SEPARATE AND UNEQUAL: THE AMERICAN DREAM UNFULFILLED

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Exclusionary zoning has become the center of "an increasingly visible and volatile public debate."[1] Fueled by sky-rocketing rates of population and consumption, this debate challenges the fundamental assumptions of what makes a built environment good. Objective issues, such as the cost of low-density settlements[2] or the link between environmental harms and Euclidean growth,[3] have traditionally emerged at the forefront of the political and legal discourse.[4] Yet, "[w]hat is actually at stake are much larger questions about planning and democracy, aesthetics and metaphysics, and differing class-based assumptions about what makes a good urban life."[5]

In this article, it is argued that constitutional issues of substantive due process and equal protection are epistemically reducible to philosophical questions of justice and of ethics. On the one hand, to enact exclusionary zoning laws is to effectively prevent certain portions of the population from residing within the borders of a particular neighborhood or town.[6] On the other hand, to ban the

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[1] Wayne Batchis, *Enabling Urban Sprawl: Revisiting the Supreme Court's Seminal Zoning Decision Euclid v. Ambler in the 21st Century*, 17 VA. J. SOC. POL'Y & L. 373, 374 (2010).

[2] ROBERT BRUEGMANN, SPRAWL: A COMPACT HISTORY 8 (2005).

[3] *See generally* Peter Newman, *Urban Design, Transportation and Greenhouse*, *in* GLOBAL WARMING AND THE BUILT ENVIRONMENT 63, 69-71 (Robert Samuels et al. eds., 1994) (discussing the environmental impact of Euclidean growth).

[4] Jeremy R. Meredith, *Sprawl and the New Urbanist Solution*, 89 VA. L. REV. 447, 463 (2003); *see* also Michael E. Lewyn, *Suburban Sprawl: Not Just an Environmental Issue*, 84 MARQ. L. REV. 301, 302-303 (2000).

[5] BRUEGMANN, *supra* note 2, at 8-9.

[6] Sarah Williams Holtman, *Kant, Ideal Theory, and the Justice of Exclusionary Zoning*, 110 ETHICS 32, 32 (1999). "On the one hand, if municipalities are allowed to enact exclusionary zoning ordinances, they effectively will prevent certain segments of the nation's population from residing within their boundaries." *Id.* at 33; Eliza Hall, *Divide and Sprawl, Decline and Fall: A Comparative Critique of Euclidean Zoning*, 68 U. PITT.

enactment of exclusionary zoning laws is to prevent the municipality from addressing legitimate concerns about the general welfare of its citizenry.[7]

Some jurisprudential scholars, however, would deny the legitimacy of this debate entirely.[8] Those belonging to the Critical Legal Studies Movement (the "CRITS") would argue that the problem of social exclusivity within the Euclidean model illustrates a malady more systemic and severe; that is, that the entire legal system exists as a false morality to protect wealth and power against the demands of the subaltern.[9] According to the CRITS, laws have been written in the absence of a minority point of view.[10] Thus, legal language is the product of false discourse; for the language, logic, and structure of the law is created by the powerful and reinforces the values of the powerful.[11]

L. REV. 915, 919 (2007) ("Euclidean zoning provides a legal mechanism whereby certain classes of people can be effectively barred from living in a neighborhood or even an entire municipality without that exclusion violating any recognized constitutional right."); *see generally* David Ray Papke, *Keeping the Underclass In Its Place: Zoning, the Poor, and Residential Segregation*, 41 URB. LAW. 787 (2009).

[7] Holtman, *supra* note 6, at 33 ("On the other hand, to outlaw such ordinances is to prevent the municipality from taking steps it deems necessary to promote what we might well agree is the welfare of its citizenry. And this is a legitimate municipal goal if ever there was one"); Euclid v. Ambler Realty Co., 272 U.S. 365, 391-92 (1926) (reasoning that "the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community. . . . The establishment of such districts or zones may, among other things, prevent congestion of population, secure quiet residence districts, expedite local transportation, and facilitate the suppression of disorder, the extinguishment of fires, and the enforcement of traffic and sanitary regulations. The danger of fire and the of contagion are often lessened by the exclusion of stores and factories from areas devoted to residences, and, in consequence, the safety and health of the community may be promoted"); *see also* Westhab, Inc. v. City of New Rochelle, 2004 U.S. Dist. LEXIS 9926, at *30 (S.D.N.Y. 2004) ("Zoning is, by tradition and by jurisprudence, a matter of local concern, in which federal courts are reluctant to intrude").

[8] *See* Duncan Kennedy, *The Critique of Rights in Critical Legal Studies*, *in* LEFT LEGALISM/ LEFT CRITIQUE 178 (Wendy Brown & Janet Halley eds., 2002) for an excellent introduction to the Critical Legal Studies Movement.

[9] *Id.* at 423; *see also* Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 414 (1984) (describing law as a "mask" for class domination).

[10] *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1672 (1982).

[11] Walter Wheeler Cook, *The Alienability of Choses in Action: A Reply to Professor Williston*, 30 HARV. L. REV. 449, 477 (1917).

