Law & Social Inquiry
Journal of the American Bar Foundation

Law & Social Inquiry
Volume 35, Issue 2, 517–546, Spring 2010

Is Law Unbounded? Property Rights and Control of Social Groupings

Amnon Lehavi

FENNELL, LEE ANNE. 2009. *The Unbounded Home: Property Values Beyond Property Lines*. New Haven, CT: Yale University Press. Pp. xi + 298. $45 paper.

This review essay follows up on a suggested model for resolving problems of neighborhood externalities and exclusionary associational patterns in metropolitan areas. The model is based on a property rights regime of "alienable entitlements," as articulated by Lee Anne Fennell in The Unbounded Home *(2009). The essay frames this model as promoting a groundbreaking approach to the fundamental quandary over the role of law as a tool for broad-based social change and asks if legal rules can fully absorb the multiple types of societal effects that influence the nature of contemporary homeownership. It assesses the normative desirability and practical feasibility of controlling social exclusion through property rights.*

INTRODUCTION

Does law serve as an effective conduit for broad-based social change? Can it alter modes of human conduct that are viewed as normatively objectionable but practically persistent, such as racial bias? Could it aid in alleviating key societal tensions, such as the growing alienation between persons and groups from different socioeconomic strata in metropolitan areas? If so, what branch of government might do a better job in mobilizing legal rules for such purposes: the legislature, the courts, or the administrative agencies?

Undermining the formalist focus on legal doctrines and the hierarchy of authoritative institutions, the law and society movement has critically

Amnon Lehavi is senior lecturer and Director of Real Estate Studies, Radzyner School of Law, Interdisciplinary Center (IDC) Herzliya. E-mail: alehavi@idc.ac.il.

I thank Lee Fennell and Nicole Garnett for their comments.

examined the ways in which legal norms and institutions are constantly shaped by economic, political, or social forces. Yet even within this highly influential body of knowledge, little consensus emerges about the role that legal rights can play, if any, in *affecting* broad patterns of social structure and human conduct. Gerald Rosenberg (2008) has all but dismissed the potential influence of law, chiefly of court decisions, on social reform. Litigation not only steers activists for change to an institution that is unable to help them, but it also diverts crucial resources away from the only realm that matters: politics. The failure of the legally celebrated *Brown v. Board of Education* (1954) decision to affect a true change in the practical patterns of racial segregation allegedly testifies to the irrelevance of law.

Other law and society commentators have taken a somewhat different approach. Stuart Scheingold (2004) argues that although legal rights do not directly empower social groups and movements, the belief of Americans in rights—"the myth of rights"—is itself available as a kind of resource that can indirectly mobilize the political process. This dimension can thus serve to constitute, and not only reflect, social practice. However, as Scheingold notes, the action of law is empirical and contingent: To what extent are individuals actually conscious of their legal rights? Do communities exert counterforces that resist resorts to legal claims? Are progressive social groups able to organize politically to make use of the potential moral persuasion of legal rights?

Other writers have also cautioned against a too radical negation of law as a tool for social change. While there may be some sense in the argument about legal cooptation—meaning that the focus on legal reform narrows the causes, legitimizes ongoing injustices, and diverts energies—the counterfocus on strictly extralegal measures may result in even worse cooptation effects that would block any chance for social change (Lobel 2007).

Regardless of where one stands on this debate, the current discourse seems to revolve around a very clear paradigm. Broad-based social changes require "high-profile" actions, be they legal or political. If we believe in the effect of law, then we assume we need a *Brown* decision or the Civil Rights Act of 1964 to change collective social patterns. For law to push forward social change, it must resort to those "dramatic" constitutional doctrines, civil rights protections, and other types of legal mechanisms that speak publicly and bluntly on the issue. The full force of the law, the argument goes, can manifest itself only through such high-profile deeds.

But can law work through different channels and still be effective for such purposes? Can private law mechanisms, typically perceived as aimed at resolving specific interpersonal interactions, be utilized to alter large-scale persistent social patterns? More pointedly, can the issue of social exclusion and segregation in America's metropolitan areas be effectively addressed outside of the all-too-familiar realms of constitutional protection, fair housing laws, or antidiscrimination decrees and prohibitions?

Lee Anne Fennell's *The Unbounded Home* (2009) suggests just that. It breaks new ground in the work of analyzing the ties between law and social behavior by offering an innovative legal scheme for resolving problems of neighborhood externalities and exclusionary associational patterns in today's metropolitan areas, based on an adaptation of what are in essence private law mechanisms: alienable property entitlements. If Fennell is correct, social scientists and lawyers, engaged in an effort to undermine conventional legal frameworks, may have been trapped in their own framing of law and social change.

As an avid supporter of such "cross-border" enterprises, be they among different fields within the legal realm or at the interface of law and other social studies, I view Fennell's contribution as impressive, tightly analyzed, and thought provoking. But probably naturally for such projects, it leaves a few areas subject to queries, some of which I address in this essay, that one should consider before adhering to such new methodological and substantive framework.

Further, this essay aims at offering a more general inquiry into the potential role of law in the social sphere. The analysis of addressing neighbors' interrelations and patterns of social exclusion through innovative legal rules may be viewed as an inductive method exercise in the "architecture of law" as a vehicle for controlling social conduct—a fundamental dilemma that is of universal interest to social scientists and lawyers alike.

To start with, in order to understand the importance of Fennell's legal reframing of the social dilemmas on exclusion-versus-inclusion and on other types of human social interrelations, one should first realize the way in which *The Unbounded Home* is also a border breaker in the allegedly "intralegal" study of the institution of property law.

Fennell powerfully shows that homeownership in contemporary society no longer conforms to our paradigmatic view of private property rights in land as focused on individual territorial control and exclusion. William Blackstone's (1979 [1766]) famous conceptualization of ownership as "the sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" (2) has never actually captured the complexity and contingency of property rights, even during Blackstone's own times (Rose 1998). Private property in land has nevertheless been considered in liberal democracies as a refuge of "negative liberty" within the four corners of the asset from the intervention and coercive demands of society (Berlin 1969). Private property has been viewed, for better or for worse, as an expression of sovereignty (Cohen 1927) and a source of economic or even political freedom (Friedman 1962). This was so even if locus-based liberty has always been constrained by conflicting interests, be it by setting up limits on creating nuisances to surrounding properties, by other types of specified duties to others (for example, the duty of lateral support), or by public regulation, such

as zoning and other kinds of land-use controls that confine the landowner's autonomy of decision making about the use and management of the land. Still, the dominant underlying purpose of nuisance law has been one of "live and let live," and the land-use regulatory power has been similarly viewed as necessary to prevent liberty from turning into all-around anarchy. Thus, individual autonomy within the set borders of the home was considered the rule, not the exception.

No longer so, says Fennell. In today's metropolitan areas, "homebuyers are often much less interested in the on-site attributes of the real estate than in the people, things, services, and conditions lying beyond what we continue to refer to as the property boundaries" (2009, 2). This interest in others does not in any way mean that property owners are becoming other-regarding in the sense that they consciously embrace a "social obligation" norm toward other members of society (Alexander 2009). Quite the contrary, as Fennell notes, homeowners continue to make every effort to guard their own castle but at the same time take exceeding pains to control the lives of others to prevent the adverse effects of being in the "wrong" kind of environment. This is especially so in regard to neighborhood ambience and community composition but also with respect to the home/workplace interface, the bundle of services and amenities provided by their locality and regularly visited adjacent localities, and political constituency affiliation.

In an ever-expanding reality of personal and physical interrelationships, so goes the argument, the classic paradigms of property are largely obsolete. Nuisance law covers only a small fraction of potential sources of friction, and zoning and land use regulation rely on categorical bans on particular land uses that are often inefficient. Moreover, the right of exclusion—considered by many to be the cornerstone of property (Merrill and Smith 2007)—no longer does an effective job in achieving what Fennell views as the chief goal of property: pairing together control over inputs and ownership of outcomes (16). What is therefore needed is a paradigm shift in property in land, one that would craft innovative legal mechanisms, chiefly individual and collective monetary "alienable entitlements." This should be done with the purpose of resolving both intraneighborhood spillovers and broader dilemmas of social association and exclusion in metropolitan areas.

I argue, however, that this transition from a perceived societal ideal (the perfect pairing together of inputs and outputs) into a corresponding new legal regime is far from being self-evident. Law is not simply an empty vessel that can be filled or refilled to perfectly attain societal goals at any given point in time. Law is not unbounded in this respect. It has internal ethical, institutional, and functional characteristics that constrain it from always "transparently" mirroring top-down or bottom-up social perceptions.

