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## Unbundling Homeownership: Regional Reforms from the Inside Out

*The Unbounded Home: Property Values Beyond Property Lines*

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**INTRODUCTION**

Two seemingly intractable puzzles plague the American system of land use regulation. The first puzzle is how to encourage land use diversity while protecting owners from harmful spillovers. Historically, regulators have responded to the latter concern by essentially ignoring the former. The dominant form of public land use regulation in the United States—*Euclidean zoning*<sup>1</sup>—operates prophylactically. That is, zoning rules seek to prevent externalities by imposing *ex ante* inalienable limitations on owners' freedom to use their property as they please. And, it is worth noting, the dominant form of *private* land use regulation in the United States—covenants imposed by private developers—operates in essentially the same way. Since local governments (and private developers) can rarely calibrate the level of regulation to residents' true preferences, *ex ante* prohibitions frequently impose excessive "prevention costs." That is, the costs imposed by the regulations to prevent possible, future harms tend to exceed the benefits of actual harm prevention. But, because property owners—especially, homeowners—are extremely risk averse, they accept (even demand) high prevention costs as a means of shielding their investment. The result is the overprotection of property owners' investments and, many would argue, a monotonous, sterile, inefficient, and inconvenient suburban landscape.

Academic skeptics of zoning (and, to a far lesser extent, of covenants) have offered several alternatives to the traditional prohibitory model of land use regulation. Some—for example, Robert Ellickson—have suggested that *ex post* fines or nuisance remedies could address harmful spillovers while enabling a more efficient distribution of commercial and residential land uses.<sup>2</sup> Other commentators have suggested that land uses should be permitted if they satisfy certain regulatory goals or "performance standards."<sup>3</sup> More recently, the self-styled "new urbanists" have proffered an alternative to zoning that relies heavily on aesthetic controls.<sup>4</sup> For reasons that are elaborated in greater detail below, however, none of these alternatives satisfactorily addresses the puzzle of

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1. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

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

3. See, e.g., DOUGLAS R. PORTER, PATRICK L. PHILLIPS & TERRY J. LASSAR, *FLEXIBLE ZONING: HOW IT WORKS* 11-12, 112-13 (1988).

4. See DUANY PLATER-ZYBERK & CO., *THE LEXICON OF THE NEW URBANISM* (2002); Andrés Duany & Emily Talen, *Transect Planning*, 68 J. AM. PLAN. ASS'N 245, 247-49 (2002); Chad D. Emerson, *Making Main Street Legal Again: The SmartCode Solution to Sprawl*, 71 MO. L. REV. 637 (2006).

overprotection: ex post monetary remedies raise inevitable concerns about undercompensation—a problem present whenever entitlements are protected by liability rules;<sup>5</sup> performance standards have proven both difficult to articulate and to apply;<sup>6</sup> and new-urbanist-inspired aesthetic coding, which has supplemented or supplanted traditional land use regulations in some jurisdictions, generates exceptionally high compliance costs.<sup>7</sup>

The second land use puzzle is how to address the intrametropolitan inequalities resulting from the fragmented distribution of regulatory authority among multiple local jurisdictions without undercutting the beneficial effects of interjurisdictional competition. While this “local government boundary problem” extends beyond property law,<sup>8</sup> land use regulations are particularly problematic because they empower local jurisdictions to exclude unwanted residents by imposing what are, for all practical purposes, high entrance fees. Critics of metropolitan fragmentation generally offer one of two strategies for addressing interjurisdictional inequality: some propose new regional government structures that would supersede local government authority in problematic areas, including the authority to regulate land uses;<sup>9</sup> others advocate fiscal redistribution between rich and poor municipalities within a metropolitan area.<sup>10</sup> The difficulty with these strategies is that each threatens to undermine the efficiency gains that are produced when, as Charles Tiebout influentially predicted,<sup>11</sup> local governments compete for residents by structuring distinctive packages of taxation, regulation, and other publically provided amenities and services.<sup>12</sup> This competition for Tiebout’s “consumer

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5. See *infra* notes 51-53 and accompanying text.
  6. See, e.g., Douglas R. Porter, *Flexible Zoning: A Status Report on Performance Standards*, ZONING NEWS, Jan. 1998, at 1.
  7. See *infra* notes 146-149 and accompanying text.
  8. Richard Briffault, *The Local Government Boundary Problem in Metropolitan Areas*, 48 STAN. L. REV. 1115 (1996).
  9. See, e.g., ARTHUR C. NELSON & JAMES B. DUNCAN, *GROWTH MANAGEMENT PRINCIPLES AND PRACTICES* (1995); Briffault, *supra* note 8.
  10. See, e.g., ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* (1994); MYRON ORFIELD, *METROPOLITICS* 9-10 (1997); DAVID RUSK, *CITIES WITHOUT SUBURBS* 22-34 (2d ed. 1995); Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Urbanism*, 88 GEO. L.J. 1985, 2015 (2000); Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).
  11. Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416 (1956).
  12. See, e.g., *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES* (William A. Fischel ed., 2006) (exploring various applications of the Tiebout Hypothesis).

voters” is hardly fine grained; it is also a primary generator of the very inequities lamented in the local-government literature. But it does subject local governments to some approximation of market competition, and regional-government and regional-redistribution proponents struggle to demonstrate that the benefits of regionalization outweigh the costs of limiting intermunicipal competition.

In *The Unbounded Home*,<sup>13</sup> Professor Lee Anne Fennell proffers innovative solutions to both of these land use puzzles. The genius of Fennell’s excellent book is that she treats these puzzles as property-entitlement problems, rather than regulatory-design problems. By resorting to property theory, Fennell is able to break free from the standard land use and local-government debates and offer novel insights into what generally seem intractable difficulties. This Review focuses on two of Fennell’s recommendations that I believe hold the most promise for successfully addressing the land use puzzles identified above: first, the use of “entitlements subject to self-made options,” or “ESSMOs,” rather than prohibitory limitations or fines, to address local land use spillovers; and second, the reconfiguration of homeownership to minimize owners’ incentives to demand exclusionary land use policies. I am less enthusiastic about her third suggestion—a “propertization” of associational rights within local jurisdictions—as the policy proposals flowing from it do not differ dramatically from the redistributive approaches to exclusion championed by regional government proponents.

Fennell’s proposed use of options to efficiently calibrate local land use regulations to resident preferences ultimately is the most promising of her policy prescriptions. Fennell argues that, in lieu of the standard prohibitory land use regulations, local governments or private developers could give property owners the right to buy or sell certain land use entitlements at prices set by the entitlement holders themselves. That is, rather than prohibiting outright activities that might generate harmful spillovers, regulators could price the right to engage in, and to be free from, the potentially harm-producing activities. Fennell’s proposed pricing system would rely on options, by entitling owners to purchase the right to engage in a land use activity, or to enjoin neighbors from the same, and would be “self-made” because it would use self-valuation devices to price land use entitlements. Fennell makes a strong case that self-priced options could better calibrate land use controls to residents’ true preference than existing regulatory devices. But, they have the potential to do even more. Fennell arguably undersells the transformative

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13. LEE ANNE FENNEL, *THE UNBOUNDED HOME: PROPERTY VALUES BEYOND PROPERTY LINES* (2009).

power of this intriguing proposal by assuming that it primarily addresses intralocal regulatory spillovers and discounting the possibility that it might address regional inequalities as well. Yet this is not necessarily the case. Most proponents of regional government and growth control proceed on the assumption that poorer jurisdictions simply cannot compete with wealthier jurisdictions for the “right” kind of residents. According to this view, the exclusion of less-advantaged residents from richer jurisdictions is problematic because it denies lower-income individuals access to the amenities (safety, quality public schools, etc.) that wealthy residents demand and that wealthy jurisdictions provide. Of course, the relative status of poorer jurisdictions and their less-advantaged residents also would be improved if poorer jurisdictions (generally speaking, center cities and older, inner-ring suburbs) *could* compete successfully with wealthier jurisdictions. And, although the current housing crisis has placed a cloud of doubt over urban prospects, evidence from recent decades suggests that center cities in particular are getting better at competing with their suburban counterparts.<sup>14</sup>

As Edward Glaeser and Joshua Gottlieb plausibly argue, this competition may have been driven by an increased affinity among elites for city life, especially for the social interactions and consumer amenities enabled by dense, mixed land use urban environments.<sup>15</sup> Unfortunately, as I have argued elsewhere, existing land use regulations frequently impose “suburban” land use patterns on city neighborhoods, arguably hamstringing urban officials’ ability to capitalize on this advantage.<sup>16</sup> Yet even city officials who recognize this as a problem—and many do not—find it difficult to use land use policy to promote density and vitality because urban residents often are not appreciably less averse to spillover risk than the suburban homeowners that take center stage in *The Unbounded Home*. Neither of the common responses to this risk aversion—either to maintain a regulatory status quo that stifles urban vitality or to swap the current regulatory system for a new system of aesthetic controls that drives up housing costs—promotes urban competitiveness. But, for reasons explored in greater detail below, Fennell’s ESSMO proposal might well enable cities to achieve greater land use diversity and thereby gain an edge vis-à-vis suburbs in the competition for residents with a taste for urban life. And, by reducing homeowner anxieties, it might also serve to open up wealthier suburbs to less-advantaged residents as well.

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14. See Conor Dougherty, *Cities Grow at Suburbs’ Expense During Recession*, WALL ST. J., July 1, 2009, at A5.

15. Edward L. Glaeser & Joshua D. Gottlieb, *Urban Resurgence and the Consumer City*, 43 URB. STUD. 1275 (2006).

16. Nicole Stelle Garnett, *Ordering (and Order in) the City*, 57 STAN. L. REV. 1, 43-50 (2004).

## I. PRICING PROPERTY REGULATION

Several years ago, the University of Notre Dame, the institution where I teach, announced plans for a new “college town” development, called “The Eddy Street Commons,” immediately adjacent to campus. As it happens, this development also would be a few blocks from my house, which is located in an older neighborhood near downtown South Bend, Indiana. The development which featured a mixed-use, “new urbanist” design, was slated to include apartments, townhomes, a hotel, and a variety of small stores and restaurants. My husband and I were delighted by the news. We immediately began composing a “wish list” of preferred tenants for the development—Trader Joe’s, Chipotle, an ice cream shop for our kids. We looked forward to the convenience of being within walking distance of a grocery store and restaurants where we could grab a quick dinner with our family. We also hoped that the development would help Notre Dame attract outstanding faculty and students by partially rectifying the unfortunate reality that South Bend, Indiana, lacks the charm and amenities of many university towns.

Not all of our neighbors joined in our celebration. Some objected to the development for essentially the same reason that we supported it—the fact that it would inject a more “urban” vibe into our relatively quiet, single-family residential enclave. Some expressed concern that the development might attract strangers, including potentially unsavory ones. Others worried that our proximity to the Eddy Street Commons would increase traffic in our neighborhood and make it less attractive to families with young children. A small group of environmentally sensitive individuals objected to the destruction of the wooded area where the development would be located and launched a “Save the Notre Dame Woods” campaign. Residents closest to the development worried that the restaurants would draw unruly undergraduates from Notre Dame into the neighborhood late into the night, raising the risk of drunk driving and other alcohol-related disorder.

The conflict illustrates the Coasian insight that each side of a land use dispute “harms” the other.<sup>17</sup> While my neighbors worried that Notre Dame and its developer would generate commercial spillovers in our community, their demand that the Notre Dame Woods remain undeveloped would impose costs on the University, the developer, and my family as well. As would have been the case in any city, these competing concerns were channeled through South Bend’s land use regulatory process. Before Notre Dame could begin the development, the University first had to convince the city to rezone the

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17. See R.H. Coase, *The Problem of Social Cost*, 3 L. & ECON. 1, 2 (1960).

property from “University District” to “Planned Unit Development District.” City officials considered the University’s rezoning request in two stages. The request and accompanying development proposal were first considered by the Area Plan Commission in a two-hour-long public hearing. After listening to the testimony of university officials, developers and thirty-three South Bend residents (twenty-three in support and ten opposed), the Plan Commission voted to recommend that the City rezone the parcel. Approximately a month later, following a heated five-hour hearing, the City Council voted to rezone the property, subject to several conditions, my favorite of which was the “relocation of small animals that inhabit the wooded thicket currently on the site, as well as dislocated animals that find their way into neighboring homes.”<sup>18</sup> Other concessions included limits on the height of the hotel, retail, and restaurant buildings, the creation of a new park, preservation of six acres of the “Notre Dame Woods,” and the use of environmentally friendly building principles.<sup>19</sup>

#### A. The “Leaky Bucket” Problem

Each year, versions of this story repeat themselves thousands of times in hundreds of communities across the United States, and South Bend’s resolution of the conflict over the Eddy Street Commons development comports with standard regulatory practices. These practices dictate that land use restrictions act as an on-off switch: before the rezoning decision, my neighbors and I were all protected *entirely* against the risk that commercial land uses might generate negative spillovers in our community.<sup>20</sup> In fact, we

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18. Dennis Brown, *Council Approves Rezoning for Eddy Street Commons*, NOTRE DAME NEWS, July 16, 2007, <http://newsinfo.nd.edu/news/8936-council-approves-rezoning-for-eddy-street-commons>.

19. *See id.* (containing a complete list of all concessions, including: “A limitation on the height of the Marriott to six stories for the hotel topped by three stories for condos;” “The creation of a pocket park of some 5,000 square feet to provide more green space;” “The incorporation of bike lanes, bike racks and a bike cage within a parking garage;” “The use of environmentally friendly building principals;” “A limitation of the height of the retail and restaurant buildings on Eddy Street to four stories, except for two five-story buildings on the corner of Eddy and Edison;” and “Preservation of six of the 13 acres of the woods”); Margaret Fosmoe, *Council Approves Eddy Street Commons*, S. BEND TRIB., July 17, 2007, at A1; Marti Goodlad Heline, *Crowd Vocal at Hearing: More Speakers Favor Development than Speak Against It*, S. BEND TRIB., June 20, 2007, at A1; Heidi Prescott & Margaret Fosmoe, *Project Sparking Interest: Public Hearing for Eddy Street Commons on Tuesday*, S. BEND TRIB., June 18, 2007, at A1.

20. It is worth noting that the preexisting regulatory regime did not protect landowners *at all* from other potentially disruptive land uses. For example, the University might, without



probably were *overprotected* from that risk since many of us preferred to live closer to commercial land uses than the existing zoning rules permitted. The rezoning, however, effectively eviscerated the adjacent homeowners' protection from spillovers that may be generated by the businesses and restaurants that have gradually begun to fill the Eddy Street Commons. While the conditions placed upon the rezoning clearly were designed to address concerns expressed by opponents of the project, the conditions actually do very little to address risk of development-related spillovers (with the possible exception of construction-related animal dislocation). Many of the conditions addressed the concerns of a small, but vocal, group of opponents—champions of the “Notre Dame Woods.” Even those designed to limit the scope of the project—for example, height restrictions on the commercial buildings—do not speak to the risks that concern homeowners, such as disorderly students and drunk drivers. And, had the city chosen to condition rezoning on the payment of monetary exactions to offset the costs of development, a regulatory option it did not exercise, these exactions would have gone to the public treasury, rather than to neighboring residents.<sup>21</sup>

Guido Calabresi and Douglas Melamed's seminal 1972 article provides the standard starting point for analyzing land use conflicts like the Eddy Street Commons dispute.<sup>22</sup> When faced with conflicting interests—such as the desire to develop and the desire to avoid development-generated spillovers—the law must first decide which side to favor (the entitlement-assignment question) and then decide how to enforce its choice (the entitlement-protection question). As Calabresi and Melamed observed, after assigning the entitlement initially, the law generally protects entitlements in one of three ways: inalienability rules prohibit the transfer of an entitlement, even at the option of the entitlement holder; property rules entitle the protected individual to set the price at which she will waive an entitlement (and give her an absolute right to refuse waiver); and liability rules guarantee an entitlement holder an externally set level of compensation when an entitlement transfer occurs (but not the right to prevent the transfer).<sup>23</sup> American land use regulations incorporate

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seeking any zoning changes, have built a dormitory in the woods—a land use that would have been consistent with the previous zoning scheme but also would have raised many of the concerns that residents expressed about the Eddy Street Commons.

21. On exactions, see generally ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ WITH ARNOLD M. HOWITT, *REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS* (1993).
22. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *HARV. L. REV.* 1089 (1972).
23. *Id.* at 1092-1116.

elements of all three. Zoning rules are inalienable, although amendable through the local legislative process.<sup>24</sup> Covenants in private communities generally employ property rules to impose reciprocal obligations on all owners, although some covenants are enforced, at least initially, through fees or other liability-rule devices.<sup>25</sup> And judges use both property rules (that is, injunctions) and liability rules (that is, damages) to enforce nuisance laws.<sup>26</sup>

As a practical matter, however, the American land use regulation system is dominated by inalienability rules (zoning laws) and property rules (covenants). And, for two related reasons, these rules tend to overprotect owners in an effort to prevent *possible, future* harms. First, zoning rules and covenants are difficult to change, albeit for different reasons. While zoning rules are not alienable, they are amendable through the political/legislative process. Still, political actors respond to many incentives other than economic ones, especially the demands of politically powerful constituents, especially homeowners who—for reasons articulated more completely below—tend to demand overprotection.<sup>27</sup> While covenants are alienable and waivable, the fact that they are usually protected by property rules means that each protected owner has the right to establish the price at which she will waive her entitlement. This right is the great advantage of property rules—they enable owners to set prices that reflect both objective and subjective valuations.<sup>28</sup> But, it is also the great weakness, since property rules also enable owners to behave strategically—for example, by falsely overvaluing an entitlement or holding out to capture the gains from assembly.<sup>29</sup> Since covenants generally are imposed reciprocally on all property owners in a development, an owner wishing to assemble a waiver has to incur significant transaction costs to secure the

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24. FENNELL, *supra* note 13, at 69-70 (describing zoning).

25. *Id.* at 75-80 (describing governance in private developments).

26. See, e.g., Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1005-06 (2004) (discussing nuisance remedies).

27. See *infra* notes 34-46 and accompanying text.

28. See Ellickson, *supra* note 2, at 736 n.192 (noting that consensual bargaining permits owners to incorporate subjective valuations into prices); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1785 (2004) (“The attraction of property rules is that they protect individuals’ values without their having to be able to justify these values or even reason about them at a conscious level.”).

29. See, e.g., Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1309, 1404 (2005) (discussing the problem of strategic and false valuation); Michael Heller & Rick Hills, *Land Assembly Districts*, 121 HARV. L. REV. 1465, 1473 (2008) (discussing how strategic behavior can impede efficient land assembly).

consent of each protected owner.<sup>30</sup> Moreover, because each protected owner has the right to set her own price for a waiver, or to refuse to grant one at all, reciprocal covenants can present what is now known as an “anticommons” problem—that is, a scenario where too much ownership impedes efficient property use.<sup>31</sup> For example, as Fennell illustrates, an anticommons problem may arise in a planned community if the assembly costs prevent a landowner from securing an efficient waiver of a land use restriction.<sup>32</sup>

As the Coase theorem suggests, when entitlements are sticky—that is, when there is reason to believe that transaction costs impede efficient recalibration of initial entitlements—it becomes more important to get an entitlement allocation “right” in the first instance, or, at the very least, to assign the entitlement so as to minimize transactions costs.<sup>33</sup> Unfortunately, the facts on the ground do not always favor efficient entitlement allocation. An important contribution of *The Unbounded Home* is Fennell’s careful elucidation of why homeowners’ demand for regulatory *overprotection* from the risks attendant to, among other things, spillovers generated by neighboring land uses, is both rational and frequently suboptimal. Most Americans’ homes dominate their investment portfolios, a reality which generates incentives to jealously guard against fluctuations in property values. Moreover, many of the things influencing home values are external to the physical structure and the parcel upon which it sits. For example, in recent years, Henry Smith has gone far toward debunking the traditional “bundle of sticks” property metaphor—familiar to any first-year law student. Smith has used the importance of boundaries and exclusion to demonstrate that property is not made up of distinct and separable “sticks” (that is, relational “rights”) but rather more

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30. It is not unusual for covenants, conditions, and restrictions (CC&Rs) to establish democratic procedures for the abolition or amendment of covenants, but these procedures typically require supermajority approval.

31. On the “tragedy of the anticommons,” see generally MICHAEL HELLER, *THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STOPS INNOVATION, AND COSTS LIVES* 1-22 (2008); and Lee Ann Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 926-33 (2004). The idea of the anticommons, attributed to Frank Michelman, was popularized in Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998). See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1322 n.22 (1993) (attributing the anticommons problem to Michelman); Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in *ETHICS, ECONOMICS AND THE LAW: NOMOS XXIV* 3, 6, 9 (1982).

32. See FENNELL, *supra* note 13, at 56-57.

33. See, e.g., James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 447-49 (1995) (discussing initial entitlement assignment and the “cheapest cost avoider” principle).

closely approximates a bucket containing the rights attendant to ownership, which are, in reality, an undifferentiated whole.<sup>34</sup> But, like all buckets, Fennell correctly notes, the property bucket sloshes and occasionally leaks. And sloshes can impose costs upon neighboring buckets. For this reason, the traditional Blackstonian conception of property as an owner's "sole and despotic dominion," protected primarily through the right of exclusion, arguably does not accurately capture the typical homeowner's situation. To borrow from *The Unbounded Home*, invisible property boundaries cannot contain the visual sloshes resulting from a homeowner's affinity for displaying pink flamingos or garden gnomes in her front yard.<sup>35</sup>

Since home values reflect amenities that are both internal and external to the parcel, homeowners—again as Tiebout predicted—"shop" for both homes and communities. By virtue of their ability to enter and exit communities, homeowners exert market pressure on both local governments and private developers to offer policies that satisfy their preferences. Homeowners' desire to protect their investment from their neighbors' sloshes also incentivizes them to organize and exercise, to borrow from Albert Hirschman, "voice," by demanding that local governments and private developers alike enact and sustain regulatory and public goods policies that maximize property values.<sup>36</sup> And local governments and regulators respond to these demands because homeowners exert significant economic and (especially in the suburbs) political clout.<sup>37</sup> This is not necessarily a bad thing. As Fennell notes, we expect the law, through regulation, to "clean up routine spills and sloshes."<sup>38</sup> Moreover, many of the policies that homeowners demand from their local governments—such as high-quality public schools, safe communities, and efficient governmental services—undoubtedly generate significant positive externalities.<sup>39</sup> Certainly, recent housing trends suggest that policies that help

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34. Smith, *supra* note 28, at 1759-61 ("[O]wnership 'is no more conceived as an aggregate of distinct rights than a bucket of water is an aggregate of separate drops.'") (quoting WILLIAM MARKBY, *ELEMENTS OF LAW* 158 (6th ed. 1905)).

35. FENNELL, *supra* note 13, at 97-98.

36. ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* 30 (1970).

37. WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 90-94 (2001) (discussing the majoritarian influence of homeowners in suburbs versus in cities); Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 *YALE L.J.* 385, 408-10 (1977) (same).