I. The Advantage of the Stronger

The implication, if the CRITS are correct, is that the concept of justice and the actions labeled as just lack any deep moral significance. Such is the view of justice proffered by Thrasymachus in Book I of Plato's *The Republic*.

> [S]ome cities are tyrannies, some democracies, some aristocracies . . . In each city this element is stronger . . . And each makes laws to its own advantage: a democracy makes democratic laws, a tyranny makes tyrannical laws, and so on with the others. And they declare what they have made—what is to their own advantage—to be just for their subjects, and they punish anyone who goes against this as lawless and unjust. This, then, is what I say justice is, the same in all cities, the advantage of the established rule. Since the established rule is surely stronger, anyone who reasons correctly will conclude that the just is the same everywhere, namely, the advantage of the stronger.[12]

Thrasymachus develops an account of justice in which "justice is nothing other than the advantage of the stronger."[13] His argument seems to be that:[14] (1) In every society some group or person emerges as stronger than everyone else, and so, rules. This group, it is said, determines the constitutional character of a city. If the group consists of the wealthy few, it is an aristocracy; if it consists of many, it is a democracy; if it consists of one, it is a tyranny. (2) The ruling body of any nation passes and enforces laws that benefit themselves, for it is human nature to be self-interested. (3) Every ruling party declares that justice consists of obeying the law. (4) Accordingly, "justice" in any nation means conforming to that which is in the best interests of the ruling party. (5) Therefore, the concept of justice and actions labeled as just lack any deep moral significance.

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[12] PLATO, THE REPUBLIC 338d-339a (C.D.C. Reeve, trans., 2004).

[13] *Id.* at 338c.

[14] C.D.C. REEVE, PHILOSOPHER-KINGS: THE ARGUMENT OF PLATO'S REPUBLIC 10-14 (1988).

The implications of this claim cannot be overstated. As a preliminary matter, Plato suggests that Thrasymachus' argument is not sound, for if it is true that the law is whatever the rulers say it is, and the rulers prescribe laws that are to their own advantage, then there is something paradoxical about being obliged to obey the law when the rulers make a law that is not in their best interest.[15] More troubling, however, is the internal inconsistencies of the position advanced by Thrasymachus and the CRITS: What some commentators call a postmodern critique of law, jurisprudential scholar and Professor of Law Jack Baldwin LeClair calls, "the dark side of globalism and critical thinking."[16] For, as Professor LeClair explains, the aim of postmodernism is to deconstruct and de-privilege dominant institutions by "reducing all philosophical and ideological principles to discrete equally valuable points of view."[17] Applied to the institution of law, postmodernists like Thrasymachus and the CRITS argue that legal language exists as the product of false discourse; for the language, logic, and structure of the law has been created by the power elite to reinforce the values of the power elite.[18] Under this light, the very concepts of human nature, gender potential, and social arrangements reflect the continued subjugation and oppression of minorities.

Admittedly, postmodern-deconstructionalism is a seductive philosophy. After all, history *has* been written in the absence of a minority point of view; and if our shared experience has taught us one lesson, it is that those with power will do almost anything to retain it. Yet, Professor LeClair cautions, "if not carefully controlled" postmodern-deconstructionalism can cause "knowledge to collapse [in] on itself."[19] By arguing that law is merely a belief system, validated only according to internal standards and developed to further the political ends of the powerful, Thrasymachus and the CRITS deconstruct the institution of law without providing a model or a method from which we can understand the world. Rather, Thrasymachus and the CRITS leave us "adrift in a sea of analytic method with no moorings."[20]

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[15] PLATO, *supra* note 12, at 339b-e.

[16] Jack Baldwin-LeClair, *Bonfire of the Humanities: Some Observations on the Contribution of Postmodernism to Modern Education*, 8 INQUIRY: CRITICAL THINKING ACROSS THE DISCIPLINES 5, 5 (1991).

[17] *Id.*

[18] *See* Cook, *supra* note 11, at 477.

[19] Baldwin–LeClair, *supra* note 16, at 5.

[20] *Id.* (concluding that "the postmodern critique, if not carefully controlled, leads to intellectual confusion and ultimately to political and educational anarchy").

Moreover, in de-privileging everything, by saying it's all opinion prescribed by the power elite, Thrasymachus and the CRITS actually undermine the legitimacy of the oppressed minority's claims, just as much as the oppressor's.[21] Professor of Philosophy Daniel Eric Bramer explains: "Every system or movement that seeks to de-privilege power, wealth, elitism . . . is always and everywhere a system designed simply to take that power, privilege, elitism . . . for itself." [22] Accordingly, it might fairly be argued that what Thrasymachus and the CRITS *really* want is not justice or equality, "but rather, the ability to have power at their own discretion, against any entity that does not fit their own (entirely arbitrary) vision of what communities should be."[23]

Nevertheless, despite the internal inconsistencies of the CRITS critique of law and Thrasymachus' account of justice, there is much to be gained by thinking critically about how, why, and by who land use decisions are made. Does an exclusionary zoning law that separates single-family homes from two-family dwellings or apartment complexes bear a rational relation to health and safety?[24] Or, in the alternative, might it be that more insidious motives lie behind the politically palatable legal principle of "police power asserted for the general welfare"?[25] If the second alternative is, or at least has in the past been true, what stops municipalities from "cloaking discriminatory motivations in the veil of public health?"[26] This article examines these issues in light of the facts surrounding the contemporary use of exclusionary zoning, and seeks to answer the question of whether municipalities can justly enforce exclusionary zoning laws at all.

