

October 2009

## Of Natural Threads and Legal Hoops: Bob Ellickson's Property Scholarship

Carol M. Rose

Follow this and additional works at: <https://scholarship.law.wm.edu/wmborj>



Part of the [Property Law and Real Estate Commons](#)

---

### Repository Citation

Carol M. Rose, *Of Natural Threads and Legal Hoops: Bob Ellickson's Property Scholarship*, 18 Wm. & Mary Bill Rts. J. 199 (2009), <https://scholarship.law.wm.edu/wmborj/vol18/iss1/8>

Copyright c 2009 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmborj>

# OF NATURAL THREADS AND LEGAL HOOPS: BOB ELICKSON'S PROPERTY SCHOLARSHIP

Carol M. Rose\*

Bob Ellickson and I have been working the same regions of property scholarship for so long that he once described us as joined at the hip. Those who know us would probably say he kept his right hip and I kept my left one, but still, it is not a bad metaphor. Not only have we edited a property reader together, and not only did we teach together for many years at Yale Law School, but without knowing it, we grew up within a few miles of each other in the Washington area, and we almost went to the same college at the same time (Oberlin—Bob went there, and I almost did, but then I changed my mind and went to the somewhat wilder Antioch). Nevertheless, even for one joined at the hip, there is always more to learn about Bob's work, and so, in preparation for this conference, I did a review of his work.

Now, anyone who knows Bob knows he has a stubborn streak, so I thought that the germs of all his future work would be there in his very first publication: his student note in the *Yale Law Journal*.<sup>1</sup> Wrong. Or at least, partially wrong. The note reviewed four subsidized housing programs from the 1960s.<sup>2</sup> To be sure, it was about land and housing, and low-income housing in particular, all constant topics in Bob's later work.<sup>3</sup> But with its larding of housing law jargon and statutory sections—"PHA" and "Sec. 221(d) (3)" and so on<sup>4</sup>—it was not at all the Bob Ellickson we now know. Quite the contrary, it was clearly an exercise in what Bob now calls "legal centralism," and he does not mean that as a compliment.

I can only surmise that the baleful pressure of the *Journal's* editorial board crammed Bob's juvenilia into such an alien mold, because in his next and independent publication, we see the full-blown Ellicksonian take on the world. *Alternatives to Zoning*<sup>5</sup> (1973) is the kind of first article that creates massive envy and inferiority

---

\* Ashybe Lohse Professor of Water and Natural Resource Law, University of Arizona James E. Rogers College of Law, and Gordon Bradford Tweedy Professor of Law and Organization (Emeritus), Yale Law School.

<sup>1</sup> Robert Ellickson, Note, *Government Housing Assistance to the Poor*, 76 YALE L.J. 508 (1967).

<sup>2</sup> *Id.* at 508–35.

<sup>3</sup> See, e.g., Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (analyzing a policy requiring housing developers to set aside a certain fraction of units for moderate- and low-income families).

<sup>4</sup> Ellickson, *supra* note 1, at 509, 535.

<sup>5</sup> Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973).

complexes in beginning law teachers. Speaking for myself, I am certainly glad that I did not know for a number of years that it was Bob's first writing as a junior law professor. If I had known, I think I would have just thrown in the towel before I started. Quite aside from its classic status, *Alternatives* gives the reader a taste of the themes and characteristics that mark Bob's work throughout his career, right up to today.

First, there is the use of homely examples to make highly sophisticated points about property. These show up again and again in his scholarship. In *Alternatives*, he uses the locations of grocery stores in the Santa Monica Mountains north of the Los Angeles basin to illustrate externalities, positive and negative.<sup>6</sup> In *Cities and Homeowners Associations*<sup>7</sup> (1982), the homely example is Minot, North Dakota, which he uses to twit the more high-flying rhetoric of Critical Legal Studies authors.<sup>8</sup> Most famous of all among the homely examples, of course, is that paragon of decentralized "order without law": Shasta County, California.<sup>9</sup>

Second, *Alternatives* showed Bob's abiding interest in interactions between and among property owners.<sup>10</sup> How do people manage the overlapping features of their properties, those positive and negative externalities? How do they delineate their property rights so as to orchestrate their relationships among themselves? These issues would become the core of Bob's later property scholarship.<sup>11</sup>

Third, one sees in *Alternatives* Bob's skepticism about governmental intervention—specifically zoning.<sup>12</sup> He argued then (and later) that this kind of governmental action

<sup>6</sup> See *id.* at 684–87.

