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Beyond the Public Law: A Taxonomy of Approaches to Alternative Governing

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Abstract:

Among the most problematic realities of living together in groups larger than families and small bands is the problem of how to deal with the "bad neighbor." In this paper we identify four approaches to bad neighbor problems and suggest that planning decisions can look beyond the traditional regulatory approaches. Zoning law and other prohibitions on human activities may make societies less rich than they could be otherwise. By "rich" we are not primarily concerned with money, but with the richness of human relations. We believe that if public officials told people to solve their problems themselves, most real problems would be solved without the force of regulation.

Keywords: Urban Planning, Planning Theory, Regulation.

Resumen:

Entre las realidades más problemáticas de vivir juntos en grupos más grandes que familias y grupos pequeños está el problema de cómo lidiar con el "mal vecino". En este artículo identificamos cuatro enfoques para los problemas del mal vecino y sugerimos que las decisiones de planificación pueden ir más allá de los enfoques regulatorios tradicionales. Las leyes de zonificación y otras prohibiciones de las actividades humanas pueden hacer que las sociedades sean menos ricas de lo que podrían ser de otro modo. Cuando decimos "ricos" no nos preocupa principalmente el dinero, sino la riqueza de las relaciones humanas. Creemos que si los funcionarios públicos dijeran a la gente que resolviera sus problemas por sí misma, la mayoría de los problemas reales se resolverían sin la fuerza de la regulación.

Palabras clave: Planificación Urbana, Teoría de la Planificación, Regulación.

1. Introduction

Alternate systems of providing governance have long been discussed, and experiments in their application have been relatively widespread historically. Despite this reality we have seen relatively little development of theoretical foundations that are not premised on traditional notions of how governance is provided and the mechanisms that can provide the results we desire. As a

result, most of the experiments that have been attempted have followed the pattern of the of the traditional regulation and planning model, albeit provided privately.

While this approach widens the sphere and creates competition between jurisdictions and would almost certainly lead to innovation, the development of a strong theoretic alternatives to the traditional patterns is necessary. This approach also leaves much of the potential for better quality of life and fewer restrictions unrealized, replacing government with a private enforcer.

In this paper we explore four approaches to governance and planning that might be used in such alternative systems and suggest that consideration of the alternative approaches would be productive for those establishing alternative jurisdictions. These approaches are certainly not exhaustive in their examination but rather are a useful approach for considering alternative approaches to governance in practice.

For those interested in alternative governance or special jurisdictions at the local level especially if they are to function beyond special economic zones creating a system capable of engaging with the common problems that most local governments undertake to solve them is necessary. Unfortunately, the most common alternatives have primarily taken the same approach as traditional governance and applied in the private context.

2. The Problems of Local Governing

Among the most problematic realities of living together in groups larger than families and small bands is the problem of how to deal with the "bad neighbor." It is easy to conjure up images of the bad neighbor both from personal experience and from popular culture. The impacts of "bad neighbors" often dominate discussions of cities, and communities, and occasionally state legislatures.

When the Utah State Legislature, introduced a bill to prohibit political subdivisions (cities, counties, special districts) from regulating beekeeping.(e.utah.gov, n.d.) An advocacy group comprised, in part, of hobby beekeepers and urban farmers who wanted to keep bees in their backyards promoted it. The text of the bill says: "A political subdivision may not adopt an ordinance, rule, regulation, or resolution prohibiting a property owner from establishing or maintaining an apiary on the owner's property."

We are part of a local government list-serve whose membership is primarily city planners and attorneys. When this bill was listed online, we sent the following tongue-in-cheek email to the list serve manager, who is the division director for regional planning and transportation of Salt Lake County: "Down with the state! Beekeepers unite and rise up against your municipal overlords." He responded with, "I wanna hear what you have to say when your neighbor puts his beehive right on his fence line next to your swimming pool!" The exchange got more serious when one of us responded:

Pesticides can drift... I am not defenseless. In all seriousness, can't nuisance law solve such problems? Surely there is a large body of common law that applies. What about nuisance cases? The legislature can control cities but have a harder time in the courts. I would inform a neighbor that I deal with trespass with pesticides if his bees were a problem for me. It turns out there are many beehives around my property because I built near some orchards. The owner brings me honey and honey wine vinegar every Christmas.