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[21] *See e.g.*, Paul A. Boghossian, *Polemical Interlude: The Sokal Hoax*, *in* SCIENTIFIC INQUIRY: READINGS IN THE PHILOSOPHY OF SCIENCE 265, 269-70 (Robert Klee ed., 1999) (describing the problem of postmodernism in science).

[22] E-mail from Daniel Eric Bramer, Professor of Philosophy, Montclair State University, to author (Jan. 31, 2012, 08:48 EST) (on file with author).

[23] *Id.*

[24] Batchis, *supra* note 1, at 390 (noting that "[t]here is no obvious need to segregate residential from commercial areas," and "there is no obvious connection between the degree of separation and the degree of injury avoided").

[25] Euclid v. Amber Realty Co., 272 U.S. 365, 387 (1926) (stating that all exclusionary zoning laws "must find their justification in some aspect of the police power, asserted for the public welfare").

[26] Batchis, *supra* note 1, at 390.

II. *Euclid* in Context

In order to put these issues into perspective, it is necessary to understand the historical circumstances around which the *Euclid* decision was rendered, and around which contemporary practices of exclusionary zoning began. It has been suggested that the latent racism of the era in which *Euclid* was decided helps to explain why, at a time when the Republican Party was at its zenith, a group of very conservative Supreme Court Justices "approved a zoning system that greatly limited the rights of property owners to use their property as they saw fit."[27]

From the 1880s to the mid-1920s, waves of immigrants poured into American cities.[28] It did not take long for the political climate to develop a strong opposition to immigration.[29] Laws restricting immigration were enacted in 1885, 1891, 1903, 1907, and 1917.[30] In 1921, the first iteration of the quota system was passed, severely limiting entry into this Country.[31] More ominously however, the 1920s solidified the Jim Crow system,[32] and in 1922, the Dyer Anti-Lynching Bill died by Senate filibuster.[33] By this time, the "Ku Klux Klan [had become] a major political force. . . . Its members held elected offices in a number of states during the first few decades of the twentieth century."[34]

Although explicitly racial zoning ordinances had been held unconstitutional by *Buchanan v. Warley* in 1917,[35] the Supreme Court in *Euclid* had "made it possible to accomplish the same discriminatory purpose more discreetly: simply removing the possibility of economic diversity within a given neighborhood [goes] a long way towards

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[27] Hall, *supra* note 6, at 924.

[28] MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: EUCLID V. AMBLER 30-31 (2008).

[29] *Id.*

[30] Richard H. Chused, Symposium, *Euclid's Historical Imagery*, 51 CASE W. RES. L. REV. 597, 607-09 (2001).

[31] *Id.*

[32] *Id.* at 607.

[33] *NAACP History: Anti-Lynching Bill*, NAACP, http://www.naacp.org/pages/naacp-history-anti-lynching-bill (last visited Apr. 11, 2015).

[34] Chused, *supra* note 30, at 608.

[35] *See* Buchanan v. Warley, 245 U.S. 60 (1917) (holding unconstitutional an ordinance which purported to prohibit the occupancy of a White neighborhood by Black persons, or the occupancy of a Black neighborhood by White persons, ruling that the State cannot prohibit the purchase or sale of property to which occupancy is an incident, solely on the basis of race).

preventing racial and ethnic minorities from moving in."[36] Additionally, since exclusionary zoning separates residential land use from business land use, a neighborhood zoned for residential use would, by definition, not have any businesses or economic activity; thus, the lower income outsider would no longer have a reason to even visit.[37] "The plain truth," wrote Judge Westenhaver in the District Court case, is that

> The true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a strait-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. . . . [T]he result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well well-kept apartment and others in a tenement, is primarily economic.[38]

Indeed, Euclidean zoning was almost "immediately understood as a means of excluding poor and minority populations from middle- and upper-class neighborhoods."[39] One leading law school casebook characterizes the Supreme Court's decision in *Euclid* "as a generous endorsement of social engineering in the name of public health, safety, and welfare."[40] As the true motivation behind the proliferation of exclusionary zoning, this continues to be "the unstated goal of social exclusivity that exist between the lines" of most contemporary zoning codes.[41]

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[36] Hall, *supra* note 6, at 925.

[37] *Id.*

[38] Ambler Realty Co. v. Village of Euclid, 297 F. 307, 316 (N.D. Ohio 1924).

[39] Hall, *supra* note 6, at 923.

[40] Eric R. Claeys, *Takings, Regulations, and Natural Property Rights*, 88 CORNELL L. REV. 1549, 1635 (2003) (quoting JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 1148-51 (5th ed. 2002)).

[41] Batchis, *supra* note 1, at 403.

