by state law, and provided a Model Statute on which most of the first generation condominiums have been based.[565] In Canada, the condominium has become the dominant form of legal organization for multi-unit building in urban centers, and is contributing to an *investor based* rather than *resident based* model of ownership, where condominium is synonymous with high price rentals, which is leading to increasing gentrification and higher costs of housing overall.[566]

However, as mentioned earlier condominiums can adopt legal restraints on transfer such as the 99-year covenant, as well as to adopt a limited equity resale formula and become limited equity condominiums. However, condominiums face in some cases higher costs of redevelopment than LEHCs, as well as issues of resale at market rate both as a result of their greater alienability. The first problem, the higher costs, are the result of higher administrative fees in the conversion of subdividing a parcel into condominiums in the form of condominium mitigation fees which can add significant costs. These condo-mitigation costs go to the production of affordable housing and are levied because rental housing is lost to market-rate housing which is aimed at people of higher incomes. It is also levied because it is understood that the resale value of the property increases when subdivided into individual parcels. Regarding the latter problem, limited equity condos can be more easily converted to market-rate than LEHCs, where it is impossible to alienate one's individual's shares from the whole, because once a

565 *Ibid.* at p.22.
566 Brian Webb & Steven Webber, *The Implications of Condominium Neighborhoods for Long Term urban Revitalization*, CITIES 61 49-57 (2017).

parcel has been subdivided into condos each condo can be sold individually. If for some reason a regulatory agreement that structured a condo as limited-equity expires this can lead the condo to be sold at market-rate thereafter. However, this does not necessarily have to be the case with limited equity condos owned by CLTs. A number of condominiums across the country are stewarded by CLTs on CLT owned land, which adds the restriction of the 99-year covenant and ground-lease. An example of the condominium based model are four properties stewarded by Northern California Community Land Trust two in Berkeley on Haskell St. and two in Oakland, one on Linden St. and the other called "Mariposa Grove" on 59th St.[567] According to the B*ay Area Consortium of Community Land Trusts Case Studies Report*, all four condo projects were structured with a 99-year Covenant with NCLT owning title to the land beneath the condos and all aimed at residents with incomes at or below 80% AMI.[568] The split in title and the designation of occupancy for those of low income act in these cases as restraints on transfer of the condos at market-rate.

7.5.1 Condominiums as a CPI

Condominiums function as a CPI because they are comprised of: 1) multiple entitlement holders of use without the ability to exclude any member from their use vis-à-vis one another, and 2) there are some-though very little-restraints on the transfer entitlement. In a condominium, a building or group of buildings is subdivided into separate units owned individually, with common areas and utilities owned jointly as common property i.e. courtyards, hallways and stairways,

[567] Bay Area Consortium of Community Land Trusts, Case Studies of Northern California Community Land Trust Properties. The condominium projects analyzed in the case studies include: 1314 Haskell St. Berkeley, 1320 Haskell St. Berkeley, 3032-3104 Linden St. Oakland, 832-834 Mariposa Grove, Oakland. Kindly shared by Francis McIlveen of Northern California Land Trust.
[568] *Ibid.*

entryways, roofs, adjoining pipes and gardens. The shared rights and duties of members, as well as their decision-making power over the common property is accomplished through a management body, which is comprised of residents, and their voting power depends on what is known as a "participation quota," "share value," "unit factor," or "unit entitlement" established by a designated formula. Designated formulas can vary, some jurisdictions preferring an equitable solution of share values being allocated equally amongst all owners, however the majority of jurisdictions use the relative value or relative size of a particular apartment proportional to the total value or size of all other apartments.[569] This quota determines 1) an owner's co-ownership share in the common property; 2) an owner's relative contributions to the expenses of the scheme; and 3) the weight of the vote at general meetings.[570] Some jurisdictions like those in the UK (England and Scotland for example), however have organized the condominium much closer to the HC, and therefore do not adopt the quota system, which results in common areas owned by the whole association rather than jointly between tenants. And also, just like an HC, in the majority of jurisdictions, the management body operates according to by-laws that express the official rules imposed on members, although unlike the HC, the bylaws are enacted in the majority of jurisdictions without an Articles of Incorporation as a framework, as in the HC.

There are many similarities between condominium with the stock HC (which includes the Swedish HCs): the entitlement holders have full use and exclusion entitlements in their own units, with only use and no exclusion entitlements in common areas vis-à-vis one another, and minimal restraints on transfer both with regard to selling at market rate and the criteria for membership. One would imagine that given the HC's form as an association primarily and a

569 VAN DER MERWE, EUROPEAN CONDOMINIUM LAW, *supra* note. 545 at p.74.
570 *Ibid.*, p.75

property institution secondarily, the criteria for membership would be a principal aspect of its governance. And, in fact, in some jurisdictions the condominium's criteria for membership are more elaborate and restrictive than in an HC: this is the case for example, as mentioned before in the US's "exclusive" SCs. This is also the case in the UK, where condominium is structured much more like an HC, and similarly allows more freedom to the management association in denying a transfer than in other jurisdictions, although they can be challenged in front of a Tribunal to determine the "reasonableness" of the restraint. Usually only restraints that can be shown to have a "material detriment" to the other members will be upheld, and never those overtly discriminating based on nationality, ethnicity, or sexual orientation.[571] In general in condominiums, the board is often quite disengaged, not seeing themselves as part of a community but rather voluntary administrators of discrete tasks leading often to delays and poor management. In some jurisdictions, very common in urban centers in Canada, those that sit on the Management Board may not be residents but rather owner-investors, who have rented their units out to others who do not sit on the board. In others, condominium schemes are also mixed-commercial schemes incorporating grocery stores and other retail stores, which assists developers to spread the cost of development between different types of potential buyers. However, this can add further complications in that commercial owners may sit on the boards and have interests that go against those of the residents given their very different use. One way of increasing resident participation on condominium boards is through the creation of an intentional community. As discussed in the previous section on HCs, intentional communities which unite residents, not only by their income and the need for affordable housing, but rather on the basis of an alternative vision of life

[571] *Ibid.*, p.125-126.

beyond the nuclear family and alternative values can generate greater resident participation in the life of the condo, as well as, on the board.

7.5.2 Analysis of Decommodification

Condominiums, as a legal institution, with regard to *Decommodification* depends very much on whether or not the condo is a market-rate or limited equity condo with restraints. However, in general, condos more than HCs, as result of the greater alienability of the individual parcels and thus the reduced power of the homeowner's association to review sales, as in an HC, tends to increase housing costs to higher levels than even in HC market-rate housing of comparable location and size.

7.5.4 Condominium and Democratizing Effect

By reducing the emphasis on membership and the associational aspect of property, the condominium reduces the scope of the decisions of the Management Board too merely decisions over the common areas. The lack of community involvement is reflected by the apathy of many condominium management boards. With common areas, not being a central aspect of the development, combined with the perception by owners that they are not co-owners of the property as a whole, as in an HC, there are less important decisions to make as in with an HC regarding joint structures, maintenance and financing. This is further exacerbated by membership of non-resident investor owners who are completely absent and unable to deal effectively with problems arising in the condominium including its long-term planning regarding maintenance and renovations.[572]

572 *Ibid.*

7.6 Conclusion & Steps Towards Design

A centralized government planning policy can lead to a lack of incentives to improve, while market approaches can lead to a lack of affordable housing- prioritizing the needs of profit over that of people- and destroying the fabric of social life. To correct for these flaws of the unfettered market, I argue for the *decommodification and democratization of housing through CPIs*: Decommodification means to fully or partially reduce dependence on the market for access to housing. While democratization means the creation of collective ownership and control over housing through decision-making bodies which make important decisions pertaining to the housing community, and beyond in the larger community to democratize housing in larger sense as in democratization of a key fundamental resource and thus democratization of the economy. In order to advance the decommodification and democratization of housing, I focus specifically on what I conceptualize as Common Property Institutions, collective institutions which govern fundamental resources where users have the ability to use without excluding one another, and where the ability to transfer is disabled or limited. As developed in previous chapters, Commons Property Institutions brings us closer to the decommodification of fundamental resources and transformation of the capitalist market because they provide legal restraints on the transfer of fundamental resources on to the market, as well as, collective decision-making mechanisms structured through property and associations law. Towards this end I analyzed three housing institutions which pursue shared limited equity, which have the features of CPIs: the community land trust, the housing cooperative, and the condominium. With the legal disaggregation analysis of these CPIs, I hoped to demonstrate that all of these legal institutions are related to one another on a spectrum by the degree of their ability to achieve decommodification through legal restraints on transfer and the democratization of housing through legal structures

which encourage democratic decision-making. Often a major drawback of decommodification in the form of reduced ability to build equity in the home, is the loss of incentives to improve and maintain the housing stock, therefore I consider to what extent the CPIs discussed provide incentives to improve and maintain the housing stock. While all three CPIs have the potential to decommodify and democratize housing, the community land trust ranks highly on both the decommodification and democratization of housing as compared to the housing cooperative and the condo even in their respective limited equity forms. Decommodification and democratization of housing are advanced through the layers of legal institutional structures aimed at collective ownership and decision-making and restraints on transfers at market rate. This is accomplished through: 1) a nonprofit association and tripartite board; 2) a deed with a covenant restricting land to below market value transfer and to low income households; 3) ground lease; and 4) limited equity resale formula. The effectiveness of the restraint on transfer is increased: a) when the purpose of the restraint is expressed through multiple legal mechanisms, and b) the legal structure provides for an enforcement mechanism. In this respect, the CLT again scores very high on the stringency of the restraint for below market value transfer and in maintaining the criteria of the specific target groups- usually low to moderate income. In the next Chapter I consider the challenges faced by CLTs in the US Context, both with regard to scalability and legitimacy of the model in decommodifying and democratizing housing, as well as, towards generalizing the model as a *Shared Limited Equity Housing Policy For All.*

Chapter 8 Institutionalizing the Decommodification & Democratization of Housing Through the Community Land Trust Model

8.1 Introduction

In the last chapter, three potential types of Commons Property Institutions (CPIs)- the community land trust, the housing cooperative, and the condominium, were compared and analyzed on a spectrum according different sets of evaluative criteria[573]based on the extent to which these institutions: 1) meet the conceptualization of a CPI; 2) achieve decommodification, "partial decommodification," or "affordability; and 3) utilize equity building incentives to improve and maintain the housing stock; and finally, 4) the democratization of housing both in enhancing collective decision-making internal to the CPI community, and beyond in the larger community, thus democratizing housing as a resource more generally. In Chapter 7, I concluded that the CPI with the greatest potential to both decommodify and democratize housing is the community land trust because of its: 1) unique legal mechanisms for creating restraints on transfer entitlements and capping equity, facilitating the removal of land and housing from the market, as well as; 2) its collective associational structure which facilitates democratic decision-making that emphasizes resident and community participation; 3) its ability to ensure the improvement and maintenance of housing stock and success of the community to take on leadership and stewardship of their homes through ongoing technical, legal and financial support; 4) acting as an

[573] This is based on what is included in the bylaws and other legal documents of these CPIs and whether or not they support the purposes mentioned. This chapter does not attempt to estimate actual levels of each factor in practice, only what is conceptualized in the design of these different legal institutions thereby assuming this is what occurs in practice. An actual empirical study was beyond the scope of this dissertation and would have to take the factors considered above and test them in real world conditions i.e. study whether the enforcement mechanisms of a Community Land Trust actually work to achieve decommodification. This chapter attempts to do some of that by identifying and analyzing the conditions necessary to make sure that these CPIs in practice will have the best chance of achieving these purposes.

important democratic intermediary with local governments in local housing policy and development.

In this Chapter, I explored the possibility of "locating deviationist doctrine" (Unger) in realizing a "switching of principles" (Wilhelmsson) as described in Chapter 4, in order to offer insights into the institutionalization of the decommodification and democratization of housing towards the embedding of the market in two senses: 1) more generally, by decommodifying housing as a fundamental resource and thus reconnecting people to direct access to this critical means of subsistence, and breaking the chain of the imperatives of the market and bringing it back under social control, and 2) by replacing market-mediated access to housing with socially-mediated and democratically-controlled access to housing.[574] Here in this Chapter we explore how this form of embedding is being accomplished by the community land trust model (CLTs) in the United States.

CLTs accomplish the decommodification of housing through legal restraints on transfer, which ensures the permanent removal of land and housing from the market, as well as, the democratization of housing through collective decision-making both internal to the housing community and externally in influencing local housing policy and community development. A CLT is always both an association (non-profit) and a form of property ownership (dual ownership with split title) which places restrictions on use, exclusion and transfer entitlements accomplished through a number of different types of legal mechanisms analyzed in Chapter 6 & 7 that prevent transfers at market-rate: the

[574] My arguments in Part II, were aimed at how I can accomplish market re-embedding through law: to remove market as dependence, I must transform how this logic is currently institutionalized and reinforced through private property. In housing, this means not only challenging and transforming false notions of "absolute private property right" through the creation and reform of current law, but also and more importantly, through transforming the practices and functions of government and finance institutions in reinforcing that false notion, namely the naturalization that all property includes the entitlement to transfer at market rate.

99 year covenant, the ground-lease, and the non-profit association with the purpose to serve the housing needs of those of low and moderate income. CLTs may deal exclusively with tracts of individual single-family homes, or multi-unit buildings operated as resident controlled rental properties, or it can also be used in conjunction with zero equity cooperatives (ZEC), limited equity housing cooperatives (LEHCs) and limited equity condominiums (LEC) or all of the above in combination.

CLTs accomplish the democratization of housing both by subjecting decisions regarding use, exclusion and transfer entitlements to collective decision-making internal to the housing community, but also by catalyzing political engagement around housing in the larger community. In this sense, the CLT, like *Stadtbau* for the German *baugruppen*, or SBC for the Swedish *bostadsrätt*, acts as an important democratic intermediary between citizens and the public and private institutions engaged in local housing development. In this Chapter, I explore in depth how CLTs act to democratize housing in three ways: 1) by democratizing access to housing finance by bringing citizens together with necessary financing, which they could not get otherwise to acquire and subsidies properties; 2) by providing important technical, legal and financial support collectives (like LEHCs) to form democratically controlled resident organizations, as well as, other support central to the survival of these collective organizations; and finally, 3) how they act as intermediary democratic community political organs for advancing the interests of residents and local citizens in local housing policy and community development. In sum, CLTs have the potential to act as an important lever in creating not only access to decommodified land and housing permanently removed from the market, but also in democratizing housing by creating communities of residents engaged in making important decisions, not only in their own housing communities which

adds to the improvement, maintenance, and long-term functioning of these communities, but more broadly in local community development.

However, while the CLT is an exciting and rapidly growing model, it is important to take stock of the fact that CLTs nationwide still constitute less than 2%-4%[575] of all housing in the United States. In order for CLTs to embed the market through creating greater access to decommodified housing, as well as to generalize the non-market collective ownership and social valuation of housing, it must achieve institutionalization and overcome two important challenges: scale and entrenchment. By scale, I refer to expanding both the number of units in each existing CLT, but even more so, the replication of the model in places, and particularly urban centers, which currently do not have CLTs. By entrenchment I refer to the CLT model's acceptance, normalization, and integration into the policy and practice of public and private institutions related to housing development and finance at local, state and federal levels, which would ensure the CLTs survival beyond on a political regime change. Scaling depends on entrenchment, as we will see in the successful examples of CLTs and thus we will focus primarily on the issue of: *How can CLTs transform the default practice of public and private institutions related to housing provision and policy so they can achieve the entrenchment of the non-market provision of housing and social valuation of property?*

During the course of my research[576] on CLTs, I identified two key problems that CLTs face with regard to achieving scale and entrenchment: 1) a lack of integration in local, state and federal housing law, policy, and practice, leaving CLTs often at the periphery of decision-making and influence in housing policy, and 2) a related problem, the lack of access to land and dynamic capital, especially

[575] This range is provided since the last major surveys of CLTs in the US was performed in 2006.
[576] My research was enhanced by the actual practice of CLTs witnessed first-hand, as well as through practitioner encountered, in the course of my work with the Bay Area Community Land Trust and the California Community Land Trust Network between December 2018-August 2019.

in expensive real estate markets. Furthermore, many CLTs also suffer from legitimacy in the eyes of the citizens they serve, by often failing to make a strong commitment to democratic control through increasing and emphasizing resident participation. As I discussed in the last Chapter, although the tripartite board model offers exciting possibilities for democratizing housing both within and beyond the CLT, the actual practice is that 55% of CLTs in the US do not have active residents on their boards though the bylaws they have adopted (in many cases) ought to ensure and structure the 1/3 resident model.[577]

I explore the first issue of entrenchment and integration into law, policy and practice of US federal, state, and local levels through an analysis of important CLT advocacy and legislation working to address different aspects of the model with regard to the influence over and access to beneficial financing and taxation regimes. The issues of finance and taxation of CLTs is a fundamental challenge to overcome because it effects the model's financial feasibility, and thus integration into mainstream housing policy. The policies towards this end discussed here represent new and emerging ways for CLTs to scale and entrench and thus also catalyze new CPIs, creating greater access to land and capital outside of the standard model of state subsidies and philanthropy, as well as, altering the current mode of tax valuations of CLT owned land which impacts the financial feasibility of projects.

In analyzing this problem of integration, I also look to specific examples of successful (as well as not so successful) CLT-municipal partnership innovations across the US, departing from the insight and assumption that increasing CLT scaling and entrenchment requires strong initial government support. The partnerships explored offer greater embedding of the CLT model in local

577 Y. Sungu-Eryilmaz & R. Greenstein, *A National Study of Community Landtrusts*, LINCOLN INSTITUTE OF LAND POLICY WORKING PAPER (2007).

government policy and practice in the form of: full municipal/CLT partnership (Burlington, Chicago, & Irvine), partial municipal-CLT partnerships (Washington D.C., San Francisco & Berkeley, CA), and quasi-governmental CLT Partnerships, in the form of Land Banking (Albany, NY).

I analyze the second related issue, of the lack of access to land and capital, by addressing the sources and problems of the current funding model, as well as to, explore innovations in alternative finance such as that offered by the East Bay Permanent Real Estate Cooperatives (Oakland, CA) & the Community Bond (Toronto, Canada). Finally, to address the issue of democratizing CLT boards and increasing resident participation, I consider the criticism levied against CLTs as not being "democratic enough" and consider the relationship between decommodification and democratization and its effect on long-term vs. short-term democratization. Finally, this Chapter builds towards the proposal presented in Chapter 9, of the potential for utilizing the CLT as a platform for a "Shared Limited Equity Housing Policy for All," and the challenges necessary to advancing a universal program for the decommodification of housing through the CLT, which ends the treatment of housing as an investment and permanently removes it from the speculative market, not only for those of low to moderate income, but for people of all incomes. The argument advanced in this section is that when housing is advanced for all people universally as a right rather than a means-tested privilege (remember Esping-Andersen's social democratic welfare state discussed in Chapter 2), it becomes possible to achieve the full decommodification and democratization of housing as a fundamental resource, and thus the transformation of capitalist social relations.

8.2 Improving CLT Entrenchment in Local, State and Federal Government

As hopefully demonstrated by the previous Chapter, CLTs have the greatest potential among the shared limited equity institutions analyzed to both decommodify and democratize housing, and in this sense represent the CPI most capable of "re-embedding" the market in the Polanyian sense and breaking the chain of market imperatives towards a new social form in the Political Marxist sense. However, in order to achieve *widespread* decommodification and democratization of housing, CLTs must achieve greater *scale* and *entrenchment* in the key institutional contexts of housing (rules, practices and functions around housing policy and provisioning). The market and market-rate provision of housing in the creation of affordable housing is a norm deeply engrained in the policies and practices of local, state, and federal public and private institutions. Therefore, for CLTs to achieve entrenchment in policy and practice at these levels, CLTs must act directly to widen their sphere of influence over the political process, and thus increase access to key resources like land and financing, as well as indirectly by creating relationships to key government agencies at state and local levels (i.e. planning and tax departments) and to private and public finance institutions.

Earlier in Chapters 6 and 7, the CLT was compared to such catalyst institutions as *Stadtbau* in Germany and SBC and HSB in Sweden. These organizations have achieved long-term institutional embeddedness overtime that CLTs lack in most places, which to a great extent is explained by the governmental and quasi-governmental role that they both play in their different national contexts. *Stadtbau* is an official state agency of Germany and SBC and HSB in Sweden were formed post World War I (1916 & 1926,) acting in a quasi-government capacity for the provision of housing for Swedes. For example, *Stadtbau* in the case of *baugruppen* had the direct authority to provide access to municipal land at rates

below market rate to citizen organized build groups, which was a key factor in making these projects financially feasible. CLTs on the other hand, other than in places like Vermont, Irvine & Boston (cases I will discuss in this Chapter), have a much work ahead of them before they are capable of achieving a level of integration which places them in a central position of decision making with respect to local urban planning, much less, to become responsible for land allocation directly.