The City Planner responded, "I agree that many situations get overblown, but sometimes you do just happen to get disagreeable neighbors. Whether nuisance law would be adequate to handle such a situation, I don't know. Now magnify what reactions may be if the person who owns the swimming pool has a child who is allergic to bee stings! Rare instances, you say, right? And that's true, but in my career, it has been amazing how often such situations arise!"

He added later, "My best example, [you] cannot make this stuff up, was in Salt Lake City when a small beer bar that catered to gay people wanted to upgrade to a full-service bar, which required getting a conditional use permit from the city. The neighbors adjacent to the bar were a group of very conservative, very staunch polygamists. The planning commission meeting, where supporters and opponents from these two various communities showed up, cannot be duplicated, or even believed if it were written as a sitcom script! But it happened!"

In the case of the gay bar, it isn't immediately clear who the bad neighbor is, but both may well have been the bad neighbor to the other. Our planner friend raised significant issues that led us to more carefully consider how the bad neighbor problem might be addressed. In doing so we develop a taxonomy of approaches to solving bad neighbor problems and attempt to work through pros and cons of approach. At the core of our analysis is the question "why allow planners to do what they do?" Which is quickly followed by, "what are the implications of each approach for promoting free, yet responsible neighborhoods and society?"

As we considered these questions, we found ourselves asking if there was a way outside of the traditional approaches that could address the question, we found ourselves asking. As we discussed these questions, we began to see four distinct possible approaches. Only one of which seemed to primarily be the realm of publicly provided government or something like it, while the others could easily be used by alternative jurisdictions that attempted an alternative form of governance.

A Taxonomy of Approaches

Our discussion resulted in a taxonomy of the various ways we identified as being possible to solve the problems that had emerged as we examined what local governments in particular were trying to do. Our taxonomy has come to include four approaches: Public Law, Private Law, Civil Society, and Exchange.

Our Taxonomy while useful for categorizing and considering different approaches does not suggest that the use of approaches from one category necessarily forecloses using approaches from any of the others. Instead, the taxonomy provides a way of thinking about different approaches and asking is an approach from this category the only way to accomplish our governance goals.

2.1. Public Law

Public law is the law of relationships between individuals and the government. The public law can prohibit certain actions and require others. Under the public law, beekeeping can be prohibited or not, gay bars can be permitted or not and can be allowed to expand or not. Pigs and chickens can be allowed or prohibited in urban settings. The process for determining the rules is a legislative one often complete with hearings and public comment.

The standard civics explanation of public law is that it somehow reflects the will of the people because a public body, using democratic processes, complete with citizen input, undertakes it. Our practical experience and formal training show this view of government to be painfully naïve and romantic. Consider city councils. Their primary business is providing infrastructure—water, sewer, roads—and public health and safety, yet the primary activity of city councils is making land use decisions. City councils spend most of their time debating what can be built where, how close buildings may be to the street and property lines on side and back yards, minimum lot sizes, minimum and maximum building sizes, maximum building heights, whether street trees are

required and of what species and size, allowable plantings between curbs and sidewalks, whether curbs and sidewalks are required, whether basketball standards are allowed in the driveway, how many pets a family may have, what animals are considered pets, how many unrelated people living together are considered a family, and on and on. One way to understand these governmental activities is to recognize they are cases of person A wanting something owned by person B. Lot sizes, planting, building heights, etc. all affect what choices B can make with his property. They are ways of granting A some of B's property rights. (Simmons, 2012)