Without a doubt, the practice and tradition of zoning for direct social control throughout the United States supports the proposition that if justice is whatever the laws of a particular community dictate, then justice is whatever is beneficial to the members of a particular community.[42] In the Euclidean model, this means that communities enforce building codes and zoning laws, not to protect the general welfare of its citizens, but to ensure the creation of communities of affluence. A number of quantitative studies documenting land use regulation reveal that highly-zoned municipalities are "more likely to be occupied by politically influential, white, upper-income households."[43] In contrast, those harmed by exclusionary zoning are much more likely to be politically disempowered lower-income minorities [44] who are "diffuse, unorganized, and [disproportionately] lacking in resources."[45] Given the obvious self-interest of municipalities in enforcing exclusionary zoning laws, municipalities are not in the best position to judge the fairness and efficiency of the Euclidean model.[46] Environmental law professor, Henry A. Span, suggests this is so because the "benefits of exclusionary zoning fall almost entirely on the residents of the municipality, while the costs fall almost entirely on those residing outside it, who, consequently, have no vote and little voice in municipal politics."[47]

III. Police Power: The *Euclid* Court's Liberty Limiting Principle

One might object that communities are what each population permits them to be; if a community that is made up of an entirely wealthy population deems that its welfare depends upon maintenance of the status quo, then it becomes difficult to make the case that they shouldn't be allowed to zone (and exclude) accordingly.[48] I counter this objection in the sections that follow by arguing that the Euclidean model fails to meet standards of moral permissibility necessary to justify the enforcement of zoning laws that effectively segregate

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[42] *See* PLATO, *supra* note 12, at 338c.

[43] Batchis, *supra* note 1, at 384.

[44] *Id.*

[45] Henry A. Span, *How the Courts Should Fight Exclusionary Zoning*, 32 SETON HALL L. REV. 1, 23 (2001).

[46] *Id.*

[47] *Id.*

[48] E-mail from Daniel Eric Bramer, Professor of Philosophy, Montclair State University, to author (Jan. 18, 2012, 07:09 EST) (on file with author).

society according to race and socio-economic status. Specifically, I argue that the Euclidean model misconstrues utilitarian notions of the common good by narrowly interpreting the "general welfare" to mean, not the welfare of society as a whole, but the welfare of those who reside within a particular community.

A. The Nature and Limits of Police Power

In order to evaluate the *Euclid* Court's central holding that the legitimate exercise of police power justifies the enforcement of exclusionary zoning laws by the state over an individual, it is first necessary to understand the nature and limits of police power. As was generally recognized in 1926, and is equally recognized today, a state derives its police power from the dual role of government in securing and promoting the public welfare.[49] However, even when such power is exercised in the interests of public welfare, the enforcement of exclusionary zoning laws encroach upon private property ownership.[50] This raises the question: under what circumstances can a state agent use coercive means to restrain or otherwise interfere with the property rights of individuals?

In his treatise, *On Liberty,* John Stuart Mill proposes that coercive force is justified if that coercion properly conforms to certain liberty limiting principles. The harm principle asserts justification for prohibiting or restricting that behavior which violates the important interests of others.[51] In contrast, the doctrine of paternalism states that if your behavior is likely to damage your own important interests, then this counts as a *prima facie* reason for restricting or prohibiting that behavior.[52]

Although coercion by the state may constitute a great gain by averting a possible evil, the direct effects of coercive force constitute an unquestionable and certain loss. In the context of exclusionary zoning, loss results from the interference with individual property rights as well as from the disparate effects of social exclusion.

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[49] Donna Jalbert Patalano, *Police Power and the Public Trust: Prescriptive Zoning through the Conflation of Two Ancient Doctrines* 28 B. C. ENVTL. AFF. L. REV. 683, 707 (2001); *see* Euclid v. Amber Realty Co., 272 U.S. 365, 397 (1926).

[50] Kenneth Regan, *You Can't Build that Here: The Constitutionality of Aesthetic Zoning and Architectural Review*, 58 FORDHAM L. REV. 1013, 1031 (1990).

[51] JOHN STUART MILL, ON LIBERTY 143 (2d ed. 1869).

[52] *Id.* at 149.

Consequently, Mill proposed that there should always be a presumption in favor of liberty, for liberty is the means to the progress of society.[53] Those who seek to override this presumption and limit the liberty of another, implicitly assume the burden of proving the coercive means as necessary. Thus, an exclusionary zoning law with a tenuous or "fairly debatable"[54] relation to health, safety, or welfare, ought not stand.

In direct contrast to this principle, *Euclid* shrouds challenged zoning laws with a presumption of validity.[55] That is, an exclusionary zoning ordinance "enacted under state enabling laws and home rule charters of municipalities are . . . entitled to a presumption that they were validly enacted, are within the powers delegated to the locality by the state, and are reasonable in effect."[56] In tactical terms, this so-called presumption of validity renders the exercise of zoning power more easily defensible; for the burden of proof rests upon the party challenging an exclusionary zoning law to show that "it was passed incorrectly . . . is beyond the scope of municipal authority,"[57] or is clearly arbitrary, unreasonable, and without substantial relation to public health, safety, morals, or general welfare.[58] Under this standard, "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."[59] In other words, where the relation of an exclusionary zoning law to the public health, safety, morals, or general welfare is

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[53] Shannon C. Stimson et al., *Mill, Liberty and the Facts of Life*, 49 POL. STUD. 231, 245 (2001) (stating the presumption in favor of liberty is a logical consequence of the principle of utility).

