Codification, Coherence, and Proprietary Competitions

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The codification of private law is a heroic enterprise. A codification process can facilitate the reexamination and the refinement of our existing rules and further contribute to their coherent coexistence. We should, however, take codifiers’ attempts to improve the coherence of private law with a grain of salt, remembering that in most cases the only defensible coherentist moves are normative (rather than doctrinal) and local (rather than global). This important lesson requires rethinking two unfortunate suggestions of the proposed Israeli civil code: unifying the remedial principles of contract law and tort law and creating a super-category of property covering assets of all stripes.

By contrast, the proposed consolidation in one chapter of the law of proprietary competitions is a laudable suggestion. The rules regulating this amalgam of cases need to face similar normative questions and thus justify a unified treatment. Yet, even in this context important factual differences between the different types of competitions entail significant contextual refinements that an overly broad treatment obscures. An improved version of the proposed Israeli civil code should clearly address these subtleties, which the existing common law already reflects.
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ABSTRACT

The codification of private law is a heroic enterprise. A codification process can facilitate the reexamination and the refinement of our existing rules and further contribute to their coherent coexistence. We should, however, take codifiers’ attempts to improve the coherence of private law with a grain of salt, remembering that in most cases the only defensible coherentist moves are normative (rather than doctrinal) and local (rather than global). This important lesson requires rethinking two unfortunate suggestions of the proposed Israeli civil code: unifying the remedial principles of contract law and tort law and creating a super-category of property covering assets of all stripes.

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INTRODUCTION

The recent publication of a proposal for a new Israeli civil code could turn out to be an important landmark in the development of Israeli private law, a “constitutional moment” of sorts.¹ A codification process – let alone an ambitious one aimed at the codification of private law in its entirety² – is a perfect opportunity for critical reflection on fundamental conceptual, jurisprudential, and normative questions. There is, to be sure, no doctrinal barrier to such a reflection at other times. But experience demonstrates that the life of the law gives us only a limited number of such “magical moments” of (partial) transcendence from the daily evolution of law.³ The invocation of such a moment within the Israeli legal community is, in and of itself, a reason for celebrating the proposed civil code.

In this Article, I hope to contribute to such critical reflection in two ways. On the more jurisprudential side, I discuss the risk – or, at least one of the most significant risks – of codification, namely: the temptation towards over-inclusiveness.⁴ The risk of over-inclusiveness derives, I argue, from overzealousness for coherence, or more precisely from insufficient attention to the virtues of local coherence and the

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² The text is overstated. The proposed code does not cover the entire field. The two most conspicuous omissions insofar as property is concerned are those of marital property law and the important doctrine governing the purchase of new apartments.


⁴ As the text implies, there are other risks. The prime example in the proposed code is the indiscriminate multiplication of remedies for breach of private law obligations. See Hanoch Dagan, Risks of Codification: On Over-Inclusiveness Excessive Unification and Multiplicity of Remedies, * MISHPATIM (The Hebrew University Law Review) (2006), part III [Heb].
vices of global coherence. This risk is not merely theoretical. As I will show in Part I, this risk has in fact affected the proposed Israeli code quite crucially and quite detrimentally in at least two important respects.

My discussion of coherence will also be the foundation for the remainder of this Article, in which I will discuss one particular area of private law: the law governing proprietary competition, that is: cases of contradictory claims raised by parties with no contractual privity. Part II celebrates one of the most significant innovations of the proposed code: the formal entrenchment of this body of law as a legal category. I will argue that this innovation is worthwhile precisely because it nicely captures the important coherence underlying the various categories of proprietary competition cases. Part III is more critical than Part II. This part surveys some helpful doctrinal distinctions Israeli case law has developed among the various categories of proprietary competitions. Unfortunately, these distinctions are not mentioned in the proposed code. Thus, even in this area of the law where the codifiers’ commitment to coherence was actually helpful, the risk of over-inclusiveness is still manifest and potentially damaging.

I. RISKS OF CODIFICATION

Both the goals section of the proposed Israeli civil code and the explanatory text produced by the codifiers emphasize coherence (at times using other words like harmony, unification, or coordination) as a primary purpose of the current codification effort. To be sure, the proposed code may well be promoting other normative purposes that justify, or even require, legislative reform. But it is difficult to explain the choice of having a code, as opposed to a series of legislative amendments, without mentioning coherence. At least in this sense coherence is the raison d’être of codification.