However, this is not to say that CLTs have been entirely unsuccessful in gaining access to resources and influence at local, state and federal levels. In fact, while CLTs in most places are not as deeply entrenched institutional actors as in places like Vermont and Irvine, they have become over time an accepted though minority player in the affordable housing landscape. This was primarily the result of advocacy that individual CLTs and state and national CLT networks pursued at federal, state and local levels. This advocacy has taken the form of activities as varied as: building partnerships with federal, state and local governments and policy makers towards creating policies favorable to CLTs; building coalitions with other housing organizations and housing advocates; and building good relationships with banks and loan providers. I argue that these efforts and partnerships are a far better indicator of the successful entrenchment of CLTs than any formal black letter legal reforms and attempts to codify the CLT at the Federal and State level, though these efforts will also be discussed. While legal reforms have advanced the model, what the story of both local and federal legislation on CLTs reveals, is that it is only by converting legal reforms into practice that they could be realized in reality. In addition to analyzing key legislation both at the federal and state level, this section will focus on major policy innovations pioneered by CLTs in partnership with city and state governments across the

United States to scale and entrench non-market housing and the social valuation of property through the CLT model.

8.2.1 Legal Reform: Federal and State CLT Legislation

As discussed in the previous Chapter, the legal structure which renders the CLT distinct from other Commons Property Institutions is its unique combination of utilizing both associational and property law to restrict transfer at below market-rate and to cap equity, thus removing land and housing permanently off the market, as well as, by creating democratic decision-making structures through its non-profit board made up of 1/3rd residents. To reiterate, this is accomplished through: 1) the non-profit purpose to serve the affordable housing needs of those of low to moderate income; 2) the democratic tripartite board structure; 3) the 99-year Covenant; and 3) the split in title between the ownership over land and ownership of the buildings or "improvements" through the ground lease.[578] As discussed in the previous Chapter, CLTs are truly a bottom-up private law innovation, and is highly reflective of its lack of entrenchment through top-down regulation especially at both federal and state levels. New Communities Inc, the first CLT was formed in 1960, and many others following thereafter, with over 250 CLTs nationwide today, however it took decades before the CLT model was codified into law at both state and federal levels, and many states even to this day still do not have any unified legislation governing CLTs. At the federal level, it wasn't until as late as 1992 that the CLT was defined in the *Cranston-Gonzalez Act*, an Act passed by Congress as part of a much larger affordable housing bill[579]of which the CLT was only a minor portion. The *Cranston-Gonzales* Act's primary purpose was

[578] Sungu-Eryilmaz & R. Greenstein, *A National Study of Community Landtrusts*, supra note. 578. The Lincoln Institute Survey CLTs rely on this mechanism as their largest funding source.
[579] Cranston-Gonzalez Bill Sec. 212 Housing Education and Organizational Support for Community Land Trusts Amendment to the National Housing Act 42 U.S.C 12773.

not to write a specific form of CLTs into law (which was perhaps its secondary purpose) but rather to include CLTs among the organizations that could benefit from federal funding of affordable housing (specifically its HOME program). In the Act (SEC. 212(3)(f)(3-5)), CLTs are defined as the following:

3) A non-profit, that:
    a. "acquires parcels of land, held in perpetuity, primarily for conveyance under long-term ground leases."
    b. "transfers of ownership of any structural improvements located on such leased parcels to the lessees; and
    c. "retains a preemptive option to purchase any such structural improvement at a price determined by a formula that is designed to ensure that the improvement remains affordable to low-and moderate-income families in perpetuity."
4) "Whose corporate membership is open to any adult resident of a particular geographic area specified in the bylaws of the organization; and"
5) "Whose board of directors-
    a. Includes a majority of members who are elected by the corporate membership; and
    b. Is composed of equal numbers of:
        i. Lessees pursuant to paragraph 3(B),
        ii. Corporate members who are not lessees, and
        iii. Any other category of persons described in the bylaws of the organization."

Comparing this legislation to the classic tripartite CLT model, this model requires the CLT board to run as a membership organization, meaning that its corporate membership is open to all and the membership is responsible for

electing the board. In this sense, it is more restrictive than the classic tripartite model, which does not mandate a specific procedure for the selection of the board. However, the board composition in the *Cranston-Gonzales* definition is looser in its "tripartite requirement" of including the community in the sense that it does not require 1/3 community members. Once could interpret "corporate members who are not lessees" to mean "community member" in the sense that corporate members could be "any adult resident of a particular geographic area specified in the bylaws of the organization"[580] and if they are not lessees but are members who live in the geographic region of the CLT then by default they must be from the "community." Furthermore, this definition does not require 1/3 technical experts, but rather "any category of persons described in the bylaws of the organization."[581] One could also understand this to be "experts" given that the only need to include someone from outside the geographic area and not a lessee is likely their expertise (technical, financial, legal), however the inclusion of experts like community members is not mandated by the definition.

Of the 250 CLTs in existence today, very few follow the *Cranston-Gonzales* model,[582] and even among CLT practitioners it is little known. Very few CLTs have adopted the tripartite model (30% of all CLTs),[583] in both strict and loose versions, and more popularly in the loose version which doesn't require all seats to be dedicated to each category nor to filled at all times or at any time, which means that most likely very few CLTs have adopted the *Cranston-Gonzales* membership model.[584] Furthermore, it appears that few states have codified this definition in their own legislation.[585] However, while the definition may have little practical

580 *Ibid.*
581 *Ibid.*
582 *Ibid.*
583 Sungu-Eryilmaz & R. Greenstein, *A National Study of Community Landtrusts*, supra note. 578.
584 *Ibid.* The survey however does not ask about the Cranston-Gonzales membership model.
585 For example California has not codified the definition in the state law definition of CLTs.

function (except for the CLTs that adopt this model) it does important work in both: 1) advancing an ideal of democratic CLT governance, which may better ensure democratic practices within CLTs and; 2) in opening up a new channel for federal financing of CLTs (discussed in the next section). Addressing the first, the potential danger of a CLT that does not operate as a membership organization is that it runs just like any other non-profit affordable housing developer with a self-perpetuating board whose composition is decided less on the basis of community and resident representation, and rather the self-interest of board members, or less pernicious, but more common, based on the ability of board members to fundraise and influence local government policies and politics. Ultimately this can lead to monopolizing the organization's decision-making by professionalized elites and local government bureaucrats thereby depleting the potential of the CLT to act as democratic organ for regular citizens to intervene in local community development. I will return to this issue later in this Chapter when I look at the problems that many CLTs face with regard to maintaining democratic resident-controlled membership.

On the other hand, moving to the second contribution made by the *Cranston-Gonzalez* Act, it did important work in changing the former exclusion of CLTs from access to federal funding for the creation of affordable housing. Similarly, as will be discussed in the next section, California legislation which defined CLTs for the first time in California law, AB 2818, rather than being concerned primarily with a formal legal definition of CLTs, was aimed at changing the practice of tax assessment of CLT land. The history and experience of both of these federal and state legislative acts reveals the extent to which altering government practice through continuing and ongoing advocacy, rather than through formal codification, results in longer lasting and greater institutional

entrenchment of the CLT model, and by extension the decommodification and democratization of housing.

8.2.1.1 Cranston-Gonzalez: HOME Investment Partnerships Program

The 1990 *Cranston-Gonzalez* act authorized the creation by the Department of Housing and Urban Development (HUD) of an affordable home ownership assistance program called the HOME Investment Partnerships Program. The HOME program awarded block grants to municipal and state jurisdictions for the creation of affordable housing aimed at very low, low, and moderate income residents in a variety of ways: new construction, preservation of existing housing stock, as well as, direct rental assistance to those of low income. Around 60% of the funds are allocated to municipalities, whereas 40% is allocated to states, with both required to match the funds provided by 25% of all grant funds.[586] The fund also mandates that 15% of the grant must be allocated to support Community Housing Development Organizations (CHDOs).[587] *Cranston-Gonzales* included Community Land Trusts among these types of organizations and certified CLTs as CHDOs in order to gain access to HOME funds. Interestingly, the act's requirements for a CLT to be recognized as a CHDO were not the same as the CLT meeting the definition of a CLT membership organization under the Act, instead the CHDO requirement codified in the HOME program Regulations 24 CFR 92.2 only required that a CLT meet the requirement of a community housing development organization (CHDO) in that it:

> "maintains accountability to low income community residents by: (i) maintaining at least one third of its governing board's membership for residents of low-income neighborhoods, other low-income community

[586] https://community-wealth.org/strategies/policy-guide/home.html (Last Visited January 5th, 2020)
[587] *Ibid.*

> residents, or elected representatives of low-income neighborhood organizations. For urban areas, community may be a neighborhood or neighborhoods, city, county, or metropolitan area.; for rural areas it may be a neighborhood or neighborhoods, town, village, county, or multi-county area (but not the entire state); and (ii) Providing a formal process for low-income program beneficiaries to advise the organization in its decisions regarding the design, siting, development and management of affordable housing."[588]

One would assume under this definition that first CLTs must meet the definition of CLTs under the act as a membership organization, then secondly to meet the definition of a CHDO, but instead CLTs were treated like any other non-profit seeking CHDO status: so long as they met the CHDO definition they could access HOME federal funds.[589] This led to a divergence between the codified definition of CLTs and the practice of how organizations were in practice treated as CLTs to receive the benefit of the funding made possible by the Act. As one can see from the discussion in 8.2 on the financing of CLTs, federal funds are the second most important source of revenue for CLTs (19% compared to the 22% from CLT program fees). The HOME program is one of three important programs run by HUD for maintaining affordable housing in the United States, and up until quite recently, HOME CHODO funds were an important way for CLTs to fund projects, some even attributing such funds to being a major factor in explaining the boom in CLT growth from 100 CLTs prior to the *Cranston-Gonzales* Act to 250 CLTs today.[590] In this vein, still others have done research which connects the growth of CLTs to changes in CLT access to federal funds,

588 HOME program Regulations 24 CFR 92.2 9(i) & (ii).
589 This was clarified in a 2001 memo from HUD: "For the purpose of receiving CHDO set-aside funds to produce HOME-assisted housing, CLTs must undergo the same designation process as any other nonprofit organization seeking CHDO status." (See CPD Notice 97-11, "Guidance on Community Housing Development Organizations (CHDOs) under the HOME Program.").
590 Annelise Palmer, *Strategies for Sustainable Growth in Community Land Trusts*, HARVARD JCHS, (2019), p. 5.

with declining growth of CLT development attributed to cuts in federal funding, further demonstrating the importance of federal funds to CLTs.[591] Furthermore, for some places where a CLT may be the only CHDO developer in that jurisdiction eligible for those funds, the CHDO status provides a path to deeper entrenchment in local government practice and policy.[592] What the history and practice of the *Cranston-Gonzales* Act, up until very recently reveals, is that while very few CLTs meet the formal definition of a CLT under the Act, the majority of CLTs not meeting this definition became beneficiaries of federal funding through this Act. In recent years, however, major cuts to HOME funding haven taken place, altering its impact in the more recent development of CLTs.[593] In 2013 an important change was made to the Home program regulation, which made many CLTs de facto ineligible to receive HOME funding. Whereas the *Cranston-Gonzales* Act explicitly stated that a CLT, "Is not required to have a demonstrated capacity for carrying out HOME activities or a history of serving the local community within which HOME-assisted housing is to be located," in 2013 this was replaced with a new criteria for access requiring CLTs to demonstrate:1) the presence of existing staff with previous experience with HOME projects, and 2)to have been serving the local community within which the HOME assisted housing is to be located for at least one year.[594] This effectively prevented new CLTs formed after 2013 from

591 *See* Emily Thaden, "The State of Shared-Equity Homeownership" Shelter Force Article May 7th, 2018. https://shelterforce.org/2018/05/07/shared-equity/. *See also* John E. Davis, *Shared Equity Homeownership: The Changing Landscape of Resale Restricted, Owner Occupied Housing*, NATIONAL HOUSING INSTITUTE (2006).

592 Palmer, *supra* note. 591 at p. 17. Interview with One ROOF CLT in Duluth.

593 *Ibid.*

594 *Supra* note. 589. (9) A demonstrated capacity for carrying out housing projects assisted with HOME funds. A designated organization undertaking development activities as a developer or sponsor must satisfy this requirement by having paid employees with housing development experience who will work on projects assisted with HOME funds. For its first year of funding as a community housing development organization, an organization may satisfy this requirement through a contract with a consultant who has housing development experience to train appropriate key staff of the organization. An organization that will own housing must

becoming eligible for HOME grants, an aspect of the *Cranston-Gonzales* Act which previously had spurred the CLT's growth nationally.[595]

What the story of the *Cranston-Gonzalez* Act demonstrates is that while the formal definition of CLTs did little to institutionally entrench CLTs through law, in the sense of creating effective legislation utilized in practice, it did provide an important step towards its greater institutional entrenchment of CLTs in creating greater access to federal finance.[596] In this way, the Act spurred growth indirectly, rather than directly contributing to the replication of the exact model defined in the Act, instead the Act stimulated scaling and replication in a different way by providing for a mechanism for start-up funding for a broad range of CLTs (not meeting the definition of a CLT in the Act itself but meeting the definition of a CHDO). However, what the recent history of the demise of key provisions of the Act (and their budgets) demonstrate is that greater institutional entrenchment at the federal government level is still needed. Such entrenchment should be accomplished not with the primary purpose being to establish a standard definition of CLTs, which would act to exclude many CLTs that adopt different variations of the tripartite and membership model, but instead with the goal of creating a direct funding source for CLTs within a broad definition, but one exclusive to CLTs, rather than through the happenstance definition as a CHDO organization, which ultimately, as this section argues, led to its demise.

demonstrate capacity to act as owner of a project and meet the requirements of §92.300(a)(2). A nonprofit organization does not meet the test of demonstrated capacity based on any person who is a volunteer or whose services are donated by another organization; and (10) Has a history of serving the community within which housing to be assisted with HOME funds is to be located. In general, an organization must be able to show one year of serving the community before HOME funds are reserved for the organization. However, a newly created organization formed by local churches, service organizations or neighborhood organizations may meet this requirement by demonstrating that its parent organization has at least a year of serving the community.

595 *Supra* note. 589.

596 *Ibid.*

8.2.2 CLT Network Advocacy in California: From AB 2818 to SB 196

The institutional entrenchment of CLTs through law at both federal and state levels reveals an uphill battle requiring ongoing advocacy and coalition building. Governments and property owners are unsurprisingly resistant to the non-market-based provisioning of housing, even when it is administered for a non-profit purpose for the benefit of those of low and moderate income. Central to overcoming such resistance at both national[597] and state levels has been the work of CLT advocacy networks. One of such organizations is the California Community Land Trust Network (CACLTN), a completely volunteer run network which began in 2012 and officially incorporated in 2016, the same year the network's Policy Committee successfully passed AB 2818, the first California statute defining the CLT in state law.[598] The primary aim of this legislation, like the case of *Cranston-Gonzales*, was initially not to codify the CLT in CA law, but rather to reform the formula for the tax valuation of CLT owned land, which constantly threatened to making the CLT model financially unsustainable by adding tax expenses to the monthly cost of residents, which are not reflective of the property's

[597] The National Community Land Trust Network which began in 2006 with the help of the Cambridge MA based Lincoln Institute, merged in 2016 with the Cornerstone Partnership to create the Grounded Solutions Network. This network provides educational, technical and training support to all CLTs nationwide and is also involved in important advocacy work both at the national and individual state level. In addition to the national network many states have their own CLT networks which provide similar support to umbrella CLTs, as well as, pursue important state-wide legislation.

[598] AB 2818's amendment to section 402/1 of the Revenue and Taxation Code, definition of CLTs is wider than the Cranston Gonzales definition of CLTs and CHDOs. CLTs are defined as a "non-profit corporation organized pursuant to Section 501(c)(3) of the Internal Revenue Code that satisfies all of the following: 1) "Has as its primary purpose the creation and maintenance of permanently affordable single-family or multi-family residences," 2) "All dwellings and units located on the land owned by the nonprofit corporation are sold to a qualified owner to be occupied as the qualified owner's primary residence or rented to persons and families of low or moderate income"; 3) "The land owned by the nonprofit corporation, on which a dwelling or unit sold to a qualified owner is situation, is leased by the nonprofit corporation to the qualified owner for the convenient occupation and use of that dwelling or unit for a renewable term of 99 years."

actual value for neither individually for CLT residents not the CLT as the non-profit owner.

AB 2818 was aimed at amending Section 402.1 of the CA Revenue and Taxation Code to include in its valuation, enforceable resale restrictions in the tax assessment of CLT owned properties.[599] The bill proposed to utilize the price of the transaction of the resale restricted price of land and buildings together since this represents the only valuation which takes into account the effect of the resale restrictions on the market value, however this eventually became diluted in its final form which led AB2818 to be held up for interpretation by the California Board of Equalization responsible for property tax assessments.[600] Prior to 2818, resale restrictions were previously unaccounted for leading tax valuations to be based on the market rate or appraisal value of land and "improvements" (buildings) together or separately, or some other valuation of housing such as the value of comparable land or the total aggregate value of ground leases collected by CLTs. These valuations were wholly inappropriate, particularly the approach of aggregating ground leases because the "rent value" of the ground lease does not in any way represent the value of the conveyance of the property, i.e. a use entitlement to the lessee along with a conditional transfer entitlement (conditioned on at below market rate and to those of low and moderate income). Instead as explained before the "rent" in a "ground lease" is a nominal fee, which neither represents the underlying value of the land or housing even with affordability restrictions, but rather a kind of highly subsidized administrative fee charged by the CLT for providing oversight assistance.[601] AB 2818 was incredibly important in advancing an alternative approach which emphasized the resale restricted character of CLT

599 Section 402.1 reads "In the assessment of land, the assessor shall consider the effect upon value of any enforceable restrictions to which the use of the land may be subjected."
600 *Ibid.*
601 Earlier reference to the ground lease on p.311-312 of this dissertation.

owned homes and thus the need for an alternative property tax valuation, thus entrenching the non-market valuation of CLT land into law. However, even after the passage of AB 2818, the transformation of the practices of tax valuations proved even more difficult than the passage of the bill itself.

Since AB 2818's passage in 2016, unfortunately the approach advanced was never applied because it continues to this day to held up for interpretation in the California State Board of Equalization (BOE).[602] The BOE is a state public agency responsible for tax administration and fee collection. The interpretation of the BOE, as well as of individual assessors, as reflected in different documents transmitted to interested parties is riddled with the many confusions about the legal function of the ground lease,[603] the land trust model in general,[604]and advances a contradictory market-based valuation based on the capitalization rate called the "band of investment" technique. The band of investment technique in particular, reflects the attempt by the BOE to reject the non-market valuation approach of utilizing the resale price once the resale restrictions have been taken into account, instead attempting to argue that the aggregate of "ground lease" payments constitute "income" and therefore an income capitalization approach as applied to market-rate rental income is appropriate. This of course assumes that capitalization of CLT rents occur under market conditions, unlike the actual way in which ground leases are valued based as discussed above. The BOE argues that in this case, following CA Property Tax Rule 9(g)(2), "assessors should look to the California

602 *Ibid.*

603 Revised Draft to reflect Interested Parties Meeting, July 20, 2019. In an earlier Memo, the BOE characterizes the ground lease as rent equivalent to rent paid on market-rate rental property which is the bases for the band of capitalization approach.

604 In another memo, an Assessor suggests that land can revert back to the land trust and therefore the Land Trust holds "Fee simple reversionary interest," which "could be used in anyway that the land trust sees fit" completely misunderstands the land trust model where the land is held in perpetuity off the market and cannot "revert back" in the technical sense which would give the Land Trust the ability to transfer the property at market rate.

money markets to derive weighted averages of capitalization rates for debt and for equity capital, and, under the legal doctrine that the absence of an 'actual market' for property does not mean that it has no value, should weight those rates in such a way as to reflect the rates that might be employed by hypothetical prospective purchasers."[605] To support this point they refer to the case of *Kaiser Co. v. Reid* (1947), a case of valuation of a property without any resale restrictions and therefore easily distinguishable from the case of CLT owned property.[606] The CACLTN responded to this argumentation in a 2019 Memo to the BOE arguing instead that using California Money Markets is inappropriate because money markets are based on returns from private capital, whereas the "investments" in CLT land is a grant or subsidy in the form of a low interest or no interest loan which is "invariably forgiven" by the lender.[607] "In short, the fundamental economic precepts of California money market funds are diametrically in opposition to the funding used to acquire CLT land. The underlying CLT land acquisition transaction has been structured to remove (as much as possible) all of the market pressures imposed by capital (either equity or financing (…)."[608] In sum,

[605] *Supra* at note. 604.
[606] *Kaiser Co. v. Reid* 30 Cal.2d 610 (1947).
[607] The rates tracked in the California money markets, in the main, reflect municipal and utility district bonds which are specifically structured to provide a stable rate of return *of* and *on* the investment. The sources of capital for these bonds are typically private capital which expect a competitive rate of return. They are in short, loans. In contrast, the 'investments' in CLT land are *necessarily* grants, due to the extremely long term of the land lease restriction, and the inability of the land lease payments to provide *any* return of or on the 'investment'. *In some cases*, the land acquisition funds are nominally structured as loans (secured by a Deed of Trust tied to some form of affordability covenant or regulatory agreement) *but they are invariably forgivable* by the lender, which is almost always a governmental entity (such as a state or local housing department). The source of these 'investment' funds are correctly characterized in the draft LTA as HOME, CDBG, and a variety of state and local sources. In a few rare instances, the source is from private grants or philanthropy (such as in a 'bargain sale' to the CLT, or an outright grant from a foundation). From CACLTN Network letter Comments on draft LTA regarding Assessment of Community Land Trust Housing: California Community Land Trust Network Members' Comments to the Draft LTA- Posted June 26, 2019- Regarding Assessment of Owner-Occupied Homes in Community Land Trusts, p.2.
[608] *Ibid.*

what is being argued here is that CLT land and housing cannot be valued according to normal market concepts of valuation because public and private subsidy invested in removing it from the market make it impossible to assume a market-value absent a market particularly when any prospective purchaser of the rental property is limited in its ability to collect normal market-rate rents due to the subsidies invested towards a non-market non-profit charitable purpose.