38. FENNELL, *supra* note 13, at 15.

39. For a thorough explication of the benefits of homeowners' majoritarian influence over local government policies, see generally FISCHEL, *supra* note 37.

stabilize property values are also socially beneficial—as Fennell herself has recently argued.<sup>40</sup>

Still, for reasons that Fennell helpfully elucidates in *The Unbounded Home* as well as previous work, homeowners' anxieties do not always, or even usually, lead to a socially optimal package of land use regulations and local public amenities and services.<sup>41</sup> Importantly, while competition for homeowners is often a good thing, it is also imperfect. Neither local governments nor private developers (nor the two working in tandem through the development-approval process) can perfectly calibrate their regulation and public-service offerings to each individual homeowner-shopper. Instead, they must offer a regulatory/public goods bundle that, hopefully, will appeal to the residents that they seek to attract. This reality may force homeowner-shoppers to “buy” regulatory/public goods packages that contain policies that they would not choose in an ideal world.<sup>42</sup> For example, as Bob Ellickson observed nearly four decades ago, the convenience afforded by a corner store in a residential neighborhood can generate many benefits for nearby homeowners. These benefits should lead some residents to prefer zoning policies that permitted some small-scale commercial uses in residential neighborhoods.<sup>43</sup> But, if most local governments respond to homeowner anxieties about commercial spillovers by banning all commercial uses in residential zones, residents may be forced to choose between urban settings, which might contain too many commercial uses, and suburban ones, which contain too few. The same is undoubtedly true, as Fennell argues in *The Unbounded Home*, of private developments.<sup>44</sup> Indeed, questions about both the extent of choice provided by the housing development market and resident's degree of satisfaction in private developments has generated an extensive academic literature,<sup>45</sup> with Fennell herself questioning the extent of diversity in the market.<sup>46</sup>

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40. See, e.g., Lee Anne Fennell & Julie Roin, *Controlling Residential Stakes*, 77 U. CHI. L. REV. 145 (forthcoming Apr. 2010) (observing that many homeowners rationally abandoned their homes when housing values dipped below the foreclosure value).

41. See Lee Anne Fennell, *Exclusion's Attraction: Land Use Controls in Tieboutian Perspective*, in *THE TIEBOUT MODEL AT FIFTY*, *supra* note 12, at 163 (2006); Lee Anne Fennell, *Homes Rule*, 112 YALE L.J. 617, 634 (2002) (book review) [hereinafter Fennell, *Homes Rule*].

42. Moreover, residents' choices are made more complicated by the fact that home values are affected by the policy decisions of multiple, overlapping local jurisdictions, as well as by the actions of both neighboring owners and local governments. FENNELL, *supra* note 13, at 26-31.

43. See Ellickson, *supra* note 2, at 685-87.

44. FENNELL, *supra* note 13, at 81-86.

45. See Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 10 (1989); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1523 (1982); Richard A. Epstein, *Covenants and*

The bundling effect also enables residents to “buy” regulatory policies that they do not desire *for their own sake* but for some secondary, associational- or property-protective effect.<sup>47</sup> As Fennell has elsewhere observed, deed restrictions in private developments can serve a “population-screening function, as opposed to merely a behavior-screening function.”<sup>48</sup> Covenants that increase the cost of housing (for example, by mandating minimum housing and lot size, architectural constraints, or high membership fees) promote socioeconomic clustering. And, while some benefits may come from this clustering—perhaps individuals of similar socioeconomic status are more likely to engage in community activities<sup>49</sup>—exclusionary rules undoubtedly also have malign effects and motives. Consider an example explored in the work of Lior Strahivetz. In recent years, increasing numbers of residential developments have featured golf courses, and increasing numbers of nongolfers have purchased homes in such developments. Pairing these phenomena with the racial demographics of golfers, Strahilevitz has speculated golf courses may act as “exclusionary amenities” that signal the likely demographics of a housing development.<sup>50</sup> Similar conclusions can reasonably be drawn about classic “exclusionary zoning” devices—such as large-lot mandates and restrictions on multifamily housing. Even if a would-be resident would be content to live in a condominium or a house on a small lot, she might choose to live in a jurisdiction that bans condominiums and mandates half-acre lots, reasoning that these restrictions act as a version of housing-value insurance by pricing out the kind of residents associated with reduced housing values.

In theory, liability rule devices, such as damages or ex post fines, could provide landowners with protection from spillovers while enabling a more optimal mixing of land uses. Liability rules could also, as Fennell illustrates in Part II of her book, be used to offload some of the risks that exclusionary zoning attempts to reduce. But liability rules have their own difficulties. While liability rules minimize transactions costs, they also generate high “assessment

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*Constitution*, 73 CORNELL L. REV. 906, 917 (1988); Clayton P. Gillette, *Courts, Covenants and Communities*, 61 U. CHI. L. REV. 1375, 1375-76 (1994).

46. Lee Anne Fennell, *Contracting Communities*, 2004 U. ILL. L. REV. 829, 890-91.

47. FENNELL, *supra* note 13, at 26-40.

48. Fennell, *supra* note 46, at 842.

49. See, e.g., Robert C. Ellickson, *The Puzzle of the Optimal Social Composition of Neighborhoods*, in *THE TIEBOUT MODEL AT FIFTY*, *supra* note 12, at 199, 204-06 (arguing that community composition will effect levels of social capital).

50. Lior Jacob Strahilevitz, *Exclusionary Amenities in Residential Communities*, 92 VA. L. REV. 437, 464-76 (2006).

costs,” since regulators and courts frequently are ill-equipped to accurately assess harms imposed by spillovers.<sup>51</sup> Moreover, and perhaps more importantly, the available evidence suggests that just as property rules and inalienability rules tend to bestow *too much* protection on homeowners, liability rules bestow too little. That is, if over-compensation—stemming from the owner’s ability to refuse to relinquish an entitlement—is the “signature risk” of property rules, undercompensation—stemming from the owner’s inability to refuse to relinquish an entitlement—is the “signature risk” of liability rules.<sup>52</sup> Thus, while proposals for partially replacing property or inalienability protections with liability rules abound in the land use and law and economics literatures—including my own<sup>53</sup>—these proposals have failed to generate either political or market traction. And, as a public choice matter, it is reasonable to assume that this is in large part because homeowners are unwilling to accept the risk of undercompensation that attends liability rules.

### B. Enter Options

Most proposals for shifting to liability rules in the land use regulation context assume that the protection afforded land owners from spillovers would come either from court-ordered nuisance damages or legislatively determined fees. As Fennell observes, the two concerns associated with liability rules could be partially addressed if community members consented in advance to a fee schedule designed to penalize rule violations. In a private community, homeowners would signal consent to such a fee schedule by purchasing a home in the development. In the case of public land use regulations, approval by a representative political body would have to serve as a (very poor) substitute for

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51. See, e.g., Heller & Hills, *supra* note 29, at 1474 (observing that “the administrative costs of judicial valuation require courts to choose crude measures of values—for instance . . . the court’s estimate of the value that a willing buyer would pay a willing seller”); Krier & Schwab, *supra* note 33, at 453–57 (discussing assessment costs); Smith, *supra* note 28, at 1777–78 (arguing that property rules have “information cost advantages” over liability rules because courts are ill-equipped to accurately value entitlements).
52. See, e.g., Richard A. Epstein, *A Clear View of The Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2095 (1997) (discussing the strengths and risks of property versus liability rules and observing that one of the “signature risks” of liability rules is undercompensation); Fennell, *supra* note 29, at 1404 (noting that liability rules may result in the underpricing of entitlements); Heller & Hills, *supra* note 29, at 1474–75 (discussing the reality of undercompensation in the eminent domain context).
53. See Nicole Stelle Garnett, *On Castles and Commerce: Zoning Law and the Home-Business Dilemma*, 42 WM. & MARY L. REV. 1191, 1243–44 (2001) (suggesting that fines, rather than ex ante prohibitions, might be used to police home-based businesses).

the consent achievable in the private development context. But regulators would still face valuation problems, both because fees would have to be set in advance, with limited information about resident preferences, and because it would be difficult to conceive of a fee schedule that responded dynamically to changes affecting resident preferences. Moreover, fee schedules would continue to reflect regulatory bundling, since regulators would be forced to make decisions about what fees to include in/exclude from the schedule.<sup>54</sup>

Building upon her previous work, Fennell offers, in *The Unbounded Home*, an intriguing twist on the fee schedule model: a regulatory pricing system based upon pre-set, self-assessed options, or “entitlements subject to self-made options” (ESSMOs).<sup>55</sup> Options provide the legal right, but not the obligation, to buy (a “call option”) or sell (a “put option”) a given commodity at a pre-set price. Traditional liability rules are, in a sense, “call options.” That is, they give an actor the right, but not the obligation, to purchase an entitlement from the entitlement holder at a price set by a third party. In the land use context, for example, when a court awards nuisance damages to one neighbor for harms caused by another neighbor’s activities, the offending neighbor has, in essence, exercised her option to purchase her neighbor’s right to live nuisance free. Fennell offers a creative twist on this familiar model, suggesting that self-valuation devices could be used to involve the affected property owners in the setting of the prices for regulatory protections and entitlements. By utilizing information-forcing devices designed to elicit reasonably truthful information about how much an owner values certain land use protections and privileges, Fennell intuits, regulators can take advantage of liability rules’ signature benefit—the ability to unilaterally force entitlement transfer—while sidestepping both assessment and undercompensation concerns.<sup>56</sup>

Fennell’s ESSMO proposal is illustrated by the following example (drawn primarily from *The Unbounded Home*): one common criticism of planned residential developments is that they mandate too much homogeneity. Covenants may permit very little architectural variation among the “cookie cutter houses” that line a development’s streets, tightly control paint colors, prohibit exterior decorations, etc. (Some local jurisdictions have enacted aesthetic zoning regulations imposing similar controls.) The regulatory “bundling” response to homeowners’ risk aversion that Fennell helpfully elucidates, as described above, provides a partial explanation for this mandated homogeneity: since developers and local governments lack a mechanism for

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54. FENNELL, *supra* note 13, at 99-101.

55. *Id.* at 103-16.

56. *Id.* at 108-10.



tailoring regulatory protection to individual regulatory tastes, they may tend to over-respond to homeowner risk-aversion by mandating *too much* protection from aesthetic spillovers. If so, would-be homebuyers, who wish to protect themselves against the overly eclectic tastes of their neighbors, must choose to purchase homes in communities mandating *less* aesthetic diversity than they would prefer in an ideal world.

Self-assessed options, however, could empower local governments or developers to better tailor the level of regulatory protection to individual residents' tastes. For example, suppose a private developer wished to experiment with aesthetic diversity, while at the same time reassuring would-be homeowners that the diversity will not get out of control. Rather than seeking to ascertain, and then mandate, the optimal level of diversity in the community, the developer might instead adopt a covenant permitting homeowners to engage in some potentially harm-producing behavior—Fennell suggests the displaying of tacky pink flamingos as illustrative—upon payment of a pre-determined fee. The developer might also set a price at which members of the community could buy back a homeowner's flamingo-display rights—enabling residents to respond to fluctuations in the tackiness quotient of flamingo displays. To address fluctuations in individual aesthetic tastes, Fennell further suggests that the developer might allow residents to customize the price at which her neighbors could buy back their flamingo-display rights. A resident with a particular affinity for the pink feathered creatures might increase the call option price for her display. And, as long as the developer engaged mechanisms to elicit truthful valuations—which Fennell describes in detail, but which I leave to one side for purposes of brevity—this ESSMO device would enable the developer to achieve an optimal level of flamingo displays: neighbors would only call in flamingo display rights when the collective disutility of a display exceeded its utility to the displayer.

The ESSMO proposal obviously generates a number of complex institutional design problems, many of which Fennell discusses in *The Unbounded Home*. For example, the community would have to determine which entitlements to protect by ESSMOs. Clearly, as Fennell acknowledges, ESSMOs cannot govern every aspect of community life. Not only would the administrative costs of identifying and then pricing the entitlements to be protected likely overwhelm any regulatory systems,<sup>57</sup> but as Fennell herself observes, normative considerations may weigh against pricing some

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57. See Amnon Lehari, *Is Law Unbounded: Property Rights and Control of Social Groupings*, LAW & SOC. INQUIRY (forthcoming 2010) (reviewing *The Unbounded Home* and discussing the problem of defining the universe of entitlements protected by ESSMOs).

entitlements.<sup>58</sup> Fennell intriguingly suggests that the households in a community might themselves, in the first instance, do the work of specifying which entitlements should be protected by ESSMOs, although she fails to elaborate on how such self-designation would work in practice.<sup>59</sup> Presumably, in the private development context, a developer might specify the process by which residents would go about determining whether, when, and how, ESSMOs would be established and priced. In the context of public regulation, the initiative process might be used to approximate the self-designation envisioned by Fennell, although historical experience with “ballot box zoning” casts doubt on whether ESSMOs driven by direct democracy could be expected to address the problem of *overregulation*. In large cities, ESSMOs might also be employed, as discussed in more detail below, by sublocal governmental entities like business improvement districts (BIDs).<sup>60</sup> Even after the universe of ESSMO protection is determined, however, numerous questions remain—from the difficulty of eliciting truthful valuation information and avoiding strategic behavior to the need to enable regulatory evolution as individual and community preferences inevitably change.<sup>61</sup>

Finally, and perhaps most importantly, there remains the question of whether ESSMOs will “sell”—either politically (as reflected in local-government innovation) or economically (as reflected in new servitude-enforcement devices). When it comes to making ESSMO regulation a reality, I must acknowledge some pessimism. Fennell correctly notes that ESSMOs can be most easily implemented in private neighborhoods “given the relative freedom of such neighborhoods to engage in creative entitlement restructuring.”<sup>62</sup> Yet, while the private-development market grows every year—the Community Associations Institute estimates that, in 2009, 60.1 million Americans lived in over 305,000 common interest communities<sup>63</sup>—Fennell does not point to the implementation of her ESSMO idea in any

58. FENNELL, *supra* note 13, at 118–19.

59. *Id.* at 111–12.

60. On sublocal governmental institutions, see generally Richard Briffault, *The Rise of Sublocal Structures in Urban Governance*, 82 MINN. L. REV. 503, 509 (1997) [hereinafter Briffault, *The Rise of Sublocal Structures*]; Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998). On BIDs, see generally Richard Briffault, *A Government for Our Time? Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 370 (1999) [hereinafter Briffault, *A Government for Our Time?*].

61. FENNELL, *supra* note 13, at 106–19.

62. *Id.* at 111.

63. Community Associations Institute Industry Data, <http://www.caionline.org/info/research/Pages/default.aspx> (last visited March 1, 2010).

existing developments. Indeed, as noted above, she has expressed concern about the lack of diversity of governance forms in the private development market.<sup>64</sup> The fact that option-based land use regulations have not been implemented to date is at least suggestive of the possibility that there is no “market” for ESSMOs. The same tentative conclusions might be said of the political feasibility of ESSMOs in the public regulation context—where regulatory innovation proceeds at a much slower pace. Fennell points to no examples of local governments replacing traditional land use regulations with regulatory options, even during a period marked by the emergence of new local-government innovations, including the rise of sublocal government entities and new regulatory models that seek to increase land use diversity, such as the form-based “transect zoning” promoted by the new urbanists.<sup>65</sup>

In the end, however, I hope that this pessimism is misplaced and that Fennell’s ESSMO proposal proves more than an intriguing academic exercise. Fennell makes a powerful case that self-assessed options would not only enable more efficient land use regulation, but would also facilitate more land use diversity, both within and between jurisdictions, than risk-averse owners currently accept—an important reality that I return to in Part IV, below.

## II. PROPERTIZING THE METROPOLITAN COMMONS

Fennell acknowledges that her ESSMO proposal also can partially address the interjurisdictional inequities within our metropolitan regions. As Fennell notes, if ESSMOs come to replace traditional regulatory devices that drive up housing costs, then they may provide a mechanism for opening up affluent suburbs to less-affluent residents. This will only occur, of course, if residents of affluent suburbs come to accept ESSMOs as a kind of insurance against the concerns that provide the impetus for excessive and exclusionary regulation—and I remain dubious about this coming to pass. Still, there is no question that regulatory barriers to entry into the suburbs are a primary cause of interjurisdictional inequality within our metropolitan regions, and Fennell is to be commended for offering an institutional innovation that might overcome some of those barriers.<sup>66</sup> Fennell’s ESSMO proposal, however, plays only a bit

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64. Fennell, *supra* note 46, at 890-98.

65. See *infra* notes 146-148 and accompanying text.

66. FENNEL, *supra* note 13, at 81-86. On regulatory barriers to housing affordability and intermetropolitan mobility, see generally ADVISORY COMM’N ON REGULATORY BARRIERS TO AFFORDABLE HOUSING, “NOT IN MY BACKYARD”: REMOVING BARRIERS TO AFFORDABLE HOUSING (1991); and U.S. DEP’T OF HOUS. & URBAN DEV., “WHY NOT IN OUR COMMUNITY?”: REMOVING BARRIERS TO AFFORDABLE HOUSING (2005).

part in her discussion of the metropolitan commons. In its place, she offers two very different solutions to the problems of intrametropolitan mobility and interjurisdictional inequality. This Part briefly discusses the first—a “propertyization” of associational rights in local jurisdictions<sup>67</sup>—which is the weakest link in Fennell’s otherwise outstanding book.

To begin, Fennell’s suggestion that associational rights might be reconceived, in part, as property rights is an entirely reasonable one. As Fennell notes, the traditional discourse on associational rights is not completely divorced from conceptions of property. Nor could it be, since property’s signature attribute—the right to exclude—is ultimately what gives associations the room to exist. As Fennell helpfully describes, property, according to the traditional view, is “an associational envelope of sorts, with hard outer boundaries that protect an invitation-only enclave,” within which rights of privacy and association are protected from governmental intervention.<sup>68</sup> It does not seem incongruous, for example, that rights of association in a private residential development are defined by property rights and restrictions in recorded servitudes—or that the entity charged with enforcing these rights and restrictions is usually a “homeowners’ association.” Nor does it come as a surprise that disputes *within* private associations frequently center on questions of ownership. To give just one example, in recent years, a number of religious congregations have broken off from the Episcopal Church in the United States and affiliated with conservative Anglican bishops in Africa. Legal disputes over the ownership of church buildings have ensued, with splinter congregations attempting, in essence, to take church buildings with them.<sup>69</sup> That such disputes are resolved according to principles of property law is no more astonishing than courts’ refusal to entertain any invitation to resolve the theological disputes underlying them.<sup>70</sup> The property-law rules governing the ownership of church buildings set, in a sense, the exclusionary boundaries of religious associations.

Fennell is also correct that some attributes of membership in a local political community (usually a municipality) bear striking resemblance to the

67. FENNELL, *supra* note 13, at 123–69.

68. *Id.* at 148.

69. See, e.g., Dan Gilgoff, *California Ruling in Episcopal Church Dispute Deals Setback to Breakaway Parishes Nationwide*, U.S. NEWS & WORLD REP., Jan. 8, 2009, <http://www.usnews.com/articles/news/religion/2009/01/08/california-ruling-in-episcopal-church-dispute-deals-setback-to-breakaway-parishes-nationwide.html> (surveying ongoing legal disputes).

70. See *Jones v. Wolf*, 443 U.S. 595 (1979); *Presbyterian Church in the U.S. v. Mary Elizabeth Blue Hull Mem’l Presbyterian Church*, 393 U.S. 440 (1969).

attributes of membership in a private development or other private association. Indeed, local governments have long straddled the uncomfortable divide in American law between public and private associations, as indicated both in the name of the dominant form of local government (the municipal *corporation*) and in the functions that local governments serve.<sup>71</sup> Moreover, as Fennell elucidates, local government policies—like private association policies—have membership effects: they exclude undesired member-residents and attract desired ones. And disaffected residents respond to disfavored local political decisions in the same way that disaffected church members respond to disfavored religious policies: They either take over and change the rules,<sup>72</sup> or they leave. Usually disaffected residents “exit” a local jurisdiction the old fashioned way—by moving to a new one, in much the same way that a disaffected Episcopal might become a Presbyterian or Roman Catholic. Occasionally, however, disaffected residents (like disaffected Episcopalians) try to take their property with them. Disputes about deannexation or secession—featuring residents seeking to disconnect property from one jurisdiction and either join another or form an entirely new one—are not unheard of in local government law (with the efforts of Staten Island and the San Fernando Valley to secede from New York City and Los Angeles, respectively, being the most spectacular cases in point).<sup>73</sup>

The central difficulty with *The Unbounded Home*'s discussion of propertized associational rights comes when Fennell transitions from the theoretical to the practical. Immediately after her careful effort to categorize associational rights along an expanded menu of entitlements (building upon Calabresi and Melamed), she promises to move the reader “from rules to policies.”<sup>74</sup> The reader is, by this point, prepared to listen, especially because Fennell has built a strong case that the costs of exclusion from membership in a local political

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71. See, e.g., MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 111-14 (1977) (chronicling the rise of the “public-private” distinction in American law); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059, 1100-04 (1980) (discussing the effect of the public-private distinction on evolving ideas of municipal power); Joan Williams, *The Development of the Public, Private Distinction in American Law*, 64 TEX. L. REV. 225, 232-35 (1985) (book review) (same).
72. See, e.g., Heather K. Gerken, *Dissenting by Deciding*, 57 STAN. L. REV. 1745 (2005) (observing that local government action, stemming from a “take over” by dissenters, can voice opposition to prevailing norms and legal rules).
73. See Richard Briffault, *Voting Rights, Home Rule, and Metropolitan Governance: The Secession of Staten Island as a Case Study in the Dilemmas of Local Self-Determination*, 92 COLUM. L. REV. 775 (1992); Michelle Cottle, *Down in the Valley: Why L.A. Should Remain Intact—Barely*, NEW REPUBLIC, Aug. 19, 2002, at 16.
74. FENNELL, *supra* note 13, at 148.

community are frequently much higher than the costs of exclusion from most private associations. Unfortunately, the policy prescriptions that flow from “propertized” associational rights turn out not to differ dramatically from the standard redistributive solutions to intrametropolitan inequalities offered by local government scholars. Fennell’s use of New Jersey’s highly criticized Regional Contribution Agreement (RCA)—which entitles a wealthier jurisdiction to pay a poorer jurisdiction to absorb a portion of its state law obligation to provide affordable housing—as an illustration of “propertized” associational rights within a metropolitan region only heightens my skepticism.<sup>75</sup> Fennell’s response to what she acknowledges are valid criticisms of RCAs combines both interjurisdictional redistribution *and* centralized state regulation.<sup>76</sup> As I have previously argued, there are serious questions about whether the *potential* benefits of these redistributive and centralizing regulations outweigh their costs—particularly the reduced interjurisdictional competition. This competition, while far from perfect, undoubtedly generates many real benefits by subjecting local governments to some approximation of market pressure that government generally lacks.<sup>77</sup> The question—which Fennell’s “propertization” discussion does not satisfactorily answer—is whether the benefits of reduced exclusion outweigh the costs of reduced competition.

### III. SLICING HOMEOWNERSHIP

Fennell’s second prescription for curing metropolitan ills—Homeownership 2.0—is more promising. As discussed previously, Fennell correctly observes that residents value exclusion—and therefore demand regulatory barriers to entry—for the same reason that they demand regulatory overprotection against land use spillovers: they are exceedingly risk averse when it comes to protecting their investment in their homes. Thus, residents will buy into jurisdictions offering amenities (regulatory or otherwise) that have the effect of exclusion, even if they do not desire the exclusionary amenities for their own sake. Most land use and local government scholars propose to address the resulting exclusion directly—for example, by recommending preemptive state regulation, centralization of authority over land use regulation, or fiscal redistribution. *The Unbounded Home* contains

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75. *Id.* at 157-60.

76. *Id.* at 160-61.