Coherence sounds like an indisputable legal ideal. But in fact it is not, or rather it is not always, a worthy goal. In this part I argue that overzealousness in pursuing coherence can generate a damaging over-inclusiveness and I further demonstrate the two main manifestations of this difficulty in the proposed Israeli civil code. In order to set the stage for making this claim I begin with some preliminary conceptual work devoted to the distinction between the coherence of rules and normative coherence as well as the distinction between global (normative) coherence and local (normative) coherence.

A. Coherence of Rules

Consider first the coherence of rules. A coherentic argument, in this sense of the term, is an argument in which the fit between a legal rule (existing or proposed) and other such rules is a good reason, perhaps even the only reason, for its adoption. It is not easy, however, to explain why such a rule is indeed preferable to the other candidates, which do not fit as neatly into the doctrinal fabric. Legal prescriptions, after all, affect people’s lives. Therefore, humanistic lawyers must base their choices, directly or indirectly, on their judgments concerning the human good, broadly

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6 As the text implies, there are contexts in which normative considerations justify some local use of formalist legal techniques. But then, by definition, these techniques rely on such
defined. When facing a legal question that has better and worse answers from the normative perspective, they should choose the normatively superior answer even if this would entail an inelegant result when judged from the viewpoint of doctrinal aesthetics.

There are, nonetheless, some cases where promoting the coherence of rules is justified. These cases typically deal with the more technical aspects of the law. One such case is already implicit in the prescription to choose the normatively justified rule over the coherent one. This prescription, on its own terms, does not proscribe reliance on the coherence of rules where the competing alternatives are morally equivalent to each other, so that the choice amongst them is purely a matter of coordination (think, for example, of many – albeit by no means all – possible rules regarding timing). Quite the contrary: as Joseph Raz explains, in these cases it is in fact important to adhere to whichever option we end up choosing, thus facilitating certainty, stability, and efficacy.

On its face, there is another type of case in which it is normatively desirable to bolster the coherence of rules: harmonizing a doctrine which at the present time includes conflicting rules. Promoting the coherence of the rules in this type of case seems to be quite obviously desirable: making a contradictory requirement is surely a clear violation of one of the most fundamental tenets of the rule of law. One example of such a coherential move can show us, however, the limited justificatory role that the sheer reference to the coherence of rules can play: Israeli existing property doctrine is quite equivocal in its treatment of the issue of self-help, so that currently the same act can be legitimate insofar as property law is concerned and illegitimate for torts purposes, or vice versa. This predicament definitely cries out for revision. But the existing incoherence is silent as to the direction of the desirable cure. In order to choose between the conflicting rules – or maybe opt for another one altogether – we need to openly engage normative arguments. The reference to coherence cannot assist us there.

B. Normative Coherence: Global vs. Local

Another, and much more significant, form of coherence as a legal virtue is normative coherence, namely: the coherence of the values underlying the legal doctrine. In fact, as we have just seen, many legal arguments that are presented in terms of rule coherence are in fact ones of normative coherence. This is the meaning of the prevalent legal argument propounding a rule that would cohere with another rule that applies in a similar case. As such, this argument – as we have just seen – is a non sequitur because it does not explain why the same regulation should apply to both

10 See section 26 to the Proposal, supra note 1, referring to section 18 to the Land Law, 5729-1969 and section 24(2) to the Torts Ordinance [New Version].
cases and why it is desirable to extend the existing rule. But this argument can be read in a better light, as implying that there are good reasons for treating the two cases at hand similarly and that the existing rule whose rationale is claimed to be expanded is (at least) satisfactory. This charitable reading exposes the real nature of the type of argument under consideration as one of normative coherence.

In what follows, I present the two most prominent accounts of normative coherence. My purpose in this brief discussion is to point out the second important distinction for our purposes: that between global coherence and local coherence. This distinction will help us to identify the main risk of codification and the main pitfalls of the proposed Israeli code.

One approach to normative coherence is identified with Ronald Dworkin's theory of law. In this view, each judge approaches (or at least should approach) adjudication like a chain novelist, attempting to write the next chapter so that it presents the legal story – the doctrine in its entirety – in the best light possible. This analogy implies that the choice between doctrinal alternatives is guided by the set of values that optimally complies with two criteria: (i) fit to (or coherence with) a broad range of existing (legislative or judge-made) rules; and (ii) normative justification. This form of adjudication, insists Dworkin, presents the legal practice in its best light because it provides the best justification for law's coercive power; and also facilitates a vision of the state as a special type of community that is endowed with a unique sense of integrity, which therefore deserves the obedience of its citizens.11

