

How Property Can Create, Maintain, or Destroy Community

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Property law plays a crucial role in the ability of groups, especially ones composed of geographically-adjacent members, to establish and maintain significant forms of "community" around a shared social, economic, or ideological interest. Property may also, however, have the opposite effect of undermining or even destroying communities, particularly those that rely on fragile modes of cooperation.

This Article identifies three major types of territorial communities: (1) Intentional Communities — close-knit groups that initially organize around a consolidating non-instrumental idea (such as cooperative Kibbutzim or religious communes) and employ sweeping internal norms to validate their communality. (2) Planned Communities — comprised mostly of residential developments of homeowners associations, which rely on a formal set of conditions, covenants, and restrictions incorporated in the association's governing documents. (3) Spontaneous Communities — clusters of initially unorganized neighbors who succeed in cooperating and coordinating over time. The evolvment of such organizations may be essential to the creation of an interpersonal "social capital" and to a physical and functional improvement of the community's surroundings.

For each one of these types of communities, property law plays a very different role. Thus, while Intentional Communities do not strictly hinge upon the existence of a supportive property system to flourish, Planned Communities cannot be conceived without the security of an overt, formal, state-backed regime, and Spontaneous Communities

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may often need property law's affirmative backing (providing what I term "Property Tailwind") to thrive and enjoy the social and economic benefits of sustainable collective action.

INTRODUCTION

The interplay between property and community is often associated with the "common property" or "limited common property" regime, which refers to resources that are formally owned and managed collectively by members of a group.¹

One prominent setting in which communal property is considered to play a constitutive role in the definition and understanding of "community" is that of self-perceived insular religious, ethnic, or ideological groups that rely on collective ownership and control of resources to maintain their enclave status within society. In these contexts, property in the service of community implicates broader questions of social, economic, or political autonomy and sovereignty.

For example, the thrust of the debate about the viability and sustainability of Indian tribes within American society largely concerns land ownership. But the property drama revolves not only around whether it is Indians or non-Indians who own lands located within Indian reserves, but even more so, around the specific structure of land rights *within* the Indian communities. Thus, the 1887 Dawes Allotment Act,² under which collective tribal landholdings were broken up to grant land allotments to individual tribe members, is considered in retrospect to have caused practically irreparable damage to the viability of Indian tribes. This is so because the allotment process, accompanied by subsequent federal restrictions and state intestacy laws dictating an ever-increasing number of multiple heirs to each allotment, resulted in severe over-fractionation of interests, the destruction of tribal economies, and broader-based undermining of traditional tribal institutions.³

1 For a definition and analysis of this property regime, see ELINOR OSTROM, UNDERSTANDING INSTITUTIONAL DIVERSITY 219-54 (2005); Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems*, 83 MINN. L. REV. 129, 139 (1998).

2 Indian General Allotment Act, ch. 119, 24 Stat. 388 (1887).

3 See Stacy L. Leeds, *Borrowing from Blackacre: Expanding Tribal Land Bases Through the Creation of Future Interests and Joint Tenancies*, 80 N.D. L. REV. 827, 829-38 (2004); Rebecca Tsosie, *Land, Culture, and Community: Reflections on Native Sovereignty and Property in America*, 34 IND. L. REV. 1291, 1293-1300 (2001).

This is obviously not to say that there is consensus among Indian tribe members about the need to restore strong tribal control over the lands. Contemporary legislative reforms have faced political and constitutional challenges by individual members who objected to ceding their rights back to the tribes.⁴ The most current legislative reform, the American Indian Probate Reform Act of 2004,⁵ thus tries to toe a finer line between avoiding too harsh an infringement of vested individual interests in land and regaining tribal collective power in cases of acute property disintegration.⁶ Regardless of the differing normative views on the matter, the scope and nature of collective ownership and control of property interests are considered to be fundamental to the essence of Indian communality.

However, as this Article argues, the interconnectivity between property and community is much more complicated and multifaceted than the specific instance of collectively-owned property within highly distinctive sub-society enclaves.

First, "community" is a fluid, often elusive concept. Even if we wish to abstain from a nihilistic view of community as simply an empty or useless idea, it is imperative to understand the diversity among different kinds of communal relationships within society and the implications that this complexity yields for the ways in which internal and external property institutions are structured.

Second, contrary to the intuitive association between communality and common property, the lives of communities necessarily involve the full range of property regimes, including private, public, common, open access, and mixtures of these forms, as well as informal modes of resource control and management. This richness is not only a matter of fact, but also has normative merit. Different types of communities, each with its own motives for incorporation, group composition, production functions and so forth, may opt for the kind of property regime that seems most suitable for the community to optimally attain its goals, and such choices may often be very far from sweeping collective ownership.

4 See *Hodel v. Irving*, 481 U.S. 704 (1987) (invalidating, as impermissible taking, the provision of Section 207 of the Indian Land Consolidation Act of 1983, which prohibited the descent or devise of any interest that represented less than two percent of the total tract in question so that upon the death of the fractional owner the shares would escheat to the tribe).

5 Pub. L. No. 108-374, 118 Stat. 1773 (2004).

6 See Kristina L. McCulley, *The American Indian Probate Reform Act of 2004: The Death of Fractionation or Individual Native American Property Interests and Tribal Customs*, 30 AM. INDIAN L. REV. 401, 412-15 (2006).

Third, property law — namely, the formal set of rules by which society allocates, governs, and protects entitlements and obligations in resources — plays a very different role for various kinds of communities. The interface between the state's law of property and the group's internal norms and overall structure may significantly diverge between different types of communities, and accordingly, such groups may experience highly differential effects by the application of what is allegedly the same set of official property laws and policies. To illustrate this point, I will define the potential implications of property law for sub-society communities along the following scale. "Property Tailwind" will refer to strong, active societal support for a certain type of community through the design of certain property rules and remedies. "Property Headwind" will reflect an opposite trend of overt hostility or conscious apathy towards the special needs of certain communities, bringing about their weakening or even outright destruction. "Property (Near) Zero-wind" will stand for a middle stance, which pretty much leaves communities to their own devices, so that their fate hinges almost exclusively on their internal mechanisms for rulemaking and enforcement.

The Article proceeds as follows. I shall address the basic dilemmas in conceptualizing "community" and its status within general society in Part I, focusing attention on territorial communities in order to define three materially different types of communities: "intentional," "planned," and "spontaneous." In Part II I shall analyze the general traits of property law in defining, enforcing, and liquidating entitlements and obligations in resources. In Part III I shall explain how, for each of the different types, property law can play a distinctive crucial role in creating, maintaining, or destroying such communities.

I. THE TAXONOMY OF COMMUNITY

A. What is "Community"?

"Community" is a highly popular, often vulgarized term that is constantly used just about anywhere: in street talk, social milieus, commerce, local and national politics, and ideological and theological discourse. Unsurprisingly, scholarly attempts to define and conceptualize "community" have often proved quite futile. For instance, a 1955 study by George Hillery found

94 different definitions of community in the scientific literature, with little common ground among them.⁷

This multiplicity, which is typical not only of inter-disciplinary but of intra-disciplinary discourse as well, has led many to skeptically view "community" as pretty much a useless concept that may as well be abandoned altogether.⁸ Recent scholarship has tried, however, to reinstate some integrity into this concept, with relatively much attention devoted to geographically or territorially based groups of people who share some type of common denominator beyond mere proximity.⁹

It seems that much of the academic ambivalence toward the very concept of "community" stems not only from methodological or empirical restraints, but also, at least implicitly, from the basic normative dilemma that inevitably haunts "community." Intertwined with the constructive traits of community, such as the sense of belonging and intra-community empathy, mutual commitment to shared values and norms, active collaboration in the pursuit of common goals, or attainment of a community-subjective optimal balance between social ties and individual autonomy,¹⁰ one finds the flip-side of communality: exclusion and alienation from outsiders. Even devoted communitarians admit that substantial long-lasting bonding within groups of people comes with the inevitable societal price tag that results from drawing distinctions between members and nonmembers, ensuring sufficient similarity among members to maintain the common ground, or limiting member turnover to allow for bonds to solidify.¹¹ The fact that the constructive traits of "community" can be quite easily manipulated, at least in everyday life, to conceal animosity, xenophobia, and intolerance make the scholarly endeavor a frustrating experience, since the ability to normatively evaluate "communities" is so often overshadowed by their persisting terminological obscurity.