<sup>7</sup> Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

<sup>8</sup> As a part of his refutation of Gerald Frug's assertions that municipalities are legally impotent, Bob uses the example of Minot's ostensibly legal though unsuccessful ballot initiative for a municipally-owned bank. *Id.* at 1572–73, 1580. In the same ironic vein he refers to himself as a "Prisoner of Liberal Thought" to distinguish himself from his Critical Legal Studies counterparts. *Id.* at 1564.

<sup>9</sup> See, e.g., ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991) [hereinafter ELICKSON, ORDER WITHOUT LAW] (using rural Shasta County to demonstrate that people often resolve their disputes cooperatively without reference to the laws applicable to those disputes); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 STAN. L. REV. 623 (1986) [hereinafter Ellickson, *Of Coase and Cattle*] (reporting the results of an investigation into how Shasta County landowners resolve disputes arising from trespass by livestock).

<sup>10</sup> See Ellickson, *supra* note 5, at 682 (advancing the thesis that "conflicts among neighboring landowners are generally better resolved by systems less centralized than master planning and zoning").

<sup>11</sup> See, e.g., Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1333–34 (1993) (describing internal and external institutions created by landowners to govern land-use relationships).

<sup>12</sup> See Ellickson, *supra* note 5, at 685 ("[L]egal sanctions are among the least civilized ways of handling conflicts between neighbors.").

is administratively costly; that it is ham-handedly overprotective against nuisances; that it is rife with special interest favoritism; and perhaps most important, that it often has a number of damaging third-party effects, particularly in reducing housing opportunities for families of modest means.<sup>13</sup>

Along with this skepticism about direct regulation, *Alternatives* showed another constant in Bob's work: a preference for legal structures that can promote private ordering.<sup>14</sup> In that article, and with a half-hearted nod to legal centralism, Bob proposed measures that could streamline private real estate covenants; he also argued for other measures for which the article was especially noted, particularly his proposal to reorganize private nuisance law in such a way as to allow property owners to find their own solutions to local land-use conflicts.<sup>15</sup>

Finally, Bob's investigation of nuisance law in *Alternatives* led him to promote "normalcy," or ordinary neighborliness, as a baseline standard of behavior among property owners; he proposed that ordinary activities be left alone, that subnormal activities pay their way via liability rules, and that, if possible, supernormal activities be rewarded.<sup>16</sup> This normalcy baseline would later famously morph into "norms" in Bob's most celebrated work, *Order Without Law* (1991).<sup>17</sup>

Even with all these beacons of future work, however, *Alternatives* did not yet have all the pieces in place. For example, the article dealt only very cursorily with the issue of rewarding supernormal behavior, palming this task off to the law of contract and quasi-contract.<sup>18</sup> Later, in *Order Without Law*, Bob would find a better answer in informal norms: the game or strategy that he called "Even-Up," the mental accounting that neighbors keep of good deeds and the reciprocal rewards that they call forth on an informal basis.<sup>19</sup> Then too, *Alternatives* got rather tangled up on the specific details of his proposal for "nuisance boards"—for example, which level of community should set the standards for neighborly or normal behavior, and how rules and enforcement should be managed.<sup>20</sup> But *Alternatives* did have another germ of what was to come, specifically for Bob's later work on social norms. At one point, it suggested ever so gently that perhaps neighboring property owners do not need law

---

<sup>13</sup> See *id.* at 693–705.

<sup>14</sup> See, e.g., *id.* at 761–79 (discussing the use of nuisance laws and fines to promote a more privatized system of land use regulation).

<sup>15</sup> See *id.*

<sup>16</sup> See *id.* at 729–33.

<sup>17</sup> See ELLICKSON, *ORDER WITHOUT LAW*, *supra* note 9, at 126–27 (defining norms as "social forces" encapsulating behavior that is "normal" in society and that people should mimic to avoid being punished).

<sup>18</sup> Ellickson, *supra* note 5, at 730–31, 730 n.176.

<sup>19</sup> ELLICKSON, *ORDER WITHOUT LAW*, *supra* note 9, at 154–55, 225–29. I claim credit for thinking of the name "Even-Up" as a substitute for Bob's initial designation: "Get Even." Even Bob recognized that "Get Even" might not connote a desirable tone of neighborliness.