2.1.1. Problems in the Public Law

Hiding one's true purposes in seeking government restrictions on neighbors is what we call policy arbitrage. It is the byproduct of attempting to resolve bad neighbor problems legislatively. Policy arbitrage is the process of exploiting law to achieve results that may not have been intended by the law, but which the law makes possible. Consider the polygamist families arguing at a public hearing that the gay bar should not be allowed to expand. They were able to couch their arguments in the language of noise ordinances, excessive traffic, and incompatible uses. all of which are covered by the ordinances of the city. Although those may have been legitimate concerns, the unstated purposes were simply that they were opposed to gay lifestyles in general, gay people in particular, and of being in close proximity to that which they find morally objectionable. The irony that they were living an illegal lifestyle was entertaining to observers but was not discussed in the hearing. What is particularly interesting is that in cities across the state of Utah limitations on occupancy, home size, and cohabitation have all been used to keep what some neighbors viewed as the immoral polygamists from moving in.

Other examples abound, parking regulations that claim to prevent street parking congestion are used to keep single-family neighborhoods from changing. Facade regulations that claim to preserve the historic look and feel of downtowns limit franchise restaurants from opening in cities. What is common among these and most examples of using the public law is that the public rules focused on attempting to correct the "bad neighbor" problem open up the opportunity for policy entrepreneurs to arbitrage the rules and arrive at their, often unrelated, preferred outcome.

Bruce Yandle's (1983) parable of bootleggers and Baptists describes how much of Public Law is made. Yandle described the bootlegger-and-Baptist model bason on his experience as a U.S. regulatory economist. Bootlegger and Baptist are terms he uses to identify members of a

coalition of seemingly opposed groups who need each other in order to gain the acceptance of a policy proposal. He takes this model from the observation that groups may work toward the same end even though their interests in that end may diverge wildly. Bootleggers benefit from bans on Sunday liquor sales or from designation of an entire county as "dry." The Baptists provide the moral cover for the bootleggers' interests. Baptists are opposed to bootlegging, but they are more opposed to legal beer and liquor sales. They provide, in Yandle's words, "vital and vocal endorsement" for banning alcohol sales. The bootleggers work in less obvious ways to lubricate the political machinery. (Yandle, n.d.)

The bad neighbor problem can bring together seemingly disparate groups to seek a Public Law solution. Professional beekeepers, for example, would not be likely to lobby against home beekeepers based on competition in the honey market, but on public health and safety issues. In fact, they would likely play the Bootlegger role by staying in the background while encouraging the Baptists (planners and other local officials) to oppose the urban beekeepers. Because bootleggers prefer to operate in the background, the bad neighbor problem offers them room for "backroom" or "underground" negotiations that lead to zoning being adapted in ways some authors describe as favoritism or corruption. (Ryan, n.d.)

2.1.1.1. Prohibiting Change

One use of public law is to use zoning laws to prohibit change. For some commentators that is a feature. For others it is a bug. The purpose of many zoning laws is to keep things as they are—to freeze the status quo through time. It will, supposedly, keep out unwanted uses and neighbors.

A downside to stifling change is that it stifles innovation by outlawing anything but the status quo. A typical innovation-stifling rule in the United States is to restrict "granny flats" on a lot with an existing house or tiny homes on small lots. The general argument is that such changes in density will change neighborhood characteristics in negative ways. The family trying to care for an elderly relative while giving him or her a measure of independence would view the change as a hugely positive one. Or the young couple attempting to build a home without what they view as crippling debt would view the opportunity to start with a tiny home a positive outcome.

2.1.1.2. Ex Ante Rules

Another feature of the public law is that it is an ex-ante approach to bad neighbors. Again, some view that as a feature and others view it as a bug. Stopping bad neighbors before they arrive gives a measure of security and permanence to existing neighborhood arrangements. Part of the trick, however, is to "correctly" anticipate bad neighbors. Does your neighbor raising chickens in her backyard make her a bad neighbor? What about putting a basketball hoop in her driveway, so her teenagers and their friends play ball in the driveway? What about planting vegetables in the park strip between the sidewalk and curb? Prohibiting your neighbors from making these and other choices might make your neighborhood a sterile place. Unintended results are a necessary feature of ex ante rules.