77. See Nicole Stelle Garnett, *Suburbs as Exit, Suburbs as Entrance*, 106 MICH. L. REV. 277, 297-98 (2007).

elements of many of these proposals. In Part IV of the book, however, Fennell takes a different tack. Rather than addressing exclusionary regulations directly, she proposes addressing a primary contributor to the homeowner risk aversion that generates demand for exclusion: the fact that most homeowners are “overstaked” in their homes—that is, their investment portfolios are not well-diversified, but rather are dominated by a single large asset.<sup>78</sup>

Fennell suggests that, as is the case with regulation, would-be homeowners face a “bundling” problem. Clearly, homeownership carries a variety of benefits that makes it preferable, for many residents, to renting.<sup>79</sup> But, those wishing to secure these benefits face a stark choice: rent (thereby avoiding all risks, but securing none of the benefits of ownership) or buy (thereby assuming all of the risks in order to secure the benefits of ownership). Indeed, the recent housing fiasco suggests, as Fennell and Julie Roin have argued, that both owners and lenders may have overestimated the benefits and underestimated the risks of homeownership in many cases.<sup>80</sup> It is reasonable to assume that many homeowners would happily offload some of the risks of ownership, especially risks attendant to factors that are beyond the owners’ direct control—from the regulatory and public-goods policies of the local jurisdiction to regional, national, and even international economic trends. In fact, as Fennell notes, most owners already do offload risks by, for example, purchasing homeowner’s insurance and mortgaging their property, thereby sharing the risks of ownership with lenders.<sup>81</sup>

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78. FENNEL, *supra* note 13, at 184. As an aside, it is worth noting that, as Fennell and Julie Roin have elsewhere argued, now many homeowners are also—thanks to the housing bubble—“understaked.” That is, they owe more money than their home is worth, giving them an incentive to default on costly mortgages. Fennell & Roin, *supra* note 40, at 146. This is not mere academic speculation. On the contrary, the *New York Times* recently reported that even homeowners who can afford to pay high mortgage payments have begun to walk away from their homes. See David Streitfeld, *No Help in Sight, More Homeowners Walk Away*, N.Y. TIMES, Feb. 2, 2010, at A1.

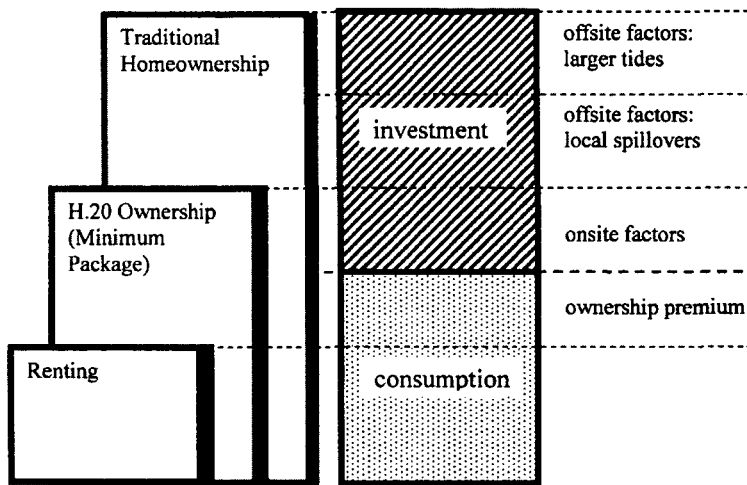
79. FENNEL, *supra* note 13, at 181-84.

80. See Fennell & Roin, *supra* note 40.

81. H2.o is not the only way to slice home ownership. Other examples include community development land trusts, which divide ownership between residents and nonprofit housing organizations, see JOHN EMMEUS DAVIS, NAT’L HOUS. INST., SHARED EQUITY HOMEOWNERSHIP: THE CHANGING LANDSCAPE OF RESALE-RESTRICTED, OWNER-OCCUPIED HOUSING 18 (2006); J. Peter Byrne & Michael Diamond, *Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed*, 34 FORDHAM URB. L.J. 527, 541-51 (2007), as well as the division of ownership characterized by many common interest communities, see Michael A. Heller, *The Dynamic Analytics of Property Law*, 2 THEORETICAL INQUIRIES IN LAW 79, 89-91 (2001). Additionally, in other countries, long-term leases are quite common tenure form, where residents holding leaseholds lasting many years but a remainderman/landlord claims

Fennell’s Homeownership 2.0, or H2.0, would enable homeowners to further diversify their investment portfolio. Specifically, Fennell suggests that the traditional homeownership bundle could be sliced and shared between owners and investors, with owners investing in, and assuming the risks of, the slice of ownership roughly approximating the value/risk of onsite factors and investors assuming the residual investment in the slice approximating the value/risk of off-site factors (local spillovers, metropolitan, and national economic trends, etc.). H2.0 is helpfully illustrated in *The Unbounded Home* as follows:

Figure 1.  
 “COMPONENTS OF HOMEOWNERSHIP”<sup>82</sup>



As this graphical representation illustrates, H2.0 eliminates the need for home shoppers to make the sharp choice between renting and owning. H2.0 “owners” capture the entire consumption stream associated with ownership, as well as the investment benefits/risks attributable to onsite factors, but are able to offload the risks associated with off-site factors over which they have no control.

Since H2.0 does not directly disable interjurisdictional competition, it offers a far superior means of addressing regulatory exclusion and the

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the residual value of the lease. FENNELL, *supra* note 13, at 190 (noting that leasehold reform represents an alternative to H2.0).

82. FENNELL, *supra* note 13, at 188 (featuring this diagram as “Figure 8-1”).



intrametropolitan inequality that flows from it than the regulatory or redistributive alternatives favored by many local government scholars. H2.o is an intriguing mechanism for addressing intrametropolitan inequality for at least two significant reasons. First, if investors come to bear the risks associated with local spillovers, Fennell intuits, homeowners' motivation to demand regulations resulting in the exclusion of "risky," spillover-prone, entrants may diminish. In this sense, H2.o does the same work as the "home equity insurance" proposed by William Fischel to reduce homeowner risk-anxiety and the inefficient policies that result from it.<sup>83</sup> Second, the availability of a "minimum" homeownership package would reduce the cost of homeownership, thereby inducing some renters to buy and enabling greater economic mobility within our metropolitan regions by decreasing the costs of entry into more affluent suburbs. By so doing, it might also prevent a replay of the current housing crisis by minimizing the risk that fluctuating housing prices will lead to a situation where over-exuberant home purchasers find themselves upside down on costly mortgages.

All of that said, Fennell's H2.o proposal prompts many questions, some of which can only be answered by the kind of legal experimentation that she advocates. The remainder of this Section details three of these concerns:

#### A. Structuring Owner-Investor Relationships

The first question is how the relationship between homeowners and investors would be structured. Possibilities, some of which are suggested in the *Unbounded Home*, include:

##### 1. Shared Ownership

Theoretically, an owner and an investor might take advantage of existing tenure forms and invest in a home as co-tenants—with owners and investors holding different fractional shares. Such an arrangement is not altogether uncommon. Family members (and even friends) sometimes choose to increase affordability and spread risk by sharing ownership—for example, my father was a co-owner of my first car. But co-ownership is an awkward fit for the H2.o proposal. While throughout the discussion of H2.o, Fennell refers to "the

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83. See FISCHEL, *supra* note 37, at 268-70. As both Fennell and Fischel note, in Oak Park, Illinois—an inner-ring Chicago suburb—such an insurance program was implemented as part of a (largely successful) effort to prevent panic selling during the time that the community became more integrated. The Oak Park program has been widely implemented in Chicago as well. FENNEL, *supra* note 13, at 177; FISCHEL, *supra* note 37, at 270.

owner” and “the investor,” it seems unlikely that owners would actually be paired with individual investors, rather than with anonymous pools of investors. (Indeed, Fennell’s suggestion that derivative markets and housing indexes might adapt to accommodate H2.o—discussed below—assumes as much.) Even if mechanisms might develop to pair individuals and owners, it is highly improbable that strangers (as opposed to family members or friends) would choose to enter into co-ownership arrangements. The arrangement has significant downsides, since, as co-owners, investors and owners would have both equal rights of possession (regardless of the division of shares) and the right to unilaterally sell and divide their shares among other owners. The former reality could presumably be addressed through a contract “leasing” the investor’s shares/possessory rights to the owner. The latter poses a significant risk that subsequent transfers of an investor’s shares would lead to excessive fragmentation, generating an anticommons problem.

## 2. *Derivative Markets and Housing Indices*

*The Unbounded Home*, to be clear, does not propose traditional co-ownership arrangements between homeowners and investors. Instead, Fennell suggests that either existing derivative markets might be adapted to implement H2.o or that legislation might be enacted recognizing H2.o as a new tenure form. The former is a promising, but underdeveloped, suggestion. Fennell argues that derivatives markets pegged to indices that fluctuate according to off-site investment risk could be used to offload risks from owners to investors. But, as she acknowledges, “important design challenges remain.”<sup>84</sup> Remember that the goal of H2.o is to limit homeowners’ exposure to offsite risk. Yet, as Fennell admits, “there are questions about whether any given housing index will pick up too much of what owners are doing on their own parcels . . . or too little of what is happening outside the parcel.”<sup>85</sup> It is also unclear who would devise the relevant housing indices. In *The Unbounded Home*, Fennell seems to assume that financial markets will generate them, but she has elsewhere suggested that local governments might be uniquely situated for the task.<sup>86</sup> As for this latter point, while it is true that a number of municipalities have adopted voluntary equity insurance programs pegged to the local housing

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84. FENNELL, *supra* note 13, at 200.

85. *Id.* at 201.

86. Fennell & Roin, *supra* note 40.

indices that Fennell advocates,<sup>87</sup> I question whether (for all the reasons that Fennell articulates in the book) local governments can be trusted to overcome a natural tendency toward parochialism and generate accurate indices. Elsewhere, Fennell has nodded to this concern—suggesting that state governments might take on a coordination and oversight role or a “platform for joint ventures” between municipalities.<sup>88</sup> (But the suggestion for more centralized control over local affairs raises many of the same red flags discussed above.)

*The Unbounded Home’s* stylized discussion of the form that derivative contracts between owners and investors might take also raises a host of questions about actual market implementation. How dramatically would H2.o differ from the home-equity-insurance programs implemented in a number of local jurisdictions that, Fennell elsewhere acknowledges, have not been widely accepted?<sup>89</sup> Would investors hold a security interest in H2.o properties, and, if so, how dramatically does H2.o differ from traditional mortgages or from shared-equity mortgages, which, again, have not been widely adopted?<sup>90</sup> While these questions are beyond the scope of this Review, the success of H2.o as a practical reform will likely improve the ability of market and regulatory actors to answer them to the satisfaction of owners and investors.

### 3. *A New Tenure Form*

Fennell also floats the suggestion that, instead of relying upon existing derivative markets, H2.o might be introduced as “a new package”—that is, as a new tenure form—even if derivative markets either have—or will soon have—the “technical capacity to reshape home investment risk in endlessly flexible ways.”<sup>91</sup> Fennell argues that adopting the “H2.o package as a new starting point”<sup>92</sup> will speed the pace of reform by offering a coherent alternative to the existing homeownership bundle that can serve as a “focal point” around which

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87. See Robert J. Shiller, *Radical Financial Innovation*, in *ENTREPRENEURSHIP, INNOVATION, AND THE GROWTH MECHANISM OF THE FREE-ENTERPRISE ECONOMIES* 306, 316 (Eytan Sheshinski, Robert J. Strom & William J. Baumol eds., 2007).

88. Fennell & Roin, *supra* note 40.

89. *Id.*

90. See Andrew Caplin et al., *Shared-Equity Mortgages, Housing Affordability, and Homeownership*, 18 *HOUSING POL’Y DEBATE* 209 (2007).

91. FENNELL, *supra* note 13, at 203.

92. *Id.*

new mechanisms for spreading homeownership risk can develop.<sup>93</sup> This argument is undoubtedly correct as far as it goes. That is, it is entirely reasonable to assume that H2.o will be more readily accepted, and new financing mechanisms likely to develop enabling it, if state legislatures adopt legislation recognizing it as a new tenure form. The rapid acceptance of condominiums following the adoption of state legislation authorizing them in the 1960s is case in point. As Thomas Merrill and Henry Smith observe, “In theory, it might be possible to create a condominium by clever combination of preexisting property forms. But in practice, condominiums did not emerge until the 1960s, when virtually all states adopted statutes expressly authorizing the creation of condominiums.”<sup>94</sup> Recognizing a new tenure form would also undoubtedly solve some of the information-cost problems discussed below, since investors would presumably register their shares in local land registries.

That said, it is far from clear whether, at least at this point, state legislatures have enough information to successfully design a new tenure form. For the reasons articulated below, H2.o presumably would have to at least begin with a standardized default package. Yet households have different financial needs and varying levels of risk tolerance, which presumably could be better addressed through the flexibility offered by ad hoc financial market experimentation anticipated in Fennell’s discussion of derivatives. Without the information that would be generated by such experimentation, state legislatures will be left guessing about the optimal division of risk between owners and investors. In her previous work, Fennell addressed these concerns by arguing that she did not intend, by suggesting a “new tenure form,” to propose a new possessory estate. Instead, she argued that “H2.o would retain the fee simple estate as the basic unit of analysis and would accomplish the transfer of risk contractually within that structure.”<sup>95</sup> While this explanation addresses concerns about the information costs facing legislatures, it also blurs the distinction between a new H2.o “package” and the use of derivatives discussed above.

### B. Recalibrating “Voice”

Fennell argues that H2.o will serve two purposes. First, it will address the reality that the current “homeownership form . . . no longer serves the needs of

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93. *Id.* at 203-04.

94. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1, 15-16 (2000) (footnote omitted).

95. See Lee Anne Fennell, *Homeownership 2.0*, 102 *NW. U. L. REV.* 1048, 1086 (2008).

most households.”<sup>96</sup> Second, it will reduce homeowners’ impulse to demand exclusionary regulations by decreasing their exposure to risks unrelated to on-site factors, such as the quality of local public schools. My enthusiasm for H2.o (and, I suspect, hers) flows primarily from the second claim—that H2.o can promote intrametropolitan mobility by increasing housing affordability and decreasing exclusionary regulation. Yet, I question the extent to which H2.o will actually reduce homeowners’ exclusionary impulses. As Fennell acknowledges, and as explored in great detail in the work of economist William Fischel, concerns about the quality of local public schools are a primary driver of competition among local jurisdictions. In 2004, almost one-quarter of parents reported having moved to their current neighborhood to enable their children to attend the local public school. What’s more, this kind of residential sorting increases as parents’ educational attainment rises.<sup>97</sup> Fischel argues that, because public school quality is capitalized in home values, homeowners have strong incentives to demand high-quality public schools.<sup>98</sup> Undoubtedly, asset risk spreading between owners and investors can assuage the concerns of homeowners who demand high-quality schools in order to protect their primary investment from market fluctuations. But concerns about home values are not the only, or even the primary, reason homeowners demand high-quality schools. Parents’ primary motivation for moving to districts with high-performing public schools likely is a desire to secure a high-quality education for their children. And, while parents are not always perfect school consumers—that is, they may tend to overestimate the quality of their children’s schools and/or to use home values as a proxy for school quality<sup>99</sup>—the available evidence also suggests that higher-income parents have better information about school quality than lower-income parents.<sup>100</sup> Not only are these high-income movers the very residents that local jurisdictions are most desirous of attracting, but they also are mostly likely to be aware that classroom

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96. FENNELL, *supra* note 13, at 203.

97. See Jack Buckley & Mark Schneider, *School Choice, Parental Information, and Tiebout Sorting: Evidence from Washington, D.C.*, in *THE TIEBOUT MODEL AT FIFTY: ESSAYS IN PUBLIC ECONOMICS IN HONOR OF WALLACE OATES*, *supra* note 12, at 104.

98. FISCHEL, *supra* note 37, at 154-55.

99. See *id.* (discussing literature suggesting that home buyers use housing prices as a proxy for school quality); Buckley & Schneider, *supra* note 97, at 107-11 (discussing literature suggesting that higher-income parents have better, but imperfect, information about school quality than lower-income parents).

100. See, e.g., Paul Teske et al., *Establishing the Micro Foundations of a Macro Theory: Information, Movers, and the Competitive Local Market for Public Goods*, 87 AM. POLI. SCI. REV. 702, 709 (1993) (reviewing empirical evidence suggesting that high income movers have better information about schools).

demographics affect school performance—knowledge that provides an incentive to exclude independent of property values.<sup>101</sup> And, of course, assuaging concerns about home values may do little to address exclusionary impulses with malign motives such as racial prejudice, as suggested in Strahilevitz’s work on “exclusionary amenities.”<sup>102</sup>

My second concern is the mirror image of the first—that is, whether H2.o might work too well. In other words, a reduced homeownership package might act to suppress homeowners’ exercise of “voice” within a local jurisdiction. As Fennell acknowledges, anxieties about home values incentivize homeowners (or, to use Fischel’s term, “homevoters”) to organize to demand many *socially beneficial* policies. As Fischel observes, “Asset risk is a good thing when it makes homeowners pay attention to the quality of schools and municipal services. It helps overcome the free-rider problem that is otherwise endemic to boring, local political concerns.”<sup>103</sup> Moreover, some of the exclusionary impulses generated by asset risk are *also* a good thing. For example, risk-averse homeowners may organize to quash new developments that will generate spillover costs in excess of their benefits—a reality that is not to be discounted in an era of concern about sustainable development and suburban sprawl.<sup>104</sup> On the other hand, homeowner anxieties also generate “NIMBY” (Not In My Backyard) pressures for local jurisdictions to enact inefficient exclusionary policies that exacerbate the existing maldistribution of resources within our metropolitan regions,<sup>105</sup> further contribute to the “spatial mismatch” between poor urban residents and suburban jobs,<sup>106</sup> deny access to quality public

101. See, e.g., James E. Ryan & Michael Heise, *The Political Economy of School Choice*, 111 YALE L.J. 2043, 2102-07 (2002) (discussing the effects of poverty on school performance).

102. See Strahilevitz, *supra* note 50.

103. FISCHEL, *supra* note 37, at 268.

104. *Id.* at 269.

105. See, e.g., Richard Briffault, *Localism and Regionalism*, 48 BUFF. L. REV. 1, 9-12 (2000) (discussing connections between exclusionary zoning, sprawl, and urban poverty); Richard Briffault, *Our Localism: Part II—Localism and Legal Theory*, 90 COLUM. L. REV. 346, 351 (1990) (discussing the connection between local regulatory powers and maldistribution of resources within metropolitan areas); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 69-70 (1999) (arguing that suburban sprawl has resulted in urban disinvestment).

106. See, e.g., Michael H. Schill, *Deconcentrating the Inner City Poor*, 67 CHI.-KENT L. REV. 795, 798-808 (1991) (discussing the “spatial mismatch hypothesis,” which attributes inner-city poverty to the suburbanization of low-skilled, service jobs). The spatial mismatch hypothesis is attributed to John Kain. See John F. Kain, *Housing Segregation, Negro Employment, and Metropolitan Decentralization*, 82 Q.J. ECON. 175, 197 (1968); see also Richard Arnott, *Economic Theory and the Spatial Mismatch Hypothesis*, 35 URB. STUD. 1171, 1171-72 (1998) (attributing the theory to Kain).

schools to those who lack the means to overcome the entry costs established by exclusionary regulations,<sup>107</sup> and even promote suburban sprawl by driving new development further into the exurban fringe.<sup>108</sup> Previous exchanges suggest that Fennell is less sanguine than Fischel that, on average, the benefits of “homevoter” preferences outweigh their costs.<sup>109</sup>

But, in *The Unbounded Home* Fennell does not—and, in all fairness, could not—provide evidence that H2.o will correctly calibrate owner/investor incentives to demand efficient, high-quality local public goods while muting the temptation to demand inefficient exclusion. We simply cannot know at this point whether the apparent benefits of H2.o, including reduced incentives to exclude, would in fact outweigh the costs, including reduced incentives to organize and demand the high-quality local services that are capitalized in housing prices. Moreover, while Fennell satisfactorily demonstrates that H2.o will adequately incentivize owners to make site-specific investments in their property, she does not fully convince me that investors can be trusted to fill in the gaps left by the reduced homeowner incentives to promote sound local policies.<sup>110</sup> To begin, the extent to which investors would be *able* to influence local politics is not clear. If derivative markets did the job of dividing up homeownership risk between investors and owners, then outsider investors would be powerless to exercise influence over the local political process in the same way that homeowners do—that is, by voting. Presumably, if states adopted legislation recognizing H2.o as a new tenure form, investors would be entitled to the same package of political rights as absentee owners, which include participation in local land use debates and, under some circumstances, voting rights in local elections.

Still, except in the unlikely event that H2.o reforms actually result in the pairing of individual residents with a single investor, or even a small group of investors, an investor’s stake in any given H2.o property likely will be insufficiently large to incentivize the same level of participation as existing homeowners. The recent experience with the securitization of subprime mortgages only heightens this concern. Mortgage securitization is, in essence, a risk-spreading device between owners and investors. But, as David Dana illustrates in a recent article, investors in securitized mortgages did nothing to

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107. See, e.g., Ryan & Heise, *supra* note 101, at 2093-96 (discussing connections between residential patterns, school district demographics, and educational attainment).

108. See, e.g., Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 163-65 (2001) (reviewing literature suggesting that local growth controls and exclusionary zoning exacerbate suburban sprawl).

109. See Fennell, *Homes Rule*, *supra* note 41.

110. FENNELL, *supra* note 13, at 192-93.

police homeowner and local government behavior. Indeed, holders of securitized mortgages are so detached from the individual homes in which they invested that they now lack adequate incentives to reform failing mortgages, even when reform is in their financial interest.<sup>111</sup> That is not to suggest that H2.o would recreate all of the problems associated with mortgage securitization. It may be preferable to encourage investors to hold equity shares rather than debt shares, and it may be that equity investment could be achieved with less fragmentation than characterizes the mortgaged-backed securities market. But, there likely is a threshold of diversification—a threshold that most rational investors are likely to meet—beyond which investors will lose interest in the kinds of local policies that influence housing values.

### C. *Avoiding Information Cost and Anticommons Problems*

Finally, *The Unbounded Home* leaves unanswered questions about the extent to which H2.o could be calibrated to individual owner/investment preferences without creating information-cost and anticommons problems.<sup>112</sup> Fennell seems to assume that, at least if adopted as a new tenure form, H2.o will have standardized default settings—that is, that the division of the ownership shares between owners and investors will be the same for every H2.o parcel.<sup>113</sup> I tend to agree with this assumption for the reasons fully explored in Henry Smith and Thomas Merrill’s work on the *numerus clausus*—the civil law principle that property rights must conform to a limited number of standardized forms. Too much customization of ownership (for example, what might be called H2.o.1) may impede efficient market transfers by raising information costs for owners and investors.<sup>114</sup> As long as the owner-investor division of H2.o property remains standardized, in other words, purchasers of, and investors in, H2.o properties will know what they are getting themselves into. But, there will be inevitable pressures for customization: soon enough an owner will wish to assume some, but not all, of the off-site risks that Fennell envisions resting with investors. And, as soon as the form is customized, each would-be owner and investor will have to exert significant effort to learn exactly “how much” ownership any given H2.o property offers.

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111. David A. Dana, *The Foreclosure Crisis and the Anti-fragmentation Principle in State Property Law*, 77 U. CHI. L. REV. 99 (forthcoming April 2010).

112. Fennell acknowledges and addresses these questions in somewhat more detail in previous work. See Fennell, *supra* note 95, at 1085-87.