7 George Hillery, *Definitions of Community: Areas of Agreement*, 20 RURAL SOC. 111 (1955).

8 COLIN BELL & HOWARD NEWBY, *COMMUNITY STUDIES: AN INTRODUCTION TO THE SOCIOLOGY OF THE LOCAL COMMUNITY* 49 (1973).

9 See, e.g., Monica Colombo et al., *Sense of Community and Participation in Urban Contexts*, 11 J. COMMUNITY & APPLIED SOC. PSYCHOL. 457, 458-59 (2001); Gene L. Theodori, *Community and Community Development in Resource-Based Areas: Operational Definitions Rooted in an Interactional Practice*, 18 SOC. & NAT. RESOURCES 661, 662-63 (2005).

10 Amitai Etzioni, *Creating Good Communities and Good Societies*, 29 CONTEMP. SOC. 188 (2000); Colombo et al., *supra* note 9, at 459-62; John L. McKnight, *Redefining Community*, 23 SOC. POL'Y 56 (1992).

11 Etzioni, *supra* note 10, at 189-90.

This complexity should not dictate nihilism, however. A *contextual, functional analysis* of different community formations — which includes 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 — can prove to be coherent and useful.

The terms "community" and "communality" should therefore be understood not as having a single universal meaning that either exists or not in a certain group in a dichotomous manner,¹² but rather as consisting of a *continuum* along which many variations exist, each with each own specific types and degrees of durable common denominators and interpersonal interactions.

Such a refined approach can also better guide us through a normative evaluation of the different types of communities and the consequent stance that society, including the legal system and property law in particular, should take towards these communities. The first task is therefore to replace a generally vague concept with a more nuanced, workable taxonomy of communities. Although such a taxonomy will obviously be far from hermetic — given potential overlapping between categories, dynamism within certain groups that may change their own locus within the taxonomy, questions of agency in self-defining the nature and future directions of the community, and so forth — this typological endeavor is nevertheless essential in order to move from a largely fruitless discourse of "community within society" to a more useful normative framework.

B. Territorial Communities and General Society

The basic traits of communities, as mentioned above, may apply to non-territorial communities ("Internet communities," "the academic community," "the business community"). Indeed, many contemporary theorists have been dealing with these types of groups and their standing vis-à-vis society and other such communities.¹³

12 See, e.g., THOMAS BENDER, *COMMUNITY AND SOCIAL CHANGE IN AMERICA* (1978) (distinguishing between groups bound by kinship, ethnicity, religion, etc. and between political or utilitarian-based groupings, and viewing only the first category as constituting "communities").

13 Theodori, *supra* note 9, at 662-63. For example, Internet communities have boomed in the past few years, with the creation of web-based networks such as Facebook, <http://www.facebook.com> (last visited Mar. 1, 2008).

Notwithstanding the growing importance of non-territorial communities, I focus in this Article on territorial ones. This is not only for methodological reasons, but also because territorial communities have certain intriguing features that deserve special attention but at the same time require re-conceptualization. *First*, physical proximity is often considered to be a central factor in both assessing and facilitating close interpersonal ties. Thus, the human ecology school views shared territory as a fundamental basis of human communality, resembling the symbiosis of animals and plants in the same habitat.¹⁴ *Second*, common territoriality provides a dynamic arena for repeat-play encounters between persons, although the resulting scenario is obviously not always a happy one. Whereas in many cases, vicinity can indeed create over time a thickening web of meaningful ties and neighborly internal norms — an instance I will define below as "Spontaneous Communities" — proximity can also result in intra-local friction, tension, and hostility.¹⁵ Yet identifying the reasons for such "make or break" dynamics poses an exceptionally intriguing challenge. *Third*, the specific configuration of sub-society territorial clustering is often highly revealing in regard to broader social patterns within this society. The extent of de facto or de jure physical segregation among groups along socioeconomic, ethnic, racial, or religious lines, and the potential confinement of communality to such boundaries have enormous societal implications and meanings.¹⁶ *Fourth*, and related, forms of territorial exclusion (residential dwelling, school composition, voting districts, etc.) often have particularly powerful practical and symbolic societal effects.¹⁷

In offering the taxonomy of territorial communities in the following Section, I look at the interplay between what I identify as two prominent

14 See generally AMOS H. HAWLEY, *HUMAN ECOLOGY: A THEORETICAL ESSAY* 1-9 (1986).

15 One can think of tragic instances such as the violent conflict between African-Americans and Jewish Ultra-Orthodox in the Brooklyn neighborhood of Crown Heights in 1991 and its aftermath. See Ari L. Goldman, *The Crown Heights Report: On the Streets; After Report, the Talk of Residents is Tense*, N.Y. TIMES, July 22, 1993, at B4.

16 See, e.g., Yuki Kato, *Planning and Social Diversity: Residential Segregation in American New Towns*, 43 URB. STUD. 2285 (2006); Brian H. King, *Developing KeNgwane: Geographies of Segregation and Integration in the New South Africa*, 173 GEOGRAPHICAL J. 13 (2006); Sako Musterd, *Segregation, Urban Space and the Resurgent City*, 43 URB. STUD. 1325 (2006).

17 See, e.g., Adam Weiss, Note, *Grutter, Community, and Democracy: The Case for Race-Conscious Remedies in Residential Segregation Suits*, 107 COLUM. L. REV. 1195, 1207-19 (2007).

groups of arguments for validating territorial communality, and I ask whether and to what extent such arguments may apply within the suggested community typology.

Briefly, the first group of arguments recognizes the inherent tension between community and society, yet justifies its existence in certain circumstances. Following Ferdinand Tönnies's famous distinction between *gemeinschaft* and *gesellschaft* as two qualitatively different forms of human organization and relationships,¹⁸ commentators have recognized that forming and maintaining solid sub-society 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.¹⁹ Society should learn to accept, even if reluctantly, some types of de facto manifestations of individual choices about congregating. After all, a liberal society that prides itself on letting people freely choose spouses, friends, and social milieus, cannot wholly rule out the value of allowing residential grouping choices. Few would argue that such choices should be absolute — overt racial exclusion would gain little moral or legal support — but nevertheless, their legitimacy should not be stamped out altogether.²⁰

Under some versions of this type of argument, in some instances the state should even go further and *actively guarantee* the viability of distinctive territorial communities. Most prominently, those who advocate the right of minority cultures to disassociate themselves from general society claim that such calls have special normative force, even from a liberal viewpoint, when the group in question (a) suffers from systematic inferiority within general society, often as the result of overt historical injustice inflicted upon it; (b) must engage in territorial separatism to exist because geographical assimilation would cause the community and its internal governance

18 FERDINAND TÖNNIES, *COMMUNITY AND CIVIL SOCIETY* (Jose Harris ed., Jose Harris & Margaret Hollis trans., Cambridge Univ. Press 2001) (1887). It should be noted, however, that Tönnies originally drew this distinction to depict a historical evolution of Western societies, and not to present an alleged conflict between simultaneously-existing models within societies.

19 See, e.g., Glen O. Robinson, *Communities*, 83 VA. L. REV. 269 (1997).

20 See Larry Alexander, *Illiberalism All the Way Down: Illiberal Groups and Two Conceptions of Liberalism*, 12 J. CONTEMP. LEGAL ISSUES 625, 636 (2002) (arguing that under the concept of liberalism as state neutrality toward individual/group preferences, "we are all members of illiberal groups, and there are no principles for sorting out our differences").

structure to collapse; and (c) is politically, socially, or financially incapable of isolating itself through mere practice, and must resort to the formal affirmative intervention of the state in order to maintain its distinctiveness.²¹

The second group of arguments in favor of sub-society 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. In fact, this is exactly the case made for local governments or for potent states in a federal regime. This is so whether one opts for the "firm" theory of local governments — inspired by Charles Tiebout's depiction of localities as market players supplying each a unique mixture of taxes and services to accommodate resident preferences²² — or for the "polis" theory, by which smaller-scale jurisdictions are practically the only arena where one can actively participate in public decision-making and citizenship, thus also benefiting democracy and society in general.²³

Taking this point further, one may argue that what works on the local government scale, may work even better for smaller-scale territorial associations. A linchpin of homeowners associations — discussed below as "Planned Communities" — is the ability of a relatively small group of persons to effectively organize and to establish mutually binding rules and collective action mechanisms for the provision of common amenities and the control of intra-neighborhood externalities resulting from certain uses of the private units.²⁴ In addition, the voluminous "social capital" literature, which ranges from social critics such as Jane Jacobs who stress the essentiality of vibrant streets and sidewalks for gathering neighbors in an intimate social fashion,²⁵ to scholars such as Robert Putnam who have

21 A prominent collection of recent theory on rights of minority cultures in liberal democracies is *THE RIGHTS OF MINORITY CULTURES* (Will Kymlicka ed., 1995). For such a liberal take on the rights of certain minority groups to congregate in distinctive neighborhoods and cities in the Israeli context, see Eyal Benvenisti, "Separate but Equal" in the Allocation of State Lands for Housing, 21 TEL-AVIV U. L. REV. 769, 775-87 (1997) (Hebrew).