Since 2016, the CACLTN network engaged in a series of "Interested Parties" meetings with the BOE to advocate for the approach of "resale restricted price" over the "band of investment" approach, however it continues to be held up for interpretation, thereby making it currently inapplicable to CLT tax valuations, even when a majority of California assessors have agreed that they could accept the AB 2818 approach. In order to settle the interpretation of the appropriate formula once and for all, the CACLTN network finally passed a legislative fix to AB 2818 through SB 196 in 2019, a bill which provide a property tax exemption for CLT owned land for the development period of a property (from the point of acquisition and rehab to the point of sale). Included in SB 196 is the provision that "For purposes of this paragraph, the sale or resale price of the dwelling or unit is rebuttably presumed to include both the dwelling or unit and the leased land on which the dwelling or unit is situated. This presumption may be overcome if the assessor establishes by a preponderance of the evidence that all or a portion of the value of the leased land is not reflected in the sale or resale price of the dwelling or unit." [609] The hope is that this provision will make the default interpretation the one advanced in AB 2818, and to clarify that the legislative intent was to advance the "resale restricted price" over any other

[609] http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB196 (Last Visited January 5th, 2020).

formulation, however even with the passage of these two pieces of legislation, there is still continuing confusion within the BOE though they are set to provide final clarification in January of 2020.[610] What this section was intended to demonstrate is that work of such networks such as CACLTN is critical to advancing the entrenchment of the CLT model at the state level, as well as to demonstrate the incredible resistance of local and state governments in non-market valuation of CLT owned property even after formal law was passed.

8.2.3 Full Municipal-CLT Partnerships

While in general many local and state governments are unfamiliar and even resistant to the CLT model as revealed above, there are some places in the U.S. that have embraced a full partnership between local governments and CLTs. A full-partnership for our purposes, is defined as to go beyond mere joint policy work (see next partial municipal-CLT partnerships), but instead where the CLT acts simultaneously as an independent non-profit entity while being treated almost like a public agency by its local government, directly involving it in city land use and planning decisions and/or providing a stable budget allocation for both its development and operational costs. The most prominent examples of this type of model exist in Burlington (VT), Chicago (IL), Boston (MA), and more recently in Irvine (CA). Here I will discuss these four examples looking specifically at the way that CLTs in these cities have become fully entrenched in the policies and practices of their respective municipalities.

8.2.3.1 Burlington, Vermont: Champlain Housing Trust

[610] The Board of Equalization is set to provide a "Letter to Assessors" (November, 2019) providing their recommendations on the formula for valuation.

The Champlain Housing Trust (CHT) is one of the largest CLTs in the US stewarding 2,200 rental units and 612 single-family residences.[611] CHT accounts for roughly 16% of all CLT rental units in the US, and 14% of all CLT homeownership units nationwide (and possibly more since this was based on the last 2011 nationwide survey).[612] From its formation in 1994 the Champlain Community Land Trust (formerly the Burlington Community Land Trust) was a municipal led (as opposed to non-profit driven) initiative. The then sitting city council and mayor (Bernie Sanders, Vermont Senator) awarded a 200,000 Seed Grant for the establishment of the Land Trust. In the same year, Lake Champlain Housing Corporation was established to manage affordable rental properties, and the two organizations eventually merged into the Champlain Housing Trust (CHT) in 2006. The Institute for Community Economic Development, a national organization responsible for much of the research and conceptualization of the CLT Model, and the City of Burlington, through its office of Community Economic Development Office (CEDO), collaborated to establish CHT as a 501(c)(3) nonprofit with the classic CLT tripartite governance model. The adoption of this model together with full municipal support and backing over a period spanning a little over a decade, allowed for greater independence for CHT to develop as a community organization, rather than as a municipal organization (compare with later examples like the Irvine Community Land Trust).

CHT retained the dual ownership model of the ground lease and resale restrictions (except in the case of condos it retained through zoning or other arrangements), and the ability to retain a preemptive option to repurchase any

611 Burlington Associates: http://www.burlingtonassociates.com/#!/resources (Last visited March 23, 2019).
612 These numbers may have changed since the last 2006 national survey due to the explosion of the model over the last 9 years.

residential structures located on its land.[613] This preemptive right, as discussed in Chapter 7, provides CLTs with the ability to retain its non-market housing stock and to ensure permanent affordability by guaranteeing that resale restrictions passed on to future buyers of the homes. The resale formula for CHT is based on an appraisal based formula, which allows homeowners to recoup their original down-payment, any equity earned towards paying off their mortgage, the value of any pre-approved capital improvements made by the homeowner, and finally a 25% of the appreciation value calculated by the difference in appraisal price at the time of purchase and the time of sale.[614]

The reasons that the City of Burlington moved towards a third-sector housing policy, as opposed to a public housing policy, cannot be separated from the national political climate of Reaganism and the general shift in the US to market-based solutions for affordable housing. Within his first year of office, President Reagan drastically cut federal grants for housing, effectively cutting off a critical lifeline of funding for small cities and towns like Burlington across America. In this context, many public housing developments went bankrupt and were demolished or converted into market-rate housing, and new affordable housing production became close to non-existent. Some small cities like Burlington, however fought back, and while the rest of the country had swung to the right, Burlington was growing the beginnings of the first "Sandernista"[615] movement to decommodify housing however using a model which was not entirely based on public funding. The movement leading up to the creation of CHT included not only Sanders and progressive City Council members "the Progressive Coalition,"

[613] John Emmeus Davis & Alice Stokes, *Land in Trust Homes that Last: A Performance Evaluation of the Champlain Housing Trust*, Champlain Housing Trust Report. p.9-10
[614] *Ibid.*
[615] Named after then Mayor Bernie Sanders, who more recently is associated with the "Our Revolution" movement and candidate of the 2020 democratic presidential primary.

but also neighborhood activist groups like Vermont Tenants Inc, (VT).[616] These progressive forces in Burlington managed to pass, in addition to the creation of CHT, a number of pro-tenant, fair access and anti-displacement measures.[617] One of the most important measures was the revitalization of the Burlington Housing Authority (BHA), which was responsible for public housing for 347 households in Burlington (all what remained of federal section 9 housing voucher programs).[618] Through the Sanders government, the BHA became a more democratic organization with tenants added to its board, and also aimed explicitly at decommodification- the removal of land and housing off of the speculative market (and really the market in general). However, rather than invest in BHA further to carry out an entirely government led and public funded effort to decommodify housing through public housing, the Sanders government turned to a third sector housing policy in creating CHT. The reasons for this are well documented by John Emmeus Davis, a CLT scholar who was one of the founders of CHT and the CLT movement, as well as Ex Housing Director of Burlington. He documents the central reasons for switch to a third sector housing policy:[619]

1) Federal funds for affordable housing had dried up and local funds were limited, and new innovative ways to raise money outside of public subsidies were emerging, as well as ways in which to retain the value of public subsidies over time, were needed.

[616] John Emmeus Davis, *Building the Progressive City: Third Sector Housing in Burlington*, (1990), p.6-7. https://ecommons.cornell.edu/handle/1813/40513
[617] *Ibid.*
[618] *Ibid.*
[619] *Ibid.* at p. 3.

2) There had been some bad experiences of public housing in Burlington both in their quality, as well as, their ability to maintain affordability permanently.[620]
3) It was more politically appealing to start a new model that was neither purely public nor private, but instead non-profit. Both those on the right and the left could support third sector housing.
4) There was a need to retain stability and continuity of affordable housing even with changes in government political composition and swings from right to left and left to right. A third sector independent organization that was committed to decommodification could accomplish permanently affordable housing immune to political changes.

While CHT operated as an independent rather than a municipal organization, it continued to be fully integrated in Burlington's housing policy as explicitly reflected in policy created in the 1980s and 90s (with continuing effect to this day), which in addition to making CHT an arm of the government ensured: 1) significant and stable commitments of financial support allocated from both state and local tax funds; 2) the creation of new forms of financial support such as lines of credit, acting as an intermediary in creating relationships with local and state lender, and normalizing loans for non-market real estate; 3) staff and project support in terms of capacity supplied by the city, as well as, 4) funds for operational budgets to support its own independent staff. [621] While all of these forms of support

[620] *Ibid.* An example of this was the Northgate apartments, a federal subsidized 336 unit rental-complex whose 24 year rent restriction proved to be inadequate protection against declining subsidies and vulnerable tenants. Ibid, p.9.
[621] *Ibid*, p.12-14. "The Report and Recommendations made it clear that the notion of perpetually affordable housing had entered, by 1996, the mainstream of Burlington's ongoing housing debate; various models for making such housing a reality had moreover become favored contenders for municipal support. By 1999, these models had become such a mainstay of the City's policies and programs that CEDO added the "decommodification of housing" to the operational goals of its mission statement, declaring that "housing that is made affordable today, using sizeable public or private | subsidies, will only remain affordable if limits are placed on the profits that property

underwent their heyday in a twelve-year period between 1980-1992, what is impressive is that even with a conservative government voted into office thereafter in 1993, much of the infrastructure survived the political regime change and even remains to this day. Within this period over 900 housing units were brought under some form of price control and 1600 units of non-market housing were newly developed. What the CHT experience demonstrates is that a full municipal-CLT partnership, where the CLT retains independence but is fully integrated into city government, is both the fastest and most stable way to scale the decommodification of housing through the CLT model while retaining its community-based democratic character.

8.2.3.2 Boston, Dudley Neighbors Inc.

The Dudley Neighbors Inc. (DNI) formed in 1999 as a corporate subsidiary of the Dudley Street Neighborhood Initiative (DSNI), a membership organization with a thirty-five person board representing the city, residents and community members. DNI is a 9 person board composed of 6 members of DSNI, four of whom are residents, with the remaining three appointed by the Roxbury City Council, District City Council Person, and the Mayor. While DNI does not utilize the classic tripartite board model, it holds elections for its corporate mother organization DSNI every two years, thus retaining the democratic character of its organization

owners may remove from their increasingly valuable commodity." The final stage in this multiyear process of incorporating perpetual affordability into the institutional fabric of Burlington's municipal policy was to make perpetual affordability, limited equity housing, and nonprofit development an explicit part of both the City's municipal plan and the City's Comprehensive Housing Affordability Strategy (CHAS). On May 3, 1991, the Burlington Planning Commission adopted a revised Municipal Development Plan that included among its housing policies the declaration that "the City of Burlington will . . . support housing models, organizations, and programs that insure perpetual affordability." There are no less than nine references in the plan to the need for municipal support for such "models, organizations, and programs."

absent the formal tripartite model. DNI's impetus for development was very different from CHT, in that DNI came out of long history of neighborhood activism and opposition to a city redevelopment plan which failed to consult the community. DNI presents an extremely interesting case of a CLT-municipal partnership with a unique form of integration into the local government: while their formation was entirely independent from the City of Boston, unlike CHT, DNI eventually came to exercise governmental powers like the power of eminent domain (discussed in Chapter 6). This means that Dudley (through its status as an Urban Redevelopment Corporation) not only came to influence government policy and tax allocation, as in other CLT-municipal partnerships, but today actually directly exercises government power. While initially city officials had a rocky relationship with the neighborhood activist organization, today they are DNI's most ardent supporters. According to Hernandez, the DNI's Director,

> "On a bi-weekly basis, we look at parcels of land that the city is looking to get off their books but want to place in the right hands. They approach us and say, 'We will give (these parcels of land) to your organization if you intend to generate affordable housing on them.' And that's the cycle; they give us parcels of land. The city then remains a partner at the table by subsidizing the costs of development."[622]

What this reflects is that DNI in addition to exercising the power of eminent domain, collaborates with the City of Boston to provide direct access to land and subsidies for development, which goes beyond the powers exercised by CHT. In addition, its independent and community driven formation offers the unique benefit of allowing DNI to retain a truly democratic character, which some

[622] Palmer, *supra* note. 588 at p. 17. *See also* PETER MEDOFF AND HOLLY SKLAR, STREETS OF GLORY: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD (1991).

suggest CHT lacked. This will be discussed in more depth in the later section on democratic resident control.

8.2.3.3 Irvine Community Land Trust

In governance and property structure, the Irvine Community Land Trust is a non-profit that utilizes a dual ownership structure of the 99-year ground lease. Unlike Burlington's CHT, however the re-sale formula is not based on a % cap of appreciation of the appraisal price but rather the % change in the AMI for the surrounding area over the time of homeownership times the initial purchase price. As discussed in Chapter 6, this formula has the benefit of guaranteeing greater affordability than the appraisal based formula for the next generation of buyers, while having other downsides.[623] Furthermore, unlike the classic CLT model and like the Chicago Land Trust, Irvine CLT does not use the tripartite board model, but instead all of its sitting seven members are appointed by the City of Irvine. While there has always been a plan to transition to the tripartite model with two board members appointed by the city as a permanent feature, the idea to transition the other five positions to residents and community members has yet to be implemented due to the fact that Irvine CLT has not reached the 500 units provided for in its by-laws as the threshold for transition.[624]

The Irvine Community Land Trust (Irvine CLT) was created in 2006 in a context of several factors documented by researcher Stephen Miller:[625]

[623] This is reflected in the Tables at the end of the Chapter and in the later discussion comparing the subsidy retention formulas.
[624] At the time this dissertation was published Irvine CLT was just two projects away from reaching this threshold. Interview with Mark Asturias, Executive Director of Irvine CLT.
[625] Miller, *supra* note. 520.

1) A widening income and housing price gap in which the median single home price was substantially higher than its surrounding county and California median prices, while the average median income was lower than the state-wide median.
2) Expiration of existing affordability controls and subsidies on affordable units created from the 70s onwards and a desire to seek a way in which to retain those controls and make them permanent.
3) The City had a historic opportunity to develop the El Toro Marine Corps Air Station into 3,625 new affordable residential units, which however also required that 20% of the tax increment funds generated from the project site be used to improve affordable housing, which the city valued at 143 million. The City sought a way to both develop the new affordable units and recapture this increment for not only affordable housing but permanently affordable housing and the CLT presented the best way forward.

The goal of the Irvine City government was to create 5,000 units by 2025, however this has been slower than anticipated due to a number of factors. Part of the success of Irvine CLT in scaling projects relatively quickly in relation to other CLTs can be attributed in part to the fact that it retained Council people on its board. In addition, as stated by Mark Asturias, Executive Director of Irvine CLT, retaining council people he asserts is important to both retaining continuity with incoming council members as well as its credibility with the local community:

> Having two council members definitely helps in maintaining a positive relationship with the local community. Having the relationship, reminds new Council members that there is a relationship in place and that the reasons for that relationship are strong and of benefit to the City. City representation does not guarantee access to land, financing, tax savings, etc…. Representation allows a land trust to keep a credible relationship with it locality and make it easier to access these resources or at least be

> considered as the first option by the locality when deciding how they will allocate resources.[626]

While Asturias makes clear that City representation does not guarantee access to funding, the continuity provided in passing the baton of representation on the board to incoming members helps to ensure continuity in supporting the policy, as well as necessary financing. In this sense, Irvine CLT is even more of a "full" municipal-CLT partnership than Burlington's CHT, to the extent that while it is incorporated as an independent non-profit, it operates as an extended arm of the Irvine city government. In this position it enjoys both central decision-making power, with regard to Irvine's housing plan, as well as, more stable financial support relative to other CLTs. This is the result of Irvine CLT being given the responsibility of implementing Irvine's housing plan, as well as, in maintaining the city's affordable ownership and rental housing inventory.

While, Irvine CLT operates in many ways as fully entrenched within the city government, its financial support had for a time become more precarious since its inception due to a number of factors resulting in delays to its ambitious target of 5000 units by 2025. The reason for the financial precarity can be explained by: 1) The dissolution of the Community Redevelopment Law, which had originally allocated roughly 30 millions dollars for development, 2) the overall withdrawal of state and federal funding; and 3) the slowdown of the housing market as a result of the recession of 2007-2009, which resulted in fewer units through the inclusionary zoning requirement. This led to the extension of city support for Irvine CLT until 2017, and also to seek grants and private donations towards meeting its plan. Today, as a result of its entrenchment and financial support from the city government for around a decade, it has managed to create more diverse

626 *Ibid.*

sources of funding and has become a fully self-sustained organization no longer funded by the city.[627]

8.2.3.4 Chicago Community Land Trust

The city-wide Chicago Community Land Trust (the Chicago "CLT") was created in 2005 by then Mayor Richard Daley. Chicago CLT was created under slightly different circumstances than any of the CLTs discussed so far, though under similar pressures of a hot housing market, stagnant wages, and decreases in federal and state subsidies. Chicago CLT is a non-profit organization housed at the City of Chicago's Department of Housing and Economic Development. All 19 members of the board are appointed by the Mayor with the advice and consent of City Council. These board members represent: development companies, community-based organizations, banks, the legal community, funders, and others active in affordable housing.[628] The primary method by which Chicago CLT acquires its properties is through the City's inclusionary zoning requirement which requires 10% of units above 10 units to be dedicated as affordable housing or to pay a 100,000 mitigation fee to the City's Affordable Housing Opportunity Fund.[629] There is also further incentive to developers to dedicate an even higher %- up to 20%- in exchange for financial assistance from the City.[630] Another way that Chicago CLT benefits from its full municipal partnership is through its

627 Among its diverse sources- in addition to ground lease fees and rental revenues- is a settlement agreement on a lawsuit that was filed against the state of California. That agreement allows Irvine CLT to use up to 10 percent of the lawsuit funds for operations. The settlement amount was $29.2 million and $2.9 million of this could be used for operations.These funds are distributed over a 12 year period beginning in 2017. (Source Mark Asturias, Executive Director of Irvine CLT)

628 Matthew Towey, *The land trust without land: the unusual structure of the Chicago community land trust.* ABA JOURNAL OF AFFORDABLE HOUSING AND COMMUNITY DEVELOPMENT LAW 18, 335 (2009).