This view, in which coherence is an independent legal virtue, is controversial. Raz discusses the conflict between commitments to coherence and to pluralism and prefers the latter over the former. The reason for this is that our moral system is not reducible to one ultimate value from which all the other values derive; that morality includes a set of intrinsic values that are incommensurable. Raz insists that we not only disagree on many moral questions; rather, we believe that in many – although by no means all – moral issues there is more than one right answer. This is why it is reasonable – even desirable – for the law to adopt more than one set of principles and thus more than one set of coherent doctrines. In a world of incommensurable human values, a monistic legal voice is repressive, whereas the plurality of normative voices may be key to our collective coexistence. For this reason coherence should be rejected as an independent value. But there is still room for more modest forms of coherence in law. In particular, Raz acknowledges the virtue of normative local coherence if, but only if, it derives from the normative injunction to found a given area of the law on one certain value (or a given balance among the pertinent values).12

Fortunately, for our purposes there is no need to resolve this dispute, because even Dworkin recognizes a practice of "local priority." Judgments about fit, in his view, always refer to a series of concentric circles, centered on the issue at stake, so that the weight of the fit with a relatively internal circle is higher than that of the fit

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11 See RONALD DWORKIN, LAW’S EMPIRE 164-258 (1986). Dworkin believes that citizens' commitment to the law is premised in the role played by the law in constituting modern heterogeneous societies. He argues that in order for the law to perform this task it needs to talk to the people with one normative voice.

12 See JOSEPH RAZ, supra note 8, at 281-282, 291-304. Raz also rejects Dworkin's account of the role of law in constituting the community of the modern state as well as his related account of obedience to law.
C. On Over-inclusiveness

Most of the coherentist changes of the proposed code are not aimed at resolving contradictions of technical rules respecting issues of no particular normative significance. Rather, they seek to promote normative coherence, as is evident from the structure of the current proposal, which includes "a thick layer of uniform rules.""14

Analyzing a codification process from the perspective of normative coherence invites a focus on the risk of over-inclusiveness, namely: an exaggerated tilt towards global (as distinct from local) coherence. Over-inclusiveness seems to be a fundamental risk of such an enterprise because there is a thin line between the natural interest of the codifiers in the code's structure and their understandable wish to make it harmonious —"going from the general and common to the particular and separate"15 — and an inflated emphasis on doctrinal aesthetics. Such an attitude is worrisome as it tends to understate (at times even ignore) important normative concerns. As we have just seen, even friends of coherence as an independent legal virtue condemn a doctrinal unification that flattens normatively significant doctrinal distinctions.16

Over-inclusiveness tends to undermine some important virtues of private law at least insofar as the common law tradition is concerned. Private law, in this tradition, is divided into narrow categories that represent a tentative suggestion for slicing the social universe into economically and socially differentiated segments, recognizing that each “transaction of life” has some features that are of sufficient normative importance to justify distinct legal treatment.17 The different institutions of private law offer a way (which is, to be sure, always tentative and imperfect) for structuring our interpersonal relations in differing social contexts, adjusting the

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13 See DWORKIN, supra note 11, at 250-254.
15 See section 15 to the Introduction to the Proposal, supra note 5.
16 As the text implies, Raz and Dworkin may well disagree as to the degree of the normative significance of these distinctions and thus on the degree of the required caution regarding doctrinal unification. Insofar as the normative significance of these distinctions is marginal, or even small, Dworkin may opt for the coherent solution. But even Dworkin's view recommends caution where this significance is substantial.
normative fine-tuning of the competing values that the doctrine promotes to the characteristics of the pertinent human relation.  

To be sure, like every aspect of the law, the existing legal categorization should be critically examined; lawyers should never be complacent about the possibility that legal categories neither follow social categories nor improve on our social structure.  But there is a danger in understating the importance of multiplicity. If law is to sustain and facilitate the richness of our social world, which is typified by a broad spectrum of ways in which people interact with one another, legal categories (existing or new) should be appropriately narrow. Narrow legal categories are commendable also because they help sustain and inculcate one of the most important advantages of judges as lawmakers: their daily and unmediated access to actual human situations and problems in contemporary life.

There is no reason to suspect that legislative interventions in private law – such as the ones that were enacted in Israel during the 1960s and the 1970s – necessarily entail the surrender of these merits. Furthermore, even the mission of incorporating various private law statutes into one comprehensive code is not an inevitable recipe for such an unhappy consequence. But some of the coherentist moves of the current proposal seem to fall into this very trap. This deficiency would be particularly worrisome if courts were to take the codifiers' emphasis on the virtue of legal coherence too seriously.

D. Two Pitfalls in the Proposed Israeli Civil Code

Two of the most important, and the most radical, reforms of the proposed code are particularly vulnerable to the problem of over-inclusiveness and thus run the risk of flattening the rich social fabric regulated by private law.