22 Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956). For a critical analysis of this theory, see Richard Briffault, *Our Localism: Part II — Localism and Legal Theory*, 90 COLUM. L. REV. 346, 399-403, 415-35 (1990).

23 See GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* 19-25 (1999). *But cf.* Briffault, *supra* note 22, at 414-15 (doubting such empirical assumptions).

24 Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 81-82 (1998).

25 JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* 55-57 (1961).

developed a theory of utilitarian and societal benefits of human networks, sees territorial communality as potentially supportive of society-wide gains.²⁶

Both groups of reasoning have been subject to fierce criticism, which will not be fully elaborated here.²⁷ Within the scope of this Article, I find it important to identify the specific kinds of supportive arguments that may be considered relevant, at least *prima facie*, to the different types of territorial communities. The central point here is that since the various kinds of communities feature different sets of initial motives, internal structure principles, and potential external effects, each type of community should rely in turn on a distinctive normative basis and be subject to discrete criticism in evaluating both the basic goal in setting up such a community and the means employed to facilitate its existence.

Hence, although the following taxonomy — as already stated in Section I.A — does not purport to be a neat and clear-cut division of the entire world of territorial groupings due to issues such as overlapping, dynamism, and agency, the fact that one can nevertheless identify broad differences in the types of initial motives, goals, and socio-legal structures among the broad categories of communities has obvious implications for the differential sets of normative evaluation toward them.

C. A Triptych of the Territorial Communities Landscape

1. *Intentional Communities*

An "Intentional Community" may be defined as a group that shares a thick common denominator of ideology, values, or beliefs that are substantially distinctive from those of general society. This requires such communities to functionally and physically insulate themselves from society and to rely on an extensive set of internal norms and institutions to maintain their communality.²⁸

Territorial Intentional Communities are not formed and maintained in a single manner. Members of religious monasteries and covenants, like

26 ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 287-349 (2000).

27 See, e.g., Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985 (2000); Richard T. Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

28 Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 271-76 (2006).

the Order of Saint Benedict, assemble in a certain physical location chiefly through decisions taken by the religious organization's higher-level institutions (although each member joins the larger organization itself voluntarily). Given also the fact that interpersonal turnover is obviously not based on intergenerational genealogy, the composition of each local community and the norms by which its members abide are not merely the result of intra-community evolution, but derive chiefly from higher-institutional decision-making.²⁹ To the contrary, religious Intentional Communities such as the Hutterites, Amish, or Jewish Ultra-Orthodox communities are family-based, so that the location and composition of each local community is determined largely by historical incident and intergenerational turnover. This does not necessarily mean that such types of local communities are subject to a lesser organizational higher-level control. Whereas local Amish communities enjoy relatively abundant autonomy within the Old Order Amish organization,³⁰ Jewish Ultra-Orthodox community members abide by the rules of the specific faction or court to which they belong, even if their Rebbe or Grand Rabbi is located in one of the community's other territorial hubs.³¹

Ethnic-religious communities such as the Indian tribes in the United States or Canada or the Indigenous tribes in Australia and New Zealand are another highly complicated variation of Intentional Communities. Their insulation is not strictly a matter of internal group evolution and choice, but also the result of their identification as distinctive by others, i.e., those who became identified as representative of "general society." Whereas practically all of these groups have been subject to overt discrimination and injustice, more recent reparatory measures in such countries still identify and formally distinguish these groups or "communities," though this time with an allegedly more benign or affirmative purpose.³²

The interplay between self-identification and external-identification of

29 See generally Timothy Wright, *The Benedictine Life: Decline, Growth, and Innovation*, 7 INT'L J. STUDY CHRISTIAN CHURCH 179 (2007).

30 DONALD B. KRAYBILL, *THE RIDDLE OF AMISH CULTURE* 91-110 (rev. ed. 2001).

31 See, e.g., JEROME R. MINTZ, *HASIDIC PEOPLE: A PLACE IN THE NEW WORLD* 3-4 (1992).

32 See, e.g., Jeremy Waldron, *Redressing Historic Injustice*, 52 U. TORONTO L.J. 135 (2002); Kevin Gover, *An Indian Trust for the Twenty-First Century*, 46 NAT. RESOURCES J. 317 (2006); P.G. McHugh, *Aboriginal Title in New Zealand: A Retrospect and Prospect*, 2 N.Z. J. PUB. & INT'L L. 139 (2004); Kent McNeil, *The Vulnerability of Indigenous Land Rights in Australia and Canada*, 42 OSGOODE HALL. L.J. 271 (2004).

other ethnic, religious, or national-origin groups as Intentional Communities is even more intricate. In many such instances, the use of the "community" terminology may often reflect not so much a genuine group choice but a euphemistic conceptualization of de facto modes of segregation and stratification.³³

Contrastingly, probably the best known example of an enduring type of a secular, genuine ideology-based Intentional Community is that of Israeli Kibbutzim. Originating in 1910, the agriculture-based Kibbutzim played a major role during the formative years prior to and following the establishment of Israel in 1948.³⁴ The cooperative Kibbutz is formally defined as a "settlement which is based on the ideas of collective ownership, self-work, and equal sharing in production, consumption, and education."³⁵ The communal and egalitarian nature of the Kibbutz manifested itself in all walks of life through the implementation of a socialist ideology that attributed a central distinctive quality to the collective enterprise at the expense of satisfying individual preferences and interests,³⁶ and enforced itself through various informal and formal mechanisms of social governance.³⁷

The Kibbutz movement is in the midst of a process of dramatic change, which has led to the evolution of a new type of Kibbutz, the "Renewing Kibbutz," alongside the old-style cooperative Kibbutz. The Renewing Kibbutz started out as a spontaneous, informal phenomenon in numerous cooperative Kibbutzim during the 1980s in response to an on-going crisis resulting from multiple factors.³⁸ As a result, numerous Kibbutzim started to carry out grassroots organizational reforms, shaping new allocation rules that generally combined "desert" principles characteristic of utilitarian-based groups alongside "need" criteria typical of groups with high interpersonal solidarity,³⁹ thus maintaining a modicum of the Kibbutz's communitarian and egalitarian ideology. To resolve the tension between this rapidly changing reality and the formal legal framework, the Israeli Cabinet appointed a public committee to formulate a new policy. In 2004, the Cabinet approved the committee's recommendations, which largely validated the grassroots modes of change, and consequently amended the applicable legislation to formally

33 See sources cited in *supra* note 16.

34 See generally HENRY NEAR, *THE KIBBUTZ MOVEMENT: A HISTORY* (1992-1997).

35 Cooperative Associations Ordinances (Types of Associations), 1995, § 2(5)(a), KT 5722, 246.

36 See YONINA TALMON, *FAMILY AND COMMUNITY IN THE KIBBUTZ* 207-08 (1972).

37 *Id.* at 2-3.

38 See Amnon Lehavi, *Mixing Property*, 38 *SETON HALL L. REV.* 137, 166-68 (2008).

39 DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* 25-32 (2001).

introduce the Renewing Kibbutz.⁴⁰ Currently about two thirds of the 266 Kibbutzim generally conform to the definition of a Renewing Kibbutz.⁴¹

Although Intentional Communities are intuitively associated with communes — i.e., those employing a sweeping commons regime — the property configurations of various Intentional Communities are in fact much more diverse. Whereas monasteries do abide by strict egalitarianism, other types of secular and religious Intentional Communities usually employ some type of a property mixture combining individual rights alongside substantial components of communality.

The Renewing Kibbutz is an example of a mixed property regime in regard to both formal rights allocation and governance. *First*, it may allocate individual budgets to its members pursuant to the "extent of their contribution, positions, and seniority."⁴² This flexible provision, aimed at motivating individual productivity, is subject to the duty of the Kibbutz to maintain a mechanism of "reciprocal guarantee" in the allocation of funds, ensuring an economic safety net for all.⁴³ *Second*, the Renewing Kibbutz may allocate housing units based on "egalitarian criteria, considering the member's seniority . . ."⁴⁴ To preserve its revised version of collectivity, the Renewing Kibbutz is required to set up direct restraints on further alienation of the housing units. This means that the Renewing Kibbutz must make provision in its bylaws for housing units to be transferred only to members of the Kibbutz's cooperative association, or, at least, that at any given point in time more than half of the housing units in the Kibbutz will belong to such full-fledged members. Moreover, the Kibbutz itself has a right of first refusal to purchase the housing unit at its market price. *Third*, the Renewing Kibbutz is entitled to allocate individual shares in the Kibbutz's productive assets, provided that the individual members will not be able to jointly gain corporate control of any specific enterprise.⁴⁵ The Kibbutz may also set up

40 The definition of the Renewing Kibbutz is now included in the Cooperative Associations Ordinances (Types of Associations) § 2(5)(b).