113. FENNELL, *supra* note 13, at 194-205.

114. Merrill & Smith, *supra* note 94, at 24-40.



A related difficulty would arise if a would-be homeowner wished to reassemble the pieces of the H2.o bundle in order to assume “complete” ownership. Students of property law, or readers who have familiarized themselves with Fennell’s artful explanation in Part I of *The Unbounded Home*, will immediately identify the risk of an anticommons problem: like the owner in a private development seeking to assemble flamingo-display rights, owners seeking to reconvert H2.o properties to “full” fee simple form will face the assembly costs associated with purchasing the ownership shares of investors—each protected by the very property rules that enable holdouts and other strategic behavior. The greater the extent of division among investors, the higher the assembly costs, and the lower the likelihood of reassembly. Again, the recent experience with mortgage securitization is illustrative. As Dana argues, the dispersal of shares in securitized mortgages among hundreds of investors has made mortgage reform a near-impossibility in many cases.<sup>115</sup> As discussed above, I assume that fragmentation will almost certainly follow from the adoption of H2.o, and that, as a result, reassembly of any given home back to H1.o will become a near impossibility. As a result, most H2.o homes will, by design or necessity, remain H2.o homes, in the same way that affordable units developed pursuant to “inclusionary zoning” policies remain affordable units.<sup>116</sup> While the resulting decline in homeowner choice does not lead me to reject H2.o, the inevitable “static” nature of homes originating in the new tenure form is a downside of the proposal and a reality in tension with the common law assumption about the uniqueness of each parcel of property.<sup>117</sup>

#### IV. OPTIONS FOR PROMOTING URBAN HEALTH

In *The Unbounded Home*, Fennell devotes a great deal of attention to reducing barriers to interjurisdictional mobility within metropolitan regions. And with good reason. A plausible case can be made that efforts to “open up the suburbs”<sup>118</sup> to less affluent residents are more important than city-focused redevelopment efforts—at least as a means of improving the long-term prospects of the urban poor. As Robert Bruegmann argued in his recent history of suburban sprawl, urban life has always been the most difficult for the poor—

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115. See Dana, *supra* note 111.

116. See, e.g., DAVIS, *supra* note 81, 64-70 (discussing resale restrictions).

117. See E. ALLAN FARNSWORTH, 3 FARNSWORTH ON CONTRACTS § 12.6 (3d ed. 2004) (discussing the legal presumption that each parcel of real property is “considered ‘unique’”).

118. See ANTHONY DOWNS, OPENING UP THE SUBURBS: AN URBAN STRATEGY FOR AMERICA (1973).

and suburbs still represent a great hope for a better life—precisely because the suburbs offer the good schools, economic opportunities, safe neighborhoods, and environmental amenities that wealthy urban dwellers can afford to purchase for themselves.<sup>119</sup> Primarily for this reason, I previously have expressed skepticism about policies that would limit suburban growth in order to promote city health and improve the plight of the urban poor.<sup>120</sup>

That said, improving the economic prospects of our urban centers remains an important goal. Not only would rising city fortunes help mute the stark interjurisdictional inequalities that concern Fennell and other land use and local government scholars, but it remains an unfortunate reality that cities will continue to be home to a disproportionate number of poor people living in poor neighborhoods. For example, urban poverty declined precipitously during the 1990s—after increasing dramatically during the 1970s and 1980s. The number of high-poverty neighborhoods (that is, neighborhoods with poverty rates of forty percent or more) fell by more than one-fourth, and the total number of people living in such neighborhoods declined by twenty-four percent (from 10.4 million in 1990 to 7.9 million in 2000). Promisingly, the decline in concentrated poverty spanned racial and ethnic lines: the most significant decline was among African Americans; the percentage of poor African Americans living in high-poverty neighborhoods declined from 30.4 percent to 18.6 percent between 1990 and 2000. These declines are *not* attributable to the decline in the overall poverty rate—the poverty rate did decline, but only by about one percent; the number of poor people in the U.S. actually rose slightly. What happened was that poverty was redistributed spatially, a trend generally regarded as positive by social scientists and poverty advocates alike.<sup>121</sup>

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119. See ROBERT BRUEGMANN, *SPRAWL: A COMPACT HISTORY* 25-29 (2005). See generally Ryan & Heise, *supra* note 107, at 2102-08 (discussing the connection between concentrated urban poverty and educational performance); Schill, *supra* note 106, at 811-31 (advocating policies that enable poor urban residents to live in suburbs).

120. See, e.g., Garnett, *supra* note 77, at 298-300.

121. See generally Alan Berube & William H. Frey, *A Decade of Mixed Blessings: Urban and Suburban Poverty in Census 2000*, in 2 *REDEFINING URBAN AND SUBURBAN AMERICA* 111 (Alan Berube, Bruce Katz & Robert E. Lang eds., 2005) (analyzing data from Census 2000 and finding that poverty rates in central cities and suburbs converged during the 1990s, with over half of center cities experiencing declining rates of concentrated poverty); Paul A. Jargowsky, *Stunning Progress, Hidden Problems: The Dramatic Decline in Concentrated Poverty in the 1990s*, in *REDEFINING URBAN AND SUBURBAN AMERICA*, *supra*, at 137, 142-44 (finding that in the 1990s, concentrated poverty declined dramatically, especially among ethnic minorities).

While the vast majority of cities saw a decrease in concentrated poverty, however, they hardly saw the problem of poverty disappear. In the central cities anchoring 102 largest metropolitan areas, for example, nearly one in five individuals had incomes below the poverty level, compared to one in twelve individuals in the suburbs.<sup>122</sup> And, although the decline of concentrated poverty among minorities is hopeful, African Americans continue disproportionately to live in highly segregated, poor, urban neighborhoods.<sup>123</sup> And, sadly, the current economic downturn has cast doubt upon the prospects for the further renewal of poor urban neighborhoods, many of which have been devastated by the foreclosure crisis.<sup>124</sup> As the New Testament reminds us, the poor will always be with us,<sup>125</sup> making urban development a practical and moral necessity.

One curiosity of Fennell's excellent book is her relative inattention to the role that her policy innovations might play as urban development tools. For example, it seems likely that H2.o would be particularly attractive as an affordability promotion device in urban communities. Many affordable housing organizations already are experimenting with using divided ownership to increase housing affordability, such as through "community investment land trusts," which divide ownership shares between residents, who own their homes, and nonprofits, who own the land upon which these home are situated.<sup>126</sup> In city neighborhoods, H2.o could similarly enable some renters to own their homes, a move that undoubtedly would generate neighborhood benefits, since tenants have fewer incentives to make site-specific investments in their homes than do owners and tenants' time horizons as neighbors tend to

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122. See Berube & Frey, *supra* note 121, at 114-15.

123. See ORFIELD, *supra* note 10; Cashin, *supra* note 10; Jargowsky, *supra* note 121, at 153-56.

124. Cf. Dougherty, *supra* note 14 (arguing that, during the current recession, cities are losing fewer residents than suburbs). See generally ELIZABETH KNEEBONE & ALAN BERUBE, BROOKINGS INST., REVERSAL OF FORTUNE: A NEW LOOK AT CONCENTRATED POVERTY IN THE 2000S (2008), available at [http://www.brookings.edu/papers/2008/08\\_concentrated\\_poverty\\_kneebone.aspx](http://www.brookings.edu/papers/2008/08_concentrated_poverty_kneebone.aspx) (discussing the decline of concentrated poverty in the 1990s and analyzing the effects of the recession on poor urban neighborhoods); Kristopher S. Gerardi & Paul S. Willen, *Subprime Mortgages, Foreclosures, and Urban Neighborhoods*, (Federal Reserve Bank of Boston, Public Policy Discussion Paper No. 08-6, 2008), available at <http://www.hks.harvard.edu/m-rcbg/Events/Papers/Willen,%20Subprime%20Mortgages.pdf> (discussing the disproportionate impact of subprime foreclosures on minority neighborhoods).

125. See *Matthew* 26:11; *Mark* 14:7; *John* 12:8.

126. See National Community Land Trust Network, Overview, <http://www.clnetwork.org/index.php> (last visited March 1, 2010) (follow "What Are CLTs?" hyperlink).

be shorter, leading them to be less invested in neighborhood affairs.<sup>127</sup> (Not surprisingly, a large body of social science research suggests that residential tenure and homeownership are two of the most significant predictors of neighborhood health.<sup>128</sup>) At the very least, recent events suggest that devices like H2.o and community investment land trusts likely are superior to subprime mortgage lending as a mechanism for promoting higher levels of home ownership in poor communities.

### A. *The Urban Option*

The remainder of this Review takes up, in a sense, where Fennell leaves off, by seeking to explore how one of the proposals from *The Unbounded Home*, the ESSMO, might enable cities to compete more effectively with their suburban neighbors. In undertaking this exploration, it is important to acknowledge the many ways in which the deck is stacked against cities, making head-to-head competition with suburbs difficult.<sup>129</sup> Yet as a proponent of “inward-focused” urban development policies and a cautious optimist about the ability of smart urban policies to promote city-suburb competition,<sup>130</sup> I am always intrigued by policy innovations that may better enable our cities to gain a competitive edge—and the ESSMO proposal may be such an innovation.

To understand why, it is important to tackle the somewhat opaque question of why cities apparently began to rebound during the last decades of the twentieth century. Beginning in the 1990s, many American center cities enjoyed an unexpected ascendancy, with many cities experiencing population gains for the first time in decades.<sup>131</sup> Edward Glaeser and Joshua Gottlieb have argued that large cities rebounded because elites increasingly developed an

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127. See FENNELL, *supra* note 13, at 192; Fennell & Roin, *supra* note 40; see also, e.g., Denise DiPasquale & Edward L. Glaeser, *Incentives and Social Capital: Are Homeowners Better Citizens?*, 45 J. URB. ECON. 354 (1999); Donald R. Haurin et al., *The Impact of Neighborhood Homeownership Rates: A Review of the Theoretical and Empirical Literature*, 13 J. HOUSING RES. 119 (2003).

128. See, e.g., Robert J. Sampson, Stephen W. Raudenbush & Felton Earls, *Neighborhoods and Violent Crime: A Multilevel Study of Collective Efficacy*, 277 SCIENCE 918, 919 (1997) (reviewing the social science literature connecting residential tenure, home ownership, and neighborhood health).

129. See, e.g., Richard Briffault, *Beyond City and Suburb: Thinking Regionally*, 116 YALE L.J. POCKET PART 203 (2006).

130. See NICOLE STELLE GARNETT, *ORDERING THE CITY: LAND USE, POLICING, AND THE RESTORATION OF URBAN AMERICA* 4-6 (2010).

131. Rebecca R. Sohmer & Robert E. Lang, *Downtown Rebound*, in 1 REDEFINING URBAN AND SUBURBAN AMERICA 63, 65 (Bruce Katz & Robert E. Lang eds., 2003).

affinity for urban life.<sup>132</sup> Rising incomes and educational attainment fueled the shift in lifestyle preferences, Glaeser and Gottlieb posit, and the dramatic decline in central city crime rates and urban disorder enabled individuals with urban tastes to act on their preferences by increasing the ease of access to the consumer amenities, energy, and informal social interactions that cities foster.<sup>133</sup> If, as Glaeser and Gottlieb argue, increasing numbers of Americans are coming to prefer city life because dense, mixed land use urban environments offer amenities that less-dense-suburban environments do not, then cities must find ways to offer more dense, mixed land use urban environments to potential residents. In other words, cities are most likely to succeed when they focus on doing what they do best—that is, being cities—especially in light of the evidence that “urbanness” is increasingly attractive to many Americans. Whatever the competitive obstacles facing cities, there is one overriding reason why cities should concentrate on being urban: a city is better at being urban than suburban.<sup>134</sup> If cities are to capitalize on their “urbanness,” however, they must do more than engage in efforts to promote a “hip” image.<sup>135</sup> They must also address the fact that prevailing urban land use regulations impose a “suburban” feel on many city neighborhoods by segregating different, presumptively “incompatible” land uses. As I have argued elsewhere, a reluctance to abandon the longstanding presumption favoring segregated land uses, and to reform the land use regulations codifying it, can hamstring city-suburb competition.<sup>136</sup>

That said, city officials are understandably wary of proposals to deregulate land uses. If Glaeser and Gottlieb are correct,<sup>137</sup> then improvements in public safety—including increased attention to urban disorder and the quality of life

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132. See Glaeser & Gottlieb, *supra* note 15, at 1286, 1297.

133. *Id.* at 1276.

134. This conclusion is somewhat analogous to economic theory of comparative advantage, which holds that weaker international trading partners should focus on doing the things at which they are least bad. As the theory of comparative advantage suggests, cities should concentrate on being cities even if *suburbs* come to offer urban lifestyles (for example, by encouraging the construction of “new urbanist” developments) that are, at least in some senses, superior to traditional urban neighborhoods.

135. I have elsewhere expressed skepticism about the “cool cities” urban development strategies promoted, most prominently, by Richard Florida in his popular book *THE RISE OF THE CREATIVE CLASS* (2002). GARNETT, *supra* note 130, at 138-39. For other criticism, see Alec MacGillis, *The Ruse of the Creative Class*, *AM. PROSPECT*, Jan. 4, 2010, at 12.

136. See GARNETT, *supra* note 130, at 93-95; Garnett, *supra* note 16, at 21-23.

137. Admittedly, the reasons for the “urban rebound” remain somewhat mysterious. See, e.g., Richard C. Schragger, *Rethinking the Theory and Practice of Local Economic Development*, 77 *U. CHI. L. REV.* 315 (forthcoming 2010).

in urban neighborhoods—played a significant role in the new urban renaissance, as did a dramatic decline in violent crime rates (which may or may be related to disorder-focused policing tactics).<sup>138</sup> And, the assumption that economic activity is disorderly and even dangerous, fosters disorder and crime, and even degrades human character has influenced thinking about land use in the United States for nearly a century.<sup>139</sup> While Jane Jacobs’s contrarian views—that mixing commercial and residential land uses will suppress disorder and crime by guaranteeing a consistent presence of private “eyes upon the street” and by fostering informal social interaction among relative strangers in a community<sup>140</sup>—have come into vogue in recent years,<sup>141</sup> the available empirical evidence tends to support traditional assumptions about land use policy. Importantly, the popular and academic commentary on Jacobs’s work and its “new urbanist” promoters, overlooks the empirical literature testing her hypothesis that mixed land uses suppress, rather than foster, disorder and crime. In a number of studies, criminologists, sociologists, and environmental psychologists have sought to examine the connection between different land use patterns (that is, exclusively residential versus mixed use) and disorder and crime. These studies mount a serious challenge to Jacobs’s now popular hypothesis that proponents of mixed land use urban environments (including myself) must confront.

Most of the researchers who have empirically studied the effects of different land use environments on disorder and crime reject Jacobs’s hypothesis as intuitively appealing but empirically unsustainable. They find instead that commercial land uses are connected to crime and disorder and that exclusively residential neighborhoods have lower crime rates and less disorder than mixed land use neighborhoods.<sup>142</sup> Drawing upon the “routine activities” theory of

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138. See, e.g., Robert C. Ellickson, *Controlling Chronic Misconduct in City Spaces: Of Panhandlers, Skid Rows, and Public Space Zoning*, 105 YALE L.J. 1165 (1996); Nicole Stelle Garnett, *Private Norms and Public Spaces*, 18 WM. & MARY BILL RTS. J. 183 (2009); Nicole Stelle Garnett, *Save the Cities, Stop the Suburbs?*, 116 YALE L.J. 598, 618-20 (2006) (book review). For an interesting discussion on the role that urban policy played in reducing crime rates, see Steven D. Levitt, *Understanding Why Crime Fell in the 1990s: Four Factors that Explain the Decline and Six that Do Not*, 18 J. ECON. PERSP. 163 (2004).

139. See, e.g., Richard H. Chused, *Euclid’s Historical Imagery*, 51 CASE W. RES. L. REV. 597 (2001); Garnett, *supra* note 53, at 1202-05.

140. JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES*, 44-48 (1961).

141. See, e.g., GARNETT, *supra* note 130, at 64-65.

142. See, e.g., Stephanie W. Greenberg et al., *Safety in Urban Neighborhoods: A Comparison of Physical Characteristics and Informal Territorial Control in High and Low Crime Neighborhoods*, 5 POPULATION & ENV’T 141 (1982); Ralph B. Taylor et al., *Street Blocks with More Nonresidential Land Use Have More Physical Deterioration*, 31 URB. AFF. REV. 120 (1995);

crime, these researchers hypothesize that nonresidential land uses serve to invite strangers—including would-be offenders—into a neighborhood,<sup>143</sup> and, contrary to Jacobs’s intuition, decrease private surveillance efforts by making it difficult for residents to discern who “belongs” in their community.<sup>144</sup> In one study, for example, residents on blocks with nonresidential land uses reported that they recognized other block residents less well, felt that they had less control over events in the neighborhood, and were less likely to count on a neighbor to monitor suspicious activity than residents of exclusively residential blocks.<sup>145</sup>

In addition to the need to respond to these *legitimate* concerns that crime and disorder will follow upon land use reforms promoting density and the mixing of land uses, city officials also face many of the same demands for exclusion as their suburban counterparts. As Michael Schill has observed:

[M]any inner-city residents would be happy not to have new neighbors, new barriers to their views, and new competitors for parking spaces. . . . Community opposition to new development manifests itself every day in opposition to rezoning, drawn-out land use and environmental approval procedures, and endless lawsuits, meritorious and frivolous . . . .<sup>146</sup>

These realities make regulatory proposals that offer the opportunity to carefully control the details of a transition from single-use to mixed-use

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Pamela Wilcox et al., *Busy Places and Broken Windows?: Toward Defining the Role of Physical Structure and Process in Community Crime Models*, 45 SOC. Q. 185 (2004). See generally Robert J. Sampson & Stephen Raudenbush, *Systematic Social Observation of Public Spaces: A New Look at Disorder in Urban Neighborhoods*, 105 AM. J. SOC. 603, 610 (1999) (reviewing empirical literature linking commercial land uses with disorder and crime).

143. The “routine activities” theory of crime posits that most crime is opportunistic—that is, that crime “involves the intersection in time and space of motivated offenders, suitable targets, and the absence of capable guardians.” Sampson & Raudenbush, *supra* note 142, at 610; see also Greenberg et al., *supra* note 142, at 162 (discussing “routine activities” and commercial land uses); Taylor et al., *supra* note 142 (same); Wilcox et al., *supra* note 142 (same).
144. Taylor et al., *supra* note 142, at 122. This argument flows from Oscar Newman’s important work on “defensible space.” Newman argued that architectural and urban design can decrease crime by increasing opportunities for residents to exercise “ownership” over public spaces. OSCAR NEWMAN, *DEFENSIBLE SPACE: CRIME PREVENTION THROUGH URBAN DESIGN* (1972). See generally Neal Kumar Katyal, *Architecture as Crime Control*, 111 YALE L.J. 1039 (2002) (applying Newman’s work to modern land use policies).
145. Ellen M. Kurtz et al., *Land Use, Physical Deterioration, Resident-Based Control, and Calls for Service on Urban Streetblocks*, 15 JUST. Q. 121, 135 (1998).
146. Michael H. Schill, *Comment*, in *GROWTH MANAGEMENT AND AFFORDABLE HOUSING: DO THEY CONFLICT?* 102, 104 (Anthony Downs ed., 2004).

neighborhoods attractive to urban officials. They promise to offer a means of promoting an “urban” feel in city neighborhoods while minimizing concern about the risk of spillovers in mixed land use communities. The prevailing alternative to use-based-zoning today is the “form-based” codes promoted by new urbanist planners and architects.<sup>147</sup> These codes flow from the assumption that a development naturally progresses from urban (most intense) to rural (least intense). New urbanists call this progression the “transect” and urge cities to replace use zoning with the regulation of building form appropriate to the various “transect zones” along the progression.<sup>148</sup> Theoretically, the concept is relatively simple: buildings appropriate for the city center should go in the city center (regardless of what they are used for); suburban buildings should look suburban. New urbanists argue that their system of regulation promotes careful planning that balances the need for city busyness with the concern about urban disorder. In practice, however, new urbanist form-based codes have tended to supplement, rather than supplant, traditional zoning rules, and they frequently rely on detailed architectural regulations—both realities that significantly increase development costs.<sup>149</sup>

As a means of promoting city-suburb competition, Fennell’s ESSMO proposal is superior to current form-based code proposals precisely because it enables cities to advance urban vitality and address homeowner anxieties about spillovers without dictating the details of urban design. Elsewhere, I have argued that it may be the uncomfortable reality that urban disorder and urban vibrancy are sometimes in tension with one another. If so, city officials wishing to promote vibrancy need to come to terms with that reality—and carefully consider what Richard Sennett has called the “uses of disorder,” which may include the promotion of urban vitality, social capital, and city-suburb competition.<sup>150</sup> Of course, this is easier said than done. City residents arguably signal a preference for greater density and mixing of land uses by virtue of choosing to live in an urban neighborhood. Yet, as the Eddy Street Commons

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147. See, e.g., Peter Katz, *Form First: The New Urbanist Alternative to Conventional Zoning*, PLAN., Nov. 2004, at 17, 18–20 (describing the merits of form-based coding).

148. DUANY, PLATER-ZYBERK & CO., *supra* note 4, at C3.2; GARNETT, *supra* note 130, at 183; Duany & Talen, *supra* note 4, at 247–49; Emerson, *supra* note 4.

149. See, e.g., Joseph E. Gyourko & Witold Rybczynski, *Financing New Urbanism Projects: Obstacles and Solutions*, 11 HOUSING POL’Y DEBATE 733, 739–40 (2000) (concluding, based on an extensive survey of builders and developers, that new urbanist projects are more expensive); Philip Langdon, *The Not-So-Secret Code: Across the U.S., Form-Based Codes Are Putting New Urbanist Ideas into Practice*, PLAN., Jan. 2006, at 24, 28 (asserting that the cost of form-based codes “exceeds that of a conventional land-use plan” making citywide form-based coding “prohibitively expensive”).

150. See GARNETT, *supra* note 130, at 73–74.



anecdote above illustrates, it remains the case that city residents (and would-be residents) have varying levels of concern about, and tolerance for, spillovers generated by density and mixing of land uses.<sup>151</sup> By allowing residents to set prices for those preferences, the ESSMO proposal may empower city officials to inject more *urbanness* into center-city neighborhoods, thereby enabling them to provide a distinctive alternative to suburban life while muting the land use risks that residents reasonably associate with city life.

### B. ESSMOs and Sublocal Governance

There remains the question, of course, of implementation. As Fennell observes, it is easiest to envision ESSMOs being implemented in new private developments, where residents would accept the regulatory model, at the front end, by virtue of their entry into a community. At least as a thought experiment, however, it also is worth considering how ESSMOs might work in conjunction with the sublocal government institution that have come to play an increasingly prominent role in urban development efforts. Questions of “subsidiarity”—that is, “the principle that a central authority should have a subsidiary function, performing only those tasks which cannot be performed effectively at a more immediate or local level”<sup>152</sup>—have come to dominate contemporary debates about land use and local government law. Most of these debates are motivated by the interjurisdictional inequities that concern Fennell and therefore focus intensely on whether some or all authority to regulate land uses should be removed to a higher-level governmental entity—a regional-, metropolitan-, or state-level institution. The thinking about the allocation of local government power within cities, however, increasingly runs in the opposite direction. As Richard Briffault has observed, recent decades have seen a rise in “sublocal” government innovations—BIDs, tax increment financing districts, enterprise zones, and special zoning districts—all of which are predicated on the assumption that some local government functions are best performed at the neighborhood level.<sup>153</sup> And, the rise of sublocal governmental institutions may itself have contributed to the recent urban renaissance by enabling a more efficient provision of local government services.