629 *Ibid.*

630 *Ibid.*

relationship with the Cook County Assessor's Office: the assessor agreed to assess property taxes based on the restricted resale price rather than the market value such as the approach advanced in AB 2818.[631]

The city of Chicago has had a long history and commitment to the creation of affordable housing through its Chicago Housing Authority (CHA) and a broader affordable housing portfolio than any of the previous cases: 125,000 units of affordable housing has been created since 1999.[632] One of the ways that the CHA accomplished this was through subsidy recapture, rather than through subsidy retention (as explained in Chapter 6): securing for-sale affordable units through soft-second mortgages which required that the units are resale restriction free. While this created reasonably quick and effective financing for the purchase of affordable units, ultimately the subsidy recapture scheme failed to guarantee subsidy retention and permanent affordability. As discussed in Chapter 6, subsidy recapture eventually leads to subsidy loss, especially without strong resale restrictions: the first generation of subsidy recipients often have the possibility of paying off the mortgage and then repaying the soft-second mortgage back to the City, which meant that in order to assist a second generation to afford the same quality homes at market-value, additional subsidy was required than for the first generation due to the market appreciation of the home and the lack of resale restrictions as a result of the soft-second mortgage. The losses created by subsidy recapture through the soft-second mortgage policy led the City to seek out an alternative that would ensure full subsidy retention in future units. This led to the creation of Chicago CLT and the adoption of a detailed restrictive covenant of 99 years to only those at below 100% AMI renewed at the time of each sale.[633] Chicago

631 *Ibid.*
632 *Ibid.*
633 *Ibid.*

CLT however does not utilize the dual ownership/ split title model where the CLT owns the land and tenant-owner the home, as Chicago CLT never own the land.[634]

However, ultimately the complexity of Chicago CLTs ownership over land, the restrictive covenant absent split in title (as in the classic CLT model), as well as, the lack of City support to fund Chicago CLT led in recent years to mounting criticisms over its effectiveness in creating affordable housing and eventually in 2017 to an Audit recommendation (2017 Audit Report) to remove "CLT" from its name entirely.[635] To Chicago CLTs credit, there were a number of shortfalls in the City of Chicago's effectiveness in managing its affordable housing program in general, such as unaccounted for funds and lack of full commitment to follow through with its promises for financing to Chicago CLT.[636] Some of these shortcomings can be explained by a change in political support which occurred between 2005 and 2017, namely that Mayor Richard Daley, after running and winning five elections in a row, did not run again in 2011 thereby leading to a change in government and the city's affordable housing policies.[637]

The complex restrictive covenant model, while being an effective way for Chicago CLT to ensure permanent affordability became less effective as a result of the 2015 revisions of the City's Affordable Requirements Ordinance, which allowed individuals living continuously in properties for up to 30 years to sell their homes at market rate resulting in losses of affordable housing units to market-rate housing.[638] Secondly, due to the City's lack of financial commitment to CCLT,

634 *Ibid.*
635 Chicago Community Land Trust, Affordable Requirements Ordinance Administration Audit (2017).
636 *Ibid.*
637 *Ibid.*

638 *Ibid.* at p.21: "The 2015 revisions to the ARO specified that deed restrictions will not be renewed at each time of sale and will expire "if the owner of the affordable unit occupies

CCLT could not buy out purchasers of subsidized properties when their properties came up for resale. "CCLT has never had an endowment and has thus been thwarted in its ability to exercise its right of first refusal. In fact, the Trust is considering relinquishing its right of first refusal because it lacks the funds necessary to exercise this right."[639] The 2017 Audit Report in view of the changes made since 2015 recommends either funding CCLT to fulfill its mission of creating permanently affordable housing through the CLT model or disbanding it altogether and merging it into the City's Planning and Development Department.[640]

The experience of Chicago CLT demonstrates that CLTs which are overly dependent upon and integrated into the city government can make them vulnerable to political regime changes until they become self-sustaining as in the examples of CHT in Vermont or Irvine CLT both with regard to the revision of legal mechanisms for ensuring permanently affordability, as well as financing commitments. CHT, unlike Chicago CLT, had a much longer period of incubation under the Sanders government before the political leadership and orientation of the City changed, Chicago CLT's shorter incubation period, combined with its ineffective restrictive covenant, left it unable to pursue its objective. This suggests that a CLT incorporated into City government, must also ensure effective legal

the...unit as his principal residence for a continuous period of 30 years." In other words, ARO units administered by the Trust under the new ordinance will remain affordable for 30 years (unless the owner voluntarily chooses to sell the unit at an affordable price at the end of the 30 years—an unlikely scenario, according to DPD), at which point the owner, who purchased the home at a heavily subsidized price under the ARO, is free to sell the home at market rate rather than preserve the affordability of the home for a new, qualified buyer. DPD and CCLT officials explained that the City agreed to reduce the affordability period of for-sale units in exchange for required on-site units in negotiations with developers as part of the 2015 ARO amendment process. In order to streamline administrative processes, CCLT is considering converting all existing 99-year covenants to 30-year covenants."

639 *Ibid.*
640 *Ibid.*

mechanisms to ensure subsidy retention and permanent affordability, as well as sufficient financing, at least for the first decade of its incubation and development. Ultimately, allowing the CLT to become independent and self-sustaining, as in the case with Irvine CLT, may be the best strategy for the CLT's long term survival since long-term dependence on City policy and financing may also leave it vulnerable to future political attack. In contrast, another wholly alternative path to successful CLT entrenchment, is represented by Dudley Neighbors Inc. The organization's impetus for forming in the first place was not city led, but instead community driven, thereby allowing DNI to mature as an organization before entering into a full partnership with the City. DNI's robust operation as an active membership organization ensured that DNI had both an independent constituency in addition to later, actually having direction representation from the city involved, allowing it to both gain the benefits of the partnership in terms of financing and resources, while at the same time retaining its independence.

A full CLT-municipal partnership however in both cases- originating by the City or independently by the community- offers many advantages for CLTs to incubate and scale, which have been discussed in this section in the form of critical resources and support such as: direct access to land, financing and administrative support, and tax breaks and incentives. However, a fully integrated partnership is not necessarily the only path to receiving city support for CLT development. As will be explored below, in order to achieve similar access to important resources many other CLTs pursue a partial municipal-CLT partnerships. CHT, DNI, Irvine CLT and Chicago CLT represent the exception of cases, as well as being the largest and most successful CLTs in the nation with a combined housing inventory that makes up more than 90% of all CLT owned homes in the country. These cases, as has hopefully being demonstrated above, reveal that achieving impactful scale

requires greater entrenchment of CLTs in local governments practices and policies in the form of full CLT-Municipal Partnerships.

8.2.4 Partial Municipal-CLT Partnerships

Far more commonplace across the US are partial partnerships in the form of active collaborations between municipalities and CLTs in crafting and supporting joint policies. For example, the cities of San Francisco, Oakland, and Berkeley, CA are pursuing affordable housing policies that involve collaboration with affordable housing non-profits including CLTs, some of which feature CLTs as central to their policies. These policies include the Tenant Opportunity to Purchase Act (TOPA), Community Opportunity to Purchase Act (COPA), and Small Sites Programs. These programs are leading to greater institutional entrenchment of the non-market provisioning of housing by including CLTs as important players in the process of crafting city policies and practices, but also in connecting CLTs to important local financing and resources for both capacity building and property development.

The Tenant Opportunity to Purchase Act (TOPA), originates in Washington D.C., a program which began in 1989 (right around the time that LEHC legislation was also adopted in D.C.) to provide tenants with a "right of first refusal," the right to have the first opportunity to purchase the property of which they are renters when the owner of the property decides to sell. Under the Washington D.C. TOPA shared equity ownership has grown exponentially, however not through the CLT but instead through the LEC (Limited Equity Cooperative) or LEHC (Limited Equity Housing Cooperative). It wasn't until more recently that a Community Land Trust was formed in D.C. to acquire

properties through the TOPA.[641] While in D.C., CLTs have had very little impact in TOPA housing up until very recently, the TOPA from D.C. has set an important precedent as a model for shared equity housing to ensure permanent affordability, spreading to the West Coast where the cities of Oakland, San Francisco and Berkeley have passed, or are in the process of passing, TOPA and COPA legislation with CLTs being a more central feature and actor in those policies.[642] In Berkeley, the Berkeley Tenant Opportunity to Purchase Act, not only offer tenants the right of first refusal, but also qualified non-profit organizations committed to democratic resident control and ownership like Community Land Trusts, a secondary right to purchase the property should the tenants pass up the opportunity. Bay Area Community Land Trust (BACLT) and Northern California Land Trust (NCLT) were central players in crafting the policy together with the East Bay Community Law Center (EBCLC) and the City of Berkeley. This program also complemented Berkeley's Small Sites Program launched in 2018, another program aimed at preserving affordable units in existing buildings, also spearheaded by EBCLC, BACLT, and NCLT, with the first pilot project undertaken by the Bay Area Community Land Trust.[643] Both the Berkeley TOPA and Small Sites Program are aimed at preventing the displacement of residents in rental buildings by offering subsidy assistance for residents and creating the

641 In 2018 the Douglass Land Trust formed to organize housing communities- specifically the Savannah Apartments- under the TOPA: https://www.streetsensemedia.org/article/permanent-affordability-housing/#.XYpQ5ZNKgzU

642 The City of Oakland is currently in the midst of discussing a Tenant Opportunity to Purchase Act, which includes Community Land Trusts as one of the intended qualified non-profits to which tenants can assign their rights to create permanently affordable housing. Additionally, in Berkeley, an ordinance is also being discussed. http://www.tenantstogether.org/updates/theyve-been-evicted-north-berkeley-building-now-they-want-buy-it-help-land-trust-%E2%80%94 (Last Visited January 5th, 2020).
Furthermore, Palo Alto, CA has also begun early discussion of a Tenant Opportunity to Purchase Act.

643 https://www.berkeleyside.com/2019/01/03/100-year-old-church-wants-to-turn-neglected-complex-into-affordable-housing (Last Visited January 5th, 2020).

opportunity for Community Land Trusts to purchase buildings and convert them into permanently affordable housing, and unlike San Francisco, discussed below, to encourage the creation of Limited Equity Housing Cooperatives.[644] Similarly in Oakland, the Oakland Community Land Trust has been a major player in the drafting of the Moms4Housing TOPA legislation, which similarly is aimed at both anti-displacement and in creating permanent affordability.

San Francisco just recently passed a Community Opportunity to Purchase Act (COPA), which provides qualified non-profits including Community Land Trusts, with the "right of first refusal."[645] Complementary to this program, in 2011 San Francisco (like Berkeley mentioned above) also implemented a "Small Sites Program," aimed at the preservation of affordable housing in existing buildings between 5-25 units, by creating a dedicated fund for the acquisition and rehab of such properties to maintain as affordable rental housing.[646] In general, housing stock in the US between 5-25 units tends to be neglected because they are too small for large non-profit affordable housing developers to maintain. Community Land Trusts, especially in urban places, on the other hand, deal almost exclusively in housing stock of that range and fill an important vacuum which larger developers have left behind. In San Francisco, the San Francisco Community Land Trust has been an important player in both crafting the Small Sites and COPA programs, as well as, in working to support these programs through property preservation, development of new affordable housing units, and technical support and assistance for the ongoing management of properties purchased under these programs.[647]

644 https://www.cityofberkeley.info/uploadedFiles/Housing/Level_3_-_General/01-FINAL%20SSP%20NOFA%20Application%20and%20Exhibits.pdf (Last Visited January 5th, 2020).
645 https://sfmohcd.org/community-opportunity-purchase-act-copa (Last Visited January 5th, 2020). Conversation with Bruce Wolfe, President of SFCLT (January 16th, 2020).
646 *Supra* at note. 645.
647 *Ibid.*

8.2.5 Quasi-Municipal CLT Partnerships: CLT- Land Bank Partnerships

As discussed above in the example of Dudley St. Neighborhood, Inc., cities are teaming up with CLTs to allocate available land, sometimes through extremely radical means, as with DNI in the form of eminent domain. However, while the City of Boston has one of the most radical policies in the country, thousands of jurisdictions across the nation have some form of regulation around vacant, abandoned, and tax delinquent properties. This can take the form of policies as "soft" as vacancy fees for code violations for blight to harder policies which result in eventual municipal appropriation of those properties within the constraints of minimal guarantees of Constitutional due process,[648] with the purpose of preventing loss of state and local revenues, promoting the safety and well-being of citizens, and preventing deterioration of neighborhoods and local economies.[649] Among the more progressive policies in the appropriation of vacant, abandoned and tax delinquent parcels is Land Banking, accomplished through a City ordinance mandating that properties that remain vacant and in neglect for a specific term of years, can be appropriated by the city, often through property tax foreclosure, in order to be placed back into productive use. Today, as a result of the sudden growth of the model from 2011 (most likely in response to the foreclosure crisis), there are around 172 Land Banks across the country, some of which, like California, exist at the State level. Land Banks usually take the form of a quasi-public entity, sometimes run directly out of a specific City department, or they can be structured as independent entities, either as corporations or non-profits.

[648] Some municipal appropriation of land is not the same as state "takings" of property for a public purpose with just compensation, but rather do not have to be justified by a clear "public purpose", although most usually do, and instead fall within the jurisdiction of local administrative and state laws regarding local community and neighborhood development

[649] See model Land Banking Ordinance template Appendix C.

Land Banks have been around for about as long as Community Land Trusts, and also have a long and independent practice and history from the development of Community Land Trusts, and as a result, though the two are complementary strategies in creating permanently affordable housing, to date, there are very few partnerships of Land Banks and CLTs. However, more recently, both policymakers and individual CLTs are advancing this new type of quasi-governmental partnership as having advantages in overcoming challenges for both. In 2016, The Albany Community Land Trust formed a partnership with Albany County Land Bank, which resulted in not only a model for replication, but also a number of insights into best practices.[650] Two key points were emphasized in the 2017 Report on the ACLB-ACLT Partnership:[651]

1) "While both entities acquire and hold land, they do so for varying periods of time and for different purposes, acting at different times in the development process. By exercising their special powers, land banks can efficiently and cost-effectively acquire tax foreclosed properties with a goal to return to productive use (…) CLTs, on the other hand, acquire properties with the goal to retain and steward in perpetuity, with a primary goal of ensuring permanent affordable housing choices through the use of shared equity homeownership models and other enforcement tools."[652]
2) As pointed out by researcher Annie Stup, contrary to common sense, land banks and CLTs are complementary vehicles for both cold and hot real estate markets. Land Banks are not only good for cold or "dry" real estate markets, where vacant land is plentiful, but also for "hot" markets where

[650] Center for Community Progress Report to Albany County Land Bank and Albany Community Land Trust (2017).
[651] *Ibid.*
[652] *Ibid.*

> vacant properties are scarce because they channel land resources to meet critical community needs for affordable housing. Also, contrary to this common sense, CLTs are important in "dry" markets because they bring investment into distressed neighborhoods helping with revitalization and creating affordability as that particular market recovers.[653]

In these two senses, Land Banks and CLTs are complementary entities for different points of the development process, and in addressing both dry and hot markets: to revitalize neighborhoods and to prevent displacement preserve scarce housing for permanent affordability. While, the Albany Community Land Trust and Albany Community Land Bank, is pioneering a new model for this partnership, ACLB deals with mostly vacant parcels in its inventory (69%), which is very different from larger more dense cities where vacant parcels are scarce. In general, there is very little practice and scholarship in this area of CLT-Land Bank partnerships. Here, I begin to assess the challenges that Land Banks face today and how CLTs may provide solutions to some of these challenges, as well as, how Land Banks could contribute to the greater institutional entrenchment of CLTs within government practice and policy.

8.2.5.1 Land Bank Challenges

Land Banks face a number of challenges in redirecting vacant, abandoned and tax delinquent properties to productive use. These challenges are well documented by Frank Alexander in the form of several barriers discussed here: the complexities of removing a property from tax delinquency, inadequacy of code enforcement, problems of tracking down unknown owners, and serious challenges of rehabilitation.[654] CLTs can provide solutions to many of these problems, or at

[653] *Ibid.*
[654] FRANK ALEXANDER, LAND BANKS AND LAND BANKING, (2011) p.27-29.

least alleviate their impact in order for a Land Bank to gain greater control of these properties. Property tax delinquency can become a barrier to conversion of vacant and abandoned properties by Land Banks if multiple years of delinquency, combined with interest penalties, result in aggregate outstanding liens that are greater than the fair market value of the property.[655] When this happens, the property cannot be transferred to the open market, and remains idle in a public inventory, which with time, compounds the complexities of freeing it from debt and administrative violations. A common practice which leads to even more complexity and longer periods of neglect and unproductive use of these types of properties, is the practice of selling the tax liens on these properties to private investors.[656] While the local government is able to generate revenues from these payments, thus putting it to a "productive use" in a narrow sense, ultimately Cities engaging in such practices, as explained by Alexander, frequently "lose the ability to control the enforcement of tax foreclosure as a method to return the property to productive use."[657] This is a particularly egregious practice in cities faced with a dire lack of housing supply where the best productive use for these properties would be to serve as affordable non-market or market-rate housing.

Another major issue that occurs quite frequently with vacant, abandoned and tax delinquent properties is the non-enforcement of code violations.[658] City staff are often too busy and overburdened to keep up with citing such properties with code violation due to a number of reasons. One reason is the difficulty of gaining timely, real time knowledge of neglect and delinquency.[659] Public records on such properties may not reflect neglect and abandonment in a timely way to

655 *Ibid.*
656 *Ibid.*
657 *Ibid.*
658 *Ibid.*
659 *Ibid.*

prevent compounding their effects, due to lack of capacity to keep these records up to date, most city staff do not have time to cross-reference property status with property tax payrolls to catch issues of delinquency, or to check through rent board data when properties remain vacant for a year or more.[660] Furthermore, these records, such as rent board data, are frequently at least one year behind and may not accurately reflect vacancies, particularly of rental property (and rent controlled property), in real-time. Similarly, issues of blight and abandonment may not be reported immediately by neighbors, and city staff rarely make on the ground surveys of properties to assess their condition and present occupancy. Even when cities do make efforts to take stock of vacant, abandoned, and tax delinquent properties and enforce code violations, usually as a result of mounting pressures on the lack of available housing, owners are often non-responsive and even difficult to locate, again due to the lack of accurate information on properties. Finally, often, even when owners can be located, they are often unresponsive due to the lack of resources to pursue code violations. Generally, properties that have been vacant and abandoned for a long time are often in very poor physical condition and may require serious rehabilitation, which the owners may not have the private resources to invest, and therefore the incentive to rectify the violations, as opposed to merely paying the fines, is not very high.

8.2.5.2 CLT Solutions to Land Bank Challenges

Community Land Trusts could assist cities to overcome many of these challenges by land banking these properties because CLTs are in the business of locating exactly such orphaned properties and converting them into permanently affordable housing. CLTs are also in an excellent position to gather information about such properties as they have the incentive to investigate the status of such homes in

[660] *Ibid.*

order to develop them as CLT properties and may do so earlier than the city especially where city administrative capacity is lacking. CLTs often have their ear to the ground in the local communities they serve and for this reason may become aware of vacant and abandoned properties before the City does. CLTs, particularly in areas where the pipeline for property development is limited, may be willing to spend the time to locate and contact the owners of such properties, especially when public records are out of date and owners are unknown or absentee. A collaboration where the CLT assists the City to land bank vacant, abandoned and tax delinquent properties, in return for eventually becoming the long-term beneficiary of land banked properties could be a fruitful partnership for both sides. This collaboration could take the form of CLTs and cities collaborating to overcome the barriers to land banking by:

1) Sharing information: CLTs and relevant city and county departments could pre-emptively identify properties in distress, or heading towards distress, before the complexities of debt, delinquent taxes, and code violations deepen and make it impossible to land bank the property. Information can be shared from several sources: CLTs, city departments and affiliated departments like the rent board, and public records on property tax pay rolls.
2) Enforcing code violations: CLTs, in addition to sharing on the ground information, as well as, in investigating and updating public records, which may lead to citing code violations early on, could also follow up on any citations issued by the city. Often city staff do not have the resources to follow-up to see whether or not the owner responded and ameliorated the violations. Other times, the property owners themselves lack the resources to ameliorate, and a CLT could follow up and offer assistance to survey

the options available which are alternatives to foreclosure like city or CLT purchase.

3) Rehabilitating Land Banked Properties: CLTs deal almost exclusively in the preservation of smaller buildings between 5-25 units and are an ideal non-profit housing developer in assisting cities to rehabilitate land banked properties and placing them back into productive use as permanently affordable housing. Cities may lack the resources to rehabilitate these properties exclusively with public subsidies, while a CLT could combine public subsidies with private loans from community lenders (such as Community Development Finance Institutions) at favorable interest rates to cover rehabilitation costs.
4) Community Driven Revitalization of Neighborhoods: In areas where vacant and abandoned land is plentiful in certain concentrated pockets of the city, land banks and CLTs could collaborate to rethink block-wide revitalization using a bottom-up community driven approach. This was the approach taken in the partnership between the Albany Community Land Bank and Albany Community Land Trust in what they called their "breathing blocks" approach. "A designated breathing block (…) is a defined area in which vacant property interventions, community engagement, data collection, and collaborative activities are layered to optimize partnerships, resources and impact."[661] The "breathing block" was applied to Albany's 3rd St. Corridor, a neighborhood where ACLB had received grants to rehabilitate a ten unit building and ACLT had residents in both land trust homes and rentals, and a sizable inventory of ACLB vacant land (30 parcels).[662] The CLT played an important role in activating

661 *Supra* note. 651 at p.27.
662 *Ibid,* p.29.

community engagement and involving local stakeholders in the decision-making and planning around the corridor through the "breathing block" initiative. Furthermore, a vacant and abandoned property task force was created to implement and oversee the identification and management of these properties made up of both city staff and community members. CLTs, being rooted in local communities and the democratic practices of the tripartite board and membership organizations could be ideal partners for land banks like ACLB in engaging a bottom up community process for neighborhood revitalization.

8.1.5.3 How Land Banks Could Contribute to the Institutional Entrenchment of CLTs

The most obvious way that land banks, like ACLB, contribute to institutionally entrench CLTs in the practice and policies of local governments, is by providing CLTs with direct access to available properties for long term acquisition. As will be explored in the next section, one of the greatest challenges that CLTs face in terms of both entrenchment and scalability is the lack of access to land and dynamic capital for property acquisition. Rather than being forced to go through private lenders to purchase properties on the market, which in the "hot" markets of many urban centers leads to financially unsustainable projects and higher rents passed on to residents out of necessity, publicly owned properties come at a fraction of the cost for CLTs. For local governments, this has the benefit of replacing often scarce subsidies with land donations to CLTs to create affordable housing. Through land banks, land and housing are decommodified - removed from the market- by local government and then transferred to CLTs to place it into productive use of the property as permanently decommodified housing. Having a steady queue of properties also means that CLTs have readily available

access to local subsidies and credit lines from cities for property development and acquisition. This is because the creation of a land bank often represents a strong commitment on the part of cities to create publicly available resources to meet critical housing needs and stimulate economic revitalization, in addition to targeting vacant properties, as exemplified in the case of the Albany Community Land Bank.

