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### Should Owner Motivation Limit the Exercise of Property Rights?

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## Should Owner Motivation Limit the Exercise of Property Rights?

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**Date :** March 20, 2019

Lee Anne Fennell, *Owning Bad: Leverage and Spite in Property Law*, in **Civil Wrongs and Justice in Private Law** (Paul B. Miller & John Oberdiek, eds.) (forthcoming Oxford University Press), available at [SSRN](#).

People sometimes exercise their property rights out of animus or an attempt to gain leverage over someone else. An owner may build a fence from which he gains no benefit because he maliciously wishes to block his neighbor's view. Or a prospective seller may overstate the minimum price she would accept for a good in an effort to gain an advantage in the negotiations to follow. In the first case, the owner probably commits a civil wrong, while in the second case, the owner probably does not.

In a forthcoming book chapter, Professor Lee Anne Fennell examines when the exercise of property rights constitutes a civil wrong. More particularly, she asks when it is appropriate to examine the motivations of the property owner or the nonowner counterparty. Her "core insight is that there are multiple possible mechanisms through which putatively absolute property rights can be made less so, some of which involve weighing the motives and interests of nonowners instead of, or in addition to, those of owners" (P. 4).

Professor Fennell favors what she terms a "blanket" conceptualization of property rights, in which an owner has a broad set of categorical rights that may be limited in particular instances. The question then becomes, when do we poke holes in this blanket? She reminds us that any such poking has an impact on property law as a whole and not just on the parties to a particular transaction.

We may need to poke these holes occasionally to limit opportunism. But any focus on motive can be both over-inclusive, by banning spiteful acts of little consequence, and under-inclusive, by permitting acts that cause great harm but were not badly motivated. Thus, focusing on motive alone is insufficient.

Motives, which can be difficult to parse, are not the only concern. "Should the owner who constructs an ugly fence to spite or pressure her neighbor be required to remove it, while an owner who incidentally inflicts identical harm through an equally ugly but earnestly constructed fence gets a free pass?" (P. 10).

In addition, there is much to be said for protecting the exercise of property rights even when the motivation for that exercise is a bad one, since this approach avoids the need to figure out what motivated any particular owner. We do not want property law to be less functional as the price for weeding out a subset of malevolent acts. As Professor Fennell puts it, "ownership is designed to work in a manner that does not require reason-giving, and . . . requiring reasons adds to the burden of ownership in systemic ways" (P. 15).

Ultimately, Professor Fennell's primary concern is with the smooth functioning of the property system rather than just the remedying of the occasional breakdown. Property law should advance the general welfare. Focusing on motive may accomplish that goal in some instances, but the risk of trying to determine motivation and then figure out when to bar certain exercises of rights may cause more harm than good, except in extreme cases such as anti-discrimination law. One must also remember that an owner's counterparty can have bad motivations, and that interactions between neighbors are ongoing, back-and-forth transactions.

One solution Professor Fennell proposes to this problem is to replace property rules with liability rules or to prohibit the exercise of certain property rights altogether. Any such remedy, however, limits property rights overall, which may have

downstream costs. She also floats the possibility of trading certain rights in advance, a model I hope she will explore and expand further in the future. This approach apparently would permit the advance trading of rights before bad blood can develop between neighbors, though it is unclear how the neighbors would know which rights merit transactions before a disagreement arises.

In the end, Professor Fennell concludes that we should be wary of investigating the motives of owners or non-owners. Such an approach does not serve property law well. But in some cases, this examination may be warranted and can lead to the poking of new holes in the property blanket or, perhaps, modifying property rights more broadly.

Professor Fennell's chapter is a pleasure to read, mixing an interesting problem, memorable hypothetical examples, and a helpful grid. She wisely refrains from recommending wholesale changes to the body of property law in order to address a problem that arises only occasionally, opting instead for a more case-by-case approach. She also recognizes that any attempt to solve the problem of spite may bleed over and have effects on other, less worrisome cases, such as those in which a party is only trying to gain leverage for future negotiations or acting in her own self-interest. Property law generally does not need to concern itself with these situations.

In short, she identifies a problem, suggests some possible solutions, describes how these solutions may cause even greater harms, and reminds the reader to be wary of opting for a response that may damage the larger body of property law in the long run. In Professor Fennell's words, "The structure of property rights is only rarely best served by motive-based carve-outs from an owner's rights. But considering interests that stand on the other side can, and often does, justify either an exception to or a broader alteration in those property rights" (P. 23).

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