The first problematic proposal is to unify "the remedial principles of contract law and tort law," and prescribe one unified regime for "remedies for the breach of

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obligations." The codifiers justify this radical reform – which is almost unprecedented – by claiming that "there is insufficient justification for the 'disconnected' development of the rules in these two fields," because "once the plaintiff has a right to a remedy for a breach of an obligation, the legal source of this right has quite limited significance."  

The desirability of this proposal is quite dubious. There are important and rather fundamental normative distinctions between contracts and torts. Space does not permit me to explore these differences here in any detail. For our purposes it is enough to mention that at least from the viewpoint of the fundamental value of human dignity and freedom – the ultimate value in Israeli law – the purposes of contracts and torts are distinctly different. Contracts are usually understood as conventional

22 There are only a few examples of codes that blur the distinction between remedies for breach of contact and remedies for torts, or – more generally – between contracts and torts. The Dutch Code is an example of the former category; the Civil Code of Quebec – of the latter one. See respectively A. S. Hartkamp, Law of Obligations, in INTRODUCTION TO DUTCH LAW 123, 129-135 (J. M. J. Chorus, P. H. M. Gerver, E. H. Hondius & A. K. Koekkoek eds., 1999); the Civil Code of Quebec: Book Five, Title One, Chapter III “Civil Liability” and Chapter VI “Performance of Obligations”.

23 The classic Continental codes such as the German, the Italian, the French and the Swiss – include, to be sure, rules that are common to the law of obligations in its entirety; yet these codes maintain the distinction between contracts and torts insofar as remedies are concerned. Thus, although both the Bürgerliches Gesetzbuch and the Codice Civile include unified rules dealing with the operational aspects of remedies for the breach of civil obligations, they have separate – at times quite narrowly tailored – rules respecting the more fundamental issue of the choice of remedies in contracts and in torts. For Germany, see the BGB: sections 249-254 (dealing with operational aspects); sections 272-282, 320, 323-325, 440, 459 and forth, 537 and forth, 633, 645 (dealing with remedies in contracts); section 823 (dealing with remedies in torts); see also B. S. Markesinis, W. Lorenz & G. Dannemann, The German Law of Obligations – The Law of Contracts and Restitution: A Comparative Introduction 398–426 (1997); Basil S. Markesinis & Hannas Unberath, The German Law of Torts – A Comparative Treatise 24-27 (2002); Werner F. Ebke & Matthew W. Finkin, Introduction to German Law 224-225 (1996); Nigel Foster, German Law & Legal System 231–237 (1993). For Italy, see the Codice Civile: sections 1176-1217, 1236-1240, 1241-1252 (dealing with operational aspects); Book Four, Title I (focusing primarily on contracts) and Title IX (dealing with torts); see also Thomas Glynn Watkin, The Italian Legal Tradition 252–256 (1997). The distinction between contracts and torts (and unjust enrichment) is even sharper in the French and the Swiss codes. For France, see the Code Civil: Book III, Title III, Chapter III “On the Effect of Obligations” (dealing with contracts) and Title IV, Chapter II “On Intentional and Unintentional Wrongs” (dealing with torts); see also John Bell, Sophie Boyron & Simon Whittaker, Principles of French Law 305, 340–357 (1998). For Switzerland, see Code des Obligations, RS Loi Federale complétant le Code civil Suisse: sections 1-40, 97-101 (dealing with contracts); section 41 (dealing with torts); see also P. Tercier & D. Dreyer, Torts, in INTRODUCTION TO SWISS LAW 125–139 (2nd ed., F. Dessemontet & T. Ansay eds., 1995); Eugen Bucher, Law of Contracts, in INTRODUCTION TO SWISS LAW, id., 111.

24 See section 27 to the Introduction to the Proposal, supra note 5; Miguel Deutsch, Interpretation of the Code 25, 291 (2005) [Heb.].


26 Even the economic analysis of the law recognizes the difference between contract law and tort law. While the former is aimed, according to this view, at maximizing the welfare of
frameworks of voluntary promises that the law enforces in order to allow people to promote their own goals by using other people (or their resources) without immorally instrumentalizing these people. By contrast, from the viewpoint of autonomy, tort law is mainly focused on prescribing rules of action and liability that fairly reconcile the competing claims of liberty and security.

The distinction between contacts and torts is by no means sharp: they surely contain overlapping or mixed doctrines, such as products liability law and the law governing medical malpractice. But this is a common legal phenomenon that cannot serve to disprove the existence of easy or core cases. Furthermore, I do not dispute the normative continuity between contracts and torts, notably due to their common pursuit of autonomy. But this similarity is so abstract that its significance is quite limited. After all, most (if not all) legal fields promote the fundamental values of the legal system, including – at least in liberal settings – autonomy. Thus, even though the ultimate values of torts and contracts are similar, or even identical, their differing contexts of application yield differing purposes. This heterogeneity should serve as a warning against a hasty unification of the remedial aspects of torts and contracts.