8.3 Access to Dynamic Capital

As discussed in the previous section on land banks, one of the greatest challenges for Community Land Trusts in the US, and particularly in urban centers with hot real estate markets, is stable access to land and large amounts dynamic capital for the purchase of land at market value. In sum, financing, particularly for the development and acquisition of new properties, but also for capacity building and operational costs, presents the greatest challenge to the CLT model. CLTs have traditionally relied on a combination of government subsidies[663] and philanthropic donations for the acquisition of below market rate properties, however these fluctuate with available public funds (at the state and city level), and/or, the generosity of foundations and individuals to make donations. Here, I analyze the different types of funding sources CLTs current utilize, as well as, offering glimpses into some of the radical alternative financing mechanisms available beyond these models.

8.3.1 The Current Model of CLT Financing

[663] Since the 2000s, local government support for CLTs accounts for 44% of CLT formations (including funds for the acquisition of new properties.) *See* Sungu-Eryilmaz & R. Greenstein, *A National Study of Community Landtrusts*, *supra* note. 579.

Community Land Trusts utilize both public "non-market" city, state and federal sources of financing, as well as private financing which heavily relies on: 1) monetary donations made by individuals and corporations, direct property donations, and sales of properties to the CLT at below market rate, and 2) private loans provided by community lenders. The typical CLT receives funding from four or more sources, presented from highest % of total revenue to lowest: fees from CLT programs (22%), federal funds (19%), private foundations (9%), local government (9%), individual donors and CLT member dues (9%), income from investments 7%, intermediaries 7%, grants from private businesses 7%, state government 6% and other charities/nonprofits 4%.[664] I provide an overview below of the first four categories, combining the discussion of federal and state funds into one discussion. However, it is important to note that CLT formation traditionally in the 60s & 70s relied on donations from private party donors for first time property acquisitions, and only later in the 80s & 90s did they join the LEHCs in utilizing federal financing mechanisms. Finally, in the 1990s to the present, local government resources became an important aspect of CLT formation including contributing to the acquisition of properties for CLT start-up.[665]

1) Fees from CLT programs: this is revenue which is self-generated by the CLT including but not limited to ground lease fees, home-buyers fees, development fees, lease reissuance fees, and rental income paid for by the tenants of the CLT owned homes. This is the largest single source of revenue for most CLTs and is also the most stable in that it does not depend on government policy nor on donations and is primarily utilized to

[664] *Ibid.* p. 19.
[665] In addition Sungu and Greenstein found that "public funds were important in over half these startups in the 16 years from 1990-2006," *Ibid*, p.10.

support overhead and administration rather than the acquisition of new properties.

2) City, state and federal mechanisms for affordable housing:
    a. In general, across states, federal funding for CLTs is managed by the Housing and Urban Development Agency (HUD) and the Rural Housing and Community Development Service (RHCDS) in the form of: grants, below market rate loans, loan guarantees, tax credits and project based (as opposed to tenant based) rent subsidies. These mechanisms utilize sources of funding like HUD's HOME program and the Community Development Building Grants (CDBG).[666]
        i. Grants: HUD's HOME program, the Community Development Building Grants, Choice Neighborhood Initiatives, and National Housing Trust Fund provide direct funding or below market rate loans.
        ii. Below Market rate loans: in addition to the HOME and CDBG lost cost loans, the Community Reinvestment Act has resulted in some below market rate loans (though not many in recent years).[667]
        iii. Loan Guarantee: the federal government acts though one of its agencies (HUD and Dept. of Agriculture) or Ginnie Mae (quasi government agency) as a guarantor on a loan.

[666] https://www.hud.gov/program_offices/comm_planning/affordablehousing/programs/home/ (Last Visited January 5th, 2020).

[667] *Ibid.*

Loan guarantees not only make inducements to banks to give loans but also provide a lower interest rate.[668]

iv. Tax Credits: these cannot be used for up-front financing as they are only available once the building has been put into service but they can be converted into upfront capital through the formation of syndications.[669]

1. The Low-Income Housing Tax Credit (LIHTC) program, which allows the project owner tax credits of 40 to 90% of the value of a residential rental property over ten years if the owner agrees to keep rents and tenant incomes below certain levels. This is by far the most used of the three credits described here in terms of its ability to reduce the cost of housing substantially below market rates and is frequently used by CLT devloper.[670]
2. A 20% federal historic tax credit for rehabilitating a certified historic structure.[671]
3. The New Markets Tax Credit: a 39% tax credit spread over 7 years for qualified community

[668] https://www.hudexchange.info/programs/section-108/section-108-program-eligibility-requirements/#overview(Last Visited January 5th, 2020).

[669] A special kind of partnership called a syndication: a **general partner** (usually the developer) plans and oversees the project and is fully liable for all financial obligations. **Limited partners** buy shares of a project's ownership much as stock certificates are sold. As with stocks, the investor's liability is limited to the amount of the investment (thus the term "limited" partnership). But unlike stocks, syndications pass through tax losses and tax credits to the investors.

[670] https://www.huduser.gov/portal/datasets/lihtc.html (Last Visited January 5th, 2020).

[671] https://www.irs.gov/businesses/small-businesses-self-employed/rehabilitation-tax-credit-real-estate-tax-tips (Last Visited January 5th, 2020).

development investments. While primarily aimed at commercial real estate development and business investment, it can also be used to lower the cost of development capital for single-family home construction.[672]

v. Project Based Rent Subsidies: Federal grants for housing project based rent subsidies might take the form of Section 9 New Construction, Substantial Rehabilitation and Moderate Rehabilitation programs; HUD Section 202 and Section 911 programs for the elderly and disabled- which also involve grants to build the projects; and RHCDS Section 515 rental housing program.[673] Some examples are the HOME program or Community Development Block Grants.[674]

b. Local Government: City and state financing mechanisms vary from place to place. However, here I attempt to provide an overview of the general mechanisms utilized for creating affordable housing subsidies.

i. Selling tax exempt bonds: investors in bonds have traded low interest rates for a tax shelter creating a pool of low-interest loan money.[675]

672 http://services.housingonline.com/nhra_images/NMTC%20Basics.pdf (Last Visited January 5th, 2020).
673 https://www.nhlp.org/resource-center/project-based-rental-assistance/ (Last Visited January 5th, 2020).
674https://www.hud.gov/program_offices/comm_planning/communitydevelopment/programs (Last Visited January 5th, 2020).
675 https://www.enterprisecommunity.org › download (Last Visited January 5th, 2020).

ii. State housing bonds: for example California Prop 1 & 2 in 2019.[676]

iii. City wide measures to create housing funds: for example Measures O &P in Berkeley, CA in 2019.[677]

iv. City initiated projects where the city conveys a property over to a CLT to develop affordable housing: an example of this is Oak CLT, a number (though not enough) of foreclosed single-family homes during the 2008-2009 foreclosure crisis were sold directly by the City of Oakland to OakCLT and similarly recently in the case of Moms4Housing.[678]

v. City mandated units (inclusionary zoning): for example where the CLT manages the inclusionary requirements on behalf of the city. This can be complicated because the zoned areas may not be on CLT land. An example of this was discussed in the case of Irvine Community Land Trust.[679]

676https://ballotpedia.org/California_Proposition_2,_Use_Millionaire%27s_Tax_Revenue_for_Homelessness_Prevention_Housing_Bonds_Measure_(2018) (Last Visited January 5th, 2020).
677 https://www.jessearreguin.com/blog-1/2019/8/8/fulfilling-the-promises-of-measures-o-and-p (Last Visited January 5th, 2020).
678 https://www.ocf.berkeley.edu/~jyelen/2016/12/13/the-foreclosure-crisis-in-oakland-before-and-after/, https://www.cnn.com/2020/01/20/us/moms-4-housing-homeless-evicted-oakland-home-purchase/index.html (Last Visited January 5th, 2020).
679https://www.lincolninst.edu/sites/default/files/pubfiles/2197_1523_LP2011_ch11_Inclusionary_Housing_and_Community_Land_Trusts_in_a_Federal_System_0.pdf(Last Visited January 5th, 2020).

vi. Public Housing Authority Divested Property: land is conveyed from a PHA to the CLT to ensure continuing affordability for existing tenants and beyond.[680]

3) Private Lenders offering low interest commercial loans (not typical 30-year mortgages in the case of market-rate homes):
    a. Community Lenders like Community Development Finance Institutions:
        i. For example in California: LISC (Local Initiatives Support Corporation), Beneficial State Bank, Capital Impact.[681]
        ii. Credit Unions: for example in California the Northern California Community Loan Fund.[682]
    b. Mainstream Primary and Secondary Market Lenders: Freddie Mac buys CLT mortgages making it easier for mainstream primary lenders (i.e. Bank of America and Wells Fargo) to provide CLT mortgages in the form of more typical 30 year mortgages.[683]
4) Donations and Sale of Properties at Below Market Rate by Private Parties.
    a. Donations: These are private parties that donate their homes or other real estate holdings to a CLT. Usually, there is an intention to build in a legacy component though not always.
    b. Sale at Below Market Rate: In the case of CLTs, often new property acquisitions occur at below market rates, even if the owner has not donated the property in its entirety. This is often the result of

680 https://www.shareable.net/how-to-start-a-community-land-trust/ (Last Visited January 5th, 2020).
681 https://www.lisc.org/(Last Visited January 5th, 2020); https://beneficialstatebank.com/ (Last Visited January 5th, 2020); https://www.capitalimpact.org/(Last Visited January 5th, 2020);
682 https://community-wealth.org/content/northern-california-community-loan-fund (Last Visited January 5th, 2020).
683 https://www.shareable.net/blog/freddie-mac-expands-loan-support-for-shared-equity-home-ownership (Last Visited January 5th, 2020).

tenants negotiating a deal with the owner or approaching a CLT to negotiate with the owner for the purchase of the property.

8.3.2 Radical Alternative Funding for CLTs

While CLTs, historically have been extremely resourceful and creative in combining government funding and private donations, as well as, other sources of financing for the acquisition of new properties, there are a number of problems with this ad hoc collage model approach to financing. Private donations are not always certain and cannot provide a steady pipeline of projects on their own. On the other hand, government financing requires navigating the plethora of constantly changing programs and policy changes, which presents a challenge for under-staffed CLTs, particularly at the city and state level where each year CLTs must take account of the new propositions and measures passed. Federal funding is also very precarious, as already discussed in previous sections, and is resulting in less and less financing for CLTs in recent years.[684] In the context of continuing cuts both recently and as a general trend of the last forty years, financing for CLT funding at the federal level appears unstable.

Finally, the CLT model of acquiring buildings where the CLT buys the building and manages existing tenants, while effective in preventing displacement and presents less difficulties for the CLT, has the downside that CLTs are not very responsive to producing new units of affordable housing as opposed to preserving affordability. In recent years, as a result of the phenomenon of "hedge cities,"

[684] Over the years, particularly in the 90s during the Reagan administration the HUD budget was cut from 27 billion to 9 billion, today, when adjusted for inflation the budget has continued to decrease steadily. Under Trump's presidency, the HUD budget for 2019 was reduced by 6.9 billion, a 14% decrease from the previous year, more significantly in the 2019 and 2019 budget Trump proposed to completely eliminate the HUD's HOME program, the Community Development Building Grants, Choice Neighborhood Initiatives, and National Housing Trust Fund, which are the largest sources of federal financing for CLT programs.

described in Chapter 6, many urban centers, like the San Francisco Bay Area, have highly speculative real estate markets, which have been created and/or destabilized by global investment firms. This has rapidly increased gentrification and displacement in these areas to the point of crisis, which CLTs have been critical in mitigating. However, if CLTs want to demonstrate their ability to meet the demand for affordable housing, more radical approaches to creating dynamic access to capital not only for housing preservation but also for housing production needs to be explored.

Rather than merely combining both public and private sources of financing (as is done by many CLTs), financing can also be created by such alternative mechanisms as commons/community based- financing, what I will divide into "self-help finance" and "community finance." In "self-help finance," the equity and creditworthiness of specific individuals who want to form a housing community is aggregated in order to create affordable housing. In "community finance," a non-profit or other corporate entity aggregates contributions from individuals from the surrounding community, either through investments, or through bonds, to create a fund for the purchase of new and existing properties.[685] In both cases, individual aggregated equity (savings and loans) or community aggregated capital (investments and bonds), aggregated equity and/or capital can be further leveraged for additional loans above and beyond the initial equity/capital raised to make up for remaining difference. Established policy and practices in community finance utilized for the creation of affordable housing, exist in both the US and Canada in the form of: 1) community capital/ impact investment models like the California Cooperative Corporation (the case of EBPREC)[686]; 2) Community Bond model for non-profits building acquisition (The Community

[686] https://ebprec.org/https://communitybonds.ca/,(Last Visited January 5th, 2020).

Bond Project),[687] and (3) for self-help finance in the example of Baugruppen discussed in Chapter 7, in Germany, Australia and New Zealand.[688]

8.3.3 Alternative Models: Community Finance for Building Acquisition

"Community finance", "grassroots finance" or "community capital" have become buzzwords in recent years to describe anything from impact investing to kickstarter campaigns to more sophisticated forms of crowdfunding involving private or public direct public offerings in businesses as far ranging as food, retail and tech. The uniting factor in all of these emerging modes of raising capital is that micro-loans, bonds or investments of individuals are aggregated from the community at large for the purpose of funding the initial start-ups costs and/or operations/expansion costs of individuals, businesses and non-profits in return for some value/impact other than the bottom line of a return on their investment such as supporting values and programs like: the arts, fostering local community, fresh local food/farming, and in the cases I will discuss below, to support community developed affordable housing and nonprofit work spaces. These loans and investments due to their "micro" size per individual operate below the radar of federal securities laws, though new federal guidelines for crowdfunding have been developed in recent years in response to the surge of a variety of platforms using this model as its basis for raising capital for businesses. While the community finance model tends to be used to describe financing through capital raised by a business entity like a corporation, it can also be used in relation to capital raised by non-profits in conjunction with local governments in the form of offering micro

687 The Community Bond DIY Guidebook. https://communitybonds.ca/,(Last Visited January 5th, 2020).
688 http://www.metropolismag.com/architecture/residential-architecture/dont-call-it-a-commune-inside-berlin-radical-cohousing-project/ (Last Visited January 5th, 2020). http://www.spur.org/news/2017-09-21/could-germany-s-co-developed-urban-housing-be-model-bay-area (Last Visited January 5th, 2020).

bonds for purchase by citizens for the broad benefit of the non-profits and broader community. This latter model is a hybridization of the community finance model with a public finance model facilitated through local government. Below I discuss four cases which represent an example of community finance (EBPREC), community/public finance (CBP), and self-help finance (Consumer Coops & Baugruppen) discussed separately in the next section.

1. The East Bay Permanent Real Estate Cooperative (EBPREC), Oakland CA: A people of color and indigenous led cooperative corporation incubated by the Sustainable Economies Law Center and the People of Color Housing Network, which has the ability to raise $1000 individual (non-accredited investors) contributions for new property acquisitions, as well as other operating costs.
2. The Community Bond Project (CBP), Toronto, Canada: A project incubated by the Center for Social Innovation, which created an interest-bearing loan that is accessible to unaccredited investors, which must be repaid, and can only be issued by a nonprofit organization. This model is currently being used for building acquisition and upgrades, energy efficiency upgrades, social enterprise development, renewable energy developments, food security.
3. Consumer Coops: a method by which consumers aggregate their time and capital in order to more cost effectively both managing and purchase consumer goods in "bulk." Consumer cooperatives exist in goods as varied as food to childcare to housing.
4. Baugruppen: a method by which citizens come together to form "build groups" to acquire land and design and develop new housing, using their aggregate wealth to acquire loans and financing.

8.3.3.1 The East Bay Permanent Real Estate Cooperative

The East Bay Permanent Real Estate Cooperative (EBPREC) is pioneering a new form of legal institution pursuing the equitable, collaborative, and decommodified ownership of housing as an alternative to the CLT model. EBPREC combines features of community land trusts, housing cooperatives, real estate investment cooperatives.[689] The Sustainable Economies Law Center and the People of Color Sustainable Housing Network, the incubator organizations of EBPREC, understood the many problems that confront CLTs and the necessity of building an alternative model to address the affordable housing crisis in the San Francisco Bay Area. Janelle Orsi, Executive director and cofounder of the Sustainable Economies Law Center, advances the view that "everyone – high-income and low-income – should stop profiting from property and live in limited equity housing."[690] Limited equity housing, as explored in the previous chapters, takes the form of legal restraints on sales of homes at market value, capping the maximum equity earned as a reasonable percentage (1-4%) tracking such indexes as the consumer price index or area median income. This radical new vision of limited equity for all required not only a model different from the CLT, which is limited to the purpose of benefiting those of low and moderate income, but also an innovative method of financing housing projects in the form of a new method of community finance, which will be discussed here.

The East Bay Permanent Real Estate Cooperative is incorporated as a California Cooperative Corporation, a multi-stakeholder cooperative,[691] and unlike a community land trust, is not a non-profit and has the unique ability to raise capital

689 http://www.co-oplaw.org/statebystate/california/ (Last Visited January 5th, 2020).
690 https://www.theselc.org/homeownership_is_dead (Last Visited January 5th, 2020).
691 EBPREC is a multi-stakeholder cooperative in that it is a workers cooperative within a housing cooperative with investors also acting as a class though having less decision-making power than the other two groups.

(1,000 per individual), to acquire new properties. This micro-impact investing model has a lot of appeal in that many citizens are divesting from environmentally and economically harmfully industries such as fossil fuels and speculative financing on Wall Street. As Chris Tittle of the Law Center says "sourcing capital directly from the community itself democratizes capital and grows community wealth by providing an opportunity for the 90 percent of us who can't usually invest directly in businesses to participate."[692] Community investor owners receive a fair rate of return of 2 percent or possibly slightly more, and while this is quite modest, it is slightly higher than the amount one makes from a financial product like a certificate of deposit.[693] By capping returns, the incentive structure around both investing and decision-making internal to the corporation is altered to support community: for investors, it's not about profit but about the impact they believe they are making with their money in the community and in furthering housing justice.

In a California Cooperative Corporation, community investor owners are an important group which exercises a number of important delimited powers, however by design they have more limited power vis-à-vis worker patrons and resident patrons owners.[694] Community investor owners can make important decision-making powers concerning the budget and direction of the cooperative, however they do not have the power to dissolves the cooperative or make other important rules concerning workers and residents.[695]

8.3.3.2 The Community Bond (CB)

[692] https://www.shareable.net/how-the-east-bay-permanent-real-estate-cooperative-is-pioneering-a-model-for-equitable-housing/ (Last Visited January 5th, 2020).
[693] Janelle Orsi, EBPREC cartoon Bylaws https://storage.googleapis.com/wzukusers/user-22872016/documents/5c1c13becd05czJWwWae/Adopted%20EB%20PREC%20Bylaws%20Dec%202018.pdf (Last Visited January 5th, 2020).
[694] *Ibid.*
[695] *Ibid.*

The Center for Social Innovation (CSI) is a social enterprise located in Toronto, Canada with a mission to catalyze, inspire and support social innovation. By 2007 it had become the host of 75 non-profit/social enterprise organizations, outgrowing their original office space and hoping to grow even larger. CSI decided to try to purchase their 6.9 million dollar building in downtown Toronto to support their plans for expansion, but as a non-profit supporting the work of other non-profits, it had very little capital to leverage (50,000 CD).[696] So, it decided to leverage the greatest asset it had - their community- in raising the capital needed to buy the building. A critical step towards this was the critical support provided by the City of Toronto to obtain a loan guarantee (available only to nonprofits) which allowed CSI to go to banks to apply for a loan resulting in a $4.9 million mortgage. Even with this mortgage they were still 2 million dollars away from their target.

In order to raise the remaining capital, CSI leveraged the mortgage to issue an innovation of social finance called the "Community Bond," which while structured as "investments" were in fact "loans" made possible by the backing of the city.[697] This was also possible because the Ontario Securities Act excludes Nonprofits and other Charitable Organizations from the very expensive long prospectus process to approve the issuance of bonds.[698] After passing through this process, CSI issued three types of bonds with differing rates of return on investment (ROI) ranging from ROIs that were prime and fluctuated between 1.75%-10% and 2.5-11% to a fixed 4%, with different levels of minimum investments $10,000-50,000, and with different rates of maturity around 5-10 years.[699]

[696] *Supra* note. 688.
[697] *Ibid.*
[698] *Ibid.*
[699] *Ibid.*

The prime fluctuating ROI bonds had longer rates of maturity and were in place to help CSI to attract investors quickly in the early months to meet the deadline of the purchase, while giving them plenty of time for repayment. Within six months they had raised the needed 2 million. The prime fluctuating bonds were issued only until the time of purchase and after that only the fixed rate bonds were sold, with CSI using the funds from those bonds to pay off the prime fluctuating ones. The bonds were not without risk to community investors, however if something went wrong, they had the assurance structured into the mortgage agreement that the City could step into assist the bank to foreclose on the building and payout the bondholders in the case that CSI defaulted on payments.