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151. See WESLEY G. SKOGAN, *DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DEATH IN AMERICAN NEIGHBORHOODS* 7 (1990) (arguing that the premise of Jane Jacobs’s work is that some individuals have a taste for *disorder* in urban environments).

152. See 17 OXFORD ENGLISH DICTIONARY 59 (2d ed. 1989) (defining subsidiarity).

153. See Briffault, *The Rise of Sublocal Structures*, *supra* note 60.

The implementation of ESSMOs at the sublocal level arguably would be appropriate for at least two related reasons. First, large cities tend to be made up of numerous distinctive urban enclaves. Not only is it reasonable to believe that the residents' regulatory "tastes" vary from neighborhood to neighborhood, but there is reason to believe that the spillover risks of different land uses also vary from neighborhood to neighborhood. For example, researchers studying the connection between land use patterns and crime/disorder have generally found that nonresidential land uses are detrimental in stable neighborhoods, but beneficial in unstable ones. In poorer communities, therefore, it might be appropriate to encourage more land use diversity, especially because crime and disorder are most strongly correlated with *vacant* commercial property.<sup>154</sup> Second, sublocal-level decisionmaking would enable intramunicipal regulatory experimentation. Although sublocal implementation would by no means eliminate the public choice realities of land use reform,<sup>155</sup> urban neighborhoods arguably would have an incentive to experiment because diversity offers neighborhoods, like cities, the opportunity to compete with one another for residents and because residential choices, at least in many cases, undoubtedly signal land use preferences.<sup>156</sup>

In fact, several scholars have elsewhere used neighborhood distinctiveness to advocate devolving certain decisions about land use regulation to neighborhood institutions similar to the now popular "business improvement districts." BIDs are public, sublocal entities empowered to levy special assessments against property owners to pay for local infrastructure improvements, business and development promotion, and supplemental governmental services (for example, street sweeping, security officers, and even social services for the homeless). While BIDs do not currently engage directly in regulatory activity, scholars such as Robert Ellickson, George Liebmann, and Robert Nelson all have made the case for permitting neighborhood-level or block-level community institutions to either regulate or deregulate land uses. As Ellickson argues, these reforms would effectively retrofit poor urban

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154. See GARNETT, *supra* note 130, at 71 (discussing literature connecting vacant property to crime and disorder). See generally Stephen Clowney, *Invisible Businessman: Undermining Black Enterprise with Land Use Rules*, 2009 U. ILL. L. REV. 1061 (discussing the vacant property problem in urban neighborhoods).

155. See Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 893-909 (1983) (acknowledging and defending the extent of neighborhood-level influence in existing land use policies on sublocal specialization grounds).

156. The caveat here is obviously that residential choices, in cities no less than in metropolitan areas, are limited by financial means.

neighborhoods with the equivalent of the residential community associations prevalent in many wealthy, planned suburban communities.<sup>157</sup>

These proposals are not uncontroversial, and they present complicated institutional design problems.<sup>158</sup> At least theoretically, however, an entity like a BID—or, as Robert Ellickson has proposed, a block-level improvement district (BLID)—could be empowered to employ ESSMOs. For example, the board of the BID or BLID might be given the authority to employ options, rather than traditional zoning rules, to regulate any range of land use issues, such as the neighborhood density, off-street parking, “teardown” restrictions, limitations on the number and size of commercial establishments in a neighborhood, liquor licenses, advertising, and so on. This list might be generated at the municipal level or sublocally. If the sublocal governing body opted for ESSMOs, it could then employ the self-valuation devices described in *The Unbounded Home* to customize the value of each owner’s land use entitlements. The owners’ exercise of their ESSMOs would generate revenue, which might either be used to supplement the special assessments already funding BID activity or to compensate owners objecting to land use changes.

## CONCLUSION

Land use and local government scholars have to date done a much better job at identifying the problems with the current system of land use regulation than with formulating efficient and just solutions to those problems. The benefits of each proffered solution, it frequently seems, trade against the benefits of the existing regime. *The Unbounded Home* represents an important step forward, and in a sense away from, standard debates about the metropolitan commons. The book promises to influence debates about, and hopefully prompt reforms to, land use policies for years to come.

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157. Ellickson, *supra* note 60, at 77-78.

158. In planned communities, residents voluntarily submit to covenants establishing the ground rules of community life by moving to a neighborhood governed by them. Any proposal to retrofit older neighborhoods ultimately necessitates a mandatory, rather than voluntary, governance structure. Moreover, most sublocal government structures, such as BIDs, privilege property ownership. That is, property owners receive the lion’s share of political authority; residents that do not own property are substantially disenfranchised. These voting procedures have survived equal protection challenges because most sublocal structures are, at least arguably, quasi-private and lack formal regulatory authority. Any proposal to vest them with regulatory authority would most certainly resurface these constitutional concerns. See Briffault, *A Government for Our Time?*, *supra* note 60, at 431-46 (discussing equal protection challenges to BIDs).



# THE YALE LAW JOURNAL

BENJAMIN C. ZIPURSKY

Integrity and the Incongruities of Justice:  
A Review of Daniel Markovits's *A Modern Legal Ethics:  
Adversary Advocacy in a Democratic Age*

*A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*

BY DANIEL MARKOVITS

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## INTRODUCTION

The problem at the heart of Daniel Markovits's challenging new book *A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*<sup>1</sup> is a familiar one: may a lawyer present her client's case in a manner calculated to lead others to adopt her client's story, even though the lawyer is aware of facts that make the adversary's story likelier to be true? The legal profession answers "Yes." In fact, says Markovits, the legal profession takes the view that a lawyer who has agreed to represent a client is *obligated* to present the client's case in a way calculated to lead others to believe the client, even when the client's contentions are actually false. This suggests that lawyers may—indeed *must*—lie, or at least that lawyers must deliberately present distorted versions of reality in order to manipulate jurors and judges to come to form beliefs that are false, so their client will win. How can it be that lawyers are not only permitted, but obligated, to lie? At a very general level, the answer is that society benefits by having a system in which disputants are entitled to be represented by loyal and zealous advocates. Although these problems and solutions are, at a general level, well trod territory in legal ethics, *A Modern Legal Ethics* is anything but banal. Like a Cartesian philosopher engaged in an experiment of self-imposed skepticism, Markovits has set for himself—and the legal profession—an agonizingly difficult problem. The hope is that when Markovits shows lawyers and legal ethicists the way out of his exquisitely designed trap, we will finally be on secure moral ground; we will have a truly justifiable framework for understanding the core of legal ethics.

Markovits frames the problematic of his book in several distinctive and unusually provocative ways. In striving to find an *ethical* account for lawyers, Markovits is not simply trying to articulate the circumstances under which certain seemingly immoral conduct is actually morally permissible or to give an account of the reasons that such conduct ought to be deemed permissible. He is seeking such an account, but he is seeking more. For Markovits, the central goal of legal ethics is to explain "how the actions, commitments, and traits of character typical" of a lawyer "may be integrated into a life well-lived."<sup>2</sup>

Strikingly, Markovits depicts the ethical burden of a good lawyer in alarming terms. He writes that:

Although the law governing lawyers includes a host of secondary rules that constrain the lies that lawyers may tell and the ways in which they

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1. DANIEL MARKOVITS, *A MODERN LEGAL ETHICS: ADVERSARY ADVOCACY IN A DEMOCRATIC AGE* (2008).
  2. *Id.* at 1.

may cheat, the deeper principles of lawyer loyalty and client control bleed through these rules, so that lawyers remain professionally obligated to lie and to cheat on behalf of their clients in spite of the constraints.<sup>3</sup>

This is not simply a gratuitous moment of saber rattling, but actually a rather clear summary of Markovits's position, presented as a concluding paragraph of a chapter supposedly devoted to a close examination of whether it is in fact a fair characterization of lawyers' conduct to say that lawyers lie and cheat. The statement that lawyers lie and cheat is a frequent refrain throughout the book, worn almost as a badge of pride. It is not put forward as a descriptive claim that there are many bad apples out there; rather it is advanced as an analytical claim about what the professional role of "lawyer" obligates real lawyers to do.

The lawyerly vices of lying and cheating are not attributed simply to a small fragment of the American bar (for example, one could imagine a story in which the American criminal defense bar deploys these vices in a full-blooded commitment to defending the individual against the awesome power of the state). Rather, these forms of conduct are obligatory wherever and whenever lawyers act as advocates for their clients. On Markovits's view, this kind of "lying and cheating" is obligatory not only for criminal litigators, but litigators generally; not only for litigators, but those who represent clients before any sort of tribunal or commission; not only for tribunal-based representation but, to some extent, those who represent clients in counseling and negotiation. This obligation is not meant to apply simply in the United States, but in any legal system with a similar structure.<sup>4</sup>

Further intensifying his problematic, Markovits thoroughly rejects the best established and most frequent defense to the foregoing criticisms, which he calls "the adversary system excuse" and I shall call the "justice-consequentialist defense." This defense states that lawyers must remain partisan advocates, even when that involves advocating positions the lawyer does not privately believe, because in the long run the adversary system is the best way for our system to arrive at truth and to do justice. The idea is that vigorous partisan advocacy generates more justice on the aggregate level than any other system. Drawing upon decades of criticism by others,<sup>5</sup> Markovits rejects the justice-consequentialist defense for three reasons. First, he thinks that an adversary

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3. *Id.* at 17.

4. *Id.* at 13-16.

5. See, e.g., ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES* (1999); DAVID LUBAN, *LAWYERS AND JUSTICE* (1988); WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE: A THEORY OF LAWYERS' ETHICS* (1998).



system with room for lawyers to abandon their advocacy position when on the verge of subverting justice would be a more justice-producing system; second, he believes that the justice-consequentialist defense lacks all plausibility where there are problems with the substantive laws and where legal services are not justly distributed; third, he contends that the rights violations that vigorous advocates knowingly support (in cases where they are aware of the lesser justifiability of their clients' point of view, but assert it loyally nonetheless) cannot be justified in an aggregative, consequentialist manner.<sup>6</sup>

Finally, Markovits maintains that even if the aforementioned shortcomings of the justice-consequentialist defense are put to one side, there is an even greater problem with that defense, which he calls the problem of *integrity*. The problem is that the standard model of how lawyers proceed within the adversary system treats everything a lawyer does as being only indirectly morally worthwhile, only indirectly part of finding truth, and only indirectly part of doing justice. The lawyer's own individual involvement is as a partisan advocate who deliberately lies and cheats for her client. The idea that the adversary system is conducive to the discovery of truth and the doing of justice in the long run is unsatisfactory for legal ethics and would be even if its long-run claims were true, and even if all of the participants in the legal system accepted those claims. This is not for the simple Kantian reason that long-term consequences cannot justify short-term breaches of duty. It is because it is unacceptable to ask people—namely, lawyers—to live a professional life whose day-to-day activities feel like, and are, a violation of others, and of basic moral norms, even if this is beneficial in the long run. A life of daily betrayal of moral commitments to be truthful, trustworthy, and fair in one's dealings is a life of alienation from oneself—at least for a person deeply committed to truthfulness, trustworthiness, and fair play. One would have to give up one's integrity to lead such a life, and it cannot be the case that leading the life of a lawyer requires giving up one's integrity.<sup>7</sup>

This final aspect of Markovits's distinctive and unusual framing of the problem of partisan advocacy is the central challenge of the book: Is there a way to understand what lawyers do as partisan advocates that does not succumb to the integrity critique? Can a hired gun have integrity? Markovits's answer is affirmative. His view is that the legal profession *can be defended* and the partisan lawyer's life is one that *can be well-lived*. By embracing the virtue of fidelity and exercising the capacity for negative capability explained by the

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6. MARKOVITS, *supra* note 1, at 104-05.

7. *Id.* at 107-08, 115-17.

nineteenth-century poet John Keats,<sup>8</sup> a lawyer can engage in a profession that is “worthy of commitment.”<sup>9</sup> Roughly, his claim is that a healthily functioning legitimate political state needs to have a system of resolving disputes that has authority, as a constitutional matter, and whose deliverances in dispute resolution have the capacity to be received by members of the community as legitimate. Indeed, the need for such a system of authoritatively resolving disputes in a manner that can be properly received by society and the disputants is in some ways analogous to the need to have a functioning polis that can decide controversial political issues, even as members of society disagree about what the law should be and what should be done. The latter system is *democracy*. The dispute resolution system is *adjudication*. Adversary advocacy is part of the legal process we utilize to make our adjudicative system work. Markovits’s claim is that adjudication and the legal process are essential to solving a community’s problem of political legitimacy as to the resolution of individual disputes, and that they are able to do this only because disputants are able to connect their concerns affectively and rationally with the legal process.<sup>10</sup>

More particularly, the daily performance of adversarial lawyers is a direct instantiation of the virtues of fidelity and negative capability. Lawyers acting as adversary advocates, exercising the virtue of fidelity and the capacity for negative capability, are essential to such engagement and therefore to the legitimizing capacity of adjudication. Once lawyers engage in what Markovits calls “role-based redescription” and take fidelity and negative capability to be fundamental commitments and values for their role, they can replace their commitments to honesty and fair play with these lawyerly ideals and ambitions, and therefore avoid sacrificing their integrity.<sup>11</sup>

A professional life that from an impartial point of view might be called “lying and cheating” is noble not because the lies and cheating make everything work out in the long run, but because: (a) a life of enabling clients to engage with the legal process is a life of making political legitimacy possible; and (b) if the bar is functioning properly and lawyers are able to understand themselves through role-based redescription, lawyers justifiably understand themselves as loyally representing their clients, not as lying and cheating. However, in a final chapter theatrically named “Tragic Villains,” Markovits’s skeptical side re-emerges, suggesting that perhaps the structural changes of the American bar in

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8. *Id.* at 93-96.

9. *Id.* at 211.

10. *Id.* at 171-211.

11. *Id.* at 163.

the twenty-first century, which have made the bar less insular, will make it practically impossible to develop and exercise the lawyerly virtues of fidelity and negative capability.<sup>12</sup>

How does one begin responding to this vibrant philosophical meditation, so bursting with intellectual sophistication that it is sometimes hard to tell just what is being asserted? In this Essay, I focus upon five provocative theses of Markovits's book, explaining each. These are:

1. The goal of legal ethics is to ascertain whether lawyers can lead a life worthy of commitment;
2. Lawyers are obligated to be liars and cheaters;
3. The life of a lawyer is encumbered by a serious integrity problem, such that it is not clear whether a lawyer can lead a life worthy of commitment;
4. Adversary advocates can, in principle, preserve their integrity by redescribing to themselves the role of lawyers as enablers of transformations of disputes so that the political legitimacy of adjudication is possible; and
5. The possibility of lawyers having integrity is threatened by the decreased insularity of the modern American bar, and therefore lawyers today may well be condemned to living the life of tragic villains.

Although I end up rejecting each of the propositions above, Markovits and I agree on five broader points:

- 1a. An important question for legal ethics is whether the aspects of being a lawyer displayed in the partisan conduct of lawyers can be squared with an individual lawyer's commitments to justice and society's commitments to justice;
- 2a. Lawyers are often obligated to act in ways that are far from displays of the virtue of honesty;
- 3a. Lawyers' self-reproach is an indication of a deeper problem, understandably called "integrity";
- 4a. Partisanship is best justified by a fidelity-based account of the legitimacy of the adjudicative system;
- 5a. Although there are important benefits to the decreased insularity of the bar, there are substantial risks as well, and these risks run to the core of some of the most serious problems of justice and integrity.

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12. *Id.* at 212-46.

Indeed, while I have my reservations about the darkly romantic metaphors strewn throughout this book, Markovits's strategy of scrutinizing problems of lawyers' integrity in order to understand the role of law in society is capable of shedding a great deal of light on both legal ethics and jurisprudence. Parts I through V take up each of these issues in turn, contesting Markovits's aggressive position, while supporting a more moderate contention.

Part VI—titled “The Problem of the Incongruities of Justice”—presents an alternative account of the normative problems underlying the self-reproach advocates sometimes experience. Many of those who choose to become lawyers—even as they sink into the pressures and pleasures of being a professional—like to think that part of what is good about being a lawyer is that one is part of a system that aims to do justice. But a reflective lawyer may worry that his work is an obstacle to justice being done. This unsettling perception is often quite true, I argue, because “justice” is not one ideal, but many, and the many forms of justice are incongruent with one another. Whether retributive justice, corrective justice, or distributive justice is done when the adversary system is working “justly” is a contingent question. I conclude by suggesting that the way to deal with one's awareness of the incongruities of justice is not single-minded commitment to the virtue of client fidelity, but practical engagement with the mid-sized problems of improving our systems for realizing justice.

## I. LEGAL ETHICS AND THE LIFE OF THE LAWYER

### A. *An Unconventional Description of the Field*

The inference that begins *A Modern Legal Ethics* provides an instant warning that readers must take care not to permit the author's beautiful writing to lure them to a peculiar place:

If the basic task of ethics is to say how one should live, then the basic task for a professional ethics is to explain how the actions, commitments, and traits of character typical of the profession in question may be integrated into a life well-lived.<sup>13</sup>

Here, Markovits is asserting an important, broad conclusion about the appropriate methodological orientation of the subject of legal ethics. The fundamental question of this book is how the life of a lawyer can be worthy of

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13. MARKOVITS, *supra* note 1, at 1.

commitment, how being a lawyer can be integrated into a life well-lived. This is an interesting ethical question about lawyers and Markovits has interesting things to say in answering it. However, Markovits does not simply say that this is the question he happens to have chosen. Rather, he argues—from the very first sentence of the book—that in taking up this question, he is taking up *the basic task of legal ethics*.

But is this the basic task of legal ethics? Is it the basic task of medical ethics to figure out how traits of character typical of doctors may be integrated into a life well-lived? Presumably, such a task would require answering the question of whether a commitment to heal, a proclivity for hard work, and a devotion to a combination of science and practical knowhow can be integrated into a life well-lived. Aside from the fact that this is an easy question (the answer is “Yes”), answering this question is plainly not the task of the subject called “medical ethics.” Medical ethics is about informed consent and end-of-life decisions and dealing with delicate questions about treatment choice and autonomy of patients. Medical ethics is not centrally concerned with doctors’ life choices, but is about the distinctive and challenging moral dilemmas that arise for members of the profession. Is legal ethics not the same? Certainly those of us who teach legal ethics focus on the distinctive moral problems faced by lawyers, such as which information must be kept confidential, which conflicts are permissible or consentable, and when client autonomy is threatened. These issues do not have to do with lawyers having lives that are worth leading, but rather with the moral questions that lawyers face in legal practice and how various legal authorities answer—or fail to answer—those questions.

What is going on here? Why does Markovits begin his book with what might seem like such an idiosyncratic claim? Is this simply a Yale Law School professor trying to address students who began law school thinking they would save the world and left deflated by the thought that they are now just corporate clones doing the bidding of the Fortune 500 for the rest of their lives? Why else would he frame as his central question whether a lawyer can really lead a life worthy of commitment, rather than the questions that are really at the heart of legal ethics? In the end, the delineation of the subject matter of legal ethics might not matter because the issues Markovits confronts turn out to involve *both* questions about acceptable conduct in the practice of law *and* questions about whether and how a lawyer can lead a good life. There are other works in the area with a similar emphasis. Charles Fried’s classic

article *The Lawyer as Friend*<sup>14</sup> and William Simon's riveting book *The Practice of Justice*<sup>15</sup> are two leading examples. But the strength and prominence of Markovits's specification of legal ethics in terms so centered on lawyers' lives is unusual and I believe it is useful to see how and why Markovits ended up starting where he did. The intellectual history of Markovits's project, set forth in the following Section, will shed light on Markovits's unusual orientation in legal ethics.

### *B. Influences on Markovits: Williams, Kronman, and Virtue Ethics*

*A Modern Legal Ethics* displays the impact of two of Markovits's major influences in two separate fields: the late Bernard Williams, an extraordinarily significant philosophical theorist of ethics at Oxford University (where Markovits did a doctoral degree in Philosophy) and Professor Anthony Kronman, former Dean of the Yale Law School (where Markovits studied law and is now a Professor). Kronman's 1993 book, *The Lost Lawyer*,<sup>16</sup> is a contemporary classic of legal ethics. Kronman utilized the widespread perception in the bar during the 1980s and early 1990s that practicing lawyers were increasingly unhappy and unfulfilled with their work to sketch an idealistic picture of the role that lawyers once played in American society, and to document the social, political, economic, and intellectual forces that led to the decline of that role. Kronman's sociological and historical narrative was secondary to his philosophical account of what makes being a lawyer special and worthwhile. On Kronman's view, the lawyer was once fundamentally a sort of counselor, who served as an essential guide in public and private affairs by dispensing a type of wisdom that comes from taking others' perspectives and integrating them into a workable detached perspective. The satisfaction of being a lawyer emerged both from the intrinsic value of the personal and intellectual virtue of good judgment and the rewards of playing this special role in public and private life. In the 1990s, when his book was published, it created a new and important space in the spectrum of thinking in the field of legal ethics, which at that point was fractured between hired gun advocates and progressive justice advocates. Kronman carved out a place for the "lawyer-statesman," potentially reorienting a number of standard legal ethics problems.

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14. Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

15. SIMON, *supra* note 5.

16. ANTHONY T. KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* (1993).

Kronman's account of how to conceive the role of a lawyer so that being a lawyer was having a particular kind of good life also plausibly constituted a larger vision of legal ethics in the more standard sense. In addition to offering an account of the social value of lawyers and the personal satisfaction that comes from being a lawyer, the lawyer-statesman model offered a perspective on how the tension between client loyalty and social welfare might be reconceived. Markovits expressly acknowledges Kronman's supervision of his student work, which was the origin of this book.<sup>17</sup>

Of at least equal importance is the influence of Bernard Williams, whose conceptualization of the problem of "integrity" lies at the core of Markovits's book. Serious moral theory in the English-speaking world during the first two-thirds of the twentieth century was dominated by utilitarians. Although John Rawls's extraordinarily well-developed neo-Kantian thinking,<sup>18</sup> and a variety of other contractarian approaches, probably had the largest influence in challenging utilitarianism, a critique published by Williams in 1973 had a major impact for quite a different set of reasons.<sup>19</sup> In that critique, Williams argued that even where utilitarianism might be getting the right answer about what a person ought, morally, to do, it went about the whole enterprise of analyzing moral questions in an untenably simpleminded way, by specifying which outcomes are best in the long run (taking into account the negative side effects of bringing about those outcomes) and then prescribing the particular actions that people should take to bring about those outcomes. Markovits repeatedly draws from Williams's hypothetical example of Jim in South America, which illustrates this point well. Jim's predicament is one in which saving lives appears to require committing a homicide.

Jim finds himself in the central square of a small South American town. Tied up against the wall are a row of twenty Indians, most terrified, a few defiant, in front of them several armed men in uniform. A heavy man in a sweat-stained khaki shirt ["Pedro"] turns out to be the captain in charge and, after a good deal of questioning of Jim which establishes that he got there by accident while on a botanical expedition, explains that the Indians are a random group of the inhabitants who, after recent acts of protest against the government, are just about to be killed to remind other possible protestors of the advantages of not protesting. However, since Jim is an honoured visitor from another land, the

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17. MARKOVITS, *supra* note 1, at xi.