2.2. Private Law

The second approach to is the use of Private Law. Private law is the law regulating relationships between individuals. The tools it provides for dealing with the bad neighbor problem are the laws of torts and nuisance. Whereas public law provides ex ante protections or regulations, private law is applied ex post. Once a tort or nuisance is identified and proven, the person who is proved to have caused a harm or nuisance can be enjoined legally from continuing to create the harm or nuisance and can be required to pay damages.

There are several potential negative features to the use of private law. The most obvious is that it is applied only after a harm has been created. Thus, your neighbor can install her beehives and essentially dare you file suit if and when his bees sting your children. A second negative feature is that is often costlier to hire an attorney than it is to lobby for a new law or ordinance. In fact, the potential costs of fighting a nuisance may actually encourage the overproduction of nuisances because those harmed cannot afford costs. Finally, taking your neighbor to court erodes the social capital that may have been built among neighbors.

Applying a rule ex post may be more powerful than commonly understood. One example it the lawsuit against McDonald's for a person being burned when she spilled coffee she had just purchased in a McDonald's drive-through in her lap and suffered third-degree burns from the 180-190°. A jury awarded her $2.6 million, which the trial judge reduced to $640,000. She and McDonald's settled for an undisclosed amount during the appeal process. Many used this case to argue that tort law was spawning frivolous lawsuits. But restaurants everywhere in the United States immediately reduced their coffee temperature to 158°. In this case, tort law effectively

internalized externalities, even for people not a party to the lawsuit. (Liebeck v. Mcdonald's Restaurants, 1994)

Besides determining the appropriate temperature for coffee, tort law is useful for determining the difference between being offended and being harmed. Although it may offend your neighbor if you wear a paisley shirt with striped pants, your attire is not a tort. You may have committed a sartorial offense, but not a tortious one. As a result, those wishing to control the colors neighbors paint their houses must find a means different than tort law--zoning, shaming, or buying paint for the neighbor, for example.

If you are actually harmed by your neighbor, rather than just offended, tort and nuisance law offer solutions. If the gay bar played music so loudly the neighbors could not sleep, then the loud music could be declared a nuisance. If your neighbor's bees sting his friends during an outdoor party, he has committed a tort, especially if one of the stung guests is allergic to bee stings and ends up in the hospital or, worse yet, dead.

Private law avoids one of the main problems with public law—it is adaptive and creative and is far less able to be captured by the political process. It limits effects to those actually harmed and to those causing the harm. Oddly enough, it turns out that it is used relatively seldom in the United States as a way to deal with bad neighbors. In one nationwide sample of adults, only two-thirds had ever used an attorney and half of them had only used an attorney once. (Curran, 1977) Apparently, people use private law very little as a means of dealing with bad neighbors. Two possible reasons are that the public law is easier to use or, and more likely, that the basic rules that govern how we deal with each other are not legal ones; they are embedded in the fabric of civil society. (Ellickson, 1987)

2.3. Civil Society

Beyond the strict legal approaches lay approaches that a premised not in the use of legal power to curtail bad behavior but rather in the relationship between individuals to do so. In 2009, Elinor Ostrom was awarded the Nobel Memorial Prize in Economic Sciences for her "analysis of economic governance, especially the commons." Ostrom's work, along with that of her husband Vincent Ostrom, examined how people make agreements in situations that economic theory has predicted would be very difficult; specifically, outside the rule of public or private law.

The Ostroms' were interested in discovering how governance operates without the "sword" of an external enforcer, usually government. The standard approach among political scientists, economists, and planners to solving conflict in social systems is to introduce legal enforcement or rules or agreements. Indeed, Hobbes argued that "Covenants without the sword are but words." The Ostrom research program showed that, at least within smaller communities, "individuals are willing to monitor and sanction one another to ensure that their covenants are sustained. Elinor Ostrom pointed out that, "Many of these agreements have survived wars, pestilence, floods, and major political upheavals" (Ostrom, 1993).