The success of the Community Bond prompted a number of other non-profits to adopt the same/similar model in their fundraising efforts[700]:

1. The West End Food Co-op runs a local farmer's market in Toronto and is dedicated to advancing the cause of food security. They are using a super accessible community bonds – selling at a price of $500 each with a 2.5% interest rate – to finance the purchase and renovation of a new natural food store in the city's west end.[701]
2. The ZooShare Biogas Co-operative is a nonprofit community co-op that plans to build a 500-kilowatt biogas plant at the Toronto Zoo for about $5 million. Electricity from the plant will be sold to the grid under the province's feed-in-tariff program and fertilizer will be sold in garden centres under the Zoo Poo brand. Waste heat will be available for a nearby greenhouse to grow animal feed. About 70 per cent of the project, or roughly $3.5 million, will be funded through the sale of RRSP-eligible. Community Bonds.

700 *Ibid.* at p.20-21
701 *Ibid.*

ZooShare hopes to offer bonds with a seven-year term and up to a 7% annual return on investment.[702]

3. SolarShare develops community-financed solar PV renewable energy projects. The proceeds from their Community Bond offering will be applied to their current project portfolio, which consists of 19 solar power installations, representing over 600 kW of generation capacity. Each project is backed by a 20-year power purchase agreement with the Ontario Power Authority and features fixed prices for the power produced, thereby guaranteeing a sustainable long-term revenue stream.[703]

EBPREC and CB offer new and innovative ways for CLTs to approaching the finance of building/home acquisitions beyond the traditional ad-hoc collage model. In particular, the CB project shows how a simple loan guarantee from the City of Toronto catalyzed both the 4.9 million in loans, as well as the further ability to leverage that loan for the issuance of bonds in light of the Ontario Securities Act exemption for nonprofits. A similar project is being launch in the California by a non-profit called "TechSoup" using the model of a non-profit "Direct Public Offering."[704]

8.3.4 Collective Self-Help Financing: Consumer Coops

Even before crowdfunding platforms had become a popular model, a similar model for raising capital was being pioneered by cooperatives, and in particular

[702] *Ibid.*
[703] *Ibid.*
[704] https://www.techsoup.org/direct-public-offering https://communitybonds.ca/, (Last Visited January 5th, 2020).

consumer cooperatives, where the cooperative's capital and management is provided by coop consumers, thus offering a more cost-effective means for consumers to gain access to a service or good. While democratic governance and management of the cooperative by its members is its most well-known and identifiable trait, another central mechanism is the aggregation of member capital and labor in order to make goods and services more affordable for its members. Examples of consumer cooperatives that provide important services are food cooperatives, childcare cooperatives, credit unions, and housing cooperatives. Food cooperatives by aggregating the capital of its members is able to buy in bulk which allows them to decrease the cost of food for their members. Housing cooperatives on the other hand are different from consumer food cooperatives in that that affordability is less a factor of aggregation of member capital and labor and more from the side effects of aggregating the assets of individual members which result in lower down payments, lower closing costs, and longer-term mortgages.[705] They also benefit from economies of scale in operational costs, as well as from non-profit operation tax exemptions when incorporated as a non-profit.[706] They also provide benefits in non-monetary ways by their limited liability- no one member is responsible for the entire co-op mortgage, and through their democratic member-controlled governance which ensures that no substantial increases are made to monthly charges. Aggregating the wealth and resources of individuals also has the additional benefit of increasing each individual's political power and ability to exercise influence over local policy concerning housing, taxes, and utility prices beyond the influence he/she could exercise individually, what is referred to as the power of the "Co-op movement."[707] However, one major

[705] Tom L. David, *Cooperative Self-help Housing,* LAW AND CONTEMPORARY PROBLEMS, 32/3 409-415 HOUSING. PART 2: THE FEDERAL ROLE (1967).
[706] *Ibid.*
[707] http://www.umich.edu/~nasco/OrgHand/movement.html (Last Visited January, 5th 2020).

limitation to the creation of new coops is the limited number of banks and other financial institutions willing to provide loans. Much of the difficulty is that banks see coops as high risk due to their collective character and legal incorporation, which prevents any one individual from being responsible for the payment of the loan.

Alternative mortgage instruments such as loan guarantees and special underwriting like that offered recently by Freddie Mac, which will soon be available for CLT single-family homes, could eventually serve as a frame of reference for advocacy and policy work for the same benefits for cooperatives in multi-family units, however no such policy is currently being pursued.[708] Historically, financial institutions have also been reluctant to lend money to CLTs because of the complexity of initiating and foreclosing on a loan for a deed-restricted home. Deed restrictions ensure the permanent affordability of homes. Under its new program, "Community Land Trust Mortgages," Freddie Mac states that it will make it easier for banks to engage in the process of underwriting properties with such deed restrictions, thereby creating greater willingness by originating banks to offer these loans. However, currently these loans are only available for single family homes. If this program were expanded to multi-family units and to coops, this could be used as an important funding source for the purchase of pre-existing multi-unit buildings in cities but also in the development of new CLT housing stock.

8.3.5 Baugruppen

Baugruppen, discussed in Chapter 7, are able to reduce the cost of development by 25-30%, which is in part accomplished through a unique financing package pioneered by Germany's Green Bank Nurnberg's UmweltBank, which pools

[708] https://www.shareable.net/blog/freddie-mac-expands-loan-support-for-shared-equity-home-ownership (Last Visited January 5th, 2020).

individual mortgages for the units of future residents in a way that funds all phases of construction. These innovations have led to units being around 600€ cheaper per square meter than units in comparable locations. Another aspect that makes baugruppe cheaper from their outset is that in some developments not all the units are completely finished, leaving much to the investment and imagination of each individual owners.[709] These factors not only increase the affordability of baugruppen but also their equity building incentive. Baugruppen have become a ubiquitous feature of the Berlin housing landscape (over 500 baugruppen projects have been initiated)[710] and have also spread all over Freiburg (where the first baugruppe was created in 1993), Tuebingen, and Hamburg. While baugruppen offer affordablity, design, and many more amenities than regular housing in the same areas, just like the Stock HCs or Swedish HCs, it is not necessarily targeted towards the decommodification of housing, in the sense that they do not create restraints on market rate transfer. All owners of individual units can potentially sell their units at market rates with very little restraints on transfer outside of the Community. However, some baugruppe like the Wohnungsbaugenossenschaft (WiBeG) development have intentionally structured a legal agreement to maintain some of the units at below market rates, therefore edging closer to offering at least partial decommodifed housing.[711] A closer look to the democratic element of baugruppen requires further research, but it seems to vary from case to case: in some cases there is a strong community management board, and in others it is a loose association with few powers over member owners. Some are structured more like condominiums and others closer

709 http://www.metropolismag.com/architecture/residential-architecture/dont-call-it-a-commune-inside-berlin-radical-cohousing-project/ (Last Visited January 5th, 2020).
710 http://www.spur.org/news/2017-09-21/could-germany-s-co-developed-urban-housing-be-model-bay-area (Last Visited January 5th, 2020).
711 https://www.archdaily.com/597590/coop-housing-project-at-the-river-spreefeld-carpaneto-architekten-fatkoehl-architekten-bararchitekten (Last Visited January 5th, 2020).

to cooperatives. There seems to be much leeway for institutional creativity of disaggregating and recombining options in the German legal landscape as evidenced by the Wohnungsbaugenossenschaft (WiBeG) in Berlin, which is different from the typical German Cooperative in which rents are paid and typically do not lead to a path to ownership. Instead in the WiBeG, members rental contributions accrue into equity, and the underlying mortgage and credit ratings is not scrutinized at the level of individuals, thereby allowing for greater "risk solidarity." In fact, this was one of the purposes for which WiBeG was organized, to protect the elderly tenants from being removed who individually did not have the credit ratings to access a bank loan on their own.[712] Such types of risk solidarity are promoted also by property and common scholar Lee Anne Fennel, who argues that one way in which to deal with the problem of placing too high a risk on individuals in entering into the homeownership market would be to spread the risk to other institutions such as the government or groups of investors.[713] However, what is being advanced here is not only that risk is spread, but that risk is taken on by stronger actors in order to subsidize the risk of weaker actors within the housing community like in the example of WiBeG. This is not to say that a model where external actors take on risk is always less desirable, so long as the benefits of these external groups (% of return on investment) is capped, as well as their decision-making power. Currently a model like Baugruppen does not exist in the United States or Sweden but is being adapted from the German model in places like New Zealand and Australia with very different legal systems and outside pf the civil law tradition, which suggest that they easily be transplanted in the US and Sweden. However, just as in Germany, critical to the financing of Baugruppen projects in New Zealand and

712 https://www.australiandesignreview.com/architecture/housing-revolution-lessons-from-berlin/ (Last Visited January 5th, 2020).
713 FENNELL, *See supra* note. 485. p. 176

Australia has been the assistance of state subsidies and loans. In some way these subsidies and loans reflect the process of risk being spread from individuals to the government, however while governments are democratically controlled, groups of investors may not. Therefore, what is critical is that there is a clear structure for power-sharing and limits on profit making similar to the model offered by EBPREC.

In this section we discussed four approaches to the alternative financing of affordable housing, which can serve as important models for the CLT in overcoming the serious challenges to the model's scalability, namely as a result of a lack of access to land and dynamic capital, which is particularly critical for CLTs to scale in expensive urban housing markets. Next I will discuss a major challenge to the CLT, however not in relation to its entrenchment and scalability, external factors, but related to an internal factor of its legitimacy as a democratic organ emphasizing the diffusion of decision-making to residents and community members. As mentioned earlier, while many CLT boards are structured as a having a tripartite board where residents represent 1/3rd of the board, in reality often CLTs do not actually meet this threshold. However, the issue of authentic democratic resident control is not as a straightforward as it appears: the problem of increasing resident participation on boards, is not only a factor of CLTs not making enough efforts to recruit residents, but also is in part a factor of not enough people currently having decommodified access to fundamental resources, making the value of a CLT obscured for many who see it as a stepping stone to market-rate housing rendering the purpose of doing the unpaid work of participating on a CLT board unattractive and unmeaningful.

8.4 Generating Democratic Resident Participation

The last major challenge for CLTs that I will discuss in this chapter is the issue of how CLTs may be able to increase their democratizing potential through ensuring resident participation on CLT boards. Resident participation enhances the democratic mission of CLTs by involving both residents and the community in important decision-making, pertaining not only to their housing community, but in the wider political process of local community development. As such resident participation on CLT boards is an important aspect of democratizing housing because it creates greater diffused control over important decisions both internal to the CLT community, but also by involving regular people in decisions pertaining to broader community development in housing: land use and land allocation, zoning and approval of new developments and rehabilitation of older developments, the creation of new affordable housing policies, and city budget allocations of taxes and bond measures for specific activities related to housing development. However, while the value of resident participation on CLT boards in democratizing housing is clear, why CLTs have a difficult time maintaining the mission to resident representation is less clear though empirical research by Emily Thaden and Jeffrey Lowe on a sampling CLTs suggests that "CLTs did not prioritize the same objectives for engagement, and their orientations towards engagement were significantly influenced by the broader temporal climate when the CLT was established as well as the local socio-political environment in which the CLT must operate." While others suggest, as I will discuss below, that the problem of resident engagements starts with a shift in the CLT model towards becoming more embedded in city governments (such as the full partnerships discussed above), and thus becoming a more mainstream housing developers less concerned with democratic resident control and dominated by administrators and bureaucrats, however the problem does appear to be so straightforward. For

example, Dudley St. Inc, is a perfect example of a CLT which is deeply embedded in the City of Boston, even exercising governmental powers of eminent domain, and yet it has an extremely robust democratic membership structure with many resident members. Additionally, many CLTs I encountered in my research (BACLT & NCLT) while committed to the tripartite board structure found it challenging to maintain residents on their board consistently. This suggests that the problem of CLT resident membership is not merely the result of the shift towards a more centralized administrative municipal model, but that recruiting resident participation is also the result of particular socio-political environments in which different CLTs must operate, many dealing with the lack of scaling and entrenchment of the model in housing policy and local government, but also in the way they are perceived by their residents. As such the problem presents a sort chicken/egg problem in the dialectic of democratization as a pathway to decommodification or vice-a-versa. One needs to both build mass political support and mobilization to universally decommodify housing, and on the other hand one needs to have a constituency that has decommodified access to the basics to fully participate as citizens in a polity in the sense of having the time and luxury to participate in politics through uncompensated work. I argue here that addressing the issue of democratizing CLT boards may not merely be ameliorated by insisting on more democracy, but instead to recognize the realities which CLTs and CLT residents face in that it is necessary to recognize that a) uncompensated work is a privilege that people of low and moderate income may not have and therefore; b) residents should be given the option to be paid or c) be given a real reason for making the commitment to volunteer work provided by the sense of belonging to a movement and not just a housing community. Furthermore, with regard to multi-unit CLTs, the lack of resident participation on the CLT board may also represent a deeper problem of the lack of participation within the individual housing

communities, and here I will argue below that there is much to learn from the LEC and LEHC model, and that this model could potentially be integrated into the CLT model. Finally, as I will discuss first below, in attacking CLTs which are embedded within city governments, it is necessary to be aware of the important tension between scaling the model by its greater entrenchment in government through city officials sitting on CLT boards, and the importance of boards with robust membership by residents and community members.

8.4.1 The Tension Between Scaling & Entrenchment of CLTs & Democratic Participation

The classic tripartite model of the Community Land Trust mandates that 33% of the Board of every CLT consists of resident board members. However, as mentioned previously as reported by the last major survey of CLTs (2011), the median % of resident board members was 11% not 33%, and 41% of CLTs reported as having no residents on the board at the time of the survey. Some scholars suggest that the reason for is the result of the "professionalization" of CLT boards, which today resemble typical non-profit boards whose members are selected primarily on the basis of their ability to contribute fundraising time and resources to sustain the non-profit's staff and operations.[714] In the case of the CLT as opposed to a regular non-profit, in addition to seeking board members that have the ability to fundraise from private foundations, this may also involve recruiting

[714] *See* Olivia R. Williams, *Community Control as a Relationship between a Place-Based Population and Institution: The Case of a Community Land Trust.* LOCAL ECONOMY 33/5 459–76 (2018); *See also* James DeFilippis, Brian Stromberg & Olivia R. Williams ,*W(h)ither the community in community land trusts?*, JOURNAL OF URBAN AFFAIRS, 40/6 755-769 (2018). For a very interesting local history of the general trend towards professional non-profit housing characterized by a landlord-nonprofit relationship rather than community driven organizations like CLTs, *See* Stephen Barton, *From Community Control to Professionalism: Social Housing in Berkeley, California 1976-2011*, JOURNAL OF PLANNING AND HISTORY 13, 160 (2014).

board members who have access to and influence on local government and budget allocations so as to effectively channel funds from public resources. While these practices undermine the democratic character of CLTs by excluding citizens of lesser power, income and influence, from the perspective of decommodification, and the scale and entrenchment discussed previously which is needed to reach impactful levels of decommodification, this can result in a tension between the aims of scaling and entrenchment and democratic resident participation. From the perspective of scaling decommodification, it may be a necessary evil to recruit members of the board with power and influence particularly over local political decisions and budget allocations. Earlier in this Chapter, I analyzed how CLTs may achieve greater entrenchment in local governments either through full or partial municipal partnerships. As I argue there, these partnerships are crucial to CLT start-up support until it reaches an impactful scale to provide access to CLT decommodified housing. In fact, many of the CLTs discussed, which eventually successfully scaled to sustain themselves primarily from ground lease and developers fees rather than government or private grants, aside from Dudley St. Neighborhood Inc., were projects initiated and controlled by local governments (Champlain & Irvine). The contributions by councilmembers and other local city administration were fundamental to getting these projects off the ground and to achieve scale. It is no coincidence that CHT alone, as noted earlier, accounts for 20% of all CLT housing stock nationwide. As I mentioned earlier, Dudley Neighbors Inc (DSNI and DNI) offer stark contrasts to these other models, however, while Dudley St. is an extremely successful case of a democratic CLT, in the sense that they maintain a robust membership process for over three decades and even exercise governmental powers, they still to this day, have created less than 300 units of permanently affordable housing, while Irvine in less than fourteen years of existence will reach 500 units this year. This may be too hasty a conclusion,

given that Dudley St.'s geographic area encompasses a metropolitan area, while CHT and Irvine CLT are in suburban areas where there is more land to develop than a dense city like Boston, however it does suggest that scaling decommodification while at the same time retaining widespread democratic participation can sometimes, particularly at the early incubation stage of a CLT, may present an important tension, though they are not necessarily mutually exclusive. It may be difficult for the CLT to recognize the need to activate their residents to participate when access to land and influence over local government policies relies less on residents and more on those who have inside access and influence. However, this does not mean that CLTs should not build a political movement that involves residents and the community, particularly once they have achieved meaningful scale and entrenchment, but also even earlier in its development. The problem however seems to be to incentivize CLT boards and staff to see themselves as part of a wider social movement for housing justice pursuing important social change and economic justice.

8.4.2 The Need to Incentivize CLTs and CLT Residents to See Themselves as Part of a Social Movement for Housing Justice

Scholars who critique CLTs as becoming more and more like mainstream affordable housing non-profits and less and less as political vehicles for social change and economic justice have an important point: by failing to connect CLTs with the political and social movement for decommodification and democratization of housing, CLTs lose the opportunity to build their constituency to support the work they pursue.[715] Rather than constantly fitting the round circle of the CLT model of non-market housing into the square pegs of local, state and federal affordable housing policies, tax regulation, and financing, which all assume

[715] *Ibid.*

market-rate housing as the norm, it could be much more powerful to build the CLT into the social movement for housing as a human right, emphasizing the unique way in which CLTs do this through permanently affordable non-market housing. This was the approach taken with the East London CLT described in the last Chapter. In hot markets, where land is expensive, and government subsidies can only go so far, such a movement may actually be necessary to activate more radical forms of land allocation (like eminent domain) and tax policies (for example an anti-speculation tax) to create more CLT housing. Furthermore, the universal decommodification of housing, "Housing for All" will undoubtedly require a wide-spread political movement, much like "Medicare For All," and perhaps even more so since it requires overcoming deep rooted commitments to the ideology of private property and market solutions to housing, which healthcare does not. However, before I discuss what such a radical program may require, the subject of the last section of this Chapter, let us return to how increasing resident participation in CLTs may represent a problem not only of a lack of incentives of the side of the CLT to see themselves as party of a social movement, but also the lack of incentives for CLT residents to see themselves as part of that movement.

An alternative theory to the theory that the lack of resident representation on CLT boards is the product of the professionalization of CLT boards, is the theory that residents of CLTs do not always feel they are part of a political movement, and the fault in that does not necessarily lie with the CLT but elsewhere. In many CLTs, residents often act as mere consumers of "affordable housing," treating their housing as a product, as opposed to understanding themselves as active and equal co-participants in the governance and care of their housing community and participants in democratic community development. This makes sense when dealing with CLT communities with mostly single-family homes, since the governance of single-family homes may not require any collective

internal organization and incorporation as a housing coop like an LEHC stewarded by a CLT. In CLTs dominated by single-family homes, the only real point of contact between the CLT and the tenant-owner may be in the beginning at the point of sale in the form of education, technical support and financial assistance provided by the CLT, in which case the CLT may act exactly like a non-profit service provider rather than as a political organ of the local community providing political education to tenant-owners. Most CLTs across the nation utilize the single-family home model, and therefore it makes sense that the majority of CLTs have more like 11% of residents on their boards rather than 33%. Additionally, the political landscape in which these single-family home CLTs exist is less contentious: the issues they face often have less to do with retaining affordable housing for all by fighting speculation in hot markets, but rather creating stable secure rental housing and pathways to ownership in relatively stable and possibly even dry real estate markets in suburban areas where land is less scare. In these contexts, many resident see themselves as simply home-owners, not activists, and while they are grateful for the opportunity to own a home they could not otherwise, many residents are not interested in spending time, particularly uncompensated time, participating on a board to influence local community development. In fact, as mentioned in Chapter 6, as a recent study shows, most CLT homeowners use their first CLT owned home as a stepping-stone into market rate housing.[716] In these contexts where residents only see their CLT housing as a stepping stone, it is more difficult, though not impossible, to motivate residents to participate at the level of the board. It is also important that board members who have the luxury of doing purely volunteer work may tend to be those who are more privileged. The reality may be that residents of low and moderate income may not have the

[716] Ruoniu Wang, Claire Cahen, Arthur Acolin, & Rebecca Walter, *Tracking Growth and Evaluating Performance in Shared Equity Homeownership Programs During Housing Market Fluctuations*, *supra* note. 464.

privilege of doing uncompensated work and therefore additional incentives in the form of compensation may need to be created.