[54] Euclid v. Amber Realty Co., 272 U.S. 365, 388 (1926) (establishing the "fairly debatable" standard of review: "[i]f the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control"); Wakefield v. Kraft, 96 A.2d 27, 29 (1953) (defining "fairly debatable" to mean "there is room for reasonable debate as to whether the facts justify . . . the need for its enactment.").

[55] Robert J. Hopperton, *The Presumption of Validity in American Land-Use Law: A Substitute for Analysis, A Source of Significant Confusion*, 23 B.C. ENVTL. AFF. L. REV. 301, 306 (1996) (Although this phrase does not appear in Court's decision, most land-use experts view *Euclid* as the origin of the 'presumption of validity').

[56] Barlow Burke Jr., *The Change Mistake Rule and Zoning in Maryland*, 25 AM. U. L. REV. 631, 631 (1973).

[57] *Id.* (stating further that "[z]oning officials have possessed this initial advantage in any litigation since the landmark decision of *Village of Euclid v. Ambler Realty Co.* in 1926"); *see* Mill Neck v. Nolan, 251 N.Y.S. 533, *aff'd*, 259 N.Y. 596 (1932).

[58] Hopperton, *supra* note 55, at 308.

[59] *Euclid*, 272 U.S. at 388 (citing Radice v. New York, 264 U.S. 292, 294 (1923)).

"fairly debatable," such law will be allowed to stand,[60] thereby causing otherwise meritorious challenges to collapse under the weight of the presumption of validity.[61]

IV. The Greatest Good

In his book, *Legal Reasoning and Political Conflict*, jurisprudential commentator Cass R. Sunstein describes a phenomenon in law that he terms, an "incompletely theorized agreement on a general principle."[62] Such agreements are incompletely theorized in the sense that the people may agree on some long standing general principle yet disagree on its application in specific instances.[63] For example, most Americans agree that freedom of speech is a fundamental right, yet some disagree on whether flag burning is a protected form of free speech.[64] The benefit of incompletely theorized agreements is that they prevent a court from having to re-examine large scale theories every time there is confusion or disagreement on lower-level principles.[65] This allows acceptance of the high-level principle, without requiring agreement on its particular implications.

Born out in practice, courts tend to decide cases on lower-level principles and/or rules, leaving large scale theories to be tackled in the democratic arena; for, as Oliver Wendell Holmes once wrote, "[g]eneral propositions do not decide concrete cases."[66] Yet, the *Euclid* Court relies on large scale theories of social utility in order to justify its holding that a municipality's enforcement of exclusionary

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[60] Hopperton, *supra* note 55, at 307.

[61] Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 783 (1969) ("This posture of restraint was affirmed [one] year later in *Zahn v.Board of Public Works* where the Court declared: 'The Common Council of the city, upon these and other facts, concluded that the public welfare would be promoted . . . and it is impossible for us to say that their conclusion in that respect was clearly arbitrary and unreasonable. . . . In such circumstances, the settled rule of this court is that it will not substitute its judgment for that of the legislative body charged with the primary duty and responsibility of determining the question.'" (quoting Zahn v. Bd. of Pub. Works, 274 U.S. 325, 328 (1927))).

[62] CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 35 (1996) (emphasis omitted).

[63] *Id.* at 35-38.

[64] *See id.* at 35-44 (providing other common examples of incompletely theorized agreements).

[65] *See id.* at 35.

[66] Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting).

zoning laws must be grounded by the legitimate exercise of police power asserted for the general welfare.[67] This notion of the "general welfare" is an incompletely theorized agreement a la Sunstein, for it raises the issue: in whose interest should police power be exercised?[68]

A. Result-based Reasoning

Utilitarianism is a species of the result-based ethical theory known as consequentialism.[69] Its doctrine holds that "the conduct which, under any given circumstances, is objectively right, is that which will produce the greatest amount of happiness on the whole; that is, taking into account all whose happiness is affected by the conduct."[70] The supposition, which forms the principle of utility, is that happiness is the only thing that is intrinsically desirable as an end in-itself; everything else that makes us happy does so by its mere possession.[71]

Different Utilitarians, however, offer different definitions of "happiness. " Jeremy Bentham, for instance, defines happiness as any "pleasure" or "avoidance of pain," [72] whereas John Stuart Mill distinguishes between types and degrees of pleasure.[73] For a Mill-Utilitarian, the "standard of morality" is that action which creates a set of lives "as rich as possible in enjoyments, both in point of quantity and quality."[74] Indeed, the principle of utility insists that one act so as to maximize the total human happiness of the world. Purdue University Professor Leigh Raymond writes:

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[67] *See* Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

[68] *See generally* David C. Keating, *Exclusionary Zoning: In Whose Interests Should the Police Power Be Exercised?*, 23 REAL EST. L.J. 304 (1995).