In the same article as the quotation above, Elinor Ostrom asserted that, "The key question is can self-governing arrangements survive the ideas that have come to dominate the thinking of many academics." She calls the idea that people living in their local communities need the government to fix community problems a "distorted view." Such a view suggests that local people are "helpless and incapable." Thus, the idea that a community needs to legally regulate beehives, gay bars, street side plantings, or chickens assumes a narrow view of people and their ability to solve problems by themselves. It also ignores the roles that local norms play in regulating behavior. There is, in fact, a wide range of extralegal regulation that neighbors use to manage their relationships with each other.

A large literature has emerged that addresses the issues of conflict, law, and informal social control. In addition, a large literature has developed on the parallel concept of social capital defined generally as "the network of social connections that exist between people, and their shared values and norms of behavior, which enable and encourage mutually advantageous social cooperation." (Putnam, 2000)We combine these ideas under the heading of civil society.

People's everyday behavior is regulated not by public and private law, but by the norms they share about rewards, punishments, and a shared understanding of what it means to be part of a society. These norms or shared understandings extend beyond families and even local neighborhoods. They are what makes possible living peacefully together as opposed to being in a state of constant conflict. They are the antithesis of public hearings and legislative committee hearings. One problem is that the sword of government easily replaces them.

While one of the authors, was mayor of a small community, he regularly received calls in which citizens would complain about their neighbor's dog barking. When he asked if they had talked with the neighbor, they responded that they did not want to offend the neighbor. Instead,

they wanted to use the power of government to solve the bad neighbor problem. As one of our colleagues asked in a recent conversation, "Whatever happened to just talking to each other?" What happened is the ease of using government. One result is that instead of a civil society based on mutual understanding and conciliation, we get a faux civil society that is based on coercion and power.

Again, an example. His new neighbor's barking dog annoyed one person we know. The dog would bark for hours. Finally, he asked the new neighbors to do something about their dog's barking. They replied that they did not know what to do but would try. Their solution was to yell at the dog when it barked but yelling had little effect. Finally, the annoyed neighbor purchased a dog bark collar and gave it to the new neighbors on the condition they put it on the dog. The collar sends a warning sound when the dog barks and if the barking continues, applies a low-voltage electric shock. The barking ended that night. The annoyed neighbor could have called the city to send an animal control officer. Instead, he talked to the neighbor and worked out a solution that did not require the power of government.

Reliance on the use of civil society to regulate behavior is not without problems. Problems that arise from bad actors may not be solved simply because we are neighbors, they will almost certainly instead require substantial effort. Carl Sandburg's admonition to "Love your neighbor as yourself; but don't take down the fence" (Sandburg, 1970) is a nice illustration of that reality. Boundaries between neighbors are actually useful for being good neighbors. One reason is that, without boundaries, kindness can be taken for granted and then exploited. As one etiquette advisor explained,

> But a good neighbor has limits and needs to set them. Remember - kindness becomes a chore when it is taken for granted. You and your neighbors will exist together more harmoniously when you know and respect each other's boundaries. (Candace Smith Etiquette, n.d.)

Another reason is that autonomy is important to most people. Being able to make choices about what is yours allows you to decide when to invite your neighbor to your home and when not to. That is, it allows you to invoke property rules, which are necessary for exchange to be used as a way to solve problems between neighbors.

The major question that is nearly always raised when civil society is suggested as a mechanism for governance is what happens when that civil society fails, breaks down, or simply isn't up to the job of resolving conflict or providing governance. Our response is much like that of Ostrom's, despite these risks among small communities with strong social ties civil society is surprisingly robust. Simply put Ostrom's examinations of small communities of interest gives much reason for optimism about the potential for the working of such governance. Further to those skeptical of such potential we would point to our final category "Exchange" as mechanism for reinforcing civil society between groups and when community size increases beyond the capacity of every member to know every other member.