18. See, e.g., JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

19. Bernard Williams, *A Critique of Utilitarianism*, in J.J.C. SMART & BERNARD WILLIAMS, *UTILITARIANISM: FOR AND AGAINST* 77 (1973).

captain is happy to offer him a guest's privilege of killing one of the Indians himself. If Jim accepts, then as a special mark of the occasion, the other Indians will be let off. Of course, if Jim refuses, then there is no special occasion, and Pedro here will do what he was about to do when Jim arrived, and kill them all. Jim, with some desperate recollection of schoolboy fiction, wonders whether if he got hold of a gun, he could hold the captain, Pedro and the rest of the soldiers to threat, but it is quite clear from the set-up that nothing of that kind is going to work: any attempt at that sort of thing will mean that all the Indians will be killed, and himself. The men against the wall, and the other villagers, understand the situation, and are obviously begging him to accept. What should he do?<sup>20</sup>

Williams's point is not that utilitarianism yields the answer that Jim should kill one in order that Pedro will not kill twenty and that this is the wrong answer. Killing one may well be the right answer. Rather, Williams's point is that utilitarianism provides too crude a depiction of the moral question facing Jim. For the utilitarian, it is immaterial to whether Jim should kill that the killing of the innocent person would, in a straightforward way, be Jim's own act. Human agency is simply the pulling of a causal lever (or the failure to pull such a lever) that results in various other events occurring. What the utilitarian fails to see is that it matters whether one's action springs from one's own values and choices. It is relevant—even if not necessarily dispositive—that for a moral theory to tell Jim he must kill in this situation is for that theory to demand that Jim permit himself to be used in a certain way by Pedro. Utilitarians do not recognize that by demanding that Jim kill an innocent person, they are also demanding that Jim permit Pedro to use him to carry out his bloodthirsty intentions and transform Jim into a killer. Although Williams never makes it clear what he means by "integrity," it appears that integrity involves maintaining an appropriate and normal connection between one's values, goals, ambitions, and projects (at one end) and one's acts (on the other). The point is not that the lack of such a connection—the lack of integrity—is so devastating as to outweigh all the pluses achieved on the moral ledger by killing one (that is, saving nineteen). Rather, the claim is that it is important if one is going to put forward an ethical theory of how a person ought to act that the course of conduct prescribed be compatible with the actor's values and commitments, which are the basis of a meaningful and valuable life. All of this drops out of the picture entirely for utilitarians, or if it

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20. *Id.* at 98-99.



enters, it does so in an instrumentalist way that fails to capture the fundamental point.

Markovits uses Jim's story not simply to resist utilitarianism, but to resist impartialist moral theories generally.<sup>21</sup> This includes Kantian moral theory, both Kant's own and that of his contemporary followers, such as Christine Korsgaard.<sup>22</sup> Markovits believes that Kantians, like utilitarians, are incapable of capturing the importance of integrity in moral theory, a view he spells out both in *A Modern Legal Ethics* and elsewhere. Kantians rightly reject the third-person point of view in ethics, the idea that the ethical permissibility of conduct is to be judged by looking at the states of affairs reached by that conduct, from a detached point of view. However, Kantians adopt a second-person point of view; a person must live up to the moral demands upon him or her that arise from the claims of other persons, one by one, upon him or her. According to Markovits, what is needed is an ethics that adopts a first-person point of view and for which the fundamental question of ethics is: how should I live my life? Fittingly, the philosophical orientation of the ancients—especially Aristotelian virtue theory—provides the framework within which Markovits addresses moral questions.<sup>23</sup>

This intellectual history illuminates Markovits's reasons for framing the central task of legal ethics as he does. His affinity to Williams explains his anti-impartialist, first-person conception of ethics. His affinity to Kronman explains why he thinks that legal ethics problems are fruitfully understood by thinking about what the good life would be for a lawyer. Bringing both together, one sees an overall view of ethics that leans toward Aristotelian virtue theory. On this view, it is striking how alien the characteristic activities of the lawyer engaged in advocacy are from a way of treating other human beings that one could take pride in and deem virtuous.

### C. Reframing the Issue Less Provocatively

In Part III, I will challenge Markovits's claim that legal ethics should be understood in terms of whether lawyers can lead good lives. In this Section, I use the prior discussion of Kronman and Williams to suggest a less provocative

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21. MARKOVITS, *supra* note 1, at 121-33.

22. See, e.g., CHRISTINE M. KORSGAARD, *CREATING THE KINGDOM OF ENDS* (1996).

23. Markovits's attraction to the ancients' phrasing of ethical questions appears to have been influenced by Williams. MARKOVITS, *supra* note 1, at 109 (describing the "venerable Aristotelean tradition" in ethics and citing Williams in support of this tradition). See generally BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* (1985) (arguing that the tradition of the ancients is superior to the modern, impartialist tradition).

way to understand Markovits's framing of the central issue of the book. Markovits faults "the adversary system excuse" for lying and cheating in two ways: First, he argues that it is not credible as a consequentialist matter that the adversary system does a good job producing a set of just outcomes by having each lawyer lie and cheat. Second, he argues that, even apart from the inefficacy of the adversary system in generating good results, the *form* of the justification of the adversary system excuse is unacceptable because it runs into the integrity problem. The legal system would be asking too much of lawyers by asking them to spend five days a week lying and cheating, even if, contrary to fact, this led to more justice in the long run. Those who parade just results as the reason that lawyers are obligated to lie and cheat are akin to the utilitarian who tells Jim that he is obligated to kill one Indian because killing one is so much better than letting twenty die.

The problem with the utilitarian's claim is not so much that Jim is acting wrongfully if he kills one Indian. The problem is that it is untenable to expect a story about the long run benefits of conduct that is seriously *prima facie* wrong, and a violation of what the agent believes in and is committed to, to produce an adequate account of why the agent should engage in that conduct. The question raised by Jim's predicament is not *whether* the act in question is permissible or impermissible or whether the actor is leading a good or bad life. The question is whether the nature of the connection between the conduct and Jim's commitments, attributes, and qualities<sup>24</sup> is such that the action is both permissible and a reflection of qualities, commitments, and a general orientation to action that an ethical person should have.

Kronman's greatest contribution in *The Lost Lawyer*, in my view, is not his argument that lawyers are worthwhile or that they do good things: it is not his defense of lawyers. What was most important was his analysis of what lawyers do, what qualities and capacities they have, how lawyering is an exercise and expression of those capacities, and how the presence of such figures in our society fits into our political structure.<sup>25</sup> Overwhelmingly, however, Kronman presented lawyers engaged in counseling and negotiation, not in adversarial advocacy,<sup>26</sup> which is the much harder task Markovits takes up.

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24. Williams, *supra* note 19, at 99-100; see also Bernard Williams, *Persons, Character and Morality*, in *MORAL LUCK: PHILOSOPHICAL PAPERS 1973-1980*, at 1 (1981) (criticizing Kantian moral theory for failing to specify the connection between a person's actions and what gives a person character and identity).

25. KRONMAN, *supra* note 16, at 53-108.

26. *Cf. id.* at 146-54 (discussing advocacy, but explaining why lawyer-statesman capacities play some role in litigation, not explaining the legitimacy of the advocate's partisanship).

With this background in mind, the fundamental question of *A Modern Legal Ethics* can be reframed. The fundamental question is not whether lawyers can lead a good life or a life worthy of commitment, but what capacities are exercised in adversarial advocacy and what function professionals who exercise such capacities serve in our political and legal system. Whether this is *the* basic question of legal ethics (which I doubt there is, in any event), it is clearly *a* basic question of legal ethics and one that Markovits is to be credited with articulating. Markovits's strategy is to reject the consequentialist justification for the behavior of adversary advocates and to redescribe what adversary advocates do so that it can be recognized as the exercise of important capacities that lawyers have, and must have in order for our legal system to function as part of a legitimate modern democracy.

## II. ON LAWYERS' SUPPOSED OBLIGATIONS TO LIE

### A. Bold Claims About Lawyers' Conduct

The most striking assertions in *A Modern Legal Ethics* come very near the beginning of the book and are repeated throughout it. On page three, Markovits bluntly states that "lawyers must lie"<sup>27</sup> and on page four that "lawyers must cheat."<sup>28</sup> He boldly defends the claim that "lawyers are professionally obligated to lie and to cheat, both under the positive law of lawyering as it stands and under any alternative regime of professional regulation that remains consistent with adversary adjudication's basic commitment to a structural separation between advocate and tribunal."<sup>29</sup> Moreover, while Markovits recognizes that there are features of the ABA's Model Rules of Professional Conduct that are meant to combat lying and cheating, he argues that

the pressures to lie and to cheat that the positive law exerts on lawyers arise out of broad and organic rules that establish the necessary foundations of adversary lawyering, whereas the constraints that the positive law imposes on lawyers' professional vices arise out of rules that are narrow, technical, and contingent.<sup>30</sup>

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27. MARKOVITS, *supra* note 1, at 3.

28. *Id.* at 4.

29. *Id.*

30. *Id.* at 4-5.

As a result, the ABA's Model Rules of Professional Conduct do not go any distance in defeating the claim that lawyers are professionally obligated to lie and to cheat.

What are Markovits' arguments in support of these broad and alarming claims? He states, quite simply that "to deceive others by asserting a proposition that one privately (and correctly) disbelieves is to lie; and to exploit by promoting claims or causes that one privately (and correctly) thinks undeserving is to cheat."<sup>31</sup> Surprisingly, Markovits's argument regarding cheating is barely developed in the book and is much weaker than his argument that lawyers are obligated to lie;<sup>32</sup> I shall focus on his argument that lawyers are obligated to lie.

### *B. What Is the Evidence that Lawyers Lie?*

It is surely true that lawyers make statements on their clients' behalf with the intention of causing judges and jurors to believe these statements, and often the statements are false. This is not enough, however, to make Markovits's point. In order to show that lawyers lie, he must show that lawyers make assertions on behalf of their clients with the intent of causing judges and jurors to believe statements, even though they believe those statements to be false. The question is: are lawyers trying to persuade judges and juries *by making statements that they actually believe to be false*? If so, then certainly the prima facie argument that lawyers lie is at least on its way, although there might be a number of responses to it. But what is the evidence that this is so? Markovits puts forward no evidence for this claim whatsoever, he merely takes it as a given. Undoubtedly, one could go out and find many disciplinary

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31. *Id.* at 35.

32. Cheating would seem to be intentionally violating the rules that govern a rule-governed activity in order to gain an advantage. Breaking of the rules—even if implicit—is essential and deservingness inessential. A stellar baseball team undeservingly robbed of a genuine double play that should have ended a game because of a bad call by the umpire would nonetheless be cheating if it altered the next batter's bat to ensure its deserved win. Conversely, the other team's assertion that the umpire's decision cannot be revisited by television replay would not be cheating, even if this amounted to advocating for an undeserved benefit. Similarly, in adversarial litigation if there is an entitlement to assert a claim or a defense that one believes is sufficiently strong to be successful, and one complies with the rules, one is not cheating. But, to replace a date stamp on a document in order to comply with a statute of limitations—even if the underlying claim is deserving—would be cheating (as well as lying). Cf. Ted Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer's Point of View*, 16 *YALE J.L. & HUMAN.* 45, 63 (2004) (criticizing Markovits's argument, as presented in an earlier article, on the ground that calling something "cheating" entails that rules or expectations governing an activity have been violated to obtain an advantage).

hearing records and other cases in which it is clear that lawyers have lied; that some lawyers lie is beyond contention. But this is plainly insufficient, for we are not talking about whether, as an empirical matter, there exist lawyers who lie. The question is whether there is lying by the good lawyer, the lawyer who behaves as lawyers are supposed to behave—whether *lying is part of what is done by a competent adversary advocate representing his client well and complying with the rules and norms of legal ethics*. Empirical evidence about the lies told by bad apples is simply beside the point.

### C. *Shades of Belief*

Markovits often purports to be drawing his claim from the “organic character” of lawyers’ duties<sup>33</sup> or the “genetic structure of adversary advocacy.”<sup>34</sup> His point is that lawyers are obligated to present their own clients’ version of the facts and the law, and would be even if the lawyer “privately [found] the opposing positions more compelling.”<sup>35</sup> But organic conception or not, Markovits is evidently assuming that sometimes lawyers are in a situation where they privately find opposing positions to be more compelling. Why does he assume this? And what is it for a lawyer to “privately find” the opposing position to be more compelling? The idea seems to be that, even as the lawyer represents his own client’s position avidly, he may at some level appreciate the (perhaps superior strength of the) adversary’s. But, again, Markovits has given us no reason to believe that this empirical claim is true. Admittedly, lawyer/scholars who are steeped in a life of litigation often replace more formally empirical evidence in their articles with a more anecdotally based assertion. Whether this is ever justifiable, as to a central empirical claim in a book devoted to how a certain group of professionals behave, is an interesting question. However, Markovits does not draw from a lifetime of experience as a litigator (nor do I), and so this is an occasion on which legal scholars who like to shoot methodological arrows at armchair philosophers should really have a field day. Being at least part armchair philosopher myself, I will leave that to others, and assume for the purposes of argument that there are frequently lawyers who confront the experience of having real doubts about the truth of their client’s claims. Let us turn to an example.

Suppose one of O.J. Simpson’s lawyers awoke at 3 a.m. one morning during the days of the criminal trial and his mind was flooded with images of

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33. MARKOVITS, *supra* note 1, at 44.

34. *Id.* at 77.

35. *Id.* at 34.

his client stabbing Nicole Brown Simpson and Ronald Goldman. Lying there, sweating, his mind ran through the testimony of the prior day's witnesses, at each point imagining that the alleged facts asserted by the witness really were true. Let us suppose that, at that moment, in the privacy of his own home, and quite against his own internal campaign of fidelity to his client (even in his own mind), he privately finds the prosecution's position to be more compelling. By the time he turns up in court that morning, showered, shaven, and bedecked in a suit—and by the time he opens his mouth—he is back with the program. He eagerly tries to impeach one of the witnesses in cross examination. Has this lawyer lied?

The answer is “No,” and would be whether one was referring to the criminal trial or the civil trial. To begin with, during cross examination, the lawyer is not necessarily making any representation; he is not necessarily putting forward any statement as true. That is certainly what the verb “to lie” normally connotes, and it is missing here. Even if there is some proposition that the lawyer is trying to cause the jurors to believe (for example, that a witness is unreliable), it is far from clear that merely engaging in an effort to cause someone to believe something untrue qualifies as “lying.” Second, and more to the point, the lawyer's private moments of finding his adversary's position more compelling do not constitute the lawyer's actually arriving at the belief that his client is guilty of the crime in question or the lawyer's actually arriving at the belief that the prosecution witness is testifying truthfully and reliably. Doubts, misgivings, imaginings, internal representations at moments of time in which the lawyer “sees” the facts the way the other side is claiming they ought to be seen, or at which he finds himself not readily conjuring up the representation of the facts that his client's account entails do not amount to forming the belief that the assertions one is advocating are false. Markovits, whose language is as exquisitely nuanced as his theory, seems to recognize this distinction because he uses several different phrases to describe the mental state of the lawyer who is supposedly lying. We have already seen one such instance. Markovits describes the lawyer as “*privately find[ing] the opposition positions more compelling.*”<sup>36</sup> On another occasion, Markovits describes the lawyer as “*asserting a proposition that one privately (and correctly) disbelieves.*”<sup>37</sup> The verb “to disbelieve” is an unusual one; much more common is the cognate adjectival phrase “in disbelief.” One typically sees the phrase “in disbelief” in a context like the following: “he stood there in disbelief as his wife revealed that she had been having an affair with his best friend for the past eighteen

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36. *Id.* at 34 (emphasis added).

37. *Id.* at 35 (emphasis added).

months." Here, the point is that the thinker in question is momentarily unable to arrive at the cognitive state of representing some state of affairs, even though he is aware of evidence in light of which it would be epistemically rational to arrive at that cognitive state. If the husband were to tell a therapist, "My wife is having an affair with Jack. I am still in a state of disbelief," what he would be asserting he is in a state of disbelief *about* is that *his wife is having an affair with Jack*. As to the statement that his wife is having an affair with Jack, he would hardly be lying, even though, by hypothesis, he is in a state of disbelief about it, and he is trying to get his therapist to believe it.

The larger point here is that there are many shades of belief and suspension of belief, knowing and not knowing, that vary in depth, constancy, and consistency among other things. To establish that X lied when X asserted that p it is not enough to show: (1) not-p and (2) X intended that the listener believe that p. Perhaps it is not necessary to show that (3) X has a confident and settled belief that not-p. But it is not sufficient to show that (4) X lacks a confident and settled belief that p. As a legal ethics scholar writing a book that constantly and confidently proclaims that lawyers lie and have a professional obligation to do so, Markovits bears the burden of actually explaining which places on the spectrum between (3) and (4) count as lying, why we should believe this to be so, and why we should accept the claim that lawyers frequently occupy that space and are professionally obligated to do so.

This is not a burden that Markovits even tries to carry, and in any event it is unlikely that he would succeed in doing so if he were to try. While there are no doubt moments or times when what is running through a lawyer's mind is a representation of the adversary's position or even a representation of the falsity of the client's claims, this falls far short of a standing or settled belief that the assertions he puts forward are false. Indeed, it seems far likelier that the typical lawyer does believe that p and does so because the client said so, the lawyer is taking the client's account seriously, and the lawyer does not have dispositive reason to believe that not-p. If all of these claims are true, and if we accept that lawyers are entitled to take their client seriously unless they have dispositive reasons to reject their client's accounts, then these claims add up to an argument that the typical lawyer who says that p has a good faith (if sometimes shaky) belief that p and, therefore, is not lying.

Of course, if the lawyer actually holds a confident and settled belief that the content of his client's account is false but asserts his client's account, then (subject to the caveats of the subsequent arguments Markovits considers) he is lying. Markovits provides no reason to think that lawyers actually hold a confident and settled belief that their client's account is false, but assert it nonetheless, and no reason to think there is a professional obligation to do so.

*D. The Relevance of Model Rule 3.3*

The most obvious argument against Markovits's claim that lawyers are obligated to lie is that the ABA Model Rules of Legal Ethics actually say that lawyers are obligated not to lie. Rule 3.3, which is titled "Candor to the Tribunal," states:

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.<sup>38</sup>

Markovits considers this argument and provides what appears to be quite a powerful response to it. Rule 3.3 forbids a lawyer from suborning perjury, from failing to disclose controlling legal authority, and from presenting false evidence. When the question has arisen whether a lawyer's belief that the testimony or evidence is false will suffice for a rule violation, the answer given by the bar, the courts, and legal ethics experts, and the text and comments of the rule itself, is that the rule forbids the presentation of such testimony or evidence only where the lawyer *knows* that it is false, and *not when the lawyer reasonably believes it is false*. This seems to render the presentation of evidence that the lawyer believes to be false permissible. Given the background assumption of a duty of zealousness, then the permissibility of offering such evidence—if the client's case would benefit from doing so—would arguably render its presentation obligatory. This seems to support the argument that lawyers are obligated to lie.

The problem with this reply is two-fold. First, as Markovits recognizes, Rule 3.3(a)(3) makes clear that even if it is permissible for the lawyer to choose to present evidence she does not know to be false (but reasonably believes to be

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38. MODEL RULES OF PROF'L CONDUCT R. 3.3(a) (2007).



false), it is also permissible (outside of the criminal defense context) to decline to present such evidence.<sup>39</sup> Hence, even if it were justifiable to read Rule 3.3(a) as *permitting* an advocate to lie, it would not follow that advocates were obligated to lie.

Second, and most importantly, the issue of whether Rule 3.3(a)(3) should really be read to license lying ultimately turns on how best to interpret the distinction between a lawyer “knowing” that the evidence is false and her “reasonably believing” it to be false, and, again how one analyzes lying. For most philosophers, a critical distinction between saying “X knows that p” and saying “X reasonably believes that p” is that the first statement entails that p is true while the second leaves open whether p is true. For the most part, this is irrelevant to what the distinction is being used to do in Rule 3.3; in one sense, neither term is really meant to go to the truth issue. It is worth noting here because it leads us to see that the rule is not really about the truth of propositions; it is about the veracity of evidence. In particular, Rule 3.3(a)(3) is largely about when a lawyer may and may not put on certain witnesses. The question is whether a lawyer must not put on a witness whose veracity she doubts. Of course, lawyers are sometimes concerned about whether their own client is lying. Rule 3.3 is unwilling to forbid a lawyer to put on a witness who strikes her as dishonest even if she does not know that the witness is lying. This can be understood as a variation of the distinction offered in the previous Subsection: a lawyer counts as lying if she puts on a witness and has a secure and well-founded conviction that the witness is lying. But what if the lawyer finds herself with reasonable misgivings about the witness’s truthfulness that fall short of such a well-grounded conviction?

A lawyer deciding to put this iffy witness on the stand does not count as lying under the Rules. To be sure, the Rules give the lawyer a bit more leeway here than with regard to a representation she makes herself. This is probably for three reasons. First, perceptions of whether someone is being truthful as a witness—absent firm evidence on the other side—are particularly mercurial and individual. The Rules hesitate to give the lawyer the obligation to pull the plug on a witness simply because of such a perception. Second, the witness that the lawyer might have to pull the plug on could be the client herself, and this could trigger a number of serious autonomy concerns. Third, and perhaps most importantly, the lawyer herself is not making the representation. Rather,

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39. See *id.* R. 3.3(a)(3). As the Comments to the Rules indicate, there are numerous reasons—including those sounding in the Sixth Amendment—to suppose that the criminal defendant’s right to counsel should be read to entail a broad obligation of the criminal defense counsel to give her client the benefit of the doubt in deciding whether to offer evidence of his innocence. See *id.* R. 3.3 cmt.

she is enabling another person (who, after all, takes an oath to tell the truth) to make the representation. The Rules understandably choose not to assign the lawyer the same responsibility for the representations made by others as would be assigned to her if she made them herself.

*E. Equating Lack of Candor and Forthrightness with Lying*

Markovits's last major line of argument that lawyers lie (and cheat) is in many ways the most revealing of his attitude toward the whole topic of lawyers and the vice of lying (and the vice of cheating):

The forms of manipulation and disrespect that make lying and cheating immoral can arise quite apart from any active misrepresentation or affirmative misuse. They arise whenever a person fails to correct a false belief in circumstances in which respectful relations required shared knowledge of the truth or fails to undo an undeserved advantage in circumstances in which respectful relations require equality. The morality of truthfulness and fair play imposes duties to correct as well as duties not to deceive or to exploit, which lawyers transgress whenever they allow others to remain mistaken or disadvantaged in the face of these duties. Certainly, the duties of truthfulness and fair play extend well beyond purely formal obligations to make only true assertions and to play by the rules.<sup>40</sup>

There is a great deal to agree with in this eloquent passage. And it is no doubt true that if the level of candor and communication that a lawyer uses within the adversary advocacy context were used by her outside of that context, she would often be regarded as immoral, and properly so. But to say that the values underlying the norm against lying normally entail a far broader duty of candor and the values underlying the norm against breaking rules to gain an advantage normally entail a far broader duty of fair play is not to say that lawyers lie and cheat if they do not comply with these broader norms of candor and fair play.

A larger question, of course, is whether the broader norms of candor and fair play of the sort articulated apply to lawyers who function as adversary advocates, either as a matter of positive law, institutional ethic, or morality. I think it is clear that the broader norm of candor does not apply as a matter of positive law or institutional ethic. One might think that the essential question for Markovits is whether such a norm *should* apply to lawyers. In fact, I do not

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40. MARKOVITS, *supra* note 1, at 40.

believe that the essential question for Markovits is whether such a broad duty of candor morally should apply to lawyers engaged in such activities. The question, rather, is whether, when a lawyer fails to live up to such a duty of candor in order to operate as an adversary advocate, she is betraying her own values in a way that creates an integrity problem. One can certainly see the relevance of the example of Jim in South America to Markovits's contention that to be an adversary advocate, one must lie. Markovits is suggesting that asking someone to become a full-fledged liar in order to be a lawyer is really asking for a sacrifice of that person's basic moral commitments; it is akin to asking Jim to become a killer. But, as the discussion below illustrates, the analogy to Jim's predicament loses its force when the claim is that to be an adversary advocate, one must fail to live up to a high standard of a duty of candor in certain circumstances.