This is not at all to say that CLTs need the same incentives structures to recruit residents. In CLTs in dry markets with primarily single-family homes, where there is less of a possibility of emphasizing the value of belonging to a housing movement, it might mean doing things like compensating board members for their time served on boards or compensating residents who do volunteer work for the organization. However, in hot markets where there is a crisis of affordable housing and therefore ripe for a movement, CLTs may need to reconceive the education they provide for CLT residents by placing greater emphasis on the meaning of resident participation as connected to the greater movement for housing justice. This might include residents meeting residents of other CLTs in other places where residents take a greater role, in order that they begin to perceive themselves as empowered and capable members of a movement rather than consumers of a product. This is for example a feature of Grounded Solutions "ambassador" program. Transforming the subjectivity of CLT residents so that they perceive themselves as part of a national movement for the decommodification of housing is a worthy goal, particularly in view of the eventual universal decommodification of housing, however it cannot be a process which one can assume will take place automatically.

In hot housing markets where CLT scaling of decommodified housing actually depends on building a democratic movement for access to non-market housing due to the astronomical price of land and housing, it not only is a ripe environment to provide political education to residents, but it actually behooves CLTs to emphasize resident control and participation in building a larger political movement that can mount a grassroots campaign for greater access to funding. More professionalized board may have little ability to represent the views and

interests of regular citizens, much less know how to engage them. While, professionalized board members may have "insider" connections to local government and know how to play "insider baseball", elected officials are equally or even more so concerned about reelection as they are in playing insider baseball, and a large turnout of their constituents outside of city hall can send a clear message as to how they should vote with regard to housing policy. In fact, in places like the San Francisco Bay Area where the real estate lobby and property owners are a powerful influence on electeds it is essential to turnout large numbers to overcome this robust oppositional force.

However, enhancing resident participation may not necessarily mean excluding city council members or other local representatives from the board so long as other resident and community members are also included. It is important to take stock of the fact that city vouncil members are democratically elected representatives, and to exclude them on the basis of not being "democratic" enough, fetishes a particular esoteric understanding of democracy within the CLT. One should not pit the CLT, the commons, against the public: the point is not to argue for replacing the public with the common but instead to use bottom-up commons communities to further enhance government democratic processes and to re-appropriate private goods as public goods with common goods as an important intermediary. As such, public representatives working side by side with residents, who understand the challenges and benefits of CLT housing, and community members who are rooted in local needs and interests, would present the most democratic and strategic way in which to mobilize the entire community. As discussed in the previous sections, the financing of CLT property development has shrunk at the federal government level and requires alternative financing both in terms of state and local finance, but also new ventures into community financing mechanisms. Pursuing an alternative way to fund CLTs will require widespread

democratic engagement with not only CLT residents but also citizens to both invest directly in CLTs, as well as, to put pressure on their local governments to fund CLTs.

8.4.3 Combining LEHCs with CLTs to Improve Democratization

Another way to activate residents of CLT housing, may be to incorporate Coops into the CLT model in CLT owned multi-unit properties. There are many reasons to do so in addition to activating residents to participate on CLT boards: inactive residents in multi-unit buildings are more difficult to manage, and therefore the housing stock is also more vulnerable to neglect. For CLTs that steward multi-unit properties, the failure to recruit resident board members may actually indicate a deeper problem of a lack of resident participation in their individual housing communities at the level of the cooperative and cooperative governance. LEHCs (Limited Equity Housing Cooperatives) and LECs (Limited Equity Cooperatives) have an excellent track record in generating successful member participation, which in part may be stimulated by the sense of being a member share-owner, and combined with CLTs, there is the additional benefit that the CLT can assist the LEHC with technical, legal and financial assistance which would be difficult for the LEHC to obtain on its own.[717]

Many CLTs, however prefer to operate zero-equity Cooperatives as opposed to an LEHCs, where co-op residents do not own a share in their cooperative, but instead participate in self-management as renters. This is because rental income from these properties may be an important aspect of the CLT budget. However, in these Coops there tends to be less participation and high turn-

717 AMANDA HURON, CARVING OUT THE COMMONS: TENANT ORGANIZING AND HOUSING COOPERATIVES IN WASHINGTON (2018). LIMITED EQUITY COOPS BY COMMUNITY LAND TRUSTS, GROUNDED SOLUTIONS NETWORK (2013).

over as with rental housing (however without the ease of replacing a renter). In sum, while it may be more attractive financially for the CLT to act either as a non-profit landlord/property manager of an affordable rental property rather than as a steward for an LEHC, however in the long run the CLT will likely spend less money and resources on an LEHC than a ZEC. One part of the move to democratize CLTs must be not only to structure collective decision-making but collective ownership. CLT need to provide clear pathway to ownership for multi-unit properties which will makes people more committed to the CLT in the long-term.

Finally, returning to the tension between scaling and entrenchment of the model vs. democratic participation of residents which I began with, an aspect of the problem which is entirely overlooked by critical scholars, is to consider that the primary purpose of CLTs to decommodify housing may itself lead to the greater democratization of housing, and democratization in a deeper sense than merely the democratization of decisions within the CLT but rather to democratize housing as a resource for society as whole. One cannot participate in a polity as a full social citizen, without access to the basics like housing, and the more one increases non-market access to fundamental resources, the more people will be able to participate. I think we can be cautiously optimistic while vigilantly working to address democratic participation among residents and community members, that as the CLT model scales, and more people have access to decommodified housing, that participation by residents and community members is likely to grow.

8.5 Shared Limited Equity for All: Beyond Low and Moderate Income

Above I discussed, there are many challenges which CLTs need to overcome, with regard to issues of entrenchment and scalability such as by: a) increasing its institutional entrenchment in local government policies and practices, and b)

creating greater access to financing through alternative mechanisms, as well as, c) addressing the problem of democratic resident participation and control. Here, I begin to consider whether or not the CLT model can be modified towards creating a "Shared Limited Equity Policy for All," and not just for those of low to moderate income. However before doing so, I think it is important to note that even if the CLT model continues to serve only those of low and moderate income, if it came to be normalized and accepted within the general toolkit of affordable housing policy at local, state and federal levels in the US, this would already bring partial decommodified housing to over a hundred million Americans with very low income, low income and moderate income.[718] Access to basic fundamental resources, as has been argued throughout this dissertation, I argue will lead more people to fully participate in politics, which in turn would lead to the further democratization of housing, as well as, to make it possible to demand the decommodification of other fundamental resources. However, as has been argued in previous Chapters, the only way to truly remove a resource completely from the market, is through its universal decommodification. If people can "opt" out to private market options, the quality of access to decommodified resources always suffers, and the type of systemic change needed at a deep structural level, as is being proposed here, cannot be fully realized. As has been demonstrated and argued in these chapters, the market operates as a set of imperatives, and therefore even if half the population divests from the housing market and prohibits windfall profits from land, this will certainly have an effect in discouraging speculators and encouraging the treatment of homes as non-market resources, but nonetheless

[718] https://www.census.gov/library/publications/2017/demo/p60-259.html (Last Visited January 5th, 2020).

there will still be an imperative on landlords and real estate investment companies (and not just opportunity as many would like to believe) to treat land as a commodity and to raise rents and the price of land for everybody, and not just for the particular plots of land they own as common sense would lead one to believe. To decommodify housing on a structural level, price must no longer reflect pressures on demand, but instead it must placed under social control and according to social metrics of value such as the ones that have been presented here such as CPI and AMI, which prioritizes access based on one's need for housing rather than one's ability to pay.

Here, I consider to what extent the CLT could be utilized as a stepping-stone towards such universal decommodification. Ultimately, the question may be moot, perhaps once CLTs scale up for those of low to moderate income, the political landscape may have been so altered as to make it possible to embrace a top-down political program for the universal decommodification of housing. However, utilizing the model of bottom-up piecemeal institutional change through law discussed throughout these Chapters, I ask whether the CLT could act as a stepping-stone towards such a transformation. The biggest challenges in utilizing the CLT model towards a program of universal decommodification are threefold: 1) the legal challenge and limits of the CLT's non-profit status, which requires that non-profits serve a "charitable purpose"; 2) the challenge of overcoming the ideology of private property in capping equity below market value (discussed in Chapter 6) and; 3) the challenge of deeper structural changes needed to other aspects of the economy in tandem with such a policy, which would increase the feasibility of capping equity, namely delinking the way in which homes are understood in the US context as a necessary form of forced savings and investment for retirement and personal crisis (as discussed in Chapter 6). In this next section,

I will discuss the legal challenge of extending the CLT limited equity model to everyone.

8.5.1 Legal Challenge: Non-Profit Status & Charitable Purpose

As explained in Chapter 6, CLTs are formed as 501(c)(3) non-profit organizations, which requires that the organization serve the charitable purpose for which it is formed reflected in its activities, governance and sources of funding.[719] This is a determination made by the United Stated Federal Internal Revenue Service since the primary benefit of incorporating as a 501(c)(3) status is that the organization is exempt from paying taxes on its activities related to its non-profit purpose.[720] Non-profit status is important to CLTs, not only because it confers tax exempt status, but also because it confer a number of other benefits: 1) ability to receive grants from philanthropic organizations as they often require a 501(c)(3) tax exempt status; 2) educational debt forgiveness programs for staff members; 3) exemptions from different regulatory contexts; and 4) the ability to engage unpaid volunteers.[721] In the case of CLTs, the approved charitable purpose which they serve according to the IRS is the provision of affordable housing to those of low to moderate income.[722] One may assume that "moderate" may also include middle income, but "moderate" is considered below 120% of Area Median Income, which is perhaps the "low middle." Furthermore, it is unlikely, according to the IRS precedent to date,[723] that CLTs would receive non-profit status if they exclusively served those of moderate income, without also showing that serving those of moderate income

719 *See* WILLARD L. BOYD III, NONPROFIT LAW: A PRACTICAL GUIDE TO LEGAL ISSUES FOR NON-PROFIT ORGANIZATIONS (2017).
720 *Ibid.* at p.2-6
721 *Ibid.*
722 *Supra* note. 473.
723 *Ibid.*

(and even high income) actually subsidizes the work they do to serve those of low-income.[724]

The Sustainable Economies Law Center, and specifically, Director Janelle Orsi, has done extremely innovative research into expanding the legal frontiers of 501(c)3 status in order to utilize non-profits not only for charitable purposes related to serving low-income clients, but for other purposes. As a result, she has conceptualized and researched other ways to frame the question of "What is a charitable class?" which might appeal to the IRS based on the direction of more recent precedent. She argues that "charitable class" might be broadening to include a class of people suffering from different forms of distress beyond living at the poverty line.[725] She argues that "distress" might encompass, not just those of low income, but also those of moderate income who are facing similar problems of economic distress like: displacement, rent burden (spending over 30% of income on rent), living without assets, and living in climate impacted areas. All of these forms of distress contribute to "community deterioration."[726] In addition to "community deterioration," I would argue that there is room within the IRS Guidelines Sec. 6 on "Exempted Purposes Other Than Relieving the Poor and Distressed" under Section(2) on "Lessening the burdens of government" that CLTs lessen the burden on government to invest in housing, as well as, in preventing wasted tax dollars.[727] CLTs demonstrate that government subsidies invested in housing are lost in one generation, requiring increased subsidies each year for the same quality of affordable housing. As explored in Chapter 6, CLTs not only retain subsidies but actually help them to appreciate: a modest amount

724 *Ibid.*
725 Janelle Orsi, Sustainable Economies Law Center Concept Paper, 2019
726 *Ibid.*
727 *Supra* note. 473.

invested can appreciate over a thirty-year span by 1,150%.[728] As a result subsidy retention (and even subsidy appreciation) assists in "lessening the burdens of the government" to invest in affordable housing.

Orsi, suggests a three-step method for framing the "charitable purpose" analysis for the IRS in order to advance alternate purposes like community deterioration. The first step in this analysis is to ask: "What are the threats one is addressing? What is the need that is being met?" [729]As Orsi argues, charitable purpose depends on the context, and in a context of climate change, of mass displacement due to inequitable rapid growth, of predatory real estate speculation, and other context of market failures such as widespread foreclosure, "charitable purpose" can and ought to be expanded to address these new threats and needs.[730] Orsi explains that the best way to make your case is to demonstrate how your organization's work is providing important solutions to these threats that meets the needs of specific target groups demonstrated through data. Reports that concretely demonstrate with numbers and statistics how moderate, and not just low-income people are being impacted by these different threats are important in persuading the IRS that the organization meets the charitable purpose requirement. She further argues that the organization ought to demonstrate, that their activity has "a substantial causal relationship" to remedying the problems and needs named.[731] This step requires further evidence, demonstrating not only the nature of the new emerging threats and needs, more generally as in the first step, but

[728] Francis McIlveen, Northern California Community Land Trust, "What Low Income Families Can Afford vs. Market Median Price" & "How Community Lad Trusts have given governments a 1,150% return on public investment." (p.314-315 of this dissertation.)
[729] Janelle Orsi, Presentation Legal Frontiers of Solidarity Philanthropy Conference (November 1st, 2018)
[730] *Ibid.*
[731] *Ibid.*

rather the impact of one's organizations in offering meaningful solutions to these threats.

Here, in the case of a "Shared Limited Equity Housing Policy For All," I would argue utilizing this analysis that access to permanently affordable housing for not just low and moderate income people, but for everyone, will solve a number of problems caused by an unstable speculative housing market discussed in Chapter 7, which could be argued as resulting in "community deterioration." This case would need to be argued more narrowly than to argue that the lack of decommodified access to basics like housing prevents people from participating actively as social citizens in a democracy as discussed previously. A more narrow argument would work on fitting the policy within the legally and politically acceptable purpose of "preventing community deterioriation" and "preventing lost public tax dollars." The following might serve as an argument for an IRS Form 1023 petition for extending limited equity through the CLT model to those of all incomes in urban areas:

Land use that permit windfall profits in hot speculative markets where housing is scarce results in mass displacement for those of not only low but moderate and higher incomes causing *community deterioration*. Mass displacement which effects not only those of low but also moderate and middle income results in community deterioration because such high rates of exodus of historical populations is destabilizing for the surrounding community in the following ways:

- People who are forced to relocate, must leave their jobs, schools, and communities;
- additionally, the community loses important members who supply essential services like educators, first aid responders, and city

infrastructure workers, who are of low, moderate, and middle income.

- Such displacement also results in failed businesses, which relied on the existing neighborhood's demographics as part of its clientele, which can also result in blight as businesses transition from serving those of lower incomes to serving those of the highest incomes.

CLTs offer a demonstrated solution, which can be evidenced by data, to addressing this threat and meeting the needs of not only low, but also moderate and higher income people, because by removing land and housing from the speculative market it: 1) immediately prevents displacement by providing subsidized housing options which are more affordable for moderate income people; 2) the subsidies, rather than being lost, are retained and even appreciate over time, and finally, 3) it offers macro-economic stability by preventing large fluctuations in land values in the local real-estate market preventing such crises as that which occurred in 2007-2010. Additionally, CLT "lessen the burdens of government" by preventing waste. Utilizing government subsidies in rapidly appreciating real estate markets results in waste since land prices in these areas requires large amounts of subsidy and without mechanisms for retaining that subsidy over time, it will be lost in one or two generations of homeowners.

These arguments would have to be supported by the following forms of data: 1) the number of moderate and higher income people, not just low-income people, who would be imminently displaced; 2) the causal nexus between speculative markets and the displacement occurring and; 3) a demonstration that the solution of removing land from the speculative market, accomplished through the CLT model, would solve this problem and meet the needs of not just low but moderate and middle income people.

8.6 Conclusion

The CLT is an exciting and rapidly growing model, however CLTs nationwide in the United States still constitute less than 2%-4% of all existing housing stock. In order for CLTs to scale, entrench, and institutionalize to reach impactful levels of decommodification, several barriers must be overcome, both in terms of internal and external limits of the CLT model discussed in this chapter. As analyzed, CLTs face two major obstacles to achieving scale: 1) the lack of entrenchment in governmental policy and practice, and a related problem; 2) access to land and dynamic capital necessary for the acquisition of land and housing, particularly in expensive real estate markets. Finally, CLTs must overcome an important hurtle to their legitimacy as democratic organizations by increasing their commitment to resident participation.

What the story of the ineffectiveness of CLT legislation both at federal and state levels demonstrates is that CLTs still lack institutionalization in local, state, and government policy and practice, which would not only allow the model to scale and become integrated and entrenched in a regulatory environment in which they could thrive, but also provide access to stable sources of government funding. In this context, the advocacy of CLTs and CLT networks at local and state levels is making the greatest impact in advancing the policy changes and access to resources necessary for CLTs to scale and entrench. In particular, along with the important work of advocacy networks like CACLTN to change the law on the tax valuation of CLTs, partnerships between local governments and CLTs has been central to this scaling and entrenchment demonstrated by: full municipal/CLT partnership of such places like Burlington, Boston, Chicago, & Irvine; partial municipal-CLT partnerships such as the examples of San Francisco and Berkeley, CA; and the quasi-governmental CLT partnerships, in the form of land banking in Albany, NY. These important localized partnerships and initiatives are providing

CLTs with the necessary institutional entrenchment in local government through law, administration, and finance in order to reach greater scale and more impactful levels of decommodified housing. Furthermore, the issue of the lack of scalability can be traced to the need to innovate beyond the current funding model, which has been heavily reliant on public subsidies and in particular on dwindling federal funding. Here, I explore innovations in alternative finance mechanisms like the East Bay Permanent Real Estate Cooperatives (Oakland, CA), the Community Bond (Toronto, Canada), which might present promising alternative ways to raise capital from both a given housing community as well as from the larger community in the form of micro-investments. We also discussed self-help financing in the form of Consumer Coops and Baugruppen, which might suggest ways forward in leveraging the existing resources of individuals to collectively purchase land and housing in more cost-effective ways, as well as, to subsidize housing through redistributing from wealthier residents to other less wealthy residents that neither have the credit nor assets to afford their rent or member share.

In addition to the challenges that CLTs face externally, I also address an internal criticism levied at CLTs, the issue of democratizing CLT boards and increasing resident participation. Here, I analyze why CLTs may not being "democratic enough" and to consider the root causes of the lack of resident participation and the tension between scalability and democratization. What I attempt to demonstrate is that the issue of the lack of resident participation on CLT boards is not entirely straightforward, it is usually not the result of an intentional decision to exclude such members, but often the lack of incentive and motivation, both on the side of CLT staff and board members to recruit resident members, as well as by residents, to engage in CLT communities when they are not compensated for their time, nor when do they see it as connected to a meaningful political and social movement for housing justice that they find

meaningful. I argue that some of these issues may be alleviated through revamping CLT education to emphasize such participation, but it may also require greater political education, along with other forms of CLT homebuyer's education provided by the CLT in what it means to be part of a movement to permanently remove housing off the speculative market through the CLT model. Increasing resident participation may also require that greater decommodification occur so that people have more time and resources to invest in the movement, as well as, the interest in participating as full social citizens in the management of a resource like housing. There is no one size fits all answer, and in some places scalability may rely on a more municipal government dependent model, while in other places, particularly in hot real estate markets where the cost of land and housing is higher than subsidies available, it may require the mass mobilization of residents and community members to put pressure on local governments to support CLT housing. In other places with dry markets and dominated by CLTs with primarily single-family homes, it may instead be necessary to find a way to compensate resident board members for their time.

Lastly, this Chapter discusses the possibilities of utilizing the CLT as a platform for a "Shared Limited Equity Housing Policy for All," and the challenges necessary to overcoming and advancing a universal program for the decommodification of housing not only for those of low to moderate income, but for all people of all incomes. Here I discuss the challenge of CLT nonprofit status being dependent on exclusively serving those of "low to moderate income," and the legal analysis necessary to advance a widening of the sphere of 501(c)3 charitable purpose to include all people by reframing the issue of affordable housing as mass displacement as a result of being priced out which contributes to "community deterioration" and government failure like "loss of public tax dollars."

Chapter 9 Conclusion: Results & Towards Shared Limited Equity For All

Commons studied empirically, as advanced by Nobel Prize winner in Economics Elinor Ostrom, offers an aggregation of evidence that undermines the hypothetical and hypostasized assumptions of neoclassical economics. By itself, however, such a purely empirical approach can only, from a constructive perspective, result in lists of "best practices" and the identification of precarious islands of non-market or post-capitalist experimentation. Commons, on the other hand, studied historically and institutionally in its social theoretical and legal institutional dimensions, and practiced in view of achieving specific social purposes that support the common good – decommodification of fundamental resources & democratization of the economy- offers not only short term post-capitalist experimentation but a plan for the longer-term transformation of capitalist social property relations, in the direction of non-reformist reforms accomplished piece-meal through law and available for increasingly generalized adaptations towards reaching universal access for all to fundamental resources.