My analysis of Fennell's work offers a new dimension to the law and society quandary. It looks not only to the problem of implementing progressive legal rules, but also to the more fundamental problem of crafting them in

the first place. Moreover, it does not assess the limits of law from the currently dominant law and society perspective, in which law is inherently overshadowed by power and politics, but rather from a more functionalist-jurisprudential viewpoint. Accordingly, I focus attention in this essay on the economic analysis of law—the viewpoint of a school often associated with a very different agenda from that of social reform movements—by pointing to the practical inability of the economic analysis to easily transform legal rules. The growing frustration of law and economics scholars with the persistence of "inefficient" legal doctrines should be addressed not only through the lenses of competing ideological perspectives, but also through acceptance of the ideologically neutral fact that law has a life of its own. As is the case with social justice movements, so too the call to switch to more efficient rules to guide human conduct must come to terms with the unique structure of law. As such, my analysis of Fennell's model offers much broader insights for law and society students. It is not limited to a certain normative perspective or to a particular theme. It seeks to illuminate more comprehensively the complex ties between law and social behavior, and the limits of law in directing social conduct.

Furthermore, Fennell's analysis may be viewed as in itself trying to bridge the often (regretfully) prevailing methodological and substantive disconnect between the economic analysis of law and the law and society literature. While Fennell resorts to economic theoretical concepts and institutional structures, she never loses sight of the key dilemmas and concerns that are preoccupying the law and society movement. Thus, her work—and, I hope, my own analysis in this essay—entail yet another broad-based dimension that would be of general interest to a diverse group of social scientists and lawyers.

In Part I of this essay, I follow a concise presentation of the main themes of *The Unbounded Home*. In Part II, I ask whether law could indeed be feasibly extended to encompass all sorts of external effects on contemporary home-ownership by recrafting a coherent and predictable bundle of property rights. My central argument is that although *physical* borders are undeniably being increasingly challenged in terms of cause and effect in economic value, a consequent redelineation of existing *legal* borders in matters of liability, causation, and remedies requires further independent articulation, especially in a property system that is generally typified by protecting rights, not economic value.

In Part III, I move on to consider what Fennell herself describes as the "most ambitious and controversial" (5) part of her analysis: controlling social exclusion within metropolitan areas through alienable property entitlements. I offer a brief taxonomy of different types of residential communities and analyze both the normative trade-off in monitoring the different communities' patterns of association and exclusion and the potential mechanisms for such intervention through current property norms. My analysis points to an internal tension between Fennell's support for a marketlike process and her

pursuit of an objective ideal that impacts the analysis. I end by suggesting in Part IV that even if one accepts the tentative blueprint for addressing social engineering issues through alienable entitlements, it is unclear if this model would create a fundamental change in the way that interhousehold and intercommunity dynamics actually take place.

One can, therefore, view the structure of this essay as a breakdown of the general theme of law as a tool for controlling social conduct into three main stages or subquestions: First, is law at all able to redress or redirect a certain pattern of social conduct? Second, if it can, what legal channels—for example, public law doctrines or private law mechanisms—would be most appropriate for doing so? Third, can legal rules be complemented by implementation and enforcement mechanisms that would ensure a long-lasting fundamental effect in real-life scenarios? With this analysis, the essay goes beyond the topics of neighbors' conduct and social exclusion to illuminate the most fundamental queries that have been preoccupying the study of law and society.

I. AN INNOVATIVE LEGAL APPROACH TO SPATIAL SOCIAL ORDERING

Fennell's work can be viewed as a potent attempt to hook up three distinctive bodies of literature involving numerous social sciences disciplines—which up until now have been only casually interconnected—in her attempt to resolve the multifaceted dimensions of property rights, and homeownership in particular, through a sustainable legal framework.

The first body of literature she considers is that of property "entitlements"—the foundation of which is regularly attributed to the works of Ronald Coase (1960) and Guido Calabresi and A. Douglas Melamed (1972). This literature's chief goal is the optimal design of legal rights and duties among persons regarding the use and control of resources, in order to maximize social welfare in a world plagued by problems of externalities, asymmetrical information, strategic behavior, and other substantial transaction costs. It is inspired by an economist's (Coase 1960) blunt antiformalistic approach to law, according to which nuisances and other interferences with property rights should not be viewed within the legal perspective of wrongdoing, but instead as an externality problem of a reciprocal nature that should be resolved to increase overall efficiency—an approach relaxed, though not ruled out, in the subsequent work of other legal scholars.

Some of these suggested innovative solutions for optimal design include calls to systematically replace law's approach to the protection of property rights by a property rule (that is, requiring the consent of the owner for the right's transfer) with a liability rule (under which the owner could be forced to give up her right for an externally determined payment) (Calabresi and Melamed 1972). Moving further in attempting to think outside the box of

conventional legal solutions, writers have been developing sophisticated legal webs of liability rules, or options, that could be universally employed to reveal parties' genuine preferences and valuations, and would thus aid courts in allocating and reallocating entitlements (Kaplow and Shavell 1996; Ayres 2005). Beyond this inherent nonformalistic aspect, the entitlements literature has also deviated from the conventional *in rem* concept of property rights by practically viewing entitlements as a set of *bilateral* coordination problems that look very much like contracts or torts, further undermining the traditional essentialist approach to property as comprising certain rights "good against the world."[1]

The second kind of literature concerns larger-scale collective action problems. How do different types of groups, associations, and communities design their lives by combining individual choices with collective control so as to avoid all sorts of resource "tragedies"? In the context of geographically based dilemmas, the inquiry about such forms of collective design may be said to consist of an amalgam of different methodological, analytical, and normative approaches in fields such as law, institutional economics, game theory, sociology, geography, political science, and psychology. A comprehensive survey of these sets of literature is naturally impracticable and in itself runs the risk of hasty alchemy, but a few themes stand out as especially relevant for the present analysis.

One such theme has been the management and governance of different types of common property regimes, mostly associated, especially nowadays, with the work of Elinor Ostrom (1990, 2005). In contrast to Garrett Hardin's conventional model of the "tragedy of the commons" (1968, 1243)—which concludes that human strategic behavior of overuse and underinvestment are doomed to end in tragic results unless commons are shifted to pure private property or state control—institutional mechanisms can be devised to overcome many of the hurdles involved in intragroup and intergroup collaboration and coordination. This does not necessitate full-scale collective entity ownership but may resort to different types of property hybrids (Lehavi 2008). In fact, once one realizes how many types of commons we constantly come across in life—starting with the household and the neighborhood and moving up to the global climate and other megascale resources—it becomes clear that commons and collective action need not be antonyms by definition. Moreover, the reverse problem of anticommons, by which the world of resources is divided into too-isolated fragments of individual property rights (Heller

1. This view has not, however, remained uncontested. Probably most prominently, Thomas Merrill and Henry Smith (2000, 2001, 2007) have called to reinstate at least some of the "integrity" of property. *In rem* rights, so they argue, are qualitatively different from *in personam* rights even if the property/contract boundaries are not always neat; Anglo-American law continues to implicitly embrace a *numerus clausus* principle of property forms, and property rights retain at least a basic layer of universal exclusion.

1998), may often impede collective action through stagnation and other types of coordination costs.

The institutional ordering mechanisms by which groups operate to manage their common interests are naturally diverse. Current literature has shown that alongside top-down formal arrangements, a key role in the societal configuration of collective action can be played by informal norms in the management and control of resources in close-knit communities (Ellickson 1991); the development and nourishment of interpersonal social capital to enhance cooperation in different human surroundings (Jacobs 1961; Putnam 2000); and formal types of institutional private orderings in entities such as homeowners associations or condominiums (Barton and Silverman 1994).

The third body of literature, which seems relevant to Fennell's attempt to reconstruct the paradigm of homeownership in today's metropolitan areas, draws again on themes from several social sciences disciplines. It deals, inter alia, with the macrogeographical patterns of residential association, exclusion, and inclusion; the various processes by which socioeconomic, religious, ethnic, and racial themes find expression and further influence physical groupings; the relationships among territorial communities and general society; and the roles of different levels of government in influencing grouping trends and preferences. Here too, the methodological and normative approaches are highly diverse.

Consider, for example, Charles Tiebout's (1956) model of a market for local governments. Under the model, people choose the locality that provides them with what the resident-consumers consider to be their ideal mix of local public services, amenities, and taxes by moving to such a locality. This approach views social groupings as a marketlike process, an aggregation of individual choices that may tilt toward a social optimum.

Yet other approaches to territorial groupings have been fundamentally different. Critical geographers (Harvey 2001), sociologists (Byrne 1999), political scientists (Mangen 2004), and others have looked at the ways in which market rhetoric aligns with covert and overt top-down public policy to validate and entrench social exclusion along socioeconomic, racial, or religious lines. Lawyers have looked at the ways in which rules and institutions engage in the dynamics of exclusion in and among metropolitan regions (Ford 1994; Frug 1999; Cashin 2001). Much debate focuses on the rapid proliferation of gated communities and other private neighborhoods in the United States and other countries (Ellickson 1982; Gillette 1994; McKenzie 1994; Blakely and Snyder 1997).

So how does the vast array of all of these topics, touching upon so many bodies of knowledge—ranging from petty disputes among neighbors about matters of aesthetics to the effects of government services or market trends on home values, and up to the spatial dimensions of society's most sensitive macroissues of wealth, race, and religion—boil down to a set of legal blueprints that can meet the enormous challenge of reconstructing homeownership?