Rather than assume – as the current proposal does – that the remedies for the breach of contract and those for the commission of torts are a priori similar, the different purposes of these legal fields call for a careful analysis of the appropriate remedial consequences of these two types of cases. Though a thorough investigation is beyond the scope of this Article I feel confident recommending against the proposed unification. This is a safe conjecture because it is a mistake to analyze remedies merely as means to protect rights. Rather, remedies are constitutive features

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29 This continuity may explain the reciprocal influence of conventional accounts of contracts and torts: the use of the cheapest cost avoider analysis for contract law and the reference to a hypothetical contract as a means to justify the rules of torts.

30 In fact, the multiple types of contracts and the multiple types of interests protected from nonconsensual interference may even suggest that such an inquiry may end up calling for a move in the opposite direction. See respectively Roy Kreitner, Multiplicity in Contract Remedies, in COMPARATIVE REMEDIES FOR BREACH OF CONTRACTS 19 (Nili Cohen & Ewan McKendrick, eds., 2005); HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES chs. 2-4 (1997).
of these rights. 31 Because different remedial responses constitute differing types of rights, which in turn can promote different human values, 32 it is implausible to suppose that legal doctrines that promote different purposes would implicate an identical remedial apparatus.33

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The second proposed reform that may end up as a problematic over-unification involves property law, which is also the focus of the remainder of this Article. Existing doctrine prescribes that the rules governing land law apply to chattels as well and — “as far as appropriate to the matter and mutatis mutandis” — to rights more generally. 34 The proposed code substitutes this doctrinal structure with a more elegant one. The fifth part of the code is titled "Assets," thus conveying a stricter commitment to unification. The internal structure of this part further fortifies this coherentist outlook. The fifth part of the current proposal begins with a "trunk of common rules that would govern assets generally" — these rules are mostly imported from the existing land law dealing with topics like co-ownership and the protection of ownership and possession — and it concludes with "special rules for land ... and special rules for chattels."35 This structure implies that insofar as the "trunk" is concerned, the unification is strict rather than mutatis mutandis. The definition clause of the proposed code is somewhat more careful, defining "assets" as "land and chattels, as well as, insofar as it fits and with the necessary changes, proprietary rights."36

This proposed coherentist reform raises two difficulties. 37 The first problem assumes that future interpreters and appliers will take the cautionary note in the definition clause seriously. The question here — which, in fact, also pertains to the existing law — concerns the application of rules that govern land to chattels as well with no adjustment mechanism whatsoever. Even those who believe that the co-ownership of land and chattels, as well as the protection of possession and of


32 For more detailed analyses in the contexts of restitution and of contracts, see respectively DAGAN, supra note 30, at ch.2; Roy Kreitner, Frameworks of Cooperation: Competing, Conflicting, and Joined Interests in Contract and Its Surroundings, 6 THEORETICAL INQ. L. 59, 64, 67-70, 74-80 (2005).

33 Furthermore, even if such a result had been demonstrated by happenstance, it still would have been desirable to resist the temptation of unification. A uniform law of remedies is bound to facilitate easy cross-references between contracts and torts, thus blurring the important distinction between wrongs and breaches of contract, and therefore skewing the development of the law. For a critique of the treatment of breach of contract as a species of legal wrongs, see HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 268-72, 278-82 (2004).

34 See sections 8, 9(e) to the Movable Property Law, 5731-1971.

35 See section 20 to the Introduction to the Proposal, supra note 5.

36 See section 5 to the Proposal, supra note 1.

37 On a happier note, the limitation of assets to proprietary rights, rather than rights more generally, is a commendable improvement on existing law.
ownership of land and chattels, should be similarly regulated, acknowledge that the differences between land and chattels may require corresponding doctrinal distinctions; but they insist that these distinctions are at the application level, and that they do not justify, in any event, a "bizarre and cumbersome repetition of the same basic regulation in two different places." For me, this aesthetic cost is rather marginal, especially compared to the possible material detrimental consequences. Moreover, once we acknowledge the need for some refinements before rules pertaining to land can properly apply to chattels as well, we realize that the more careful – albeit less elegant – tool of analogical application (mutatis mutandis) is preferable to the elegant – but more blunt – mechanism of unification.