41 See KIBBUTZ MOVEMENT YEARBOOK NO. 3, at 45-48 (2006) (Hebrew), available at http://www.kibbutz.org.il/calcala/shnaton/060628_shnaton_2006.pdf.

42 Cooperative Associations Ordinances (Types of Associations) § 2(5)(b)(1).

43 Cooperative Associations Ordinances (Reciprocal Guarantee in a Renewing Kibbutz), 2005, KT 6445, 190.

44 Cooperative Associations Ordinances (Affiliation of Housing Units in a Renewing Kibbutz), 2005, § 3, KT 6445, 195.

45 Cooperative Associations Ordinances (Affiliation of Productive Assets in a Renewing Kibbutz), 2005, KT 6445, 195.

caps on overall individual holdings, as well as a right of first refusal in its favor in case of share transfers.⁴⁶

In Intentional Communities of the Jewish Ultra-Orthodox variety we find a different type of resource control. As mentioned, these groups see it necessary to physically huddle together to preserve their unique ideological, cultural, and social fabric. Territorial concentration facilitates the efficient provision of services (such as a separate education system or the provision of kosher food), observance of community practices (e.g., closing inner roads to traffic on Shabbat), and most importantly, enhancement of the group's ability to closely monitor member behavior.⁴⁷ Beyond social practices of insulation, the Israeli Supreme Court has validated the establishment of neighborhoods and entire towns designated solely for the Ultra-Orthodox — including those erected on state land or subsidized by government — recognizing the interests of "minority communities who seek to preserve their uniqueness."⁴⁸

These organizational modes spill over into intra-community property issues. Ultra-Orthodox communities employ various measures, mostly informal — in the state jurisprudential sense — to shape their property landscape. Thus, for example, in many Ultra-Orthodox neighborhoods and towns Rabbinat selection committees condition their approval of apartment sales on the candidate's suitability to the community's "way of life," based also on his affiliation with a certain faction, i.e., the specific community within the Ultra-Orthodox world. Developers who do not abide by these decisions face an informal yet extremely effective sanction: boycott.⁴⁹ Similarly, "housing committees" recently established in Ultra-Orthodox neighborhoods and towns monitor rent market rates. Landlords who substantially raise rents without receiving the committee's approval get blacklisted and the apartments are effectively taken out of the Ultra-Orthodox market.⁵⁰

46 Associations Ordinances (Affiliation of Housing Units in a Renewing Kibbutz) § 9.

47 See AMIRAM GONEN, *BETWEEN CITY AND SUBURB* 171-91 (1995).

48 HCJ 4906/98 Am Hofshi Ass'n for Freedom of Religion, Conscience, Education, and Culture v. Ministry of Housing [2000] IsrSC 54(2) 503, 508-09.

49 See Anat Georgy, *Respect for Rabbis and Preservation of Jewish Law — No Less Important than Quality of Construction*, HA'ARETZ, Dec. 5, 2004, Real Estate Supp., at 1 (Hebrew). Cf. Nomi Maya Stolzenberg, *The Culture of Property*, in *ENGAGING CULTURAL DIFFERENCES: THE MULTICULTURAL CHALLENGES IN LIBERAL DEMOCRACIES* 169, 182-86 (Richard Shweder et al. eds., 2002) (describing such exclusionary practices in the Hasidic Kiryas Joel village in New York, stemming not so much from Rabbinat decree, but rather from a prevailing social norm).

50 Eric Mirowski, *Rabbinat Housing Committees Monitor Rent Rates in the Ultra-Orthodox Sector*, HA'ARETZ, Oct. 18, 2004, at A7 (Hebrew).

Hence, property practices of Intentional Communities preserve a central role for the community in owning *or* governing assets or several attributes of them. Yet far from conforming to a single property blueprint, such practices significantly diverge.

Even more importantly, one should be careful not to be misled into viewing Intentional Communities as completely sealed and static entities, including in property matters. Internal disputes, majority-minority tensions, and constant pressures for change exist even within the tightest and most insular of groups. Even when one can identify relatively clearly who is authorized to make decisions for the community and speak on its behalf, potential agency problems and minority disenfranchisement are bound to come up, not only when a conservative majority blocks a change-seeking minority that has no exit option, but even more so when it is rather the decision-makers who seek to introduce a change — the "renewal" of Kibbutzim and recent land tenure changes in Indian reserves being just a couple of examples. As will be shown, these complicated issues have clear implications for the stance that a liberal society should take toward such Intentional Communities, including in property law matters.⁵¹

2. *Planned Communities*

A different type of residential communities that have grown rapidly in the past few decades are "planned communities," typically referred to as Common Interest Communities (CICs), Common Interest Developments (CIDs), etc. The genesis of such communities is completely different from that of Intentional Communities.

These private developments, chiefly residential ones, are initially designed to solve a host of collective action problems that neighbors typically face in residential neighborhoods. These issues relate both to the establishment and management of joint resources — such as inner streets, parks, and sport facilities — and to the control of intra-neighborhood externalities resulting from the use of the private housing units. To facilitate this coordination and reciprocal control, developers of Planned Communities construct a consent-based legal regime which purchasers must formally join by signing the conditions, covenants, and restrictions (CC&Rs) that are part of the CIC's governing documents. Moreover, the CIC's institutions generally not only have the power to enforce the original terms, but are also authorized to

⁵¹ See *infra* Section III.B.

make managerial decisions, promulgate rules, and even amend the governing documents without a need for unanimous consent.⁵²

That said, one may ask whether Common Interest Communities can really be considered "communities," or might their title be erroneous, not to say deceitful. In one sense, they certainly are. CICs are often criticized as a "secession of the successful,"⁵³ etc., referring to the numerous formal and informal exclusionary mechanisms employed by these communities.⁵⁴ This is most vividly illustrated by "gated communities" — i.e., those that physically restrict public access to them.⁵⁵

But how about the constructive elements of communality? Recalling the two types of general arguments discussed in Section I.B in favor of sub-society communities, can people who reside in CICs utilize their institutional interconnectivity to form "deeper" manifestations of common values, empathy, and a sense of belonging, and do they? And can the possibility of creating and nourishing intra-community social capital be complemented by the existence of genuine "mini-democracies" in the CIC institutions?

At best, the evidence for this 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, may allegedly attest to the fact that people truly "feel at home" in CICs.⁵⁶ On the other hand, several studies have shown an increasing number of recorded disputes and conflicts between residents and CIC institutions, as well as an abundance of rule violations, especially on the part of resale purchasers who take little care in reading the governing documents.⁵⁷ In addition, in contrast to the utopian

52 See Lehari, *supra* note 38, at 160-66.

53 Cashin, *supra* note 27.

54 Lehari, *supra* note 38, at 161.

55 See EDWARD J. BLAKELY & MARY G. SNYDER, *FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES* (1997); SETHA LOW, *BEHIND THE GATES: LIFE, SECURITY, AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA* (2003).

56 In a recent survey, 78 percent of CIC residents said that their CIC's rules "protect and enhance" property values. Only one percent said these rules "harm" property values. Zogby International, Homeowners and Community Associations, 2007 National Survey, <http://www.caionline.org/about/survey.cfm> (last visited Mar. 1, 2008).

57 See Rowland Atkinson & Sarah Blandy, *Introduction: International Perspectives on the New Enclavism and the Rise of Gated Communities*, 20 HOUSING STUD. 177, 178-79 (2005).