This is indeed an extremely difficult, almost heroic, task. Fennell (2009) is cautious to state that she does not claim "to have hit upon a single best design" (169) but is nevertheless engaged in a fascinating reconceptualization of the way in which property law should do "a better job of aligning the homeowner's returns with the homeowner's choices" (4) and of providing homeowners with coherent tools to perceive the relevant trade-offs between individual choices and collective control in an ever more complicated and dynamic world.

In Part I of the book, Fennell sets out to defy much of the conventional wisdom about homeownership, while introducing the theoretical frameworks that could aid in reconfiguring property law. In Part II, she focuses on inter-household frictions within a given jurisdiction or neighborhood, mostly in matters of aesthetics. She describes the ways in which public land use regulation (zoning) or private regulations (covenants) set out to ensure compliance to collective rules of conduct. Fennell criticizes, however, the potential inefficiencies of such binary rules that either permit or wholly ban a certain use and calls to create mechanisms for potential efficient bargains. Fennell's suggested model is one of "entitlements subject to a self-made option" (abbreviated as ESSMO). One version of the model is the "customizable callable call option" (111). If, for example, Lee wants to display a lawn flamingo in her front yard—a potential aesthetic disturbance—the rule would require Lee to self-assess her value for such a use and to pay a value-based tax, but the community could be entitled to take back Lee's privilege by paying her the entire self-assessed value of the use. Monetary alienable entitlements, says Fennell, could do a better job in internalizing the social costs and benefits of property uses, while alleviating many problems of strategic behavior in negotiations.

Part III of the book takes such property alienable entitlements one step forward to tackle the most acute sociogeographical problems in metropolitan areas: ones of intercommunity social exclusion and inclusion. Identifying some of the multiple, often covert and sophisticated "membership effects" (124) that various types of community rules and practices have on potential residents and neighboring jurisdictions, Fennell argues that existing policy mechanisms dealing with neighborhood composition could be complemented by creating "options in space" (160).[2] Thus, for example, each community might be required by a state agency to determine the value it places on a given exclusion increment (that is, a standard number of low-income housing units). The community would then be required to pay a tax to a state coffer

2. As Fennell notes (156–58), there is some previous discussion in the literature about potential monetary mechanisms such as public subsidies or "bribes" to wealthy households to monitor problems of spatial segregation. Yet, Fennell's model is innovative in offering a comprehensive theoretical analysis and a set of practical tools that could allegedly devise a broad-based property framework for these dilemmas.

based on its own valuation. But, as in the above example, the valuation would create a callable call option that could be exercised by the agency—which acts on behalf of individual households—so that it could take back the community's right to exclude by paying the community the entire stated self-valuation of the exclusion increment. Finally, in Part IV of the book—which I do not focus on in this essay—Fennell suggests breaking up the "housing as consumption" and the "housing as investment" (180–87) components that are currently intertwined in conventional homeownership. This means that a homeowner would be able to sell to an investor the potential upside resulting from off-site factors that are not controlled by her (for example, market trends) or insure herself with such an outside investor against a potential downside.

II. TOO PERFECT PROPERTY RIGHTS?

My friendly critique of Fennell's work starts by questioning if law in general could indeed be feasibly extended to encompass all sorts of external effects on contemporary homeownership by recrafting a coherent and predictable bundle of property rights.

As I mentioned in the Introduction, my view of the law's potency as qualified is not based on the typical explanations that the law and society literature has generally promoted. Leaving to the side for the moment these external considerations, such as the overshadowing of formal legal rules by the reality of power and politics, I offer here what one might view as an internal analysis of law. This analysis, however, should not be of interest to lawyers only. It seeks to flag out, for social scientists in various disciplines and of different ideological stands, certain ethical, institutional, and functional characteristics of the legal system that are relevant to *any attempt* to promote a social agenda through legal rules.

Fennell sees property's essential nature as residing in the institution of property's "capacity to pool together inputs and outputs" (15). This argument picks up on Harold Demsetz's model (1967) about private property as the solution for resource tragedies. By making persons internalize the negative and positive effects of their acts, the private cost-benefit calculus would merge with society's trade-off, meaning that individual pursuit of self-interest would consequently increase overall social welfare. The idea that society would be better off when one is able to reap what one sows is by no way new: it dates back to the works of Adam Smith (1982 [1762–1763]), William Blackstone (1766), and Jeremy Bentham (2005 [1802]).

But although this view of property has been highly dominant—and leaving aside for the moment competing theories touching on autonomy, personhood-constitution, equality, social responsibility, and so on as alternative mainstays for the institution of property—as a matter of legal policy, the

goal of input-output internalization is explicitly not being pursued to its utmost end. In many scenarios in which one can identify a factual link between the act of one person and its influences on another, the law chooses not to intervene in the sense of setting up correlative property rights and duties. In this respect, while Fennell's sophisticated mechanism of alienable entitlements aims at providing a more perfect pairing of *economic* inputs and outputs, it overlooks in some ways the need to provide an independent normative reasoning for imposing *legal* liability.

Starting with positive effects, the law of restitution or unjust enrichment has been generally reluctant to hold a neighbor liable in restitution following a self-serving activity by a landowner that incidentally improves the neighbor's land, even when such a benefit is readily translatable into objective monetary benefits. While such internalization would make sense from a pure economic perspective, law has looked to considerations of autonomy and encouragement for preactivity agreements as constraining the scope of potential liability (Lehavi 2006). Although several scholars have called for expanding the scope of restitution in certain cases to solve, for example, free-riding scenarios when the respective parties' interests are genuinely locked in (Dagan 2004) or when the actor engages in the private production of public goods (Porat 2009), private law rules have refrained from simply "pairing inputs and outputs" (Fennell 2009, 14) including in residential settings.[3]

Even with respect to negative effects, the law has solid reasons to refrain from aiming at *always* pairing outputs and inputs. An attempt to have perfect property rights in this respect is liable to prove to be too perfect. It may make sense from an economic viewpoint but it is socially impracticable and normatively debatable. Many of the facets included in Fennell's depiction of today's metropolitan areas have been already identified and considered. These aspects have altered the law over time but not without borders.

For example, landowners affected by what they deem to be unneighborly conduct may employ various common law causes of action. Liability, however, is not regularly established merely by demonstrating damage or interference with the use and enjoyment of land.[4] Legal border-setting in

3. This categorical mismatch between positive and negative effects also typifies the public realm of property rights. While government is held liable when an adversely affecting action is considered as amounting to a "taking" under the Fifth Amendment, a benefit-conferring government action, a "giving," does not usually trigger correlative liability on the part of the private owner—for example, in the case of land upzoning or if the improvement of public infrastructure increases the market value of adjacent properties. This distinction too has been criticized (Bell and Parchomovsky 2001), but it is nevertheless based on a conscious consideration of issues that have been familiar in legal discourse for quite some time, and is not merely a matter of legal myopia or neglect.

4. Private nuisance, for example, is said to apply only to invasions of another's interest in the private use or enjoyment of land that are either "(a) intentional and unreasonable, or (b) unintentional and otherwise actionable . . . for negligent or reckless conduct, or for abnormally dangerous conditions or activities" (American Law Institute n.d., div. 10, chap. 40, topic 2).

nuisance law is based not only on the limited capacity to predict all the different types of interpersonal interferences and cross-border effects, but also on a normative viewpoint that not all types of spatial interactions should be perfectly regulated by legal rights and duties.

The question of such legal delineation is obviously often contentious. For example, in the context of aesthetic nuisances, most courts have been reluctant to recognize a cause of action, generally reasoning that courts are not designed to serve as arbiters of taste. In contrast, a few courts, as well as several commentators, have called to recognize such a right, arguing that courts are not required to judge beauty but to determine whether a certain land use is "consonant with established community values" (Coletta 1987, 142).[5] Yet even if one agrees that aesthetics is simply a matter of community conformity, the legal quandary goes further. To what extent do residents have the right to idiosyncratic tastes within a broader community? Should covenants in private neighborhoods that *do* regulate and monitor matters of taste always be enforced by state institutions, including courts? There are no easy answers here. But this is exactly the point. Legal rights and duties do not simply follow economic costs and benefits but must be more fundamentally assessed.

In the context of private law rights, the issue of delineating the borders of *legal causation* is also playing a particularly dominant role. The work of H. L. A. Hart and Tony Honoré (1985) focuses attention on numerous such normative factors, in particular the judgment about whether a person's action constitutes "intervention on a stage already set" (72). The evaluation of which factors form part of the background and which are considered an intervention is not simply a factual "but for" query. It asks legislatures and judges to make normative calls based also on common-sense shared understandings; to articulate and establish these understandings in law; and by so doing, enable a division of labor between collective and individual responsibilities (Simmonds 2000). These issues also touch more broadly on the distinction between public law and private law: To what extent can fundamental social challenges be met by private rights and duties, or do they allow for action only in the public realm?[6] More generally, I point here to a more

---

This is a vague definition, and nuisance laws have been accordingly notorious for their unpredictability and ad hoc nature in identifying and defining the legal basis of liability (Prosser 1966). But it should be clear enough that an "anything goes" approach, by which liability would be imposed every time one can prove a factual input/output link—simply could not work.