[69] *See Consequentialism*, BBC ETHICS GUIDE, http://www.bbc.co.uk/ethics/introduction/consequentialism_1.shtml (last visited Mar. 18, 2015).

[70] HENRY SIDGWICK, THE METHODS OF ETHICS 411 (7th ed. 1907); JEREMY BENTHAM, THE PRINCIPLES OF MORALS AND LEGISLATION 3 (Robert M. Baird & Stuart E. Rosenbaum eds., 1988) ("An action then may be said to be conformable to the principle of utility . . . when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.").

[71] *See* JOHN STUART MILL, UTILITARIANISM 51 (1863).

[72] *See* BENTHAM, *supra* note 70, at 4.

[73] *See* MILL, *supra* note 71, at 12.

[74] *Id.* at 16.

> The whole system of utilitarianism is based on an attitude of generalized benevolence or the disposition to seek happiness for the residents of the world . . . . Ethical actors should maximize the total human happiness of the world through all of their actions. . . . For the utilitarian, the principle of utility is the ultimate definition of the "good" to be sought by human society.[75]

The utilitarian might therefore label exclusionary zoning as bad because it breeches the municipality's obligation to the principle of utility; that is, the obligation to actualize the best of all possible worlds.

In the context of social exclusivity, case law has defined the term "exclusionary zoning" to mean any regulation of land use and development that, singly or in concert, tends to exclude persons of low or moderate income from the zoning municipality. [76] Since *Buchanan v. Warley*,[77] courts have consistently struck down overtly racial exclusionary zoning provisions.[78] Yet, economically restrictive zoning ordinances are capable of achieving exclusion based on race- regardless of intent- since many members of racial or ethnic minority groups are persons of low to moderate income.[79]

Similarly, "[z]oning ordinances that operate to exclude the poor may have been enacted with exactly that purpose in mind; [however,] it is also entirely possible in any given instance that no

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[75] Leigh Raymond, *The Ethics of Compensation: Takings, Utility, and Justice*, 23 ECOLOGY L.Q. 577, 580, 583-84 (1996).

[76] *See* Dowsey v. Kensington, 257 N.Y. 221 (1931) (where the municipality limited the permissible uses within a community to exclude certain groups); *see* Levitt v. Sands Point, 6 N.Y.2d 269 (1959) (where the municipality imposed restrictions so stringent that their practical effect was to prevent all but the wealthy from living there); *see generally* Suffolk Hous. Services v. Brookhaven, 397 N.Y.S.2d 302 (Sup. Ct.), *aff'd as modified,* 405 N.Y.S.2d 302 (1978); *see generally* Asian Americans for Equality v. Koch, 72 N.Y.2d 121 (1988); *see generally* Cont'l Bldg. Co., Inc. v. North Salem, 625 N.Y.S.2d 700 (1995); *see generally* BAC, Inc. v. Millcreek Twp., 534 Pa. 381 (1993).

[77] *See supra* note 35.

[78] Norman Williams Jr., *Planning Law and Democratic Living*, 20 LAW & CONTEMP. PROB. 317, 336 (1955).

[79] *See* Note, *Snob Zoning—A Look at the Economic and Social Impact of Low Density Zoning*, 15 SYRACUSE L. REV. 507 (1964).

exclusionary intent was involved." [80] Nonetheless, whether purposely or not, zoning to exclude those of lower income can be achieved by implementation of various land use and development devices,[81] most commonly implemented under the umbrella rational of 'maintaining the aesthetic character of a neighborhood or town.'[82] Typically, such devices take the form of: "minimum lot-size requirements, minimum building-size requirements, [square] frontage requirements, exclusion of mobile homes, [number of] bedroom restrictions, land improvement requirements such as sewage plants, minimum floor space requirements, living density requirements, prohibition of multiple-family dwellings, and various provisions in building codes."[83]

In the vast majority of United States jurisdictions, where economically restrictive zoning ordinances are in effect,[84] those of lower income are free in the sense that no formal restriction prohibits them from residing where they wish, yet their ability to take advantage of that freedom is severely compromised by these exclusionary techniques.[85] Consider the most apparent realization you could derive from the understanding that poverty rates in central cities tend to be three times higher than poverty rates in nearby suburban neighborhoods.[86] And that is, that the contribution of exclusionary zoning to concentrated poverty correlates with increased levels of crime, gang violence and drug use, as well as educational failure,

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[80] Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 782 (1969).

[81] Frank Aloi & Arthur Abba Goldberg, *Racial and Economic Exclusionary Zoning: The Beginning of the End?* 1971 URB. L. ANN. 9, 11 (1971).

[82] 2 Rathkopf's The Law of Zoning and Planning § 22:4 (4th ed.); *See* Berman v. Parker, 348 U.S. 26 (1954) ("The concept of the public welfare is broad and inclusive;" police power can be invoked to preserve the aesthetic beauty of the community); *see also* Belle Terre v. Boraas, 416 U.S. 1 (1974) (Police power may be invoked to preserve the "character" of a single family neighborhood); *but see* Kavanewsky v. Zoning Bd. of Appeals, 160 Conn. 397 (1971) (holding that concern for community appearance does not justify exclusion of lower income persons from the community).