"polis" perception, managerial activities are often not carried out by residents themselves, but rather by professional management corporations.⁵⁸

These practical characteristics have obvious implications for the appropriate legal approach towards CICs. Alongside the strong intra-group utilitarian justification for CICs as effective providers of club goods and collective action coordinators, as well as the pervasive market success of such developments, the very proliferation of CICs poses significant challenges for public policymakers. The fact that in many countries throughout the world, including in North America, Southeast Asia, Latin America, and the Middle East, planned communities have practically become the default for new urban developments intended for higher-status residents — and in some cases are actively encouraged and even mandated by local governments themselves⁵⁹ — has obvious societal implications not only for those who remain outside these communities, but also for reconsidering the basis of resident consent which has been the linchpin of CIC rules and institutions.⁶⁰

3. *Spontaneous Communities*

An altogether different type of territorial community is one which I conceptualize and define as "Spontaneous Community." By this term I refer to settings in which groups of physically-adjacent residents who live in "regular" neighborhoods — i.e., those that are not initially organized by a set of internally binding norms and institutions — are able to cooperate and coordinate over time, and in the process create a meaningful, enduring basis for localized communality.

In earlier works, I identified such a phenomenon with users of local public spaces in several American cities, focusing on the case study of New York City.⁶¹ Briefly, during substantial periods since the 1970s, cities like New York faced acute fiscal crises which caused them to de facto withdraw from many of their responsibilities in public parks, leaving the parks pretty much to their own fate. In a growing number of cases, grassroots initiatives were taken by groups of previously unorganized residents who had realized the instrumental role that successful public spaces play in providing direct

58 See, e.g., Simon C.Y. Chen & Chris J. Webster, *Homeowners Associations, Collective Action and the Costs of Private Governance*, 20 HOUSING STUD. 205, 214-16 (2005).

59 See, e.g., Evan McKenzie, *Constructing the Pomerium in Las Vegas: A Case Study of Emerging Trends in American Gated Communities*, 20 HOUSING STUD. 187, 187-92 (2005).

60 Atkinson & Blandy, *supra* note 57, at 182-84.

61 Amnon Lehavi, *Property Rights and Local Public Goods: Toward a Better Future for Urban Communities*, 36 URB. LAW. 1 (2004); Lehavi, *supra* note 38, at 181-95.

and indirect benefits, as well as the adverse flip-side of neglected and derelict public spaces as harboring crime, disorder, and socioeconomic decline.⁶²

As of 2007, there are over 3,800 grassroots community-based organizations in NYC, of which about 2,700 are chiefly dedicated to parks.⁶³ Overall, such "friends of" groups are active in over half of the City's 1,770 parks.⁶⁴ These cooperative modes take several forms. Alongside informal and non-institutionalized "friends of" groups, there is a substantial number of groups incorporated as tax-exempt nonprofit organizations with volunteer directors and officers, who enlist dues-paying members and regularly undertake multiple activities such as the purchase of plants and gardening supplies; the renovation of portions of the park; and financial and logistic support for community events such as art shows, summer concerts, and holiday festivals. In a small number of parks, the City has entered into formal cooperation agreements with nonprofit organizations for the full or partial management of the publicly-owned park.⁶⁵

Spontaneous Communities may also sprout and operate in other areas of group interest. A prominent example is the work of community-based organizations, known as Community Development Corporations (CDCs), in reviving rundown American neighborhoods. These activities include building or rehabilitating affordable housing for low-income residents as well as providing social services such as job training, youth programs, and small business assistance.⁶⁶

Note, however, that even if the activities of such groups seem to be a "win-win" situation for all parties — one in which cooperation in public spaces, for example, spills over to other issues to create viable Spontaneous Communities in traditional urban neighborhoods — such

62 Lehari, *supra* note 61, at 24-48.

63 Interview with Mr. Jason Schwartz, Director, and with Ms. Emily Maxwell, Acting Director, Catalyst Program, Partnerships for Parks, in New York City (Apr. 24, 2007).

64 *Id.* The difference between the number of groups and that of community-active parks derives from the fact that, in many cases, there are multiple groups working in the same park. For example, there are about thirty groups involved in the Flushing Meadows Park in Queens.

65 Lehari, *supra* note 38, at 181-92.

66 For the work of CDCs, see, for example, ALEXANDER VON HOFFMAN, *HOUSE BY HOUSE, BLOCK BY BLOCK: THE REBIRTH OF AMERICA'S URBAN NEIGHBORHOODS* (2003). For the intriguing example of the Dudley Street Neighborhood Initiative (DSNI) in Boston, which succeeded in fostering a grassroots revival in one of the city's most impoverished areas, see PETER MEDOFF & HOLLY SKLAR, *STREETS OF HOPE: THE FALL AND RISE OF AN URBAN NEIGHBORHOOD* (1994).

grassroots endeavors can also be a source of friction. This is especially so when the interests of the local "commoners" are in tension with those of the general public or other sub-groups within it, or when the local community exercises informal exclusionary measures vis-à-vis outsiders. Policymakers should thus keep an open eye to prevent potential adverse effects of what is otherwise a very constructive phenomenon.

In this sense, agency problems, as well as more fundamental concerns over who gets to say "what the community wants" in the absence of clear hierarchal structures, are especially acute in Spontaneous Communities. The "spontaneity" of the community also indicates that such groups may be subject to more frequent internal changes and fluctuations. The ability of formal law to properly respond to the evolution of Spontaneous Communities, even assuming that these are viewed as socially constructive, may be particularly challenging — though definitely not pointless — when the very foundations of the targeted community may be unstable.⁶⁷

II. THE ATTRIBUTES OF PROPERTY LAW

Having delineated a rough taxonomy of territorial communities, one must now turn to the workings of the state property system. In this Part my aim is not to offer a comprehensive analysis of property law, but rather to briefly flesh out some of its essential features, with the purpose of laying the groundwork for evaluating the cross-influences between these distinctive sets of institutions and rulemaking apparatuses, and especially the potential impacts that property law has on territorial communities and their internal mechanisms for resource control and management, as elaborated in Part III.

A. Creating Property Entitlements . . .

Property law constitutes the formal regime which sets out the ways in which society allocates, governs, and protects entitlements and obligations in resources and human relationships around them. A political institution, property law is at its basis the result of conscious decisions by the state's authorized entities to designate resources as subjects of property and to create a certain set of entitlements and obligations accruing to them.⁶⁸

⁶⁷ See Lehari, *supra* note 61, at 67-73.

⁶⁸ See Amnon Lehari, *The Property Puzzle*, 96 GEO. L.J. 1987, 1993-96 (2008); J.E. PENNER, *THE IDEA OF PROPERTY IN LAW* 202-03 (1997).

The creation of property entitlements through the legal system takes at least two different forms. *First*, in designating the types of resources that may be the subject of property rights, property law also establishes the forms of recognizable interests that will be validated and enforced. The *numerus clausus* principle — explicit in the civil law system and implicit though persistent in the Anglo-American one — is the chief instrument for creating formally recognized property interests.⁶⁹ Modern jurisprudence has, however, often gone beyond "mainstream" property rights to enshrine what may be viewed as quasi-property interests, such as "property" interests in certain kinds of welfare benefits — although the nature of such entitlements qualitatively diverges from that of "classical" property rights.⁷⁰

Second, property rights can also be "created" in the sense of allocating property rights to certain individuals or groups by society's institutions outside of conventional market or *ex lege* transfers of property. These instances are especially intriguing in the case of systematic wide-scale reforms. This may include legislative reparations for historic injustice in favor of certain categories of individuals or groups (native and aboriginal tribes being a notable example);⁷¹ the allocation of initial rights in the case of innovative property regimes such as tradable emission rights or fishing quotas;⁷² major land tenure reforms in countries in transition (South Africa being a recent case);⁷³ and other types of "dramatic" changes in the overall societal concept of resource control.

B. . . . Enforcing Existing Ones . . .

Property law is measured not only on the basis of initial allocation or recognition of entitlements and obligations, but also by the ongoing enforcement of such interests by the legal system, especially in the adjudication of specific disputes.

Ever since Guido Calabresi and Douglas Melamed's groundbreaking

69 See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 12-24 (2001).

70 Lehari, *supra* note 38, at 155-60.

71 See sources cited in *supra* note 32.

72 See DANIEL H. COLE, POLLUTION AND PROPERTY: COMPARING OWNERSHIP INSTITUTIONS FOR ENVIRONMENTAL PROTECTION 45-84 (2002).

73 See A.J. Van der Walt, *Transformative Constitutionalism and the Development of South African Property Law* (pt. 1), 2005 J. S. AFR. L. 655.

work,⁷⁴ the conventional spectrum of remedies awarded by courts in property disputes — i.e., injunctions, interim and permanent compensation awards, or no remedy at all — has been conceptualized under the property rule/liability rule framework, with the original four-rule taxonomy extended by subsequent scholarship to include a wider array of property rules, liability rules, and various combinations of them.⁷⁵

As a matter of positive law, the choice of remedies — and hence the level of enforcement of existing rights — substantially diverges not only among jurisdictions, but based also on the type of resource, the nature of the alleged infringement and competing interests, and the contextual aspects of the dispute.