2.4 Exchange

Our final approach is that of exchange. For us exchange just means using market approaches to resolve problems. A simple example is the right to a view, as a typical neighbor dispute is the view from one's property. In the United States there are generally no rights in the public or private law to a protected view. Property owners can, however, find legal and extralegal ways to protect a view. The legal ways are market transactions. The most formal is to purchase a view easement from a neighbor. That easement is attached to the title of the property and can prohibit any structures or even trees from blocking the view. An easement turns the view into a protected right. Another way is to purchase the adjacent property, which is a choice often made by property owners who build on slopes. They purchase the property immediately downhill from them. The extralegal or civil society way is to just talk with the neighbor and work out informal agreements about structures and trees.

Another example from the term as mayor illustrates this well. A retiree called to talk about the home being built next to his. He lived on the hillside on one side of our valley and had an exceptional view of the mountains twenty miles away. From his deck, with the exceptional view of the mountains, he pointed to the house being built just below his. He explained that the roof on that house was going to block part of his view and that a realtor told him the lost view was worth $80,000. He asked for the city to stop the builder from building the house so high. Because he did not own a right to the view, there was no solution in the private law because losing the view was not a tort. Neither was there a solution in the public law since the new home met all zoning regulations. When asked if he had a request to the builder that he build a house that did not infringe

on his view, he said he did not want to cause problems. The family building the home seemed like nice people and he did not want to upset them. But it was apparently fine for the mayor to upset them. With no protections in public or private law and having rejected a civil society approach, he was left with the possibility of exchange--he could purchase a view easement so the neighbors would find it in their interest change the home design in order to protect the view. It turned out that rather than negotiate and come to a deal, he really wanted the mayor to use government power to stop them.

Notice that one of the costs of using exchange is that the offended neighbor has to talk to the offending one and see if they can come to an agreement. The costs of reaching that agreement, including the interpersonal costs, are known as transaction costs. One of the core arguments in Coase's "The Problem of Social Cost," is that transaction costs can prevent agreements from being reached. (Coase, n.d.)

Zoning ordinances are generally viewed as a response to the transaction costs problem. In fact, Justice Sutherland, writing for the Supreme Court in the seminal zoning case in the United States, Village of Euclid v. Ambler Realty Co., can be understood as arguing that transaction costs make using nuisance law far too difficult. He said that zoning minimizes the number of conflicts that could occur when a city does not have planned development. (Village of Euclid v. Amber Realty, [1926])

One of the best-known discussions of transaction costs is from David Hume in 1749. He was talking about common property rather than private property but his claim sheds light on the transaction cost problem:

"Two neighbors may agree to drain a meadow, which they possess in common, because 'tis easy for them to know each other's mind; and each must perceive that the immediate consequence of his failing in his part is the abandoning of the whole project. But 'tis very difficult, and indeed impossible, that a thousand persons should agree in any such action… Political society easily remedies … these inconveniences. Thus, bridges are built; harbors opened; ramparts raised; canals formed; fleets equipped; and armies disciplined everywhere by the care of government, which, though composed of men subject to all human infirmities, becomes, by one of the finest and most subtle inventions imaginable, a composition which is, in some measure, exempted from all these infirmities." (Norton and Norton, 2000)

The transaction costs argument is quite simple: agreements between two people are quite easy, but the costs of getting a thousand to agree make such agreements very difficult. Such agreements may seem to be nearly impossible in theory, but in practice they happen all the time. In the civil society section above we identified how people from all over the world solve such problems. It requires organization, agreement, and sanctions imposed within the group, but not necessarily by government.

Hume's discussion would be entirely different if the meadow were owned by someone rather than everyone. In fact, property rights are what make exchange possible and solves many of the problems of transaction costs. For example, airport authorities purchase land under landing approaches and then resell it with a noise easement is an example of solving the problem of the airport being a bad neighbor. Those purchasing the property do so at a substantially reduced cost, in exchange for giving up any rights noise reduction. Subdivision covenants are put in place when a subdivision is begun to solve the bad neighbor problem by identifying what is and is not allowed in that subdivision. One way to think of subdivisions with covenants is that everyone purchasing property in the subdivision gives up a portion of their property rights to everyone else in order to guarantee (assuming the covenants are enforced) that actions deemed bad by those drafting the covenants are not allowed.