[83] Aloi & Goldberg, *supra* note 81. *See generally* Norman Williams Jr. & Thomas Norman, *Exclusionary Land Use Controls: The Case of North-Eastern New Jersey*, 22 SYRACUSE L. REV. 475 (1971); Batchis, *supra* note 1, at 380.

[84] Batchis, *supra* note 1, at 380.

[85] *See* Holtman, *supra* note 6; *see also* Hall, *supra* note 6, at 926 ("[S]eparating residential zones by housing type dramatically reduces the ability of lower-income people, and by extension minorities and new immigrants, to move into the area").

[86] EDWARD G. GOETZ, DECONCENTRATING THE POOR 25-31 (2003).

teenage pregnancy, unemployment, and mental health issues.[87] Furthermore, high levels of crime and family instability in areas of concentrated poverty "lead to low levels of social trust and weak social networks," both of which perpetuate the cycle of crime and family instability in addition to the impediment of economic mobility.[88] Further still, "the social isolation associated with concentrated poverty causes behavioral patterns and mental attitudes that make immersion in the mainstream economy difficult."[89]

Therefore, in view of the foregoing, I submit that the Euclidean model misconstrues utilitarian notions of the common good by narrowly restricting the definition of "general welfare" to mean the welfare of those who reside within a particular community. To the contrary, "[m]unicipalities are not isolated enclaves, far removed from the concerns of the area in which they are situated. As subdivisions of the State, they do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries."[90] Local municipalities are, in consequence, not justified in excluding whatever segment of the population they deem undesirable, even if it is in the municipality's self-defined best interests.

V. Kantian Ethics and the American Dream: Getting from A to Z

Ethical theories of the deontological variety are not concerned with the consequences of actions, but with the acts themselves.[91] Accordingly, a deontologist cannot justify an action by showing that it produced good consequences.[92] For the deontologist,

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[87] *Id.*; *see, e.g.*, Michael H. Schill, *Assessing The Role of Community Development Corporations in Inner City Economic Development*, 22 N.Y.U. REV. L. & SOC. CHANGE 753, 757-58 (1997).

[88] David A. Dana, *Exclusionary Eminent Domain*, 17 SUP. CT. ECON. REV. 7, 51 (2009); RONALD L. AKERS & CHRISTINE S. SELLERS, CRIMINOLOGICAL THEORIES: INTRODUCTION, EVALUATION, AND APPLICATIONS 22-28, 41 (1992) (discussing Émile Durkheim's "anomie theory").

[89] *Id.* (*citing* Alexandra M. Curley, *Theories of Urban Poverty and Implications for Public Housing Policy,* J. SOC. & SOC. WELFARE, June 2005, at 97).

[90] Britton v. Town of Chester, 134 N.H. 434, 441 (N.H. 1991).

[91] *Duty-based Ethics*, BBC ETHICS GUIDE, http://www.bbc.co.uk/ethics/introduction/duty_1.shtml#h3 (last visited Jan. 29, 2012).

[92] *Id.*

an action is "right" when that action is in conformity with some universal moral rule.[93] This broad formulation of non-consequential duty-based ethics is often contrasted with result-based consequentialism. However, Immanuel Kant's deontology may have more in common with Mill's utilitarianism than it first appears.[94]

Similar to other Enlightenment thinkers, "Kant was an opponent of absolutist government, and believed that the legitimate moral claims of the individual should override the claims of the state."[95] As Ronald Dworkin wrote, in the spirit of Kant, some rights are simply not expressions of social utility: "Individual rights are political trumps held by individuals. Individuals have rights when, for some reason, a collective goal is not a sufficient justification for denying them what they wish, as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them."[96]

But at the same time, Kant recognized the need for government restraint of individual freedoms where one's chosen act interferes with the autonomy of another;[97] that is, where unrestrained human egoism would limit the total amount of freedom by violence and exploitation.[98] On the Kantian account, justice is achieved where, in sum, "the choice of one can be united with the choice of another in accordance with the universal law of freedom."[99] Accordingly, Kant's account of justice can be seen as striving to "maximize the opportunities that *individuals* [have] to exercise their legitimate freedoms," thereby promoting the most freedom for all.[100]

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[93] Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA OF PHIL. (NOV. 21, 2007), http://plato.stanford.edu/entries/ethics-deontological/.

[94] It is acknowledged that Kant would likely object to the formulation of common ground espoused herein. Nevertheless, this article seeks to identify and blend knowledge from relevant perspectives so as to produce a comprehensive understanding of the exclusionary zoning problem. While Kant's deontology and Mill's utilitarianism offer important insights into the problem of exclusionary zoning, each ethical theory is- on its own- unable to provide an adequate understanding of this complex problem. Thus, a common ground among ethical theories is developed as the foundation from which to integrate their respective insights; the consequent is a whole which is greater than the sum of its parts. *See generally* ALAN F. REPKO, INTERDISCIPLINARY RESEARCH: PROCESS AND THEORY (2008).

[95] Donald L. Beschle, *Kant's Categorical Imperative: An Unspoken Factor in Constitutional Rights Balancing*, 31 PEPP. L. REV. 949, 963 (2004).