Taking disputes over property rights in land as an example, the distinction between infringement of physical possession and other types of interferences seems to have played an essential role in the enforcement of rights in land. Remedies for nuisance are usually very context-specific and often based on a "balance of interests" test, which at times is used quite confusedly to exempt the defendant from any liability,⁷⁶ and in other instances vacillates in a very ad hocish manner between monetary compensation and injunctive relief remedies.⁷⁷ Contrastingly, permanent physical trespasses to land have been almost always sanctioned by injunctions or supra-compensatory monetary awards.⁷⁸

In other property settings, the direction of remedies has been less clear-cut. In the recent *eBay Inc. v. Mercexchange, L.L.C.* decision,⁷⁹ in the context of patent infringement, the U.S. Supreme Court reaffirmed the highly contextual four-factor equitability test which a plaintiff must satisfy to be granted permanent injunction. The Court rejected both the under-inclusive approach of the District Court as well as the over-inclusive approach of the Court of Appeals towards permanent injunctions for infringement of property

74 Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

75 See, e.g., IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* 1-38 (2005); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 724-28 (1996); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1721 n.5 (2004).

76 Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 720-21 (1973).

77 RESTATEMENT (SECOND) OF TORTS § 941 (1979).

78 See Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 993-94 (2004).

79 126 S. Ct. 1837 (2006).

rights, emphasizing that "the creation of a right is distinct from the provision of remedies for violations of that right."⁸⁰

Hence, the way in which property entitlements and obligations are enforced *de facto* and *de jure* by the state is no less instrumental than the creation and recognition of rights for our comprehension of the underlying attributes of property law.

C. . . . and Liquidating Them

An essential component of property law concerns the flip-side of the creation and enforcement of property rights: their termination or liquidation. In some cases, as with most types of intellectual property, the exclusive rights of a copyright or patent owner are designed *ab initio* as time-limited.⁸¹ With the expiration of the statutory protection period, the resource shifts from the realm of private property to the public domain, granting open access to all and the right to exclude to no-one.

In addition, statutory or judicially-developed property law includes mechanisms by which private property rights that are initially unlimited time-wise may become overridden by other stakeholders. A notable example is the adverse possession doctrine, which allows a *de facto* possessor of another person's property in certain circumstances not only to enjoy immunity from a claim by the original owner upon the passage of the statute of limitations period, but also to gain title and become the new "true owner" of the resource.⁸² Other doctrines, such as that of prescriptive easement or the old English custom doctrine,⁸³ may validate a long-term use of another's property by formally derogating from the owner's "bundle of rights," chiefly her right to exclude against the said user.

Yet probably the most drastic instance of termination of property rights is the governmental power to take private property. Just about every legal system awards government the power to nonconsensually transfer all rights (or part of them) in certain assets to facilitate a "public purpose" or "public use," subject to certain constraints — chiefly the duty to pay

⁸⁰ *Id.* at 1840.

⁸¹ See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 145-46, 153-57 (2004).

⁸² THOMAS W. MERRILL & HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES 194-220 (2007).

⁸³ Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

"just compensation" for the forced termination of private property rights.⁸⁴ As I shall show in Section III.B, the way in which the law of takings and compensation is designed may have enormous effects on different types of communities, which must be taken into consideration.

III. WHY PROPERTY MATTERS TO COMMUNITY

A. Of Property Tailwind, Headwind, and (Near) Zero-wind

I now move on to examine more closely the interconnectivity between territorial communities and state property law. At the outset, I define three types of influences which formal property law may have on societal goals or institutions, focusing attention on the creation, preservation, and enhancement of certain types of sub-society territorial communities.

"Property Tailwind" will refer to strong, active societal support for a certain type of community through the design of certain property rules and remedies by society's formal institutions. *"Property Headwind"* will reflect an opposite trend of overt hostility or conscious apathy towards the special needs of certain communities, bringing about their weakening or even outright destruction. *"Property (near) Zero-wind"* will stand for a middle stance, which leaves communities very much to their own devices — so that their fate hinges almost exclusively on their internal, insular mechanisms for rulemaking and enforcement.

Four caveats are in order here. *First*, the following discussion about the implications of property law does not in any way purport to be exhaustive. In this sense, not only is the taxonomy of territorial communities somewhat ambiguous, but so is the delineation of property law effects on communities. Even before going into the question whether Property Tailwind, Headwind or Zero-wind is normatively desirable from a societal viewpoint (an issue I will shortly address), the question whether the community *itself* considers a state property act as having a certain impact hinges upon dilemmas that I have already addressed: Who may be said to represent the community and its collective will? Are the state property norms responding to existing community reality or also changing it? Put differently, property laws and regimes are so abundant, and the potential effects on various communities — including different groups allegedly located within a certain suggested

⁸⁴ See Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704 (2007).

category of territorial communities — too numerous to allow for any safe generalizations. The following analysis should therefore be weighed chiefly on its ability to illuminate some prominent instances of cross-influences between property and community, and not on its capacity to suggest a unified blueprint for shaping community-oriented property law.

Second, the analysis below is not restricted to property law and policy which is explicitly and uniquely designed for certain types of communities (as is the case with the U.S. federal legislation on Indian-Americans).⁸⁵ A large part of the property-related fate of territorial communities is determined by the influence that *general, allegedly neutral* legislation and other legal rules have on a certain type of community. When such general property rules are applied in specific instances of communities struggling to achieve their common goals, one may find that the same property rule is highly constructive for one type of community, destructive for another, and practically meaningless for a third. Thus, property laws should often be evaluated *as applied* to specific circumstances, so as to fully understand the implications they may have for different communities. This point will be demonstrated in Section III.B in the context of rules of compensation for governmental takings.

Third, the legal system has an influence on different types of communities that obviously goes far beyond property law. Issues as diverse as freedom of religion and the mirror-image prohibition of state establishment of religion; imposition of civil duties such as military service, mandatory education, or the acceptance of medical treatment to which insular communities strongly object; municipal and voting districts line-drawing around such territorial communities; or the application of criminal law to offences not perceived as such within the community — these are but a handful of the major issues that create tension between the norms of distinctive communities and those of general society.⁸⁶ Property law is by no means unique or categorically more dramatic than such other issues. It is merely the specific venue chosen as the subject of this research, and must often be studied together with other legal fields to fully comprehend its fundamental influences on communities.

Fourth, and probably most important, nothing in the following paragraphs should be construed as unwarranted normative support for the rules and practices of "intentional" or other communities. In many cases, society,

⁸⁵ See *supra* notes 2-6 and accompanying text.

⁸⁶ For some of these issues, see Robinson, *supra* note 19; Mark D. Rosen, *The Radical Possibility of Limited-Based Interpretation of the Constitution*, 43 WM. & MARY L. REV. 927 (2002).

acting through its decision-making institutions, may be entirely justified in intervening with community norms, especially those perceived by society as infringing on members' individual rights below a threshold that a liberal democracy cannot tolerate, or when the community imposes substantial externalities on other society members. It is therefore essential to keep in mind that my use of the terms Property Tailwind, Property Headwind, and Property (Near) Zero-wind is *not synonymous* with "socially desirable," "socially repugnant," and "socially (practically) meaningless," respectively.

What I have set out to do in the following Section is primarily to identify the effects that a certain state property regime has, as the community *itself* perceives them to be — assuming we can identify its clear collective voice in the matter. But this is obviously not the end of the analysis. Just as my suggested division of territorial communities is intended chiefly to differentiate between distinctive types of internal motives, structures, and goals that characterize different sorts of territorial groupings in order to identify these communities' claims to distinctive rights and prerogatives within general society, so the study of property law's role is most important for laying the groundwork for a nuanced, more sophisticated *normative* analysis of when and how society should intervene with the practices of territorial communities. Hence, since even a merely taxonomic or descriptive enterprise cannot really be devoid of normative presumptions, the real ambition of this research is definitely to provide the necessary conceptual infrastructure that will facilitate a more meaningful normative theory of community/state property relationships — even if such a full-scale analysis has to be left to a later date.

B. Implications for Territorial Communities

Whereas some features of property law may simultaneously impact several types of territorial communities, I will divide the analysis of potential Property Tailwind, Headwind, and (Near) Zero-wind effects along the three-prong taxonomy of territorial communities drawn in Section I.C, and focus my attention on the distinctive implications that property law may have for each type of community.