Understanding how property rights solve bad neighbor problems requires understanding a bit about property rights. First of all, property rights are not rights to things, they are a set of use rights that may be asserted against others. That is, they are rules of behavior that dictate how you and others interact about what is "yours" and what is "mine." The shared understanding of rights, responsibilities, and limitations form a sort of social contract about acceptable behavior towards each other.

In Kaiser Aetna v. United States, the U.S. Supreme Court declared that "The right to exclude others" is "one of the most essential sticks in the bundle of rights that is commonly characterized as property." (Kaiser Aetna v. United States, 1979) Note that the court was essentially agreeing with our assertion that property rights are a set of behavioral rules. The court was also recognizing one of the most important features or property rights; they are bundled rights, not simple overarching rights. That is, there are often separable features, or "sticks" as the court referred to them, in a person's bundle of rights. Those sticks can be separated and sold, leased, or given away.

The number of sticks in a bundle of rights is only limited by imagination or legal rules. A person can offer to purchase a view right and once that agreement is filed as an easement, it is a right that is now legally recognized. That can only happen if it clear that someone owns that stick in her bundle of rights. If you own a view right across your neighbor's property, she can offer to purchase that right from you in order to build a view-blocking building. The same is true of sunshine rights. If it is clear that someone owns a right to sunshine not being blocked from reaching his property, he can sell that right or not.

Unclear rights make it difficult to make a deal. In one California example a family planted redwood trees on their property line. Five years later their neighbor installed solar panels on his roof and then complained that as the redwood trees grew, they would shade his panels. California had a law protecting sunshine rights for solar panels, but what if the solar panels were installed after the trees were planted? That lack of clarity drove the neighbors to court and the tree owners were forced to prune their trees. (Barringer, 2000) In response, the California legislature modified the solar law to exempt trees planted before a solar collector is installed, and a fact sheet prepared by the chief sponsor of the bill explained that the legislation was necessary because "a recent court order raised questions about the clarity of current law." (www.senatorsimitian.com, n.d.)

Note that what clear property rights create is the opportunity for negotiation and security among right holders and purchasers. If rights are clear, neighbors can negotiate and reach a mutually agreeable solution, or not. But Neighbor A cannot take Neighbor B's sunshine without compensation unless the legislative process is used rather than negotiation. Instead, they must negotiate a solution. If they cannot reach an agreement, it is at least clear who owns what rights.

3. Conclusions

Our goal in identifying these four approaches to bad neighbor problems was to examine how we might use alternative approaches and to encourage those interested in creating alternative governing jurisdictions to look to look beyond how they can adapt the public law into the private sphere. Relying solely on the Public Law its prohibition on human activities makes societies less rich than they could be otherwise, and for those interested in creating alternative approaches to governing these considerations should be at the front of their consideration. We believe that if people had to solve their problems themselves, most real problems would be solved without force.

Beekeepers and neighbors could resolve conflicts through private law or just by being neighborly, or through exchange.

Our taxonomy of approaches gives the administrator of special jurisdictions, the planner from local governments, the creator of new communities, or the theorist of alternative governance additional ways to think about the how governance can occur beyond of the public law.

The public law even if administered by a private jurisdiction, has particularly serious problems for those interested in alternative governance: It stands in front of the creativity, enterprise, and progress that are encouraged by private law, civil society, and exchange. One of our favorite books is Virginia Postrel's, The Future and Its Enemies: The Growing Conflict Over Creativity, Enterprise, and Progress. (Postrel, 1999) She uses the terms "dynamism" and "stasism" to identify systems that encourage creativity and those that do not.

The dynamism of market exchange especially when allowed to occur without artificial restrictions established by governments is well established. The creativity, effort and rewards that come from mutually beneficial trade are laid bare when compared to the limits imposed by politically determined rules.

The private law can be dynamic because it addresses issues once they have occurred, which allows for conversation and solutions that could not have occurred to planners in advance. It allows for time and place specific information to be used. It also allows for questions about who is, in fact, the bad neighbor.