Returning to Jim in South America, suppose Pedro has wounded a boy, who was among the twenty he intends to shoot. Jim, who has medical training and a clean knife and a first aid kit with him, has the capacity to save the boy from bleeding to death by cleaning and closing the wound. As Jim kneels on the ground to begin doing so, Pedro says "If you leave the boy alone and let him bleed to death, I will spare the other nineteen." This is not the same dilemma as the original, for killing and letting die are not the same. Normally, respect for life imposes a moral duty to save a life when one is able to do so, and it is the value of human life that, to a great extent, underlies the duty not to kill. But this does not add up to an argument that declining to perform a rescue under such circumstances simply is killing. More relevant, for our inquiry, is that the impartial moral theorist's demand that Jim desist from saving the boy in order to spare nineteen other lives does not force Jim to abandon his personal commitment to be a person who never kills. Consequently, this demand does not constitute an attack on Jim's integrity of the same magnitude.

In the same way that killing and letting die are distinguishable, the adversarial advocate who remains less than candid is distinguishable from the advocate who lies to the judge and the jury. The requirement that advocates be less candid than a virtuous person would in his daily, nonprofessional interactions, is not an attack on integrity in the way a requirement to lie would be. In either case, a morally sensitive person will see that there is an alternate path of conduct that is more attractive from the point of view of a general conception of virtue and more observant of an important value that pertains to respecting persons. But saying that an adversary advocate must, under certain circumstances, select the path of lesser forthrightness in order to do her job is a far cry from saying that one must lie to be a lawyer.

The root of Markovits's conception of the moral status of what advocates are required to do is a refusal to draw certain kinds of lines around moral

agents and their actions—a refusal to recognize the significance of *others' responsibilities* in arriving at a correct characterization of the lawyer's own action. For example, when Markovits equates lying with failing to correct, he is ignoring the adversary's responsibility to present the other side. When he equates lying with putting on a witness whose credibility one doubts, he is ignoring the witness's responsibility to testify truthfully. And, when he equates lying with making a representation that lacks a statement of one's own misgivings, he is ignoring the jurors' responsibility to weigh the evidence themselves and the judge's responsibility to contextualize the lawyers' representations within the framework they know to be adversary advocacy. All of these ways of behaving are really quite different from lying, but can seem like lying if one ignores other agents' responsibilities. Common sense notions of morality, lying, and truth-telling do consider the role of others, as does conventional legal ethics, which is what the "organic" conception of the advocate's role builds upon. Ironically, it is the refusal to take seriously the respects in which others' actions bear on an agent's own moral responsibilities that lies at the core of Williams's critique of utilitarianism.<sup>41</sup>

#### F. Reservations About Frugality with Information

This completes my argument against the claim that lawyers are obligated to lie. Making this argument did not require an account of fidelity or negative capability. It principally involved showing that Markovits has not adequately defended the claim that lawyers who continue to represent their clients' positions even when they have misgivings are not lying. A similar argument can be run with respect to truthfulness about the law.<sup>42</sup>

Nevertheless, we should not pretend that adversary advocacy has been brought to a good place by my refutations of the "lawyers lie" argument. From an impartial point of view, there is nothing admirable about the adversary

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41. See Williams, *supra* note 19, at 99 ("[Utilitarianism ignores] that each of us is specially responsible for what *he* does, rather than for what other people do. This is an idea closely connected with the value of integrity.").
42. And, indeed, the argument that lawyers are lying about the law is, I believe, much weaker to begin with. It rests on the claim that lawyers are lying when they take positions before judges that they would not take outside of the particular representation. As to the judicial context, where there are adversaries, this falls far short of an argument that lawyers are lying. Although the "actor" argument is not quite correct, the addressees of lawyers making legal arguments are judges and other lawyers, who perfectly understand that the context of speech is intrinsically framed by mutual understanding that each lawyer is taking an adversarial stance. In this sense, it is no more like lying than bluffing in an expert game of poker.

advocate's frugality with the truth. If honesty is conceived of as a virtue, as an excellence of moral character, then it is hard to believe that one should characterize the adversary advocate as an exemplar of the virtue of honesty. Indeed, while the adversary advocate does not, *contra* Markovits, possess the vice of being a liar or being a dishonest person and she has not violated the moral obligation not to lie, it certainly appears that her conduct on such occasions is not of a sort that exemplifies the virtue of honesty, conceived as an excellence. Part of where Markovits has gone wrong is in equating conduct that would not be selected as exemplary of the virtue with the possession of the vice or the violation of the obligation not to lie. Similarly, while the lawyer does not possess the vice of a cheater and has not violated the obligation not to cheat, the lawyer's conduct in these instances would not be selected to exemplify the virtue of fair play either.

The word "integrity" is the closest term we have in English for the virtue of being honest and straight-shooting in one's interactions and actions, such that others view one as wholly reliable and trustworthy. In this sense, Markovits is right to suggest that the conduct of adversary advocates in those scenarios where they are not very candid, frugal with the truth, and willing to file claims whose merits are open to serious challenge, is conduct that would often be taken to display a lack of the virtue of integrity. But while integrity, so understood, is an important virtue, and a person's commitment to be an exemplar of integrity may be one of great importance in her life (and that of her community and those immediately around her), this concern does not generate nearly the sort of problem that Markovits derived from Williams. Williams was looking at the lack of integrity as a kind of defect in a person that went beyond even having a vice; the problem is that the person is alienated from himself, and is not the author of his own actions. We shall, nonetheless, return to the question of whether integrity in the sense of displaying the excellences of honesty and trustworthiness is something that must be unavailable to the adversary advocate, in her work life or beyond.

### III. IS A LAWYER'S LIFE WORTHY OF COMMITMENT?

I argued in Part I that it is possible to interpret Markovits's central question so that it is not about whether one can "render the legal profession worthy of commitment"<sup>43</sup> or whether lawyers can live their lives in a manner that permits them "to sustain their integrity."<sup>44</sup> Yet there is no doubt that Markovits himself

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43. MARKOVITS, *supra* note 1, at 211.

44. *Id.* at 10.

believes these to be good questions; he believes that there are good reasons to doubt the existence of a positive answer; he believes the answer he defends is satisfying; and he believes that because the bar has changed over the past several decades, the path to integrity may be closing down. We shall later examine in detail Markovits's reasons for this worry and his proposed path to redemption. For the moment, however, it is important to place Markovits's supposedly realistic challenge in a more realistic context.

First, the integrity challenge, as Markovits describes it, only arises for lawyers engaged in adversarial advocacy. The overwhelming majority of lawyers have a transactional, business, or bureaucratic practice that does not principally involve adversarial advocacy. So we are only talking about a fragment of the legal profession to begin with. Of those, some are lawyers who represent the government.<sup>45</sup> A strong case has been made—and is generally accepted—that the norms of adversarial advocacy do not plausibly apply to such lawyers to the same degree, even assuming that Markovits is generally correct about adversarial advocates.

As to the remaining litigators, let us be careful not to assume that the value sets of such individuals are at odds with those of their clients in the way that Markovits sometimes suggests generates his worries.<sup>46</sup> In-house lawyers for big and small companies, hospitals, universities, and many other enterprises in many respects *are* the client. Moreover, as David Wilkins' recent work has demonstrated,<sup>47</sup> many lawyers who are formally members of a law firm that is independent of all of its clients are nevertheless deeply aligned with a small number of very significant clients over a period of years. Indeed, Markovits himself depicts the increased specialization of the bar, and recognizes (in footnotes) that many lawyers either choose their particular occupation with their sympathies in mind, or come to share their clients' sympathies over time, or both.<sup>48</sup>

In this light, consider the public defender or the private criminal defense lawyer who frequently represents individuals accused of violent felonies or drug-related offenses. Many such lawyers have as a project to slow the heels of the government as prosecutor and to protect the rights and the well-being of populations who are especially vulnerable to government overreaching.

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45. *Id.* at 173.

46. *Id.* at 219-21 (describing as part of the change in the legal profession that more lawyers are shifting to jobs in which their interests are more closely aligned with their clients' interests).

47. David B. Wilkins, *Team of Rivals? Toward a New Model of the Corporate Attorney/Client Relationship*, in 62 *CURRENT LEGAL PROBLEMS* 478 (Colm O'Conneide ed., 2009).

48. MARKOVITS, *supra* note 1, at 220 n. †.

Whether this is a laudable commitment is not the question (I happen to believe it is); the question is whether the lives of such litigators present the kind of conflict Jim faced in South America. Does the aggressive position of criminal defense lawyer Jones representing probably-guilty client Smith conflict with Jones's larger commitments in life or in law or in justice? Hardly. Jones is not simply representing Smith and acting upon his loyalties to Smith; Jones is also realizing his personal commitment to shield the vulnerable against the aggression of the state. The same may be true of mass media defense lawyers or, for that matter, medical malpractice or products liability defense lawyers, trial lawyers for injured persons, tax and labor litigators, and so on.

Finally, and on a somewhat different but perhaps more realistic note, Markovits—probably like many academics—appears to presume that what one chooses to do in order to earn a living must play a large role in defining one's basic commitments and one's identity. A person who represents debtors or creditors or personal injury claimants insurance companies in court all day may not define herself principally by this activity, just as an accountant or a clothing store clerk or a family physician or a grade school librarian—or a law professor—might not. These are jobs. The question of whether one's life is a good life may not largely be about the nature or quality of the job. Indeed, the fact that the job brings in more money rather than less is normally thought to help make life easier and, in some cases, better. Markovits's critique does not rely on the time commitments and high-pressured nature of being a lawyer today. Unless there is something genuinely immoral or degrading or hypocritical involved in doing the job, or unless one places the job as the star feature of one's life, it is hard to see why features of the job undercut the possibility of having a good life, a life of integrity.

Markovits would argue that the point that litigators identify with their clients really misses the problem of integrity he is spotting.<sup>49</sup> The integrity problem arises not because of conflicts between lawyers qua representative of the client of the moment and those individuals' commitments more generally. The problem arises because being an adversary advocate requires lying and

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49. Markovits anticipates this objection and responds to it. He writes:

[T]he suggestion that a division of labor might save lawyers' integrity misconstrues the nature of the threat against their integrity that lawyers face, specifically by locating that threat, incorrectly, in lawyers' discomfort with their clients' ultimate purposes rather than, as I have been arguing, in tensions between more general first-personal ethical ideals of truth-telling and fair play and the methods that lawyers must employ in serving their clients' purposes, whatever they are.

*Id.* at 221 n. †.

cheating, and lying and cheating are vicious. If the only way to justify viciousness is consequentialist in the way that the utilitarian dictates Jim should be, then a commitment not to lie and cheat is being overridden in a manner that leaves no place for integrity. This is true even for the lawyer whose professional life is not the center of her commitments if she is committed to not being a liar or cheater. In other words, the integrity critique arises only if one accepts the claim that lawyers are performing immoral acts—lying and cheating— as part of their work as adversary advocates.

It should now be clear that the refutation of Markovits's "lawyers lie" argument in Part II puts to rest whatever remained of Markovits's argument that there is a serious question about whether a lawyer can lead a life worthy of commitment. However, it would be a mistake to brush away the issues Markovits has raised. There are three reasons to take seriously Markovits's worry about the clash between adversary advocacy and the lawyer's deepest ethical convictions. First, it is right that for at least some lawyers, the inability to see themselves as exemplars of the virtues of honesty and trustworthiness when they are being adversary advocates leads to a kind of anxiety and personal disappointment; we have seen that this might even be called a problem of "integrity." Second, Markovits is right that if the adversary system excuse fails, as many of the leading figures in this area think it does,<sup>50</sup> we need some other justification for why lawyers should be willing to veer from the ideal of true integrity when acting as advocates. Third, once one begins to think about the obligation to remain loyal to one's client in advocacy, and one reflects on the symmetrical conduct of other attorneys, and one loses faith in the strength of the adversary system as a truth-discovery tool, the question may arise whether one is doing justice at all. This pattern of private deliberation can give rise to a kind of soul-searching and even self-reproach, sometimes softened by the material rewards of being a lawyer, but sometimes exacerbated by the high pressures of the litigator's job. The characteristic internal dialogue of the lawyer engaged in such self-reproach may well be:

How did I get here? . . . What is the point of what I am giving my life to? . . . I tell myself that I am a part of a system of protecting rights and doing justice, but I am really telling myself a lie, because I do not really see that I am making the world a more just place.

At these junctures in the lawyer's life, the lawyer is, in an important sense, questioning his own integrity. Markovits points out that legal ethics ought to grapple with the question of whether the lawyer's self-reproach at such

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50. See sources cited *supra* note 5.



moments is justified. This, too, is fairly described as a question of *integrity*, and it is one worth taking seriously even if it does not threaten the possibility of lawyers leading lives worthy of commitment with anything like the breadth or depth he argues.

#### IV. JUSTIFYING THE ADVERSARY SYSTEM

The most original claim of Markovits's book is that the role that lawyers play in adversary advocacy can be rendered justifiable to lawyers in a manner that will overcome the integrity problem by recognizing the capacity of the adversarial system to legitimize the authority of adjudication.<sup>51</sup> In a wonderful phrase reminding the reader of Markovits's equal comfort in the domains of private and public law theory, he writes: "What democracy is to political legitimacy at wholesale, adjudication is to political legitimacy at retail."<sup>52</sup>

The argument begins with a wide-ranging discussion of political legitimacy that initially appears to be Rawlsian but, on closer inspection, embraces a conception of legitimacy more closely aligned with Habermas.<sup>53</sup> This discussion produces what Markovits calls a "practical" conception of political legitimacy, rather than a theoretical one.<sup>54</sup> The pertinent point is Markovits's suggestion that the need to resolve disputes and disagreements in a democracy by adjudication presents an especially difficult problem of legitimacy, in light of the very diverse ends and values of the individuals who come into conflict with one another, and that a practical conception of legitimacy in adjudication is superior to a theoretical one.<sup>55</sup> It then asserts that when individuals are represented by lawyers exercising fidelity and negative capability in adversarial proceedings, that representation and those proceedings enable lawyers to connect with their clients in a manner that permits a transformation of the legal dispute through adjudication.<sup>56</sup> Transformation through the legal process, in turn, permits litigants to understand the legal system as *legitimately*

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51. See MARKOVITS, *supra* note 1, at 184-211.

52. *Id.* at 185.

53. *Id.* at 173-84, 314 n.16 (citing RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* (1981)).

54. *Id.* at 176.

55. See *id.* at 184-87.

56. See *id.* at 187 ("[T]his practical account places lawyerly fidelity and negative capability at the center of the transformative power of the legal process and therefore at the foundation of its legitimacy.").

adjudicating and resolving their disputes.<sup>57</sup> Thus, adversary advocates exercising fidelity and negative capability permit the legitimacy problem inherent in adjudication in a democracy to be solved. Because the attribute of fidelity and the capacity for negative capability make possible the solving of the legitimacy problem, and because they can be understood as doing so by lawyers themselves, lawyers can engage in a role-based redescription that ultimately leads them to see what they are doing as worthy of commitment. The integrity problem is therefore solved.<sup>58</sup>

Preliminarily, it is important to try to grasp what the “lawyerly virtues” of fidelity and negative capability are really supposed to be. As to the meaning of the terms “fidelity” and “negative capability,” Markovits says less about each than one would like.<sup>59</sup> This is unfortunate, especially as to the latter term, for while “fidelity” has a deep and freighted history in jurisprudence,<sup>60</sup> “negative capability” is largely an import from an entirely different field.<sup>61</sup> Negative capability is a concept drawn from the letters of nineteenth-century Romantic poet John Keats. Keats himself used the term in writing only once, in an oft-cited letter written to his brothers George and Thomas: “[A]t once it struck me what quality went to form a Man of Achievement, especially in Literature, and which Shakespeare possessed so enormously—I mean *Negative Capability*, that

57. See *id.* at 189.

58. *Id.* at 210–11.

59. *But see id.* at 90–98.

60. See, e.g., Lon L. Fuller, *Positivism & Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

61. Two caveats are needed on this point—one large and one small. The large caveat is that while there appears to be consensus that John Keats introduced the term “negative capability,” one of the most prominent jurisprudential articles of the past several decades actually makes extensive use of this term. See Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 650 (1983). Moreover, negative capability is one of the large overarching themes of Unger’s book, ROBERTO MANGABEIRA UNGER, *FALSE NECESSITY: ANTI-NECESSITARIAN SOCIAL THEORY IN THE SERVICE OF RADICAL DEMOCRACY* (1987). Unger mentions that the phrase “negative capability” comes from Keats, Unger, *The Critical Legal Studies Movement*, *supra*, at 624, and indicates that his usage of it differs from Keats’s, notwithstanding some connections, *id.* Markovits indicates in a note that his usage of “negative capability” bears “some similarity” to Unger’s. MARKOVITS, *supra* note 1, at 297 n.71. The smaller caveat is that the body of legal scholarship prior to Markovits—including legal scholarship about the nature of legal thought—includes some discussion of Keats’s “negative capability.” See, e.g., Peter Read Teachout, *The Soul of the Fugue: An Essay on Reading Fuller*, 70 MINN. L. REV. 1073, 1107 (1986) (articulating negative capability themes—although not by that name—in the thought of Lon Fuller). These observations do not take away from the originality of Markovits’s use of the Keats idea in thinking about legal ethics, for the prior uses do not pertain to the legal thought of practicing private lawyers advocating for clients.

is, when a man is capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason . . .”<sup>62</sup> Markovits, apparently following a quite widely shared understanding among Keats scholars, interprets passages in a subsequent Keats letter to be elaborations of the concept of negative capability:

Begin with the service that the poet provides his subject. Keats argued that the negatively capable poet is unusually able to efface himself, maintaining “no identity” of his own, and (through this self-effacement) to work continually as a medium, “filling some other body—The Sun, the Moon, the Sea . . .” and rendering this ordinarily mute body articulate. The lawyer is similarly required, by the sword-like component of professional detachment, to efface herself, or at least her personal beliefs about the claims and causes that she argues. . . . Just as the self-effacing poet enables his otherwise insensible subjects to come alive through him, so also the lawyer enables her otherwise inarticulate clients to speak through her.<sup>63</sup>

Even assuming this evocative romantic metaphor is aptly applied to the context of what litigators really do, there are serious problems getting from this conceptualization of the lawyerly role to the powerful defense of the political status of adjudication—Markovits’s target. First, and perhaps most importantly, we must be clear about whether the “legitimacy” problem of adjudication refers to how outcomes of adjudication are perceived by those involved or whether they are actually legitimate. Even assuming that a perception of legitimacy by disputants is, in and of itself, a *prima facie* good because it fosters social cohesion, it would be at most a *prima facie* good. The actual legitimacy of the resolution is surely important. Markovits takes up the idea that lawyer fidelity and negative capability make possible the actual legitimacy of the outcome, but as a general matter, he makes clear that his assertion falls short of the ambition to justify the actual legitimacy of adjudication.<sup>64</sup> Although appropriate and justifiable, this is an odd concession, given that Markovits’s inquiry was motivated, in great part, by a recognition that the justification-consequentialist defense of the adversary system is very weak. Moreover, one might think that the value of perceived legitimacy

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62. Letter from John Keats to George and Thomas Keats (Dec. 21, 1817), reprinted in *THE SELECTED LETTERS OF JOHN KEATS* 102, 103 (Lionel Trilling ed., 1951).

63. MARKOVITS, *supra* note 1, at 93 (quoting Letter from John Keats to Richard Woodhouse (Oct. 27, 1818), in *THE SELECTED LETTERS OF JOHN KEATS*, *supra* note 62, at 165, 166).

64. *See id.* at 201.

actually declines to the extent that we have less reason to believe there is actual legitimacy.

Second, Markovits presents no evidence and no real argument that the negative capability of adversary advocates permits the adjudication system to have a transformative effect on litigants. The transformativeness of the law has been an interest of a wide range of important legal scholars.<sup>65</sup> And, of course, there is a great deal of controversy over whether our adversarial litigation system really enhances the possibility of transformativeness, or whether the anticooperative nature of standard litigation tends to forestall the possibility of transformativeness. Markovits offers no reason to believe that transformativeness through the adversarial process really does happen or that if it really does happen, that is because attorneys' fidelity and negative capability are at a level that leads them to conduct that ordinary people would consider failures of truthfulness and fair play.

Markovits does contend that fidelity and negative capability permit the client to have a voice and to have his concerns expressed and translated into legal terms and legal concepts. Citing to work by Tom Tyler, he argues that without this voice, litigants would be less likely to regard the process as legitimizing.<sup>66</sup> Even if one accepts this important point, as I am inclined to do, it falls far short of what is needed. At most, it shows that lawyers' providing their clients with fidelity and negative capability is necessary for the perception of legitimacy by clients. It does not show that providing voice is *sufficient* for their perception of legitimacy, or even that it goes a significant distance toward producing it. It does not show that the degree of adversariness that is the subject of the book is necessary to providing voice (or enough voice). It does not show that providing voice is *necessary, or sufficient, or contributing to actual legitimacy at all*.

These concerns come together in a fourth point. The focus of this part of Markovits's argument is on the question of whether there is genuine value in playing the adversary advocate's role in such a way as to exercise a full-blown version of fidelity and to exercise negative capability. We know what motivates Markovits to ask this question: he is anxious that lawyers be able to redescribe what they are doing so that it is not simply a matter of cheating and lying. However, even if one assumes that these are worthwhile concerns, they cannot be met simply by redescribing what the lawyer is doing in such a way that it is

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65. See, e.g., Robert Cover, *The Supreme Court 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

66. MARKOVITS, *supra* note 1, at 318 n.60 (citing TOM R. TYLER, WHY PEOPLE OBEY THE LAW 105 (1990); Tom R. Tyler, *The Psychology of Disputant Concerns in Mediation*, 3 NEGOTIATION J. 367 (1987)).

seen by the lawyer to reflect a valuable kind of commitment (that is, fidelity to the client). We must remember that the adversary system is still under attack. We need an argument that the adversary system is itself justifiable, notwithstanding the extensive critiques it has been subjected to apart from the integrity critique. And unless the entire process of adjudication Markovits describes reliably produces legitimate resolutions in addition to engendering perceptions of legitimacy there is no reason to think this defense of the adversary system succeeds. Many of the reasons Markovits uses as grounds for questioning the justice of the results achieved under the adversarial system—especially inadequate and inequalitarian allocation of resources for those who enable litigants to have a voice—are also reasons for questioning the legitimacy of the results of our adjudication system.

Here, as with prior claims, Markovits is onto something important, however. Ironically, the problem with his legitimacy argument is that he has not been ambitious enough, or at least not been clear enough about his ambition. Legitimacy, not the perception of legitimacy, is the point he should be focusing upon. Of course, the fact that a system can provide (some, or even all) individuals with a voice in representation, translating their claims or defenses or concerns or needs into the language of the law, does not make it a legitimate system; this is a point about which Markovits is admirably clear. However, as Markovits indicates, the capacity to provide voice and a meaningful connection with the law may well be a *necessary* condition for the legitimacy of our legal system, as Charles Fried,<sup>67</sup> Stephen Pepper,<sup>68</sup> and David Luban,<sup>69</sup> in different ways, have argued. Moreover, Markovits makes a substantial contribution to our understanding of how lawyers are able to provide voice and a meaningful connection with the law. He gives us a vivid sense of how these things not only seem to be, but are, important to the disputants' dignity and their vulnerability to the state, and to the other legally empowered persons around them. And he gives us a sense of why it is that legal ethics rules regarding the detachment of lawyers from their clients are essential to those capacities.