5. This debate follows up on a broader debate about nuisance law. Ellickson (1973) has suggested imposing liability in private nuisance when the plaintiff is able to show that the activity is subnormal in relation to its geographical vicinity. But although a local component has always played a part in defining the legal borders of nuisance, one could argue that there is only a certain sense in which nuisance can be determined by bottom-up community practice. Indeed, courts typically engage in independent top-down legal policy in designing legal rules, beyond merely identifying local practices.

6. In property law, one such point of contention is whether societal values such as distributive justice can also be promoted by private law rules, or whether such goals should be

intrinsic ethical argument by which legal rights and duties cannot and should not govern every single instance of human action. The requirement of legal causality or the limits on the duty of care in negligence law, for example, are not only about practical administrative costs or distribution. They also reflect a fundamental understanding, especially in a liberal democracy, by which we want to create some divisions, even if often fuzzy, between individual responsibility and collective responsibility, and between the legal realm and the pure social realm.[7]

I do not intend to engage here in a full-scale analysis of these major dilemmas. My point is more modest and takes issue with much of the economics-inspired entitlements literature. Moreover, as already emphasized, my discussion is very much applicable to any attempt to translate a certain social or ideological agenda into legal rules. Very simply put, legal rights and duties have a life of their own. Thus, even in a society that is otherwise dedicated to the goal of promoting overall societal welfare, the way in which property rights and duties are created, allocated, and enforced, the division between private law and public modes of action, or the methods by which different legal remedies are deigned and awarded once legal liability has been recognized, are embedded in independent normative considerations that go beyond mere shifts of costs and benefits.

This is especially the case since US property law places enormous weight on defining types of property interests, crafting the bundle of entitlements and obligations for each one of them, and viewing property rights as worthy of legal validation and protection *as such*—so that the jurisprudential inquiry starts with the identification of *legal* rights and duties and whether these were violated, and only then moves to evaluate the *economic* effects of the infringement for designing the appropriate remedy.

Hence, for example, in the constitutional setting, it is not the loss of economic value in itself that triggers constitutional scrutiny and intervention, but rather the identification of constitutionally protected rights and a resolution that such rights have been infringed by state action.[8] The same

---

accomplished only through public law and policy mechanisms, most prominently by the tax-and-transfer system (Lewinsohn-Zamir 2006). This debate is naturally relevant to the residential land use context. Should qualitative differences exist between the power of a local government to allow or forbid certain land uses through zoning and other regulatory measures, and the contours of private property rights, in addressing potential conflicts among neighbors? What normative place do collective private arrangements such as residential community associations hold along the public-private continuum of regulating space?

7. My general argument here is that only totalitarian countries can claim to have no ethical or conceptual limits on legal duties. This broader point, however, lies outside of the scope of this essay.

8. Consider, for example, the Supreme Court's decisions in *Phillips v. Washington Legal Foundation* (1998) and later in *Brown v. Legal Foundation of Washington* (2003). The two cases dealt with the Interest on Lawyers Trust Accounts (IOLTA) programs adopted in different states. Under these programs, certain client funds held by an attorney in connection with his practice of law are deposited in a bank account, with the interest income generated by the funds

applies in the private law of property.[9] Changes in economic costs and benefits in themselves do not suffice to establish property rights and legal liability. This does not mean, of course, that law should not be updated or reconsidered when economic changes call into question the efficacy and normative desirability of current rules. But if we do take rights seriously, including property ones, these do not boil down to value only.

Again, my dispute here is not only with Fennell's model, but more broadly with much of the contemporary entitlements literature. Consider, for example, Ian Ayres and J. M. Balkin's (1996) view of "legal entitlements as auctions" (705–06). Analyzing entitlements in land and potential frictions between the current landowner and an interested rival, Ayres and Balkin do not settle for a legal switch to liability rules. They argue that "efficiency might be sometimes further enhanced by allowing additional rounds of 'bidding'—that is, by allowing both sides successive options to take the entitlement back at successively higher prices" (706). While such an innovative suggestion might make sense from a pure economic viewpoint, one may be left to wonder whether such a reconfiguration of property rights would not prove to be too perfect, that is, an unattainable legal regime.

The reader may aptly note that Fennell's own model of alienable entitlements for addressing residential spillovers or metropolitan associational patterns does not necessarily dictate a single solution, but merely offers additional tools or mechanisms that lawmakers, judges, or private collectives could apply in their decision making; or in Fennell's terms, it is simply about "expanding the menu" (2009, 151). But going back to Fennell's detailed analysis of "ESSMOs in the neighborhood" in Chapter 5 and to the leading example of the pink lawn flamingo whose use is controlled by a self-assessed callable call option, one cannot help thinking what a perfect pairing of inputs and outputs would look like. From an efficiency perspective, private communities or local governments would probably be unwise to outright allow or

---

being paid to foundations that finance legal services for low-income individuals. The Court generally recognized the respondents' argument that each one of the separate client funds was too small to generate interest income in itself, such that there was no direct economic loss, but at the same time reasoned that "[w]e have never held that a physical item is not 'property' simply because it lacks a positive economic or market value. For example, in *Loretto* . . . we held that a property right was taken even when infringement of that right arguably *increased* the market value of the property at issue. Our conclusion in this regard was premised in our long standing recognition that property is more than economic value; it also consists of 'the group of rights which the so-called owner exercises in his dominion of the physical thing,' such 'as the right to possess, use and dispose of it.' While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property" (*Phillips v. Washington* Legal Foundation 1998, 169–70, internal citations omitted).

9. While courts consider, for example, the power to exclude to be "one of the most treasured strands in an owner's bundle of property rights," and similarly view rights of possession, control, and disposition as "valuable rights that inhere in the property," no such clear commitment exists for any particular benchmark of *value* (Lehavi forthcoming).

prohibit different land uses. Rather, if the community were sophisticated enough, *all* different types of land uses would be priced, taxed, and potentially taken back by the community. This would allegedly create a perfect internalization of inputs and outputs, one that enables collective control alongside use-specific efficiency. But property law would practically be reduced to bits and pieces that offer very little guidance as to what property means.

To be fair, Fennell does offer a tentative taxonomy of types of decisions that should not be bought or sold, as compared to "potentially negotiable" entitlements (151–53). But Fennell's normative analysis in this regard is surprisingly formalistic. She identifies "land use controls for the protection of health, safety, and morals" (152) as collective decisions that, once made, cannot be bought by specific landowners. She similarly views household "residential choices for constitutionally protected reasons" or "choices free of discrimination" (152) as ones that cannot be bought by the community. In contrast, collective decisions on "most land use controls addressing externalities and aesthetics" or household decisions on "most residential choices" (152–53) are potentially negotiable and transferable.

This division, which allegedly follows constitutional jurisprudence, is debatable. First, Fennell's carte blanche for land use controls that aim at protecting morals is potentially troubling.[10] Consider the famous *Village of Belle Terre v. Boraas* (1974) case, in which the Supreme Court upheld a local ordinance definition of "family," for the purpose of one-family dwelling houses, as "[o]ne or more persons related by blood, adoption, or marriage." Rejecting the contention of six college students barred from renting a house in Belle Terre, New York, the Court reasoned that the police power is "ample to lay out zones where family values, youth values, and the blessings of quiet seclusion . . . make the area a sanctuary of people" (9). Yet even if one accepts the Court's finding that no fundamental right has been infringed, why should we immediately conclude that such a regulation—often viewed in the aftermath of *Belle Terre* as a moralist one[11]—can never be "sold"? I do not say that it necessarily *should* be, but what is missing from such an analysis is an

10. This is especially so when one considers the evolution of the public nuisance doctrine (Spencer 1989; Nagle 2001), and, later, of land use controls that impose certain community-wide moral standards, whenever a deviation from such a standard falls short of being a constitutionally protected liberty (Phillips 2002).

11. In *Village of Belle Terre*, the majority opinion frames the regulation as embedded in considerations of urban problems such as noise or congestion. Justice Marshall's dissenting opinion illuminates, however, the ways in which the regulation implicates (unconstitutionally, in his view) personal lifestyle choices of household companion (16–17). I do not claim to know what the Village of Belle Terre had in mind originally or whether the majority opinion is genuine in disregarding the moralist agenda. Indeed, in later cases, the Court invalidated or limited moralist regulations that were deemed as infringing upon constitutionally protected liberties, such as in the sweeping zoning out of pornography (see *Schad v. Borough of Mount Ephraim* 1981) or in recognizing as a "family" only a few categories of otherwise-related persons (see *Moore v. City of East Cleveland, Ohio* 1977, striking down an ordinance that prevented a grandmother from having her grandson live with her). But in many other cases, land use

independent normative argument about why such a kind of spatial regulation could never be monetized under Fennell's model, as opposed to other types of valid land use ordinances.

Second, with respect to "most land use controls addressing externalities and aesthetics" or "most residential choices" (Fennell 2009, 152–53) that qualify as negotiable under Fennell's taxonomy, it is doubtful whether all of the different types of land uses along this broad spectrum should be considered on an equal normative footing, for example, in deciding which party should hold the entitlement to the use or how the entitlement should be protected.