Civil society can also be a system of dynamism because it encourages people to seek creative solutions to bad neighbors. The dog bark collar we mentioned above is one example. It was a simple solution that left both neighbors much happier than invoking the police power of the city would have done. Using public law creates winners and losers. Being a good neighbor sometimes requires a great deal of creativity and tolerance. It also requires connecting with neighbors in ways that build social capital.

To create alternative approaches to governing the special jurisdictions that can provide it have to rethink the usual approach of governing that seeks to address problems like the "bad neighbor" that local governments are so often asked to solve. We the public law and its use of the force of the state to enforce compliance can be replaced by private law, civil society, or exchange the quality of life in the communities we live in have the potential to be improved substantially, and individuals left freer as a result.

4. References

1. Barringer, F. (2008). Trees Block Solar Panels, and a Feud Ends in Court. *The New York Times*. [online] 7 Apr. Available at: http://www.nytimes.com/2008/04/07/science/earth/07redwood.html?_r=0 [Accessed 8 Jun. 2022].

2. Candace Smith Etiquette. (n.d.). *When Being a Good Neighbor Becomes a Chore*. [online] Available at: http://www.candacesmithetiquette.com/good-neighbor.html [Accessed 8 Jun. 2022].

3. Coase, R. (n.d.). *The Problem of Social Cost.* [online] *The Journal*. Available at: https://www.law.uchicago.edu/files/file/coase-problem

4. Curran, B. A. (1977). *The legal needs of the public: the final report of a national survey, a joint undertaking by the American Bar Association Special Committee to Survey Legal Needs and the American Bar Foundation*. Chicago, The Foundation.

5. Ellickson, R.C. (1987). A Critique of Economic and Sociological Theories of Social Control. *The Journal of Legal Studies*, 16(1), pp.67–99. doi:10.1086/467824.

6. Hume, D., Norton, M.J. and David Fate Norton (2000). *A treatise of human nature: being an attempt to introduce the experimental method of reasoning into moral subjects*. Oxford: Oxford University Press.

7. *Kaiser Aetna v. United States* [1979] (Supreme Court of the United States).

8. le.utah.gov. (n.d.). *HB0115*. [online] Available at: https://le.utah.gov/~2016/bills/static/HB0115.html [Accessed 8 Jun. 2022].

9. *Liebeck v. McDonald's Restaurants* [1994] (New Mexico District Court).

10. Ostrom, E. (1993). Covenanting, Co-Producing, and the Good Society. *The Newsletter of PEGS*, [online] 3(2), pp.7–9. Available at: http://www.jstor.org/stable/20710607 [Accessed 8 Jun. 2022].

11. Postrel, V. The future & its enemies the growing conflict over creativity enterprise & progress. (1999). United States: Touchstone Books.

12. Putnam, R. (2000). *Bowling Alone*. Simon & Schuster.

13. Ryan, E. (n.d.). *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning*. [online] Available at: https://scholarship.law.wm.edu/cgi/viewcontent.cgi?referer=&httpsredir=1&article=1278&context=facpubs [Accessed 8 Jun. 2022].

14. Sandburg, C. (1970). *The complete poems of Carl Sandburg.* New York, Harcourt Brace Jovanovich.

15. Simmons, R.T. (2012). Public choice and public life. *Public Choice*, [online] 152(3/4), pp.303–309. Available at: http://www.jstor.org/stable/23260559 [Accessed 8 Jun. 2022].

16. www.senatorsimitian.com. (n.d.). *SB 1399: Solar energy systems | State Senator Joe Simitian*. [online] Available at: http://www.senatorsimitian.com/entry/sb_1399_solar_energy_systems/ [Accessed 8 Jun. 2022].

17. *Village of Euclid v. Amber Realty Co.* [1926] (Supreme Court of the United States).

18. Yandle, B. (n.d.). *Bootleggers and Baptists-The Education of a Regulatory Economist*. [online] Available at: https://techliberation.com/wp-content/uploads/2010/12/v7n3-3.pdf [Accessed 8 Jun. 2022].