The second possible problem with this proposed reform relates to assets besides land and chattels. Even if we ignore the rather awkward way in which the definition clause conveys the message that in these cases analogical application is in place, it may still be questionable whether the combination of (i) the location of this prescriptive norm in the definition clause (571 sections before the beginning of the assets part of the proposed code); (ii) the creation of a new "super legal category" of assets; and (iii) the codifiers’ strong emphasis on coherence, might generate a judicial tilt toward unification. Put differently, whereas the existing doctrine makes the analogical extension of land law to other assets somewhat cumbersome, the proposed structure might render it almost obvious.

This contingency would be quite unfortunate because the traditional property law distinctions between the regulation of different types of resources are neither accidental nor arbitrary. Quite the contrary: the categories of resources that property law constitutes – such as land, chattels, copyrights, patents, etc – lie on a spectrum. On one end of this continuum are resources that are constitutive to their owners' personhood (land – in particular, a home – is a classic example). The other end of the continuum consists of resources, such as money and other mostly fungible assets (e.g., trade secrets or patents), the possession of which is purely instrumental. Israeli property law, like other property laws, respects the personhood value of property. Therefore, it accords owners of constitutive resources a rather fortified sovereignty, while giving more space to other property values (such as utility, social responsibility, and distributive justice) insofar as the more fungible resources are concerned. These normative distinctions entail, of course, doctrinal consequences; they justify the distinction between the various regulatory regimes governing different resources.

The proposed reform – in particular, the creation of an all-encompassing legal category of assets – might flatten these distinctions by generating a dynamic of hasty analogies from one category to the other. This detrimental contingency is admittedly not unavoidable. In this context – as in the doctrinal contexts discussed above or indeed (almost) any other doctrinal context – reflective judges can remedy, at least to an extent, legislative failures. And yet it is surely preferable not to codify a legislative

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38 Deutsch, supra note 14, at *.

39 For a more extended treatment see HANOCH DAGAN, PROPERTY AT A CROSSROADS 38-42, 67-74, 86-96 (2005) [HEB].

40 Thus, for example, there may well be good reasons to distinguish between co-ownership of a copyright – one of the most constitutive categories recognized by law – and other types of co-ownership. See Gilad Wekselman, Co-operation in Copyrights (Tel-Aviv University, Doctoral Dissertation, forthcoming 2006) [Heb].
reform that would require such judicial aid, especially where the better regulation is already reflected in the existing law.

II. A NEW LEGAL CATEGORY: PROPRIETARY COMPETITIONS

Thus far I have discussed coherence – both as a virtue and as a potential vice of codification efforts – and demonstrated the risks of codification using the main two pitfalls of the proposed Israeli code as my examples. I shift gears now to the second main goal of this Article: to discuss at some more length one particular, and particularly difficult, area of property law and examine its codification in the proposed code. So the remainder of this Article will deal exclusively with one type of property dispute: cases that involve contradictory claims raised by parties with no contractual privity, such as conflicts between two parties holding contradictory contractual commitments from the same intermediary, conflicts between sellers and transferees of buyers, and triangular conflicts emerging from entrustment or theft.

In current Israeli legislation each such case is covered by a separate rule typically appearing in a separate statute. But in recent years courts have increasingly looked at these cases as if they belong to one legal category and have thus adopted interpretive strategies, such as analogy, that make these separate rules more coherent. This approach is significantly fortified in the proposed code, which dedicates a separate chapter to the law of proprietary competitions, in which the scattered rules, of which it is currently composed, are assembled and unified.

The basic thrust of this proposal is both important and desirable because we are indeed dealing with a group of cases that raise similar problems and frequently invoke similar normative judgments. In what follows I try to delineate the common normative infrastructure of the law of proprietary competitions. (Part of the discussion will expose some possible normative disagreements that run through this area.) The next part of this Article will consider some important differences between the sub-fields of the law of proprietary competitions and thus criticize some excesses in the proposed code's coherentist approach.

A. Proprietary Competitions as Legal Accidents

In The Eternal Triangles of the Law, Menachem Mautner conceptualizes a category of cases of proprietary competitions as "legal accidents." The parties to these legal dramas, typically an original owner and a third party, each interacted with an intermediary for the same right. In the typical case, the intermediary turns out to be judgment-proof, so that achieving priority with respect to this right is the conflicting parties' only or most significant possible remedy. Therefore, resolving the competition between these parties – prescribing priority rules – can be compared to resolving accident cases. Both accidents and proprietary competitions require the allocation of harm resulting from the parties' attempt to use the same resource simultaneously. In a "factual" accident, they both attempt to have recourse to the

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41 The first academic complaint against this important deficiency appears in Daniel Friedmann, “Rights of the Owner against a Third Party in Modern Israeli Legislation” 4 TEL-AVIV U. L. REV. 245 (1975).