1. Intentional Communities

As mentioned in Section I.A, Intentional Communities are characterized by strong internal norms that have sweeping effects on the lives of community members, and by a consequent necessity for a certain level of formal and practical insulation from society's norms and institutions in order for such communities to survive.

Unlike Planned Communities, Intentional Communities are not formed just *because* a certain state property structure makes it easier or economically feasible to do so. Benedictines assemble in monasteries because they share the same religious convictions that require them to segregate themselves from general society, as is the case with Jewish Ultra-Orthodox communities. Kibbutzim founders had to territorially congregate with their own kind to fulfill their vision of a cooperative, communitarian life.

Thus, to the extent that society regularly refrains from meddling with the community's institutions for member selection, regulation, or ejection — including decisions over resource control and management within the community — it can be seen as avoiding the creation of Property Headwind for such communities, assuming of course, as suggested beforehand, that such a genuine "community will" can be detected. If the state goes so far as to formally defer to such internal judgments when these are challenged in state institutions, reasoning that the unique social fabric of such communities justifies an explicit "hands-off" approach — it may even be said to provide significant Tailwind for the community.

For example, Israeli courts have traditionally rarely interfered with membership decisions by cooperative Kibbutzim, including decisions to remove members — which had enormous property implications in the old-style Kibbutzim in which members were not entitled to pro rata allocation of collective assets upon removal. In so doing, courts relied on Kibbutzim's allegedly voluntary nature and the importance of maintaining social harmony and collective discipline in them.⁸⁷ Kibbutzim also traditionally enjoyed strong institutional support from Israeli governments. Whereas this sweeping judicial abstention and unreserved governmental support have somewhat eroded in the past few decades, state institutions can still be viewed as providing significant Property Tailwind to Kibbutzim, for example, by formally validating the alternative format of resource control and management in Renewing Kibbutzim.⁸⁸

A noninterventionist state approach may provide significant support for the community when parties to property disputes do not regularly challenge

⁸⁷ See, e.g., HCJ 4222/95 Palatin v. Registrar of Cooperative Ass'ns [1998] IsrSC 52(5) 614, 620; CA 8398/00 Katz v. Kibbutz Ein-Tzurim [2002] IsrSC 56(6) 602, 623.

⁸⁸ Lehavi, *supra* note 38, at 166-73. One might argue, however, that the validation of the Renewing Kibbutzim structure can be viewed as creating Property Headwind for old-style cooperative Kibbutzim, bringing about the demise of the latter Kibbutzim's values and ideology, to the extent that one can detect an actual "competition" among these two forms of congregation.

decisions made by internal community institutions. In the case of Ultra-Orthodox Jews, the aforementioned Rabbinic selection committees in residential neighborhoods and cities have been highly effective largely because Ultra-Orthodox members do not challenge the decisions of such informal (from a state perspective) institutions.⁸⁹

In other cases, when formally-recognized community institutions exceed their state-mandated jurisdiction, de facto lax state enforcement may lead to similar results. Thus, for example, Rabbinic Courts in Israel have formal jurisdiction in family matters (exclusive in some issues, parallel to civil courts in others), yet they have often gone beyond these issues to discuss other types of property conflicts as well as other private law issues. Even though the Israeli Supreme Court has determined that formal Rabbinic courts are unauthorized to act in this manner, including in the guise of arbitration procedures,⁹⁰ the practice of extra-state adjudication continues practically undisturbed. This is because Ultra-Orthodox community members have preferred to resolve much of their private adjudication before informal (again, from a state perspective) Ultra-Orthodox Rabbinic tribunals that have no formal status under state law but are accordingly not limited by issues of formal jurisdiction. Whether such tribunals can be viewed as arbitrators under the Israeli law of arbitration matters little, if the litigants do not challenge these tribunals outside the community, and the state on its part does not actively engage in scrutinizing the conduct of such tribunals.⁹¹

Contrarily, when members of Intentional Communities tend to challenge internal community decisions in property matters before state institutions, as the *Hodel v. Irving* case demonstrates in the instance of American-Indians,⁹² then, to the extent that the state wishes to be responsive to the "community will" even in the face of minority opposition, Property Tailwind would have to take a more interventionist approach, either by legislating property laws that

89 See *supra* notes 49-50 and accompanying text.

90 HCJ 8638/03 Amir v. Rabbinic High Court in Jerusalem (Apr. 6, 2006). The Israeli Knesset is currently deliberating over a recent Draft Bill that would formalize the authority of Rabbinic Courts to decide any kind of issue subject to the parties' consent. See Rabbinic Courts (Marriage and Divorce) (Amendment — Jurisdiction by Consent) Draft Bill, 5768-2007 (private bill, submitted by M.K. Eli Aflalo on Dec. 3, 2007).

91 See Tuli Fikresh, *Standing on Trial*, HAZOFE, Jan. 2, 2006 (Hebrew), available at <http://www.hazofe.co.il/web/newsnew/katava6.asp?Modul=24&id=40405&Word=&gilayon=2602&mador=>.

92 *Hodel v. Irving*, 481 U.S. 704 (1987).

conform to tribal community norms, or by formally extending the institutional and substantive jurisdiction of tribal courts in property matters.

However, as emphasized above, it is exactly in such instances that questions about the normative legitimacy of community practices and state property actions arise in the most acute fashion. In considering the Intentional Community's claims on recruiting the state's coercive powers to facilitate its practices and discipline unwilling minorities, the state faces difficult choices concerning the proper dominion of these sub-society enclaves vis-à-vis both members and nonmembers.

2. *Planned Communities*

Planned communities are based on an entirely different dynamic. Such communities cannot be effectively established without the basic structural support of the state legal system. The contract/property legal web of Planned Communities' governing documents relies almost entirely on its enforceability, if necessary, by state institutions. Thus, CICs, which create a system of equitable servitudes to control and regulate commonly-owned assets and the use of private housing units, as well as governing institutions that have broad decision-making powers, could simply not exist without the external support of CIC-enabling legislation, the judicial enforcement of the governing documents, and official deference to managerial and other decisions by CIC institutions.⁹³

Unlike Intentional Communities, members of Planned Communities rely relatively little on informal norms as the chief measure for monitoring and compliance. Especially with the growth in numbers of CIC developments and of the number of residents in each, the interpersonal familiarity and thickness of social relations, which might have been typical of earlier generations of planned communities, has given way to a more arms-length formal approach which often involves extra-community dispute resolution. As mentioned above, there is an ever increasing number of recorded disputes and conflicts between residents and CIC institutions, as well as an abundance of rule violations that necessitate adjudication outside the community institutions.⁹⁴

So how have state institutions responded to such conflicts? Generally speaking, Planned Communities have received the blessing of American society's formal institutions, not only facilitating their very existence

93 In some states, the creation of CICs is governed by specific legislation on the matter. See RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) § 6.3 (2000). Probably most familiar is California's Davis-Stirling Act (codified as CAL. CIV. CODE div. 2, pt. 4, tit. 6 (West 1982 & Supp. 2008)).

94 See *supra* notes 56-58 and accompanying text.

but also providing significant Property Tailwind in borderline cases. For example, in *Villa De Las Palmas Homeowners Ass'n v. Terifaj*,⁹⁵ the California Supreme Court upheld a majority-approved amendment to a CIC's governing documents, which imposed a restriction on pets. The court viewed use restrictions as "crucial to the stable, planned environment of any shared ownership arrangement,"⁹⁶ and held that "all homeowners are bound by amendments adopted and recorded subsequent to purchase."⁹⁷ The Court thus awarded CICs substantial power not only to enforce contracts, but also to create and sustain what one would normally categorize as property entitlements and obligations within the confines of the community.⁹⁸

Similar support has generally been granted in matters such as aesthetic controls of the external shape, design, and color of the housing units;⁹⁹ restrictions on outside storage or display of certain items such as unused cars;¹⁰⁰ or limits on other types of activities which are not regularly prohibited by general private law.¹⁰¹ The most recent front, not yet resolved judicially, seems to be Planned Communities' rules prohibiting smoking *within* private housing units.¹⁰²

Planned Communities have also enjoyed a fair amount of state discretion in issues of member selection and exclusion. Whereas courts have intervened in overt cases of racial discrimination against those seeking to enter such communities,¹⁰³ in many other instances lawmakers and courts have given sufficient leeway to Planned Communities to set up criteria for member selection — even when such rules adversely affect not only residents who fail to meet such criteria, but also implicate broader issues of public policy. In *Mulligan v. Panther Valley Property Owners Ass'n*,¹⁰⁴ a community association 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

95 90 P.3d 1223 (Cal. 2004).

96 *Id.* at 1228.

97 *Id.* at 1229.