<sup>20</sup> See Ellickson, *supra* note 5, at 762–64.

at all to organize their relations. Instead, they could leave matters to good manners.<sup>21</sup> The rest, as they say, is history.

Well, almost. A few subsequent pieces still suggested that perhaps Bob had not quite thrown off the mantle of legal centralism in his property work. His *Suburban Growth Controls*<sup>22</sup> (1977) and the later *Irony of "Inclusionary" Zoning*<sup>23</sup> (1981) focused on legal regimes. These articles especially railed at those urban and suburban legal regimes that purport to do good while actually hurting outsiders—particularly low income outsiders whose need for cheap housing falls by the wayside in fancy land use regulations (notice the echoes of Bob's 1967 note).<sup>24</sup> In the course of these complaints, Bob described such local regulatory programs as the products of homeowners' "cartels," in which homeowners support growth control legislation that increases the value of their houses by reducing supply for others.<sup>25</sup> While some may think that the cartel label is too purposefully Machiavellian to pin on your average suburbanite, the land-use economist William Fischel has picked up on the idea of homeowners' cartel-like political proclivities,<sup>26</sup> as has the newer land-use regulation scholar Christopher Serkin.<sup>27</sup>

Bob's next big breakthrough was of course his *Stanford Law Review* article *Of Coase and Cattle*<sup>28</sup> (1986), soon to be developed into his signature work, the book *Order Without Law*.<sup>29</sup> In both, he explored the ways in which property and property owners' relationships are governed not by law but rather by social norms.<sup>30</sup> Because others in this issue are devoting their remarks to Bob's work on norms,<sup>31</sup> I will resist

<sup>21</sup> See *id.* at 685–86.

<sup>22</sup> Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 (1977).

<sup>23</sup> Ellickson, *supra* note 3.

<sup>24</sup> Compare Ellickson, *supra* note 22, at 402 (discussing effects of municipal growth controls on housing consumers), and Ellickson, *supra* note 3, at 1170 ("[M]ost 'inclusionary' programs are ironically titled."), with Ellickson, *supra* note 1, at 508 ("[T]he result of thirty years of federal intervention in the housing market has not been a bonanza for the poor.").

<sup>25</sup> See Ellickson, *supra* note 22, at 389, 427, 430–38.

<sup>26</sup> See WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES* 4 (2001).

<sup>27</sup> See Christopher Serkin, *Big Differences for Small Governments: Local Governments and the Takings Clause*, 81 N.Y.U. L. REV. 1624, 1627–28, 1648 (2006) (accepting the view that homeowners support local land-use regulations that maintain property values while reducing their own taxes).

<sup>28</sup> Ellickson, *Of Coase and Cattle*, *supra* note 9.

<sup>29</sup> ELICKSON, *ORDER WITHOUT LAW*, *supra* note 9.

<sup>30</sup> See *id.* at 52–53; Ellickson, *Of Coase and Cattle*, *supra* note 9, at 672–73.

<sup>31</sup> See Lee Anne Fennell, *Scaling Property with Professor Ellickson*, 18 WM. & MARY BILL RTS. J. 173 (2009); Nicole Stelle Garnett, *Private Norms and Public Spaces*, 18 WM. & MARY BILL RTS. J. 183 (2009); Henry E. Smith, *Ellickson's Extraordinary Look at the Ordinary*, 18 WM. & MARY BILL RTS. J. 207 (2009).

the temptation to say more about it, although this terrific work has been of central importance in Bob's property scholarship. My own view is that in the property area, the major follow-on articles to *Order Without Law* were his articles *Property in Land*<sup>32</sup> (1993) and *Ancient Land Law: Mesopotamia, Egypt, Israel*<sup>33</sup> (1995), as well as his more recent article and book on the household.<sup>34</sup> Although Bob has much more property work than these pieces, I want to focus on them because I think they are especially illustrative of some central themes in Bob's property scholarship.