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67. See Fried, *supra* note 14, at 1075.

68. See Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613. As Andrew Kaufman points out in his response to Pepper, Pepper's structural account does not entail that it is always impermissible for a lawyer to diverge from what Pepper refers to as the lawyer's amoral role, or that some extraordinarily high standard must be met to justify such a divergence. Andrew L. Kaufman, *Commentary on Pepper's The Lawyer's Amoral Ethical Role, A Symposium on The Lawyer's Amoral Ethical Role*, 1986 AM. B. FOUND. RES. J. 651, 653-54.

69. See David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, in LEGAL ETHICS AND HUMAN DIGNITY 65 (2007).

The story—which, as presented below, is perhaps closest to that articulated by Stephen Pepper<sup>70</sup>—goes like this: legal rights are critical to our capacity to maintain a rule of law and a domain of governance and conflict resolution that is legitimate and just; legal rights in a sophisticated society like our own are sufficiently complex that empowerment to exercise such rights depends on having the representation of a lawyer; a lawyer’s taking the client largely on his or her own terms and enabling the client to have a voice are critical to the empowerment of the client to use his or her rights; the virtue of fidelity and the attendant negative capability of the adversarial lawyer are mature versions of the lawyer taking the client on his or her own terms, and enabling the client to have a voice. This argument is hardly trouble-free, but its core point is clear enough: meaningful rights are necessary to the legitimacy of governance in our society and lawyers exercising the sorts of virtues Markovits refers to are necessary, though hardly sufficient, for these rights to have meaning. The adversariness of the advocate is not the purpose but the predictable side effect of a system of rights representation that takes client voice seriously.

#### V. THE CHANGING BAR AND ITS CONSEQUENCES FOR A LAWYER’S INTEGRITY

At one level, Chapter 9 of *A Modern Legal Ethics* is the best documented and the least controversial. Markovits claims that over the past few decades, being a lawyer has become increasingly high pressured; advocacy has become increasingly sharp; legal practice has become increasingly segmented; the demographics of who becomes a lawyer has broadened enormously; and the membrane separating law and business becomes thinner and more porous with each passing day. Lawyers are increasingly identified with their clients’ interests and decreasingly detached in their own values; for better or worse, the way that lawyers approach their jobs is increasingly difficult to distinguish from the way that business people approach theirs. These trends and their significance have generated a rich legal profession literature including the work of Robert Gordon,<sup>71</sup> Russell Pearce,<sup>72</sup> Deborah Rhode,<sup>73</sup> Tanina Rostain,<sup>74</sup>

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70. Pepper, *supra* note 68, at 615-19. Markovits’s account differs from Pepper’s in innumerable ways. Critically, while Pepper states that law is “intended to be a public good which increases autonomy,” *id.* at 617, Markovits’s justification looks to the role of law in dispute resolution in a democracy. Moreover, Markovits would reject both the public good conceptualization, as such, and the autonomy consequentialism Pepper seems to accept.

71. Robert W. Gordon, *The Legal Profession*, in *LOOKING BACK AT LAW’S CENTURY* 287 (Austin Sarat, Bryant Garth & Robert A. Kagan eds., 2002).

David Wilkins,<sup>75</sup> and numerous others. Anthony Kronman's *The Lost Lawyer*, although written at a time when these changes were not as far along, parallels Markovits's book to a closer extent on these issues, wistfully lamenting these changes because he believes they undercut the capability of lawyers to exercise the very capacities that make their profession worthwhile. While one might wish that Markovits had engaged this literature to a greater degree, the empirical claims upon which his "Tragic Villains" chapter relies are more than adequately substantiated.

What makes Chapter 9 riveting is not its empirical claims but its assessment of the significance of those changes. In a few respects Markovits's response is quite conventional: he welcomes the broadened demographics and deplores the increased pressure and increased sharpness of the conduct of adversaries in litigation. Strikingly, however, he claims that the decreased insularity of the bar—the diminution in the clubishness and the "we are special" ethos—is a devastating problem for the integrity of lawyers.

Because the bar has become a less discrete entity and lawyers have become more identified with their clients' interests and less likely to shift in whom they represent, the redescription of role that once "worked" to avoid the integrity critique will no longer work.<sup>76</sup> If lawyers see themselves as betraying their commitment as human beings to honesty and fair play, then the integrity problem hits with full force. The only way out is for lawyers to see themselves as exercising the virtue of fidelity and the capacity for negative capability, rather than seeing themselves as liars and cheaters. But they cannot do this unless they can shift their cognitive mindset so that they are in the grip of a powerful role redescription of a sort the bar purveys. The capacity of the bar to effectuate this cognitive shift, and the capacity of individual lawyers to sustain the shift in themselves is sensitive to the social and cultural context in which the legal profession has situated itself. As we move into the future, lawyers will become tragic villains;<sup>77</sup> although striving to play a role that utilizes fidelity and negative capability to legitimize adjudication, they will increasingly be unable to do so, and—with all good intentions—will revert to understanding

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72. Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995).

73. DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000).

74. Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273 (1998).

75. Wilkins, *supra* note 47.

76. MARKOVITS, *supra* note 1, at 245.

77. *Id.* at 246.

themselves as the equivalent of liars and cheaters (and, since they will no longer be able to play that role, will to that extent be liars and cheaters).

While most legal ethics scholars reading Markovits might pardon the melodrama of the “Tragic Villains” chapter, they will bridle at the inversion of ordinary moral thinking it represents. Markovits comes perilously close to saying that self-deception is the key to integrity. If too much exposure to the real world impact of one’s conduct and its actual entrenchment in the intercourse of life turns out to spoil the story that lawyers are telling themselves—their role redescription—then so much the worse for the story. A cognitive mindset that can only be retained by artificial barriers to experience and knowledge would seem to be a cognitive mindset not worth keeping. Transparency, not insularity, preserves integrity. When lawyers exceed the bounds of what a plausible conception of fidelity to clients would warrant, we want them to recognize what is happening, not to keep humming along cheerily because their professional norms insulate them from moral self-awareness.<sup>78</sup>

For all of the reasons indicated in prior sections, I am in some ways even less receptive to Markovits’s argument than those who accept his earlier conclusions would be. I do not think that lawyers lie and cheat or, therefore, that there is an integrity problem that runs as deep as Markovits suggests or that there is a serious concern as to whether lawyers can lead a life worthy of commitment. Furthermore, I do not think that the negative capability resuscitation of lawyers’ integrity that Markovits constructs would work, if it worked, by virtue of a role-based redescription lawyers tell themselves. As a result, it should be unsurprising that I also reject his insularity argument.

But here, as with his other claims, I think Markovits leads us to a profoundly important concern—indeed, three important concerns—about the perils of lost insularity. In outlining them below, I do not mean to affirm Markovits’s conclusion that we should mourn the loss of insularity, all things considered, let alone his conclusion that lawyers are doomed to be tragic villains. I do, however, wish to affirm the contention that the loss of insularity provides a kind of threat to the legal profession, a threat that can be expressed in the language of integrity.

First, an important aspect of integrity is knowing who one is and who one is not. Perhaps somewhat counterintuitively, this aspect of self-knowledge is enhanced if lawyers are more detached from the parties they represent and

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78. See generally Luban, *supra* note 69, at 19–63; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975).



more aware that what they are doing is providing voice and representation to another, rather than working side-by-side with that other. A lawyer in the litigation section of a law firm that does products liability defense for one or two drug manufacturers, for example, will have a harder time than the jack-of-all-trades litigator knowing whether, in his day-in-day-out representation of the client in a particularly long and drawn out case or set of cases, he is the client or is only the client's mouthpiece. This does not make him a liar or a cheater or a person whose life is unworthy of commitment. And, indeed, if he comes to share his client's goals and values fully, he will likely feel less conflict and less self-reproach. As psychologists who study cognitive dissonance tell us, this is partly why such transformations occur.

Transformations are not always as complete or as clear as they might seem, however, and partial or incomplete transformations may be personally costly. For one thing, in the event that the lawyer's client does make a choice he would not have chosen himself as a legal actor (for example, to make a certain motion, assert a certain defense or counterclaim), because as an individual he would judge it to be too weakly founded or too close to being exploitive to be justifiable, his do-not-judge-the-client mindset will be less available because of his higher degree of identification with the client. And yet, because he is the lawyer and not the client, he is obligated to behave as if he fully inhabits that mindset of professional detachment. The lawyer may have trouble judging how identified he is with his client, and in this sense, he may be unclear on who he is as a person and what he himself stands for.<sup>79</sup>

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79. The psychological costs of personal change are, interestingly, one of the central themes of Chapter 6, and play a very large role in Markovits's philosophical defense of Williams. MARKOVITS, *supra* note 1, at 143-50. Indeed, Markovits's defense of Jim's decision not to kill is oddly based on a kind of cost-of-change argument. The question is why it might be rational for a person to have ethical commitments—such as the commitment not, through one's acts, to bring about another person's death—that are so deeply entrenched that one would be unwilling to violate those commitments even if one saw what appeared to be a strong impartialist justification for doing so. Markovits's answer is that leading lives that amount to something and being a person who has some goals and substance would not be possible unless at least certain commitments are so deeply entrenched that we are incapable of revisiting them; it would be simply too psychologically costly to rethink commitments every time there would appear to be reasons to rethink them. Hence, a rational person makes such commitments. Given that it is rational to make commitments of this form, given that the commitment not to take other lives is a commitment that it is entirely justifiable for a person to have, and given that Jim has made such a commitment, it is not true that Jim is ethically required to take the life of another. The point would not be that one was asking Jim to betray his basic commitments (although one would be), but that one would be asking Jim not to have this basic commitment, or, perhaps, any basic commitments of this strength, and those would be unjustifiable demands.

A second sense in which the diminution in the insularity of the bar tends to amplify integrity problems pertains to issues of the sort discussed at the end of Part II. I commented there that the lawyer's failure to disclose misgivings about the accuracy or truth of his client's account is not *dishonesty* and that the pursuit of nonfrivolous but questionable claims is not *cheating*, but that neither of these actions exemplify the traits of honesty and trustworthiness that one ordinarily associates with the virtue of integrity. If we abstract away from the role of adversary advocacy, this is not "pillar of the community" or "punctilio of honor" conduct, on its face; rather, it is conduct that would appropriately give rise to pangs of conscience.

Yet, as Fred Zacharias and Bruce Green have argued,<sup>80</sup> lawyers have not conceived their role as one that requires the abandonment of conscience. And, of course, many lawyers—including adversary advocates—pride themselves on being men or women of integrity in the sense of being beacons of honesty and trustworthiness. Part of the explanation for how this is possible is that honesty and trustworthiness are to a significant extent virtues that depend on a person's generating clear expectations that turn out to be justifiable; they are "truth-in-advertising" virtues. The adversary advocate defending a client in criminal or civil litigation is not putting forward all the misgivings he might have about the case, but no one expects the lawyer to do this. Lawyers are understood to be acting in a manner that toes a particular line of affirmative truthfulness without full candor, and there are both rules of professional conduct and conventions of lawyering that help to define where this line is. Friends who play poker together every month can trust one another and regard one another as honorable not because the poker playing is done in full candor, but because their perception of one another is entrenched within a set of special norms of conduct relative to which honesty and trustworthiness can be restored.

If change, expansion, and dissolution of subcommunity boundaries become too great, social conventions that anchor the expectations of lawyers may begin to dissolve. Lawyers may lose a grip on just where the line is that they—and their adversaries in litigation—are carefully trying not to cross. When this occurs, members of the profession may begin to lose the availability of the virtue of integrity as an *excellence* of honesty and trustworthiness within their profession, even if they do not become liars and cheaters. Whether this has occurred is an empirical question whose answer I do not pretend to know. But Markovits is right that the way lawyers understand their profession and one

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80. Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005).

another has, in principle, an impact on the set of ideals they are able to hold out to themselves as possible.

## VI. THE PROBLEM OF THE INCONGRUITIES OF JUSTICE

The challenge presented to lawyers in our political and legal system is but the sharpest version of the challenge that exists for our political and legal system as a whole, and for everyone in it. The problem is that a system that takes legal rights seriously, as does ours, will almost inevitably be found deeply disappointing in its capacity to perform what would seem to be the single most important function of a legal system: securing justice. This is not because legal rights have nothing to do with justice or only bear some antagonistic relationship with justice; it is because the concept of justice covers more than one ideal, and the ideal to which our conception of legal rights is fundamentally connected fits uneasily with the conceptions of justice to which the notion of securing justice is connected.

As Markovits has rightly emphasized, democracy requires that individuals and entities whose conflicts are disposed of by the state through coercive means need to be respected and their dignity recognized. Moreover, in our liberal democracy, we have undertaken to interpret this requirement so as to parcel out a wide variety of legal rights to individuals, and have done so in a manner that is both intended to realize a variety of rule-of-law values and aimed to serve a variety of substantive ends. As Stephen Pepper and others have pointed out, legal rights are extraordinarily complex, and, as a result, the promise of respect and dignity that underlay the crafting of such rights into the law is largely hollow without the promise of legal representation. Markovits argues that lawyers serving with fidelity play a role in realizing this promise. Building on Fried's work, Markovits indicates that this activity is a substantial good. As all of these scholars would be happy to admit, and as a broad tradition of legal scholarship over the past several decades has passionately contended, client-centered representation is an integral part of the justice of our legal system, not simply a means to an end.

It is tempting to refer to the form of justice that legal representation permits as *procedural* justice, but this would be misleading on several fronts. The right to recover compensation from a tortfeasor is not procedural justice, nor is the right to remain free of liability if one has not committed the tort. Both of these rights are, when all is said and done, quite meaningless without an adversary advocate. The right to a lawyer in civil cases is typically less dramatic than the Sixth Amendment right to counsel in a criminal proceeding. However, having access to a lawyer is of similar importance in that having access to a lawyer is critical to the meaningfulness of other substantive rights,

such as the right to remain free of criminal punishment absent a showing by the state that convinces a jury of the violation of an appropriately announced law. The right to legal representation is significant to the meaningfulness of the substantive rights. The justice that legal representation permits is therefore the substantive justice that goes hand in hand with having a rule of law that allocates legal rights to individuals on many different levels. Within adversary advocacy, these are legal rights that involve empowerment (from the point of view of the plaintiff) and freedom from liability as a result of another's exercise of empowerment (from the point of view of the defendant). Within other areas of legal practice, these are legal rights to engage in transactions, transfer property, create companies, marry, et cetera. Because these are the very legal rights—legal powers and legal liberties and legal protections—that constitute having a legal order that operates in a rule-like manner in a system that has a rule of law, I shall refer to the form of justice that is committed to seeing to it that these rights are given substance *constitutive justice*. Although this is perhaps too lofty a phrase, its excessive loftiness will only help to make my point.

Respecting legal rights is no doubt essential to some forms of justice but there is more than one form of justice, even if “justice” is defined broadly. Without purporting to cover all forms of justice, it is useful to designate at least three broad categories: constitutive justice, dynamic justice (which includes both retributive justice in criminal law and corrective justice in private law), and distributive justice. To say that a certain trial in which a defendant was acquitted of homicide was a miscarriage of justice is not necessarily to say that the system failed to respect anyone's legal rights: it is entirely possible that each side was represented well and that the jury decided for the defendant. However, it is entirely cogent for someone who believes the defendant was guilty and that there was adequate proof of such guilt to describe the result as a miscarriage of justice. What such a person might mean is that defendant ought to have been convicted and punished; retributive justice required the conviction and punishment of an actor who deserved such punishment. Justice was not done, even if rights justly allocated were properly respected.

Although retributive justice is typically reserved for criminal law, it is quite easy to speak of the civil law in terms of corrective justice. If one wonders whether a manufacturer who marketed a defective product that hurt someone has been forced to pay the victim, one is wondering whether corrective justice has been done. Conversely, if the manufacturer's product never even went near the plaintiff, and could not have done so, then a jury that decides to hold the defendant liable anyway is not doing corrective justice. Both retributive justice and corrective justice are species of what might be called “dynamic justice”: the conception of justice as something that is *done*, a legal disposition meted out in light of what others have done in the past.

A lawyer who faithfully represents his client and asserts his client's rights is, to the extent articulated above, doing constitutive justice, but there is no guarantee that dynamic justice will be done as a result of his participation. Constitutive justice is what lawyers work at, but dynamic justice is what lawyers are often aspiring to, at a private level. Adversarial lawyers stand right at the interface between different kinds of justice. Because their normal participation is to give heft to legal rights, they frequently find themselves in the midst of frustrating the doing of dynamic justice.

It is not only adversarial lawyers who face the awkward fit of their own rights-representing professional activity and a distinct but equally powerful conception of justice. Transactional lawyers do too. Although one of the things members of a society often hope for in their legal system is the capacity to *do justice*, which is a dynamic notion, another ideal is that benefits and burdens, goods and ills, will be justly distributed in society. Distributive justice and dynamic justice are no doubt connected in various ways but they are hardly the same. While purely transactional lawyers deal less frequently with tribunals whose ideal function is to do dynamic justice, they deal on a daily basis with the allocation and reallocation of goods. In their work, they must attend to and protect their clients' rights, typically in transactions. Those transactions can be unjust by failing to respect their clients' rights, and a lawyer is there in part to protect such rights. But even if she succeeds in doing so—indeed, sometimes because she has succeeded in doing so—the alterations in holdings or power created by the transaction will often have no claim to be increasing distributive justice in any palpable sense, and sometimes the lawyer—stepping out of her role as lawyer for a time—will end up anxiously wondering whether distributive justice has been diminished.

The problem is that, of the three different ideals that go under the name “justice”—dynamic justice, distributive justice, and constitutive justice—only one of them, constitutive justice, is the central focus of the practicing lawyer with clients. It is essential to a liberal democratic state to have a fair scheme of legal rights for individuals; this is, in itself, a significant form of justice, and a form that lawyers—operating one by one—are essential to preserving and protecting. Yet members of society—and this includes those members who happen to be lawyers—also want our legal system to deliver dynamic justice and distributive justice. There is no guarantee that the lawyer's role in protecting her client's rights—preserving our system's constitutive justice—will wind up promoting dynamic justice or distributive justice. Indeed, there are many reasons to suppose that it will often not do so. The several forms of justice are incongruous with one another. Because there is no reason to believe that all of the forms of justice can be integrated with one another, justice itself is not a whole.

I suspect that the incongruities of justice are a large part of what leads an adversary advocate to engage in self-reproach, and that it is part of what leads lawyers to become anxious about who they are, where they stand, what they are doing with their lives, and whether they have really lost whatever integrity they had to begin with. If one sees oneself as seeking justice, and representing clients' legal rights for that reason—which, I believe, is how lawyers often do want to see themselves—one might still end up wondering whether one has facilitated dynamic or distributive justice, and one might well answer “No.”

One way in which lawyers can respond to the incongruities of justice begins with the ideal of fidelity to the client. Markovits is right, I suspect, to think that a certain kind of passion for fidelity and negative capability—a purism about the infinitely pliable and formless adversary advocate—can help to smooth over the discomforts that others perceive in the incongruities of justice. This kind of ultracommitted advocate makes as his top project the serving of clients and his top normative commitment the doing of what I have called constitutive justice, albeit in a manner that takes the division of labor very seriously. If Markovits is correct about the diminishing insularity of the bar, then it may be that this role is becoming less available and that one comfortable place for the lawyer to stop and to take pride in herself is vanishing. The increased adversarialness of the bar is likely to lead many lawyers to identify more closely with their clients' interests. By bringing their views of what constitutes dynamic or distributive justice closer to that of their clients, lawyers can reduce the conflicts they perceive between constitutive justice and dynamic and distributive justice.

I suspect that many legal ethics scholars are like myself in that they are skeptical about the purist ideal of the adversary advocate who holds constitutive justice as an unchallenged top priority and unconvinced that there is really an integrity problem of the sort Markovits claims that would even begin to justify such a singleminded view. From this perspective, the purist ideal of the fidelity of the adversary advocate was never necessary, and in any event always quite dangerous, for it entrenches, rather than exposes, what is in the end admitted to be a kind of illusion. Many such scholars, like William Simon, are rather pleased to see the illusion crumble, if it will help us to recognize how poorly we are doing at realizing other forms of justice.

The solution—and that is far too grand a term, for I have no solution, only a suggestion—is not to wish away the incongruities of justice we perceive or to accept them as they are. It is to recognize that the incongruities of justice can be greater or lesser and that we lawyers are better situated than anyone else to effect practical changes aimed at harmonizing the many forms of justice, such as modifying the legal ethics rules, modifying procedural rules, modifying institutional and economic structures determining the allocation of legal

services, and, critically, modifying the substantive law creating and allocating legal rights. To this end, the perception that one's integrity is under attack—the pangs of conscience and self-reproach felt, from time to time—may actually be a positive force in the life of the lawyer. Someone must stand ready to identify the systemic problems of our adversarial system, and to do so in a manner that does not spring from one interest group or political cause or another, nor from a point of view that idealizes the virtues of fidelity and negative capability, which, after all, only go so far. None are better suited to this job than lawyers themselves, including the slightly self-reproaching hired gun.

## CONCLUSION

*A Modern Legal Ethics* is an intellectual whirlwind, sweeping from Aristotle and Kant to contemporary debates about impartial moral theory to the details of the Model Rules without stopping to take a breath. What is most arresting in the book is the charge that lawyers lie and cheat, a charge that turns out to be indefensible. What is most defensible is the claim that the morally troubling aspects of adversarial advocacy derive from a lawyer's obligation of fidelity and her ability to provide the client with a voice, the very capacities that arguably allow the legal profession to serve a legitimizing role in a democracy. What is most engaging is the question that drives Markovits throughout: is it possible for an adversary advocate today to have integrity?

At one level, the answer to Markovits's question is too obvious to merit asking. One's inclination is to answer:

Of course an adversary advocate can have integrity. I know many such individuals. They are people of integrity: they are honest and trustworthy; they have a set of worthwhile commitments in their life that motivates them, and with respect to which they remain committed; and, their goals and values ground their actions and their life plan in a way that makes them whole. If you want more, you are not looking for integrity but for something else.

Markovits does want more, which is not to say he wants a better person than those just described. He wants—as I suggested in Part I—a philosophical account of what set of values is operating in the adversary advocate such that conduct that would normally be viewed in a negative light—limited candor and a high level of willingness to employ the legal system in ways that generate questionable advantages and disadvantages—can actually turn out to be justifiable, even obligatory conduct. And he wants an account of what the normative structure of our political and legal system is that such a set of values

does rise to this level. To his great credit, he has begun to deliver such an account: fidelity, detachment, and empowerment are the values; practical legitimation of adjudication in a democracy is the structural feature. My largest concern about *A Modern Legal Ethics* is that, despite its concern to preserve integrity, its most natural reading points away from integrity. The virtues of honesty, trustworthiness, candor, and constancy that lie at the core of integrity do not permit a lawyer to ignore the incongruities of justice or to wrap herself in the cocoon of client fidelity. They demand judgment, moderation, sensitivity to community understandings and expectations, and—as thinkers from Aristotle to Williams and Kronman have recognized—practical engagement.