Again, consider the perfect world of inputs/outputs pairing, in which all land uses follow a self-assessed callable call option model. Even in pure economic terminology, we aim at distinguishing between cases in which a person acts within the market, even if her actions influence others, and between an externality. A new IKEA store may effectively drive out of business all other furniture stores in the neighborhood. But this in itself does not regularly create legal liability on IKEA, although its acts have tremendous neighborhood effects (loss of jobs, decline of Main Street, etc.). In this respect, property law may view such an action as different from a case, for example, in which a person opens up a business only to annoy neighbors or to drive someone else out of business. The latter mode of action can be considered as constituting an abuse of right (Perillo 1995), although the input-output calculus is otherwise equal. Again, one may contest if a bad motive should be relevant to property law, but the discussion in itself points to the fact that imposing legal liability (and ESMMO schemes do just that) does not simply follow from an input-output mismatch.

Finally, even in private neighborhood settings, which are initially based on reciprocal consent, there seems to be a solid normative sense in making communities speak clearly on which uses of land are permitted, which are forbidden, and which can be negotiated, rather than engaging in an all-encompassing, normatively neutral ESSMO-type scheme. Beyond practical considerations, such as mounting transaction costs, when aiming at collectively identifying and self-assessing all potential contingencies of cross-border effects, such private institutions for collective action cannot release themselves from making independent, explicit value judgments in configuring their property ordering.[12]

---

regulations driven by a moralist viewpoint remained intact. So, regardless of where the Court draws the line constitutionally, I remain puzzled why Fennell views such regulation as automatically inalienable.

12. As Lisa Bernstein shows (1992, 2001), in studying different types of merchant communities, for bottom-up contract and property regimes to survive over time, the community need not only make some clear judgment calls on legal dos and don'ts within the community, but must also play an ongoing active role in preserving epistemological and normative understandings to decrease the likelihood of disagreement in yet unforeseen scenarios.

Concluding this part of the analysis, I consider Fennell's articulation of monetary mechanisms to resolve intra- and interneighborhood externalities as offering extremely important insights for current property theory. Yet even if the model offers a cross-boundary economic optimum, property law cannot automatically follow up on it.

As mentioned, this criticism is in no way unique to the economic analysis of law. Any attempt to promote a certain philosophical, political, or social agenda through legal rules is liable to encounter ethical, institutional, and functional constraints, touching on issues such as categorization, stability, predictability, personal liberty, legal causation, remedy design, and the limited resources that a legal system has in crafting and enforcing legal obligations. Such an analysis may thus also serve as a lesson for the otherwise-very-different law and society school. Utilitarianism and social justice would face similar challenges in this respect.

III. ALIENABLE ENTITLEMENTS AS GUIDES FOR SOCIAL COMPOSITION

Nothing in my analysis so far should lead to the conclusion that certain social issues should always remain outside the grasp of law or that monetary remedies are inherently or morally inappropriate. Rather, in many cases, the legal system's challenge is to identify the specific types and scope of intervention that are both normatively desirable and practically feasible. In the context of social association and exclusion, I definitely share Fennell's view that law in general cannot simply remain indifferent to potential wrongs. But are alienable property entitlements the cure?

The analysis in this part addresses three main themes. First, as a more general legal policy point, I argue that not all types of associational huddling patterns should be normatively viewed in similar manner. I do so by offering a brief taxonomy of residential communities and of the potential societal trade-off in permitting such communities to exercise exclusionary associational practices. Second, I describe ways in which existing formal property law norms may already affect internal and external aspects of such residential communities, including in matters of social exclusion. Third, I address practical and conceptual difficulties in the suggestion to switch to alienable entitlements based on the community's self-assessment of its preferences. Since there are so many sophisticated ways to overtly and covertly control social composition, it would be practically impossible to tag each such practice or effect. Moreover, I point to an internal conceptual tension in Fennell's analysis between the structuring of property inalienable entitlements as a marketlike process of subjective assessments and her pursuit of a fundamental objective blueprint in constructing an ideal model of society.

To start with, as I have elsewhere shown (Lehavi 2009), to avoid the often-vulgarized and incoherent discourse on community, and territorial communities in particular, we would do better with a *contextual, functional analysis* of different community formations. This should include the identification of the initial motives and ongoing goals of a group in forming a community and maintaining formal and informal mechanisms for collective action, and of the ways in which the community structures its institutions and employs specific exclusionary practices. A community should be understood not as having a single meaning that either exists or not within a certain group in a dichotomous manner, but rather as consisting of a *continuum* along which many variations exist, with different types of potential denominators and interpersonal interactions.

Such typology could correspondingly aid us in discussing the interplay between what I identify as two prominent groups of arguments for validating territorial communality and in asking whether and to what extent such arguments may apply within this typology.

Briefly, the first group of arguments recognizes the inherent tension between community and society (Tönnies (2001 [1887]) but justifies its existence in certain circumstances. Commentators have long recognized that forming and maintaining solid subsociety communities may often run contrary to the ethos and norms of general society and undermine its cohesiveness. Yet this is a price that liberal societies must pay if liberalism is understood as mandating a significant level of state neutrality, tolerance, and respect for individual choices (Robinson 1997). Society should learn to accept, even if reluctantly, some types of de facto manifestations of individual choices about congregating. Few would argue that such choices should be absolute—overt racial exclusion would gain little moral or legal support—but nevertheless, goes the argument, their legitimacy should not be stamped out altogether (Alexander 2002). Under some versions of this argument, the state should at times go further and *actively guarantee* the viability of distinctive territorial communities—especially in the case of a minority culture that suffers from systematic inferiority and that must maintain territorial separatism to exist, since geographical assimilation would cause it to collapse (Kymlicka 1989).

The second group of arguments for subsociety communities sees at least some types of groupings as socially desirable because these are believed to entail wider societal gains resulting in a win-win scenario. This is what the Tiebout model, discussed in Part I, is actually about. In addition, under the polis theory, small-scale jurisdictions are considered the only arena where one can actively participate in public decision making and citizenship, thus also benefiting democracy and society in general (Frug 1999). Taking this point further, one may argue that what works on the local government scale may work even better for smaller-scale territorial groupings, such as homeowners associations. A relatively small group may be able to effectively organize and

establish mutually binding rules and collective action mechanisms for neighborhood management (Ellickson 1998) while enjoying better prospects for social capital (Putnam 2000).

My suggested taxonomy for examining these arguments and their applicability to potential justifications for different patterns of social congregation and exclusion consists of three main types of residential communities: (1) *Intentional Community*, a group that shares a thick common denominator of ideology, values, or beliefs that are substantially distinctive from those of general society (for example, the Amish or Ultra-Orthodox Jews); (2) *Planned Community*, a private residential development designed to solve the host of collective action problems that neighbors typically face in residential neighborhoods, chiefly provision of common resources and control of intra-neighborhood externalities; (3) *Spontaneous Community*, groups of physically adjacent residents who live in regular neighborhoods, that is, those that are not initially organized by a set of binding norms and institutions but are able to cooperate and coordinate over time (for example, by reciprocal grassroots collaboration and coordination in publicly owned public spaces) and in the process create a meaningful, enduring basis for communality (Lehavi 2009).

I do not discuss here the intentional community (which Fennell addresses briefly in Chapter 7, basically supporting its right to exclude in view of its distinctive constitutional status) or the spontaneous community, but I will focus attention on planned communities that form the heart of Fennell's analysis.

To facilitate coordination and reciprocal control, developers of a "planned community"—also typically known as a Common Interest Community (CIC)—construct a consent-based legal framework that purchasers must formally join by signing the CIC's governing documents. The CIC institutions are not only empowered to enforce the original terms, but are also authorized to make managerial decisions, promulgate rules, and even amend the governing documents, usually without requiring unanimous consent.

In one sense, the CIC can truly be considered a community—that is, in its exclusionary practices. This is most vividly illustrated by gated communities that physically restrict public access to them. But what about the constructive elements of communality? Recalling the two types of general arguments in favor of subsociety communities, do CIC residents utilize their institutional structure to form deeper manifestations of common values, empathy, and a sense of belonging? Is the possibility of creating and nourishing intracommunity social capital being indeed complemented by the existence of genuine "minidemocracies" in the CIC institutions? In other words, can we identify in planned communities the social benefits that exceed enclave-guarding and may even be said to produce societywide advantages that justify exclusion?

The evidence on this matter has been mixed. On the one hand, the constant proliferation of CICs and the general support that residents express in surveys for CIC rules and institutions seem to attest to the alleged fact that

people truly "feel at home" in CICs.[13] Moreover, a theme-specific CIC, such as a golf community with its own golf course, could congregate people who share the same passions, ones that go beyond merely sport.

On the other hand, several studies have shown an increasing number of recorded disputes and conflicts among residents and CIC institutions, as well as an abundance of rule violations, especially on the part of resale purchasers (Atkinson and Blandy 2005). In addition, unlike the utopian polis perception, managerial activities are often not carried out by residents but by professional management corporations (Chen and Webster 2005). And what about theme-specific planned communities? Here, too, the positive elements of communality may often become meshed with its mere exclusionary aspects. Golf communities have typically become a top residential choice also for many nongolfers, who may very well seek not only to enjoy open space and low density, but also the de facto modes of racial divide that typify such communities (Strahilevitz 2006).