In *Order Without Law* and all these follow-on works, Bob puts forth his ideas about the natural character of property. The question he addresses is the following: left to themselves, how do people organize the relationships among themselves *vis-à-vis* their various properties?<sup>35</sup> He gives one version of the answer in Shasta County,<sup>36</sup> but he gives it again in ancient Israel,<sup>37</sup> as well in a number of the examples in *Property in Land*.<sup>38</sup>

So, what do people do? For one thing, they cannot confine their actions to a single piece of property. Their properties and their property-related activities interact with the surrounding areas, and this means that they have to interact with one another in order to manage activities that have scale economies as well as activities that involve risk sharing.<sup>39</sup> They are thus very apt to slide into close-knit groups—social groups in which they can interact on a number of fronts at the same time that they can monitor one another's actions.<sup>40</sup> As in the very early *Alternatives to Zoning*, people can leave normal behavior alone, and they can punish subnormal behavior (generally with mild chastisements like gossip).<sup>41</sup> But going beyond the legal regimes outlined in *Alternatives*, they can also reward supernormal behavior through social norms—especially through the strategy of “Even-Up,” keeping a rough accounting of good deeds and rewarding them on other fronts.<sup>42</sup>

<sup>32</sup> *Property in Land*, *supra* note 11.

<sup>33</sup> Robert C. Ellickson & Charles DiA. Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI-KENT L. REV. 321 (1995).

<sup>34</sup> ROBERT C. ELICKSON, *THE HOUSEHOLD: INFORMAL ORDER AROUND THE HEARTH* (2008) [hereinafter ELICKSON, *THE HOUSEHOLD*]; Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226 (2006).

<sup>35</sup> See ELICKSON, *ORDER WITHOUT LAW*, *supra* note 9, at 1.

<sup>36</sup> See both ELICKSON, *ORDER WITHOUT LAW*, *supra* note 9, and Ellickson, *Of Coase and Cattle*, *supra* note 9, for discussions of how norms and not legal rules govern trespass laws in Shasta County.

<sup>37</sup> See Ellickson & DiA. Thorland, *supra* note 33 *passim*.

<sup>38</sup> See Ellickson, *supra* note 11 (discussing many case studies of historical land regimes).

<sup>39</sup> See, e.g., *id.* at 1332–44 (describing group management of property for scale economies and risk sharing).

<sup>40</sup> See ELICKSON, *ORDER WITHOUT LAW*, *supra* note 9, at 167–83; Ellickson, *supra* note 11, at 1320; Ellickson & DiA. Thorland, *supra* note 33, at 351–52, 408.

<sup>41</sup> See ELICKSON, *ORDER WITHOUT LAW*, *supra* note 9, at 225–29.

<sup>42</sup> See *id.*

More specifically with respect to property, in the natural community people will have individual property, both for the sake of incentives and for libertarian privacy.<sup>43</sup> They will have communal property or communal norms for the sake of economies of scale (as in the common livestock grazing in ancient Mesopotamia<sup>44</sup> or the norms about wandering cattle in Shasta<sup>45</sup>), and they will have open-access property like roads for the sake of wider circulation.<sup>46</sup> And yes, they will buy, sell, and mortgage their properties, always taking into account their ability to monitor and deal with bad behavior.<sup>47</sup> But in Bob's presentation, the basic natural patterns of property ownership are not multitudinous. Instead, on the Ellicksonian thesis, they are remarkably circumscribed, and remarkably similar over time.<sup>48</sup>

Although I have not yet fully absorbed Bob's new book, I understand it to say the same of the household. Here too there is a natural order. The natural household consists of a relatively small number of people, perhaps six or seven at the most.<sup>49</sup> These participants are overwhelmingly "intimates"—normally family members—but basically people who are committed to one another. The household's small size reduces transaction costs, while its members' mutual commitments cut back on the various forms of cheating and shirking that might otherwise occur in the household setting.<sup>50</sup>

Like the property owners in Shasta or ancient Israel, the household's participants all bring some chips to the table, in the form of capital and labor, and their different chips result in different payoff structures.<sup>51</sup> But—shades of the "Even-Up" strategy of Shasta County's residents—the household members all have to pay attention to one another or face the prospect that some important member will become disaffected to the point of exit.<sup>52</sup> To be sure, by a convenient move—making a widower the head of his exemplary fictional household<sup>53</sup>—Bob sidelines the intimate conflicts between spouses, and the same move allows him to give only minimal attention to larger social patterns that generally allow one spouse to bring more capital to the table than the other.<sup>54</sup> Some of the rest of us (speaking for the left hip) think those issues are pretty

<sup>43</sup> See Ellickson, *supra* note 11, at 1327–30, 1352–54.

<sup>44</sup> See Ellickson & DiA. Thorland, *supra* note 33, at 357–58.