43 See Sections 584-588 to the proposal, supra note 1.
same physical resource. In proprietary competitions, they both attempt to have recourse to the same legal resource: the right in dispute.  

Following the accident analogy, Mautner correctly suggests that some of the same normative concerns that guide tort law in dealing with factual accidents guide decisions about priority rules in dealing with legal accidents. Applying the economic analysis of tort accidents, which, in his view, also represents concerns of justice, Mautner sets out three guiding considerations for priority rules. First, ex ante efficiency concerns (which can also be recast in terms of retributive justice) recommend imposing liability on the least cost avoider of the legal accident to encourage people in this situation to invest sufficient resources to prevent the very occurrence of conflict. Second, ex post allocative efficiency (minimizing the losses suffered by the litigating parties) and the need criterion of distributive justice entail a preference for the party "likely to suffer the greater loss if the other party prevails." These two considerations, translated into legal doctrine, typically require the third party who seeks priority to be a good faith purchaser for value. Bad faith clearly indicates opportunism and easy (cheap) avoidance, as well as culpability; and without significant investment ("value") in reliance on the interaction with the intermediary, the third party's potential loss if the right is allotted to the original owner is likely to be relatively small. Third, priority rules minimize litigation and uncertainty costs, which may overwhelm a system in which both the least cost avoider and the least vulnerable party are determined on a case-by-case basis. This third consideration, along with other virtues of the rule of law, explains and justifies the law of legal accidents' articulation of precise rules for typical cases, rather than vague standards requiring the evaluation of every case on its own terms.

B. Normative Tensions

A difficult question concerns the weight to be assigned to each of these three considerations. One aspect of this problem, beyond the scope of this Article, concerns the balance between the two substantive considerations on the one hand and the third consideration (litigation costs) on the other hand. For our purposes it is enough to stipulate my support of relatively clear rules and proceed to focus on another aspect of this problem – namely, the relationship between ex ante efficiency, or the identification of the least cost avoider, and ex post efficiency, or the identification of the least vulnerable party. Mautner appears to suggest that the ex ante considerations

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45 Mautner, id., at 100-26. For a similar analysis, see, e.g., Craig Rotherham, Proprietary Remedies in Context: A Study of Judicial Redistribution of Property Rights 70-73 (2002).

46 Mautner, supra note 44, at 101-06. For an opposite view, in which need-based concerns have no place in private law, see Benson, supra note , at 754-55, 801-14; Ernest J. Weinrib, Right and Advantage in Private Law, 10 Cardozo L. Rev. 1283 (1989). For the intrinsic role of need-based concerns in the justification of property, see Jeremy Waldron, Property, Justification, and Need, 6 Can. J. L. & Jurisp. 185 (1993).

47 Mautner, supra note 44, at 110-12.

are of primary importance, while ex post considerations enter the picture only when the parties' relative preventive ability is in doubt.\textsuperscript{50} This approach focuses on maximizing incentives for least cost avoiders. On its face, such a rule of lexical ordering seems justified also because the ex post efficient allocation is likely to emerge regardless of the way the law allocates rights between the parties, assuming that the transaction costs between the original owner and the third party are negligible.\textsuperscript{51} Even if the law is wrong from the perspective of ex post efficiency, this mistake will be corrected quickly, because the loser in the priority litigation, by definition, will then be willing and able to purchase the right from the winner.

In many types of cases, most notably regarding legal accidents in a purely commercial context, this account is sufficient. But other types of cases do not follow the reasons justifying lexical priority for ex ante efficiency, or may present other reasons that support a more significant emphasis on ex post considerations. Thus, in certain categories of cases, the assumptions underlying this approach, that the law's messages reach their addressees (or are in some way intuitive to most people) and that people will be able to change their behavior accordingly, are likely to be fanciful, or at least questionable.\textsuperscript{52} In such cases, even where the comparative avoidance ability test yields a definite answer – let alone where it is somewhat ambiguous – ex ante efficiency should not enjoy exclusive emphasis. Likewise, in many cases of legal accidents, conflicting parties face nonnegligible transaction costs following the legal accident. Frequently, legal accidents entail an all-or-nothing battle for a unique asset, such as land or art, that constitutes a large part of one or both parties' estates, and on whose ownership both parties have relied. In such cases, the litigating parties frequently are locked into a bilateral monopoly,\textsuperscript{53} and thus are subject to strategic behavior that may hinder mutually beneficial transactions.\textsuperscript{54} The result of such "legal wars of attrition" might be dictated more by the parties' relative wealth, which determines their resiliency in a long and exhausting legal struggle, than by the balance of harm or utility.\textsuperscript{55}

\textsuperscript{50} Mautner, \textit{supra} note 44, at 100.