Planned communities therefore pose a difficult normative challenge to law and public policy. Considerations of collective action efficiency, liberty, and potential social capital coincide with concerns for social segregation and de facto denial of liberty for others.

Given the ambiguous nature of such residential associations, it may very well be that "quantity makes quality" from a normative perspective. As an isolated phenomenon, a planned community may be considered positive or at the least harmless from a social perspective—especially because, unlike intentional illiberal communities, the residents of such planned communities do not wish to entirely seclude themselves from society or to challenge its fundamental values. They do not refuse to receive medical aid, are not conscientious objectors to the draft as a collective, and do not practice polygamy.

Matters change, however, when planned communities are practically becoming the default for new urban developments intended for higher-status residents (Atkinson and Blandy 2005) and, in some cases, when such developments are encouraged or required by local governments (McKenzie 2005). Such residential groupings then begin to pose a significant problem for those who remain outside these communities and create broader societal adverse impacts stemming from the "secession of the successful" (Cashin 2001, 1675).

Property law, it should be said, already has a substantial impact on the sustainability of such communities and on their ability to exclude those that "don't fit." I have termed the potential impact of formal property law as providing either Property Tailwind, Property Headwind, or Property (Near)

13. For example, in a 2007 survey, 74 percent of CIC residents said that their CIC's rules "protect and enhance" property values. Only 3 percent said these rules "harm" property values—a slight increase from the 1 percent that argued for such negative effects in a 2005 poll (Vanno 2007).

Zero-wind for residential communities (Lehavi 2009). Whereas such Tailwind would mean that state institutions, including courts, would refrain from viewing planned communities as semipublic institutions and would accordingly resolve disputes under private law doctrines, the opposite approach, that of Property Headwind, would apply public law principles to rules and decisions of planned communities and place the burden of "reasonableness" on their institutions.

Generally, legislatures and courts have so far provided mainly Property Tailwind for both internal norms of compliance and external norms of selection and exclusion.

In the *Villa De Las Palmas Homeowners Ass'n v. Terifaj* (2004) case, the California Supreme Court upheld a majority-approved amendment to a CIC's governing documents, which imposed a no-pets restriction. The court viewed use restrictions as "crucial to the stable, planned environment of any shared ownership arrangement" and held that "all homeowners are bound by amendments adopted and recorded subsequent to purchase" (1228–29). Similar support has generally been granted in matters such as aesthetic controls, restrictions on outside storage of certain items such as unused cars, or limits on other types of activities that are not regularly prohibited by general property or tort law (Ellickson and Been 2005).

Consider next overt member selection and exclusion. In the *Mulligan v. Panther Valley Property Owners Ass'n* (2001) case, a CIC voted to prohibit individuals registered as Tier-3 sex offenders under Megan's Law from residing in the community. This decision was challenged by an association member who argued that it violates public policy by infringing on the constitutional rights of Tier-3 registrants and also by de facto deflecting those persons to regular neighborhoods that have no such institutional exclusion mechanisms. While the New Jersey court did not wholly rule out these arguments, it reasoned that the question whether such provisions "make a large segment of the housing market unavailable" to such persons, or expose those who live in the "remaining corridors to the greater risk of harm than they might otherwise have had to confront," is largely empirical (1193–94). Since, the court reasoned, the burden of proof lies with the plaintiff, who has established no such record, the court finally ruled in favor of the association.

Property law is thus already part and parcel of the practices of social groupings and exclusion.[14] Changing current doctrines would have some impact on such dynamics. In this respect, I believe that property law *does* make some "constitutive" impact, to use Stuart Scheingold's (2004)

14. I do not argue, of course, that property law is the only mechanism that does so or that it is particularly effective. It is merely the focus of this essay, following up on Fennell's analysis, and must be studied together with other legal fields to comprehend its fundamental influences on territorial groupings.

terminology; and more specifically, I share Fennell's view that property doctrines can serve as an effective legal channel to promote desirable societal goals or deter unwanted phenomena in the context of social association and exclusion.

But can a monetary alienable entitlements scheme—in which the entitlement in question is the right to exclude—provide the most effective mechanism? Once again, not only is this a question of interest to those readers working in the field of residential groupings, but it may serve as a more general exercise in "the architecture of law," that is, the way in which legal rules and mechanisms can be best tailored to address a certain societal dilemma.

Fennell bases the social exclusion entitlements scheme on two chief principles: (1) identifying the kind of activities that communities or localities may engage in so as to affect membership composition, requiring the community/locality to assess the value of such conduct for each increment (corresponding to a given number of affordable housing units), and making the community/locality pay a pro rata tax to the state agency when it engages in such exclusionary measures (that is, bars the construction of affordable housing); and (2) setting the price at which the state agency would be able to call back the option—the right to exclude—at the community's self-assessed value. The underlying assumption here is that the state agency would exercise the option only when the strike price is lower than the damage to the metropolitan area caused by the exclusion.

The second prong of this strategy is based on Fennell's (2009) contention that social exclusion not only affects distribution or fairness but may also result in overall societal inefficiencies. This is so because of the peer-group effect in social composition. In a world that contains "quality-enhancing group members" (designated "Es") (131), alongside "quality-detracting group-members" (designated "Ds") (131), one can identify points of marginal social optimum in composing neighborhoods of Ds and Es—for example, when would adding another E to the neighborhood have particularly high marginal benefits for properly providing collective amenities such as education or public order, while at the same time positively influencing the behavior of current Ds? Although Fennell is somewhat cautious about immediately identifying Es and Ds according to wealth or income (137), it does seem that the currency of reaching the critical mass of "quality enhancers" (160) is one of monitoring the group's socioeconomic composition.

As stated, I leave to the side upfront moral objections to such "trade." I think that Fennell is right in considering monetary options, which have been in use until recently, for example, in New Jersey's Fair Housing Act (1975). Instead, I argue that the market scheme's problems lie in its practical infeasibility—especially because Fennell is in fact driven by an "objective" viewpoint in favor of housing integration, to which I personally subscribe.

To start with, even if one accepts Fennell's simplifying focus only on land use controls imposed by collectives rather than on the decentralized locational choices made by individual households, it is probably still impracticable to separately identify and price the various types of exclusionary practices that affect neighborhood membership. Fennell identifies community exclusion with not providing affordable housing units: a clearly identifiable and verifiable conduct, since enabling affordability typically involves *active* support by the locality (that is, subsidies to developers or public vouchers to homebuyers/renters) and is easily discernible in the market prices of housing units.

But what about the numerous implicit practices and policies that Fennell herself points to and that are not prohibited on constitutional grounds? Assume that housing units in golf communities are not typically more expensive than housing units in other private neighborhoods with high-level amenities that do not have the practical effect of racial sorting. One could argue that we could rely here not only on a declared policy, but also on ex post facto statistical evidence: the difference in actual racial composition. But how do you monetize it? Do you grant localities or private neighborhoods an upfront call option to exclude increments of racial minorities?

Consider next the above-mentioned *Mulligan* case. Assume that barring Tier-3 sex offenders under Megan's Law from residing within a community is not constitutionally prohibited, per se; not only would the community have to assess the value of not having sex criminals around, but the state agency would have to calculate its own incremental value of adding or subtracting sex offenders within a neighborhood's social composition.

And what about other types of public or private regulation? A hard-line aesthetic regulation that allows painting the exterior of housing units in white only and bars any type of visible external storage? A no-pet restriction? A restriction on smoking *within* the housing units (Semrad 2007)? As Fennell (2009) herself notes, all of these "compliance effects" would also have strong "membership effects" (123–25). Thus, creating a perfect list of all types of collective rules and practices that affect membership might prove to be an overambitious task.

Moving now to the other side of the market: the decision of the state agency when and where to exercise its call-back option vis-à-vis the community. To make an efficient decision, the state agency should equate the community's self-assessed strike price with the state-based surplus that would be gained if a certain mode of exclusion is bought out.

To do so, the state agency would have to identify the optimal social composition of Es and Ds in this and other localities (in view of the connected vessels principle that would apply) so as to effectively buy appropriate increments of the right to exclude from a certain locality. The costs of calculating such an associational production function separately for each

different locality or neighborhood would probably be prohibitive, even for a single attribute of being an E or a D, and even if we assume that wealth or income serves as an effective proxy for this purpose. The only practical solution here would be to calculate a general optimal social composition formula for residential neighborhoods, one that identifies a certain distribution of income or wealth levels within the community. In an optimal world, all residential neighborhoods would comply by such a production function. The role of the state agency would thus be to tilt localities toward this social optimum.