This dissertation attempts to combine social theory, legal theory, and legal institutional design towards meeting the Polanyian challenge of creating alternative property institutions to re-embed the market in social rules through legal structural reform aimed at counteracting market imperatives by altering property entitlements to fundamental resources. It attempted to take the insight of the Political Marxists into the transformation of *social property relations*, between feudalism and capitalism, which cut people off from their means of subsistence, subjecting everything and everyone to the market, including one's ability to access fundamental resources like food, water and housing. Cutting people off completely from their means of subsistence required the enclosure of the Commons, as the Commons, in providing an alternative means of accessing subsistence goods, prevented the penetration of all social relations to the logic of the market. It was

this transformation in social relations and the enclosure of the commons, which gave birth to unfettered capitalism. The Commons in this transformation provided a meager buffer from the market, and it was never a final destination, but it offered an important lifeboat to many before the creation of the welfare-state. Many find themselves again at sea in small lifeboats in this latest neo-liberal phase of capitalism and decline of the welfare state, without any land in sight, grasping at their lifeboats to provide them with respite, nourishment and hope for a better future beyond capitalism. The Commons movements today represent those lifeboats, however, to prevent these boats from being pushed back permanently by the current into the past, they must forge forward with maps, plans and tools for seeking solid land. I attempt to offer such maps in the form of social and legal theory, and plans and tools, in the form of legal institutional design for the decommodification of fundamental resources through commons property institutions. Commons property institutions are conceptualized as property institutions which allow multiple users within the community to use a resource while preventing them from excluding one another from the resource, and disabling market rate transfer of the resource by individual entitlement holders. A commons property institution in this sense stands for: the collective ownership and social control over fundamental resources; property as a social relation between persons about resources disaggregated bundles of entitlements rather than absolute islands of ownership; shared limited equity for everyone which socializes the value created by land collectively rather than providing individuals with windfall profits; and a blueprint for a shared future which places social limits and rules on access to resources fundamental to human life aimed at decommodifying and democratizing access in order to break the chain of market operating as imperative, reconnecting man to his means of subsistence, and transforming capitalism to a new social form.

9.1 Recap of Dissertation Results

This dissertation produced the following results in relation to the study of the Commons as Post-Capitalist Strategy through Law:

1) The development of an alternative social theory for embedding the market through law and commons, uniting Ostrom's work on the legal foundations of the economy with the institutional analysis of Polanyi. A social theory that situates the actual, historical and potential, future roles of the commons within larger context of epochal shifts in historically-specific social relations. This social theory is connected to legal theory through an analysis of the legal institutional structure of the capitalist market (Chapters 1, 2 & 3);
2) Purpose and value-driven research into which legal institutions, and in particular, *disaggregated entitlements* of property regimes, best support the purposes of *decommodification & democratization* of fundamental resources (Chapter 4,5,6); and
3) The study of commons as a Commons Property Institution (CPI), a property institution where there are multiple entitlement holders all having the entitlement to use, with none having the entitlement to exclude others within the commons community, and none having the entitlement to transfer at market rate outside of the commons community. CPIs, I argue, are one possibility in a spectrum of institutional options available for experimentation in non-market forms of organizing the allocation, production and distribution of specific fundamental resources through law, which I apply to housing as one such fundamental resource (Chapter 6,7, 8, & 9).

4) The relevance of the "Resource Specific" approach for the conceptualization of CPI's in designing legal institutions which analyze the specific characteristics of unique resources in pursuing their decommodification and democratization. (Chapters 5 & 6)

This dissertation also produced the following results specific to Law:

1) A new approach to socio-legal analysis which incorporates *theory and purpose* in addition to the poles of analysis of *law, fact, & value*. Theory is conceptualized as both 1) socio-legal theory and 2) social theory. (Chapter 4). An application of this new theory of socio-legal analysis on Commons and Housing (Chapters 5 &6).
2) An approach which connects *social property relations* (Robert Brenner) produced by social theory to *property as a social relation* (Wesley Hohfeld) produced by legal institutional theory. (Chapters 2 & 3)
3) I forge a new level of "resource specific analysis," what I call a "social relations analysis." I also apply "resource specific analysis" in three dimensions to housing: the economic analysis, the social relations analysis and the values driven analysis. I demonstrate the capacity of each level of analysis to reveal relevant characteristics of a given resource in order to design legal institutions (Hohfeld) aimed at different purposes. (Chapters 5 & 6)
4) I offer an application of Roberto Unger's project of "institutional imagination" by locating "deviant doctrine" in relation to Community Land Trusts. I also combine Unger's project with Thomas Wilhelmsson's project of alternative legal dogmatics, analyzing Community Land Trusts, in the context of US law at both federal and state levels in view of catalyzing a "switching of principles" in legal doctrine on property and immoveable

goods by building a model for embedding the market an decommodifying housing based on existing legal institutions and concrete legal doctrinal material. (Chapter 4 applied to Chapter 8)

This dissertation also produced the following results for housing policy:

1) A tool kit for the decommodification of housing and constructing CPI institutions to that end in the U.S. context utilizing associational law, property law, and an evaluation of the advantages and disadvantages of social valuations of property in the form of limited equity restricted resale formulas. (Chapter 6)
2) A comparison of potential CPIs in housing such as the Community Land Trust, the Housing Cooperative, and Condominium, and their ability to decommodify and democratize housing as a resource with primary attention to the experiences of the United States and Sweden. I explore how CPIs may be utilized to ensuring access to housing which is permanently affordable (decommodified) and collectively owned and controlled (democratized), while at the same time utilizing equity incentives to ensure maintenance and improvement of the housing stock. (Chapter 7)
3) I offer a specific proposal for how to scale and entrench the CLT model at the level of public and private organizations involved in housing development policy and finance in the United States. As well as an analysis of their ability to democratize housing and proposals for improving their democratizing potential. (Chapter 8)
4) Finally, I offer a Shared Limited Equity Housing Policy for All through the CLT model, analyzing potential necessary modifications to the model to apply shared limited equity beyond those of low to moderate income.

9.2 A Shared Limited Equity Housing Policy for All Through Commons

A decommodified housing policy which guarantees housing as a human right achieved through CPIs brings us one step closer to the goal of a universal program for the decommodification of housing through law what I call a "Shared Limited Equity Housing Policy For All." CPIs have the benefit that they are localized, decentralized, and involve the active engagement of civil society, as opposed to operating purely through public bureaucracy, which tends towards hierarchy rather than democratic decision making, or purely through market forces, which produces inequitable outcomes. A Shared Limited Equity Housing Policy for All in the long-term would move us closer to altering current *social property relation* and towards eventual full universal access to housing for all as a human right. Furthermore, it could avoid the problems of mobilizing mass political support by democratizing housing in ways that it could institutionalized for the long term insulated from political swings. In the short-term, it would also provide opportunities for homeownership to low, moderate, and middle income in places where the price of homes is unaffordable to all but those of the highest incomes.

What the recent experience of the US and Sweden, two historically divergent nations, in terms of both economic policy and political thought, demonstrate that housing cannot be analyzed separately from the general trend over the last one hundred years: employment has become concentrated in cities, causing flight from rural areas, leading to an oversupply of housing in places where employment opportunities are shrinking and high demand in others that outpace supply. Available public housing in many metropolitan areas, tends to be concentrated in those areas where there is less demand due to a lack of attractive location in relation to employment opportunities, resulting in isolated ghettos dominated by the poorest and most vulnerable segments of society, namely new immigrants and people of color. Intensifying racialized divisions and social

stratification in those areas is causing greater and greater political backlash and divisions in many countries including the US. Furthermore, in many cities, the dire need to maintain and improve existing housing stock due to deferred maintenance over decades is further accelerating the process of gentrification: as improvements are made to run-down existing stock, they are sold and rented at much higher prices, thereby incentivizing new construction through high profits and ownership for the wealthy. Housing for different groups must be embedded from the outset into a housing policy for all, rather than a public or non-profit rental system for people of color and those of lower socio-economic classes and ownership opportunities for the rest. What these experiences reveal is that a housing policy aimed at decommodification must aim for universal access to housing based on shared limited equity. Building equity allows individuals to grow wealth and to use housing as a limited form of investment with reasonable rates of return, while at the same time (as discussed in Chapter 6) playing a social function in creating *incentives to improve* and maintain the housing stock over time.

A universal program of shared limited equity housing through CPIs, as developed in the Chapter 6, offers a concrete way in which to alter the *social property relations* of capitalism towards the full decommodification of an important fundamental resource – housing -– to which all people ought to have access. Shared in "shared limited equity" means democratically governed, and "limited" means socially determined caps on equity rather than market determined price. In this sense, *shared limited equity brings together the democratization of housing with the decommodification of housing*. As explored in the previous Chapter, a universal program of shared limited equity would require offering *affordable options for those of all incomes* by weakening the difference between owning and renting through: 1) delinking and removing the underlying land from the market and subjecting it to democratic control and decision-making according to social rather than market driven

purposes, and 2) capping and limiting equity to reasonable rates of return for owners while retaining incentives to improve and maintain housing stock. However, universal decommodified access to housing, *a shared-limited equity housing policy for all,* is too far on the horizon of current political feasibility, though potentially realizable through the incremental scaling and greater democratization of existing commons property institutions as I demonstrated in Chapters 8 & 9.

Politically, to call for property owners to give up their ability to sell at market rate through government regulation would be extremely difficult in most places today in the world. Even in Sweden, which was closest to reaching full decommodification to many resources, including housing up until the 1980 and 90s, the idea of shared limited equity for all may still seem like leap rather than step ahead. In contrast, in a country like the United States, which is just starting to gain mainstream political support for a program of universal healthcare for all, capping equity on all home prices and removing land from the speculative market would be a laughable proposition. Rather what is being proposed here is a long-term plan of making access to housing under a program of *shared-limited equity through commons*-widely available for adoption on a voluntary basis by bottom-up communities. One may ask, "why would anyone want to do so on a voluntary basis?" Aside from the ability to create intentional communities of persons with similar world-views and values, as will be explained in the following section, in many metropolitan areas in the world, the affordable housing crisis has put homeownership out of reach, not only for those of the lowest income brackets, but even those of moderate and middle income. The trade-off in caps in equity may appeal to those in such places where the alternative is to rent, often at astronomical prices and in limited supply, or to leave and commute to work from the city's periphery and surrounding suburbs often from hours away. For so many people in this situation without any alternative, the opportunity to purchase a good quality home at a reasonable price

may seem worth the trade-off of accepting a reasonable- rather than market- rate of return.

As discussed in Chapter 7, the decommodification of housing was historically the result of interventions into the housing market by the welfare state, and in places like Sweden during the long reign of a Social Democratic government, universal decommodification, as opposed to the means-tested assistance of countries like the US and UK, was the ultimate aim. However, as I argue in Chapter 2, since the decline of the Scandinavian social democratic welfare state and the rise of neoliberal policies, full universal decommodification of housing has been abandoned everywhere, and even means-tested assistances has been massively reduced. This has led worldwide, towards the reduction of public housing, and a segregated housing policy of market rate rentals for the poor and ownership opportunities for the rest. In previous historical periods, like the post War period to around 79-80 when a worldwide recession hit, inequality between classes was not as dramatic due to the efforts of world-wide social democratic governments and the programs like the New Deal of FDR in the US which contributed to higher wages, housing subsidies, and other forms of alternative shared equity homeownership programs like the LEHC and Bostadsrätt. This changed as the result of Reaganism in the United States and the end of uninterrupted reign of Social Democratic politics in Sweden and the beginnings of the liberalization of the economy. Under Reagan, the budget for HUD (Housing and Urban Development) agency, which supported federally operated housing subsidy programs, was reduced from 27 billion to 8 billion. The intensified levels of foreclosure and crisis in Sweden in the early nineties and the United States more recently in 2008 brought even a deeper divide in the wealth of ownership vs. rental households and decreases in subsidized housing (the almost elimination in the US). As discussed in Chapter 7, Sweden, in the early nineties, subsidized credit rates for

new owners was decreased and eventually eliminated, and the public housing sector reduced, as well as other forms of subsidized housing (such as Bostadsrätt) converted to regular market rate housing. Those who lost out in the recession of the 90s were pushed permanently out of the homeownership market due to poor credit, low wages, unemployment, and for new immigrants and young people due to the lack of credit histories. In contrast, in the United States, subsidized housing has been eliminated slowly since the 80s with major cuts during the Clinton era and continuing incrementally with each administration (regardless of political party). Furthermore, since the 2008 crisis, the availability of credit has been restricted worldwide, making entrance into homeownership more difficult than before. Since these crisis, while the housing market in many places has bounced back to even astronomical rates (for example in the SF Bay Area), the availability of credit to many segments of the population has not, leading to the increase of renters to 50% of all residents in almost all the major cities in the United States and rising nationally above 37%, the highest it has been in over 50 years, with 20% of those renters being formed in the last ten years, which has led some to call the US a "renter nation."[732]

Creating ownership opportunities in market conditions such as these means much more than providing a less restrictive criteria for obtaining credit. It means even more than providing subsidized interest rates, it requires removing land and housing off of the market either through government public housing or as I have proposed through Commons Property Institutions, it means creating subsidized housing at a buy-in price and rate of equity delinked from the market and based on a formulation which tracks income or some other form of social metric for valuing property. More public housing is needed, regimes of regulation are continuously made and undone, meanwhile people are displaced, government

[732] *Samara*, *supra* note. 490

investment lost, and long periods of deregulation pass before the citizenry organize to mount a counterattack to reclaim access to fundamental resources like housing.

Commons Property Institutions in housing[733]explored in Chapter 7 provides important alternatives to both the market rate provision of housing and public housing by decommodifying housing through self-help communities engaged in bottom up democratic engagement to permanently remove the provision of housing off of the speculative market. Decommodification is achieved by the removal of housing and land from the speculative market effectuated by legal restraints which restrict transfer and exclusion entitlements and emphasize use entitlements. The restrictions on transfer take the form of resale restrictions on market rate sale through limited equity resale. Commons housing comes in many varieties of governance, ownership, and finance structures, explored in Chapter 8, with differing abilities to achieve decommodification, as well as, to incentivize maintenance and improvement of the housing stock. Commons Housing or CPIs in the housing sector take the form of legal institutions defined by collective governance and ownership like: cooperatives, condominiums, and community land trusts. Such Commons Housing prove to be resilient over time and to political change because in addition to creating permanent affordability through government subsidies, they are funded through alternative funding sources like: philanthropic donation-based contributions, members' dues, individuals- pooling, sharing, and aggregating assets -and finally crowdfunding mechanisms through micro-investment campaigns or "community bonds" just to name a few of the sources explored in Chapter 9. Just as Commons Housing's

[733] "Social Housing" is characterized by its universal access, community driven, and citizen participation in land and housing planning and management. This is what I also see as synonymous with "commons housing." Universal access is an issue however in places like the United States where welfare benefits are non-existent and where they exist, are means-tested. Here only partial decommodification on a means-tested basis is possible.

ability to collectively raise capital strengthens the resiliency of these institutions from changing political tides and dependency on government subsidies, collective governance and ownership, as discussed in the last Chapter, has the important function of weakening the divide between absolute ownership (with the transfer entitlement prominent in that bundle) and rental (which only entitles one to use and exclusion with limited to no ability to transfer) through shared equity and shared responsibility over the allocation and management over the entitlements of ownership.

In Chapter 6 and Part III, I provided an overview of tools for legal institutional design towards a radical proposal for the decommodification and democratization of housing through Commons Property Institutions (CPIs). The ultimate aim of this proposal is to achieve through CPIs a "Shared Limited Equity Housing Policy for All," however first through creating widespread access to "shared-limited equity housing" for those of all incomes through decommodifying housing by removing land, buildings, and home equity off of the market, not through pure public regulation nor market mechanisms, but a shift to an alternative third way of "Shared Limited Equity," pursued through CPIs. I argue this can happen by: 1) eliminating the distinction between ownership and rental by decreasing equity profit windfalls currently facilitated through the transfer entitlement (ownership), and 2) increasing and enhancing the gains of use entitlements (rental) through limited, shared, reasonable rates of return. This requires ending the treatment of housing as an investment by capping equity to reasonable rates by extending shared limited equity to both owners and renters.

A shared limited equity policy as a universal program for decommodification would require mass political mobilization and dramatic governmental structural reforms, instead what is being is being promoted here is not a top-down program of regulation but the first steps towards such a program

through bottom up legal intervention catalyzed through CPIs. However, the role of the government regulation cannot be entirely sidelined as has been discussed in the previous Chapters. As I hopefully have demonstrated in Chapter 7, as exemplified by the history of Coops both in Sweden and the United States, CPIs in the housing sector while less subject to political whims as public housing are not entirely immune from the vicious cycle of political swings resulting in losses of decommodified housing. The history of Cooperatives in the US and Sweden, while seemingly divergent, ultimately converge in decay and failure, though for very different reasons. In the US, support for the LEHC model at the federal level declined, and in Sweden, many government subsidized Coops were converted into market-rate Coops.

What this demonstrates is that Coops, or any other CPI, by itself, is not enough to achieve decommodified access on a meaningful level. Government subsidies for CPIs is crucial to its institutionalization both in terms of scaling and entrenchment. Government support is needed to achieve impactful scaling of CPIs in the housing sector which will lead to its deeper entrenchment and thus more widespread decommodification. This is especially true in large metropolitan areas, as discussed in previous Chapters, as a result of the astronomical cost of land and housing, often requiring public subsidies to make purchase land and housing in the first place. Furthermore, so are the presence of crucial catalyst intermediary democratic institutions like Stadtbau and CLTs discussed in Chapter 7 & 8, which provide important oversight, resources, and relationships with public and private entities like banks, governments, and municipal administrative bodies.

9.3 The Role of the Citizen as Protagonist in Pursuing Shared-Limited Equity

There is undoubtedly a massive abyss that divides the current system from a universal program of shared limited equity, especially utilizing existing principles

and doctrines of private and public law and the current spectrum of tools available in the housing sector. However, to transform the system in ways which guarantee lasting impact and institutional embedding, one must engage in the applied work of combining Wilhelmsson's "switching of principles" and Unger's "institutional imagination" with Polanyi's institutional social embedding discussed in Chapters 2, 4 & 5. One must work from within law to alter capitalist social relations to create enduring and sustainable institutions aimed at decommodification, which requires altering legal doctrine, principles, and policy while maintaining an outside-in view guided by an alternative social theory and its evaluative criteria of decommodification (as presented in Parts I & II). Willhelmsson's concept of "switching of principles," discussed in Chapter 2, utilizes the values within existing legal principles and concrete doctrinal materials of private law to catalyze a switch from within law towards supporting alternate values. This was exemplified by Willhelmsson's work on the *social force majeure* in contract law, which used the concept of force majeure and expanded it to support social welfare values. I attempt to do the same but with broader reach in what I understand as the "sources of law" and the agents of law-making to include citizens, and not merely jurists and judges, as Roberto Unger proposes in his work (as discussed in Chapter 2). Furthermore, as argued in Chapter 2, values, cannot be unanchored from a social theory, otherwise they turn into a normative game of purely subjective preferences masked as objectivity. Instead values aimed at the more equitable distribution of resources must be developed out of human purposes informed by a social theory of how social changes occur, cognizant of the winners and losers of every social configuration.

Social theory teaches jurists that the institutionalization of changes in law cannot occur without institutionalizing those changes in society. Law follows society, not the other way around, as the formalists would lead us to believe (as

discussed in Chapter 2). Replicating and generalizing new models for decommodified housing will occur not only through reforming legal doctrine through case-law and legislation, but also through, and perhaps more importantly, by providing citizens with the legal, technical and financial tools and resources necessary to bring those models to life. The case for example of Baugruppen, as well as all the other Commons Housing discussed in the previous Chapters, are particularly illustrative of this point. This model could not have come to life without citizens coming together to: a) form intentional communities, the collective entity, but also that their efforts could only be realized once they were connected with b) available land through Stadtbau, an important intermediary in providing legal, technical, communications and other administrative support necessary to getting the model off the ground. Furthermore, until the entry of the Green Bank, which became the largest provider of individual loans for these types of projects, it would not have generalized and replicated into the thousands and 500 projects (in Berlin alone), as it now has become today. Therefore, in addition to law, I analyzed the potential and availability of administrative and financial support mechanisms in the countries where the models originate. In this way, this dissertation, and particularly Part III, is intended not only as a work of socio-legal analysis, but a toolkit or manual for citizens to build decommodified housing, with emphasis on how to build and improve upon existing institutions in the US.

While from the perspective of law, and particularly from the perspective of a dogmatic formalist approach rooted exclusively in the provincialism of one national context, the legal institutions presented in these Chapters appear dramatically different from one another, and therefore comparison appears unimaginable, much less fruitful for legal scholars to undertake. However, against this formalistic understanding of law, I hope I have demonstrated in Part III that purposive socio-legal analysis (as developed in Chapter 4) reveals that while CPIs

may not appear within the same "legal family" in form, they are united (and compared) through the purposes and effects they pursue. The differences between these legal institutions are less a product of differences in their legal structure, but rather the result of their purposes and their effects, and in particular how the purpose of decommodification is accomplished through legal restraints on transfer at below market rate. As such, citizens play an important role in creating law, and in pursuing shared limited equity through Commons Property Institutions. CPIs weaken the tenure between ownership and rental by citizen intervention, integrating both into one type of tenure: collective ownership with limited returns. This thesis does not discount the importance of the role of politics, nor do I claim it entirely possible to avoid this path in forging more robust and generalizable Commons Property Institutions, however this thesis attempts to offer an alternative path not wholly reliant on that model, which places its fate in the hands of regular citizens armed with maps and tools, such as the ones offered here, in order to forge a better shared future beyond capitalism.

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