98 For a more detailed analysis, see Lehavi, *supra* note 38, at 163-66.

99 See ROBERT C. ELLICKSON & VICKI L. BEEN, *LAND USE CONTROLS* 593-96 (3d ed. 2005).

100 See, e.g., *Shafer v. Bd. of Trustees of Sandy Hook Yacht Club Estates, Inc.*, 883 P.2d 1387 (Wash. Ct. App. 1994).

101 ELLICKSON & BEEN, *supra* note 99, at 596.

102 Staci Semrad, *A New Arena in the Fight Over Smoking: The Home*, N.Y. TIMES, Nov. 5, 2007, at A18.

103 *Shelley v. Kraemer*, 334 U.S. 1 (1948).

104 766 A.2d 1186 (N.J. Super. Ct. App. Div. 2001).

policy by infringing the constitutional rights of Tier-3 registrants and also by de facto deflecting such persons to regular neighborhoods that have no such institutional exclusion mechanisms. While the court did not wholly disregard these arguments, it nevertheless reasoned that the question whether such provisions "make a large segment of the housing market unavailable" to such persons, or exposes those who live in the "remaining corridor to the greater risk of harm than they might otherwise have had to confront," is largely empirical. 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.¹⁰⁵

These cases thus demonstrate a clear policy choice by legislatures and courts to normatively back such communities' structures and practices, a choice which is by no means self-evident, especially in view of the narrowing resident choices and the respective growth of the external societal impacts of Planned Communities.

3. *Spontaneous Communities*

Spontaneous Communities, especially in urban settings, may serve an important function of creating social capital and a platform for collective action that is not necessarily followed by exclusionary practices vis-à-vis "outsiders." Yet these communities usually rely on relatively fragile modes of cooperation, and even when incorporated as nonprofit organizations, they typically do not distinctively and formally hold formal property rights to resources. This, in turn, frames the way in which governments and other state institutions, including courts, treat such communities as a *legally negligible phenomenon*.¹⁰⁶ In the relatively few instances in which such types of informal communities have asked courts to legally validate the consequences of such interpersonal group effects, courts have tended to see the communities' role as merely sentimental, often coupling a local group's losses resulting from governmental actions with subjective damages of nontransferable value, which in any case do not qualify for compensation under the Fifth Amendment Takings Clause.¹⁰⁷

A vivid, well-known example is the razing of the entire neighborhood of *Poletown* in Detroit in the early 1980s to make way for General Motors' new car-manufacturing facility. Although the City of Detroit had

¹⁰⁵ *Id.* at 1193-94.

¹⁰⁶ Lehari, *supra* note 61, at 56-59.

¹⁰⁷ See *United States v. 564.54 Acres of Land*, 441 U.S. 506, 516 (1979); *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5 (1949).

taken and demolished the neighborhood's 1,400 homes and nearly 150 businesses, the Supreme Court of Michigan refused to recognize social and cultural environments as within purview of the State's statute governing environmental protection, and further disregarded the enormous social, economic and psychological costs — the magnitude of which was realized only in retrospect — in applying the constitutional strictures of "public use" and, moreover, of the "just compensation" formula.¹⁰⁸

The *Poletown* case is obviously not an isolated incident of strong Property Headwind for Spontaneous Communities. During the era of the federal urban renewal programs the power of eminent domain was used throughout the U.S. to raze entire neighborhoods in the name of removing "blight" and to make room for middle and upper income housing. Yet these earlier programs proved to be a resounding failure, as they exacerbated the socioeconomic problems of the former residents of what were physically rundown yet socially vibrant Spontaneous Communities.¹⁰⁹ And as stated, such implications resulted not only from actual condemnation, but also from the nature and scope of compensation. The payment of pre-project "fair market value" to residents in rundown areas meant that they would in effect be priced out of the redevelopments, in addition to dramatically undermining their future prospects for reviving any such type of communality.

In response to such concerns, Gideon Parchomovsky and Peter Siegelman seek to directly address the currently unaccounted for "community" component by switching to a comprehensive resettlement remedy in cases of wholesale community clearing,¹¹⁰ and the payment of a premium above fair market value when due to the taking of multiple properties the remaining landowners drop below a critical point, rendering "unsustainable the provision of community amenities and disrupting community life."¹¹¹ Such a contextualization of compensation law may provide Property Tailwind for Spontaneous Communities, by making governments realize that the property

108 *Poletown Neighborhood Council v. City of Detroit*, 304 N.W.2d 455 (Mich. 1981). The general principles of *Poletown* regarding the existence of a valid "public use" for such types of takings were recently overturned in *County of Wayne v. Hathcock*, 684 N.W.2d 765 (Mich. 2004).

109 See BERNARD J. FRIEDEN & MARSHALL KAPLAN, *THE POLITICS OF NEGLECT: URBAN AID FROM MODEL CITIES TO REVENUE SHARING* 24-25 (1975); Wendell E. Pritchett, *The "Public Menace" of Blight: Urban Renewal and the Private Uses of Eminent Domain*, 21 YALE L. & POL'Y REV. 1, 31-47 (2003).

110 Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CAL. L. REV. 75 (2004).

111 *Id.* at 133-42.

whole may be greater than the sum of its parts, even in allegedly informal community settings.

Another instance of a systematic gap between formal property law and the significant socioeconomic reality of Spontaneous Communities concerns the discussion in Section I.C about grassroots community involvement in rehabilitating, maintaining, and improving formally government-owned public amenities. As I have shown, the level and nature of local involvement may determine the fate of the resource. This state of affairs is not, however, accompanied by an adequate legal regime that looks beyond the formal government ownership.¹¹² One suggestion that I have made in this respect concerns otherwise locally uncompensated conversions or alienations of pre-designated public spaces. Such instances may justify awarding the local community a substantive collective remedy which would be of a group non-pecuniary nature, focusing primarily on the provision of a substitute facility in which the community can keep pursuing its activities.¹¹³

Thus, providing Property Tailwind for Spontaneous Communities can take the form not only of intensifying existing rights (e.g., contextualizing the mechanisms of compensation), but also of recognizing Spontaneous Communities as bearers of distinctive, innovative property rights in appropriate circumstances. But again, as with the other types of territorial communities, the policy decision whether to provide such Property Tailwind must first and foremost rely on a normative evaluation that carefully weighs, alongside the distinctive justifications for Spontaneous Communities, issues such as the extent of exclusion employed by the group, the appropriateness and transparency of its internal decision-making, the practical possibility of exit, and so forth.

To sum up, the following table shows the potential effects of property law on the different types of territorial communities.

112 Lehari, *supra* note 38, at 197-99.

113 Lehari, *supra* note 61, at 85-97.

| <i>Effect of Formal Property Law</i> <hr/> <i>Type of Community</i> | Property Headwind | Property (near) Zero-wind | Property Tailwind |
|------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------|
| Intentional Communities (IC) | Limit, either de facto or de jure, the jurisdiction of IC internal institutions Invalidate internal decisions that do not conform to general society norms | Refrain de facto from intervention in internal IC decision-making | Formally extend jurisdiction of IC institutions Affirmatively defer to IC norms and practices, even if "illiberal" |
| Planned Communities (PC) | Attribute public traits to PC and apply public law principles to their rules and decisions Place the burden of "reasonableness" on PC institutions | Refrain from viewing PC as semi-public institutions Resolve disputes under private law doctrines | Provide the legal infrastructure for setting up PC (enabling statutes) Enforce covenants and defer to decisions made by PC institutions |
| Spontaneous Communities (SC) | Refuse to contextualize doctrines (e.g., compensation rules) when private loss of rights is exacerbated by concrete, visible community losses | Stick to the conventional legal frameworks in defining property and right-holders; Require SC to always act formally | Recognize unconventional group entitlements in appropriate cases Support SC grassroots activities that minimize exclusion, alienation |

Table 1: Mapping the Effects of Formal Property Law on Territorial Communities

CONCLUSION

Property and community are highly prominent concepts in public and legal discourse. But, as such, they may easily fall prey to manipulation and redundancy.

To avoid this, and to allow for a better analysis of the interconnectivity between property and community, we need a more nuanced taxonomy of the different types of social configurations that currently take shelter under the vague, over-inclusive term "community." Only then can we start to genuinely understand and normatively evaluate the effects that property law may and should have on different social groupings, and employ these insights for redesigning legal doctrines so as to properly attain societal values and goals. This Article has taken a preliminary, largely methodological and empirical step forward in this matter. Future research is, however, essential to promote a more sophisticated normative approach toward the interplay between property bundles and social bundling.