Would such a world indeed be ideal? This is definitely a debatable assumption. One thing for sure: it runs contrary to the Tiebout (1956) model. In Tiebout's perfect world with all its simplifying assumptions, residents would move to homogeneous neighborhoods that fit their subjective preferences about aesthetics, amenities, taxes, and so forth. In Fennell's world, people would align themselves (with the aid of the state agency) in localities that all share a certain social composition, one that is heterogeneous by nature. Once again, from an overall societal utilitarian viewpoint only, which model—homogeneity or ordered heterogeneity—would fare better? Which market would work more effectively? These are difficult questions indeed, ones to which I do not claim to offer succinct answers.

And maybe this is exactly the point. I may be wrong here, but it seems to me that Fennell is very much driven by a normative objective agenda about the social virtue of integration and the moral wrongs of excessive exclusion, even if their exact utilitarian quantification proves too much of a challenge in each case. Fennell seems to make a point—one that I would wholeheartedly embrace—that we as a society should not simply sit idle in the face of growing exclusion and alienation in metropolitan areas, even if a certain land use regulation cannot be dubbed as unconstitutional. Students from high-income families sharing a classroom with those from a more modest background is socially desirable, even if it cannot be unequivocally demonstrated that it maximizes the aggregation of revealed subjective preferences throughout the metropolitan area. Not allowing crime rates to exceed a certain threshold in troubled localities can still be a fundamental goal, even if one argues for a more efficient reallocation of police forces.

Summing up, property law may very well be an appropriate tool to address concerns over association and exclusion and to guide actors accordingly. Property rules can be designed to provide "Tailwind" to certain forms of spatial behavior and "Headwind" to other types of rules and practices that are deemed socially objectionable. My disagreement with Fennell is whether alienable entitlements may prove particularly useful for controlling social composition. When we zoom out to the general dilemma of law as a conduit for social change, we see how essential the "architectural details" are. It is not enough to say that law is important or that property law should be employed.

Getting the details of the legal regime wrong may result in the undermining of the entire social enterprise.

IV. WOULD ENTITLEMENTS ACTUALLY ALTER COMMUNITY BEHAVIOR?

The final point that this essay briefly makes is concerned with the practical effects of implementing an innovative scheme of monetary alienable entitlements on community behavior. In other words, even if we assume that law can be employed to address neighbors' spatial relations and broader-based modes of social exclusion, and, moreover, that alienable property rights are a proper channel for such a pursuit, one is still left to wonder whether such rules could be complemented by implementation and enforcement mechanisms that would ensure a long-lasting fundamental effect in real-life scenarios.

I address here only one issue, which touches on the delicate balance between individual choices and community decision making required to solve collective actions problems, including both commons and anticommons "tragedies." To illustrate this point, I return to intraneighborhood externalities in matters such as aesthetics.

In presenting the example of the lawn flamingo and the potential harassment it may cause to neighbors, Fennell describes the problem of rigidity in current land use ordering mechanisms that either permit or entirely ban certain uses and the potential inefficiency that may occur, for example, in a no-flamingo neighborhood if the value of the use to the homeowner exceeds the aggregate harassment caused to neighbors. Although such collective control mechanisms do not feature the full-fledged problem of anticommons that would have occurred if the homeowner had to collect the separate consent of each one of the residents in the neighborhood—because the community collective institutions can make decisions that do not always require a consensus—negotiating around a rule is still difficult. The ESSMO customizable callable call scheme, described above, allegedly allows the call and call-back options to be self-exercised by the parties without the need for specific consent, thus better facilitating efficiency over time.

But the question still lingers whether such a mechanism would actually alter the behavior of the parties. Consider, for example, the scenarios under which a CIC would allow an otherwise restricted posting of a lawn flamingo in the yard of one of the housing units. As Fennell (2009) mentions, the current mechanism for change is political (86–87), that is, a decision by the association whether the particular restriction would be alienable and at what price. But with no easy way to strike a specific bargain, the parties may stick to an inefficient status quo. Would an EESMO scheme necessarily make a difference in this case?

Think, for example, of an ESSMO scheme for an otherwise no-flamingo one-hundred-housing-unit neighborhood. Hank has an idiosyncratic taste for pink yard artifacts, values the posting of a flamingo at $500, exercises the call option, and pays an appropriate pro rata tax over time. Hank's immediate neighbors—say, the eight neighbors in the surrounding quadrangle with direct view to the lot—each suffer an aesthetic disturbance of $100 and keep complaining to the association. But as years go by, the association learns that Hank is the only flamingo-loving person in the neighborhood. Suppose further that Hank's eight immediate neighbors have a proportionate representation in the association's board (for example, one representative in a twelve-member board). Since it is the board that has to exercise the call-back option, and the financial burden of paying Hank $500 to take back the right would be imposed on the general coffer and divided equally among all the residents, most representatives may be reluctant to exercise the call-back option. Thus, the collective nature of the decision may still bring about an overall inefficient result. Even when an allegedly monetary mechanism exists, the decision is still collective and political.

One could argue, of course, that different numerical examples could be given and, more importantly, that the association could require the affected eight neighbors to reimburse it for making the collective expenditure. But if we start breaking down the collective entitlement to individual ones for each one of the affected neighbors, the collective action might start to collapse and maybe even end up in an anticommons scenario in which Hank has to directly negotiate with each one of the neighbors.

My general point here—and I think that it applies in some force to the state agency vis-à-vis locality scenario in regard to associational entitlements, and moreover to broad design issues pertaining to law as controlling human behavior—is that collective action mechanisms have certain features that would continue to be prominent even in a world of monetary alienable entitlements. I do not point here only to the dark side of political power plays within the collective decision-making body, but also to the positive features of such institutions that can effectively handle both commons and anticommons issues.

There may be some logic that homeowners' associations can make certain decisions that are binding on all residents and that these decisions are not easily negotiable, to allow for specific exceptions. Trying to have a perfect world with both overall efficient collective control *and* mechanisms that aspire to use-specific efficiency for each type of use may prove to be "too perfect." Fennell herself notes that even the most careful attempt to solve a commons problem may lead to an anticommons problem, and vice versa. So it may very well be that for the purpose of reducing overall transaction costs and allowing neighbors to live in a world of reciprocal rights and duties, the practical institutional design and collective action dynamics place certain

constraints that may not allow implementing what is theoretically a superior scheme for controlling spatial ordering.

CONCLUSION

The Unbounded Home offers an intriguing analysis of property and homeownership that identifies and articulates central dilemmas in metropolitan areas. The reconceptualization of what it means to own property in a world increasingly engaged in matters of interhousehold spillovers and intercommunity social engineering not only advances legal knowledge, but also is of interest to scholars and decision makers in the various social sciences fields that deal with the interfaces of social behavior and collective order.

I entirely support Fennell's enterprise of making law more attentive to social and economic developments in our physical habitats, and I am especially intrigued to have learned how property theory can play a central role in devising better solutions for society. As with all innovations, some features of this new view of property would have to be considered before Fennell's blueprint reshapes private and public control mechanisms. Law is not unbounded, as is the case with all collective institutions. The translation of key societal issues to viable mechanisms of law and order is always tricky; the higher the stakes, the more intricate. But it is only through boundary-breaking efforts such as Fennell's that we will be able to properly address the ever-growing challenges of contemporary society.

More generally, I frame Fennell's enterprise as promoting a groundbreaking approach to the fundamental quandary over the role of law as a tool for broad-based social change, which has been at the center of the law and society literature. Consequently, I hope to have convinced the reader that my analysis in this essay offers broader insights for sociolegal inquiries beyond the particular themes of externalities and exclusion discussed above. To the extent that the central arguments made in this essay are found to be convincing, I submit that these are not limited to a certain ideological perspective—for example, the promotion of social justice or of utilitarianism–or to a particular theme of social concern. Instead, the analysis put forward here has aspired to more broadly illuminate the complex ties between law and social change, and the boundaries of law in controlling and directing social conduct.

REFERENCES

Alexander, Gregory S. 2009. The Social-Obligation Norm in American Property Law. *Cornell Law Review* 94:745–819.

Alexander, Larry. 2002. Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism. *Journal of Contemporary Legal Issues* 12:625–36.

American Law Institute. n.d. *Restatement (Second) of Torts 1979*. Washington, DC: American Law Institute. http://homepages.law.asu.edu/~dkarjala/Property/Restatement Provisions.htm (accessed January 5, 2010).

Atkinson, Rowland, and Sarah Blandy. 2005. Introduction: International Perspectives on the New Enclavism and the Rise of Gated Communities. *Housing Studies* 20:177–86.

Ayres, Ian. 2005. *Optional Law: The Structure of Legal Entitlements*. Chicago: University of Chicago Press.

Ayres, Ian, and J. M. Balkin. 1996. Legal Entitlements as Auctions: Property Rules, Liability Rules and Beyond. *Yale Law Journal* 106:703–50.

Barton, Stephen E., and Carol J. Silverman, eds. 1994. *Common Interest Communities: Private Governments and the Public Interest*. Berkeley: University of California, Berkeley.

Bell, Abraham, and Gideon Parchomovsky. 2001. Givings. *Yale Law Journal* 111:547–618.

Bentham, Jeremy. 2005 [1802]. *The Theory of Legislation*. London: Thoemmes Press.

Berlin, Isaiah, ed. 1969. Two Concepts of Liberty. In *Four Essays on Liberty*, 118–72. Oxford: Oxford University Press.