<sup>45</sup> See ELICKSON, ORDER WITHOUT LAW, *supra* note 9, at 52–53, 185.

<sup>46</sup> See Ellickson, *supra* note 11, at 1381–85.

<sup>47</sup> See Ellickson & DiA. Thorland, *supra* note 33, at 378–87, 393–400.

<sup>48</sup> See Ellickson, *supra* note 11, at 1398–1400; Ellickson & DiA. Thorland, *supra* note 33, at 408–09.

<sup>49</sup> ELICKSON, THE HOUSEHOLD, *supra* note 34, at 35–41.

<sup>50</sup> See *id.* at 27–34.

<sup>51</sup> See *id.* at 60–75.

<sup>52</sup> See *id.* at 25, 103.

<sup>53</sup> See *id.* at 11.

<sup>54</sup> For example, a few brief references cite the external norms that might allocate more of the housework to the household's female members, as well as some equalization in gender norms. *Id.* at 26, 97, 115–16.

important in the household.<sup>55</sup> But however these contentious questions may play out, Bob once again finds a consistent and very constrained natural pattern: the natural household consists of a relatively small number of intimates who regulate their interactions by informal norms.<sup>56</sup>

So this is the natural household, just as Shasta is the natural community. Bob's writings show a certain morbid fascination with utopian communities; these are groups that have tried intentionally to break away from these natural forms of household and community.<sup>57</sup> Not surprisingly, in Bob's view, such efforts are doomed. They may lurch along for a time, but sooner or later, they crash either on astronomical transaction costs or on the reassertion of hierarchy.<sup>58</sup> (I myself live in a kind of quasi-utopia, a "co-housing" community in Tucson, Arizona, and in my darker moments I think there may be something to what he says.) In Bob's view, utopianism is a variant on overly intrusive formal law: both undermine a natural order and the norms that make this order work.<sup>59</sup> He thinks it is a mistake to introduce great rafts of legal formalisms, either by overly detailed "small-bore" formal law in the community or by similarly detailed contracts in the household.<sup>60</sup> In Bob's view, such measures will ultimately be ineffective and can only undermine the household as well as the community. Legal centralism? Balderdash.

Or is it balderdash? To my surprise, I found that at the beginning of *The Household*, Bob devotes an entire chapter to a description of the liberal state.<sup>61</sup> The elements of the liberal state are that it secures to every member of the household the right to own property, the right to contract, and the right to exit.<sup>62</sup> The liberal state is not intrusive, and it is not redistributive in any major way. In Bob's view those kinds of *dirigiste* disruptions do not just undermine property, but they also undermine the relationships among property owners and among members of the household as well.<sup>63</sup> Interestingly enough, without the liberal state, the natural household would appear to be at risk, and so would the natural community.

<sup>55</sup> For a very brief exploration of how such issues might operate in a marriage, see Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J. 2409 (1994).

<sup>56</sup> See ELLICKSON, THE HOUSEHOLD, *supra* note 34, at 28–29.

<sup>57</sup> See, e.g., *id.* at 54–55 (describing two of the longer-lived utopias, the Hutterian Brethren Benedictine settlements and Israeli Kibbutzim); Ellickson, *Property in Land*, *supra* note 11, at 1346–52 (describing the same).

<sup>58</sup> See ELLICKSON, THE HOUSEHOLD, *supra* note 34, at 53–59; Ellickson, *Property in Land*, *supra* note 11, at 1350–52, 1356, 1359.

<sup>59</sup> See Ellickson, *Property in Land*, *supra* note 11, at 1350–51.

<sup>60</sup> ELLICKSON, THE HOUSEHOLD, *supra* note 34, at 50–51, 103–06, 134–35.

<sup>61</sup> See *id.* at 10–26 ("Household Formation and Dissolution in a liberal society").

<sup>62</sup> *Id.* at 14.

<sup>63</sup> See *id.* at 14–16.



At the end of the day, I finish my odyssey through Bob Ellickson's property work wondering whether the natural community and the natural household are really natural at all, and whether they are not actually a call for a certain kind of law. It is not law like Section 221(d) (3) of the Housing Act of 1937, as in his original student note.<sup>64</sup> It is rather a kind of restrained, thin legal order—an unintrusive legal frame that allows people to weave their own quite predictable, but good-natured, patterns of order.

---

<sup>64</sup> See Ellickson, *supra* note 1, at 544.