[96] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY, at xi (1977).

[97] Holtman, *supra* note 6, at 35.

[98] Beschle, *supra* note 95.

[99] IMMANUEL KANT, THE METAPHYSICS OF MORALS 24 [hereinafter METAPHYSICS OF MORALS] (Mary Gregor trans. & ed., 1996).

[100] Beschle, *supra* note 95, at 964. (emphasis added).

This bedrock principle of justice is guided by Kant's formulation of the 'Categorical Imperative.'[101] Kant reasons that since all other things are only good under certain conditions, the only thing good in itself is a good will.[102] A moral agent possesses a "good will." if his actions consistently accord with the right motive.[103] Thus, Kant states, "if any action is to be morally good, it is not enough that it should conform to the moral law—it must also be done for the sake of the moral law."[104] For the Kantian, to act in a morally right way is to act according to duty.[105] Barring extreme negligence, a moral agent ought not be punished when the chosen act was in accordance with his duty and obligation to uphold the 'universal law of nature.'[106]

Kant uses this language with the theory of natural law in mind.[107] While there are many formulations of the theory of natural law, each is a variant of the following principle: "Human nature is what all humans have in common at all times. The natural law must be universal because human nature is universal. If there is a natural law, it applies to all humans just because they are humans."[108] The theory of natural law provides an appealing moral base for Kant because it allows standards governing human behavior to be objectively derived from human nature. It follows from Kant's premise that every action is either inherently right or wrong, based upon a good will, and is not contingent upon specific situations.

Put more formally, Kant argues that moral imperatives to behave in a certain manner are absolute, non-conditional, and categorical in nature.[109] When read together, the two formulations of Kant's Categorical Imperative serve as a paragon by which a rational being can evaluate his actions: (1) Act only according to that maxim

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[101] IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 30 (James W. Ellington trans., 3d ed. 1993) [hereinafter GROUNDING FOR THE METAPHYSICS].

[102] *Id.* at 7 ("There is no possibility of thinking of anything at all in the world, or even out of it, which can be regarded as good without qualification, except a good will.").

[103] *Id.* at viii.

[104] *Id.*

[105] *See* Alexander & Moore, *supra* note 93.

[106] Robert Johnson, *Kant's Moral Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (Feb. 23, 2004), http://plato.stanford.edu/entries/kant-moral/#ForUniLawNat.

[107] *Id.*

[108] Owen Anderson, *Metaphysical Foundations for Natural Law*, 87 NEW BLACKFRIARS 617, 619 (2006).

[109] METAPHYSICS OF MORALS, *supra* note 99, at 145 (referring to the Categorical Imperative as the "unconditional ought").

which you could will to be a universal law;[110] (2) Always treat humanity, whether yourself or others, as an end-in-itself, and never merely as a means to an end.[111]

On the first formulation, one ought to act only in the manner he would wish others to act, given similar circumstances. On the second formulation, Kant writes: "Now I say that man, and in general every rational being, exists as an end in himself and not merely as a means to be arbitrarily used by this or that will."[112] Here, Kant proposes that humans are inherently valuable. In contrast to things, which have only an instrumental value, people have intrinsic worth by virtue of our dignity as rational and autonomous beings.[113] It is therefore wrong to treat a person as merely a means to accomplishing a subjective end, for "autonomy is the ground of the dignity of human nature."[114] To equally and adequately respect the dignity of a rational individual, then, is to treat that individual as an autonomous end-in-himself.

Examined in light of the contemporary practice of exclusionary zoning, Kant's deontology may be applied as follows. On Kant's first formulation of the Categorical Imperative, one could argue that if the duty and obligation of the state is to take action for the public welfare; and if the state acts so as to affect this duty; and if for no other reason enforces exclusionary zoning laws, then the state acts in a morally right way despite any ill consequences of social exclusion. This position takes a rather narrow interpretation of Kant, for it focuses exclusively on the principle of a good will and fails to account for or explain how Kant's theory of justice impacts the analysis.

The better position is that by enforcing exclusionary zoning laws, a state agent violates the second formulation of the Categorical Imperative: Exclusionary zoning treats individuals as merely a means to an end; for in the Euclidean model, excluding undesirables is the means by which communities create or maintain a certain aesthetic. Further, when communities enforce exclusionary zoning laws that "significantly discourage or limit the construction of low-cost housing," communities deprive the disadvantaged of their autonomy and freedom as rational beings.[115]

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[110] GROUNDING FOR THE METAPHYSICS, *supra* note 101, at 14.

[111] *Id.* at 36.

[112] *Id.* at 35.

[113] *Id.*, at 35, 41.

[114] *Id.*, at 41.

[115] Holtman, *supra* note 6, at 39.

> While no formal restriction bars those of low income from the community, lack of wealth (often compounded by lack of education, information, and self-respect) results in an inability to make use of that freedom where exclusionary zoning laws are in force. This, in turn, may mean an inability to enjoy the educational and other public benefits affluent communities offer, making the ultimate achievement of independence all the more difficult.[116]

[116] *Id.*