Bernstein, Lisa. 1992. Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry. *Journal of Legal Studies* 21:115–57.

——. 2001. Private Commercial Law in the Cotton Industry: Creating Cooperation through Rules, Norms, and Institutions. *Michigan Law Review* 99:1724–87.

Blakely, Edward J., and Mary G. Snyder. 1997. *Fortress America: Gated Communities in the United States*. Cambridge, MA: Harvard University Press.

Blackstone, William. 1979 [1766]. *Commentaries on the Laws of England, Volume 2: Of the Rights of Things*. Chicago: University of Chicago Press.

Byrne, David. 1999. *Social Exclusion (Issues in Society)*. Buckingham, UK: Open University Press.

Calabresi, Guido, and A. Douglas Melamed. 1972. Property Rules, Liability Rules, and Inalienability: One View of the Cathedral. *Harvard Law Review* 85 (6): 1089–128.

Cashin, Sheryll D. 2001. Privatized Communities and the "Secession of the Successful." *Fordham Urban Law Journal* 28:1675–91.

Chen, Simon C. Y., and Chris J. Webster. 2005. Homeowners Associations, Collective Action and the Costs of Private Governance. *Housing Studies* 20:205–20.

Coase, Ronald H. 1960. The Problem of Social Cost. *Journal of Law & Economics* 3:1–44.

Cohen, Morris R. 1927. Property and Sovereignty. *Cornell Law Quarterly* 13:8–30.

Coletta, Raymond R. 1987. The Case for Aesthetic Nuisance: Rethinking Traditional Judicial Attitudes. *Ohio State Law Journal* 48:141–75.

Dagan, Hanoch. 2004. *The Law and Ethics of Restitution*. Cambridge: Cambridge University Press.

Demsetz, Harold. 1967. Toward a Theory of Property Rights. *American Economic Review Papers and Proceedings* 57:347–59.

Ellickson, Robert C. 1973. Alternatives to Zoning: Covenants, Nuisance Rules, Fines, and Land Use Controls. *University of Chicago Law Review* 40:681–781.

——. 1982. Cities and Homeowners Associations. *University of Pennsylvania Law Review* 130:1519–80.

——. 1991. *Order without Law: How Neighbors Settle Disputes*. Cambridge, MA: Harvard University Press.

——. 1998. New Institutions for Old Neighborhoods. *Duke Law Journal* 48:75–110.

Ellickson, Robert C., and Vicki L. Been. 2005. *Land Use Controls: Cases and Materials*, 3rd ed. New York: Aspen.

Fennell, Lee Anne. 2009. *The Unbounded Home: Property Values Beyond Property Lines*. New Haven, CT: Yale University Press.

Ford, Richard Thompson. 1994. The Boundaries of Race: Political Geography in Legal Analysis. *Harvard Law Review* 107:1843–921.
Friedman, Milton. 1962. *Capitalism & Freedom*. Chicago: University of Chicago Press.
Frug, Gerald E. 1999. *City Making: Building Communities without Building Walls*. Princeton, NJ: Princeton University Press.
Gillette, Clayton P. 1994. Courts, Covenants, and Communities. *University of Chicago Law Review* 61:1375–441.
Hardin, Garrett. 1968. The Tragedy of the Commons. *Science* 162:1243–48.
Hart, H. L. A., and Tony Honoré. 1985. *Causation in the Law*, 2nd ed. Oxford: Oxford University Press.
Harvey, David. 2001. *Spaces of Hope*. Edinburgh: Edinburgh University Press.
Heller, Michael A. 1998. The Tragedy of the Anticommons: Property in the Transition from Marx to Markets. *Harvard Law Review* 111:621–88.
Jacobs, Jane. 1961. *The Death and Life of Great American Cities*. New York: Random House.
Kaplow, Louis, and Steven Shavell. 1996. Property Rules versus Liability Rules: An Economic Analysis. *Harvard Law Review* 109:703–90.
Kymlicka, Will. 1989. *Liberalism, Community, and Culture*. Oxford: Oxford University Press.
Lehavi, Amnon. 2006. Intergovernmental Liability Rules. *Virginia Law Review* 92:929–89.
——. 2008. Mixing Property. *Seton Hall Law Review* 38:137–212.
——. 2009. How Property Can Create, Maintain, or Destroy Property. *Theoretical Inquiries in Law* 10:43–76.
——. Forthcoming. The Taking/Taxing Taxonomy. *Texas Law Review* 88.
Lewinsohn-Zamir, Daphna. 2006. In Defense of Redistribution through Private Law. *Minnesota Law Review* 91:326–97.
Lobel, Orly. 2007. The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics. *Harvard Law Review* 120:937–88.
Mangen, S. P. 2004. *Social Exclusion and Inner City Europe: Regulating Urban Regeneration*. New York: Palgrave Macmillan.
McKenzie, Evan. 1994. *Privatopia: Homeowner Associations and the Rise of Residential Private Government*. New Haven, CT: Yale University Press.
——. 2005. Constructing the Pomerium in Las Vegas: A Case Study of Emerging Trends in American Gated Communities. *Housing Studies* 20:187–204.
Merrill, Thomas W., and Henry E. Smith. 2000. Optimal Standardization in the Law of Property: The Numerus Clausus Principle. *Yale Law Journal* 110:1–70.
——. 2001. What Happened to Property in Law and Economics? *Yale Law Journal* 111:357–98.
——. 2007. The Morality of Property. *William & Mary Law Review* 48:1849–95.
Nagle, John C. 2001. Moral Nuisances. *Emory Law Journal* 50:265–322.
Ostrom, Elinor. 1990. *Governing the Commons: The Evolution of Institutions for Collective Action*. Cambridge: Cambridge University Press.
——. 2005. *Understanding Institutional Diversity*. Princeton, NJ: Princeton University Press.
Perillo, Joseph M. 1995. Abuse of Rights: A Pervasive Legal Concept. *Pacific Law Journal* 27:37–97.
Phillips, Ashley C. 2002. Matter of Arithmetic: Using Supply and Demand to Determine the Constitutionality of Adult Entertainment Zoning Ordinances. *Emory Law Journal* 51:319–53.
Porat, Ariel. 2009. Private Productions of Public Goods: Liability for Unrequested Benefits. *Michigan Law Review* 108:189–227.
Prosser, William. 1966. Private Action for Public Nuisance. *Virginia Law Review* 52:997–1027.

Putnam, Robert D. 2000. *Bowling Alone: The Collapse and Revival of American Community*. New York: Simon and Schuster.
Robinson, Glen O. 1997. Communities. *Virginia Law Review* 83:269–348.
Rose, Carol M. 1998. Canons of Property Talk, or, Blackstone's Anxiety. *Yale Law Journal* 108:601–32.
Rosenberg, Gerald B. 2008. *The Hollow Hope: Can Courts Bring About Social Change?* 2nd ed. Chicago: University of Chicago Press.
Scheingold, Stuart A. 2004. *The Politics of Rights: Lawyers, Public Policy, and Political Change*, 2nd ed. Ann Arbor: University of Michigan Press.
Semrad, Staci. 2007. A New Arena in the Fight over Smoking: The Home. *New York Times*, Nov. 5, A18.
Simmonds, N. E. 2000. Justice, Causation and Private Law. In *Public & Private: Legal, Political, and Philosophical Perspectives*, ed. Maurizio Passerin d'Entrèves and Ursula Vogel, 149–76. New York: Routledge.
Smith, Adam. 1982 [1762–1763]. *Lectures on Jurisprudence*. Indianapolis, IN: Liberty Fund Inc.
Spencer, J. R. 1989. Public Nuisance—A Critical Examination. *Cambridge Law Journal* 48:55–84.
Strahilevitz, Lior Jacob. 2006. Exclusionary Amenities in Residential Communities. *Virginia Law Review* 92:437–99.
Tiebout, Charles M. 1956. A Pure Theory of Local Expenditures. *Journal of Political Economics* 64:416–24.
Tönnies, Ferdinand. 2001 [1887]. *Community and Civil Society*, ed. Jose Harris, trans. Jose Harris and Margaret Hollis. Cambridge: Cambridge University Press.
Vanno, Philip A. 2007. Foundation for Community Association Research Tracking Poll. http://www.cairf.org/research/zogby.pdf (accessed December 9, 2009).

CASES CITED

Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).
Brown v. Legal Foundation of Washington, 538 U.S. 216 (2003).
Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977).
Mulligan v. Panther Valley Property Owners Ass'n, 766 A.2d 1186 (N.J. Super. Ct. App. Div. 2001).
Philips v. Washington Legal Foundation, 524 U.S. 156 (1998).
Schad v. Borough of Mount Ephraim, 452 U.S. 61 (1981).
Villa De Las Palmas Homeowners Ass'n v. Terifaj, 90 P.3d 1223 (Cal. 2004).
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974).

STATUTES CITED

Civil Rights Act of 1964, Pub. L. No. 88–352, 78 Stat. 241.
Fair Housing Act of 1975, New Jersey Statutes Annotated 52:25D-301 et seq.