\textsuperscript{52} See Robert D. Cooter & Edward L. Rubin, \textit{A Theory of Loss Allocation for Consumer Payments}, 66 TEXAS L. REV. 63, 89-90 (1987); \textit{see also}, \textit{e.g.}, ROBERT C. ELLICKSON, ORDER \textit{WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES} 144-145 (1991); IZHAK ENGLARD, \textit{THE PHILOSOPHY OF TORT LAW} 43-44 (1993). Some versions of the cheapest cost avoidance test incorporate factors of information and rationality into the calculus of comparative avoidance ability. If these considerations have already been taken into account, they should not, of course, be reintroduced again at this stage.

\textsuperscript{53} A bilateral monopoly is a situation in which, concerning a specific resource or right, there is only one seller and one buyer, who are locked into dealing with each other. \textit{See, e.g.}, RICHARD A. POSNER, \textit{ECONOMIC ANALYSIS OF LAW} 60-61 (6th ed. 2003).


\textsuperscript{55} In other words, in many cases the wealthier party will obtain the asset, and the one with more limited resources will lose out or will be forced into an uncomfortable compromise, even if she is more in need of the disputed asset or likely to gain more utility from obtaining it.
My discussion thus far merely established that economic efficiency does not justify awarding a strong preference to the comparative avoidance ability issue over the comparative vulnerability test. This conclusion is important because economic efficiency is a proxy – albeit at times one that is regressively tilted – of social welfare, which is in turn an important property value. But it is not the only pertinent property value. Three other such values – social responsibility, distributive justice, and personhood – should also importantly inform the law of proprietary competitions. The first fortifies the weight of the comparative avoidance ability test; the second supports the comparative vulnerability test; and the third highlights an additional important distinction that the law of proprietary competitions should follow.

Social responsibility requires that owners (or owners-to-be), who can avoid a legal accident at a relatively low cost, do so in order to prevent the severe harm another person is likely to incur if the accident takes place. In other words, the moral prescription embedded in the comparative avoidance ability test is not one of retributive justice (a concern that should very rarely, if ever, inform private law). Rather, it is our commitment to the social responsibility of landowners that joins the property value of social welfare in condemning a cheapest cost avoider who did not bother to prevent a legal accident.

By contrast, a commitment to distributive justice pushes in the opposite direction. We must give the comparative vulnerability test attention even when it has no impact on ex post efficiency (i.e., even if mutually beneficial transactions are not hindered by bilateral monopolies) because even in these cases the legal allocation of entitlements determines the identity of winners and losers. The ensuing distributive implications make the comparative vulnerability test always relevant, although the reason for its significance varies according to the type of case at hand.

Consider first categories of cases – such as the "combination transactions" discussed in section III.C – in which the socio-economic status of the parties is more or less equal. As Mautner himself noted, in these cases the comparative vulnerability test can serve as a proxy to the more general question of the parties' relative needs, so that distributive sensitivity would suggest imposing the accident's costs on the party who is likely to suffer the lesser loss if the other party prevails. Here bilateral distributive considerations – as opposed to the broader ones I discuss momentarily – help determine the normatively desirable rule.

But even types of cases that deviate from this paradigm – in which the conflicting parties typically belong to different social strata – lead to a similar conclusion. To be sure, in some categories of legal accidents the groups of original...
owners or third parties can hardly be characterized as discrete subgroups of society, making the distributive question much less significant.\textsuperscript{61} When such a characterization can be made, however, a commitment to distributive justice requires paying attention to the variance among people competing for disputed rights and giving some (not necessarily determinative) preference to rules that favor deprived groups.\textsuperscript{62}

Finally, the personhood value of property can also make a difference. This value requires that the law make a qualitative distinction between the ways it treats constitutive resources (of which people's homes are a prime example) and fungible resources (such as money). The relevant prescription here is that where the type of conflict at hand confronts a party whose interest in the right at stake is purely fungible with a party for whom the resource is constitutive, some preference for the latter is in order. (This prescription can be restated as suggesting a qualitative vulnerability test, as opposed to the quantitative vulnerability test discussed above.) Applying this prescription is not easy, though, not only because there are bound to be cases in which the other pertinent considerations push in the either direction. It may also be complicated because cases of constitutive resources are heterogeneous. It is not only that various resources stand in varying places along the constitutive-fungible spectrum, but also that there is a difference between the personhood value of an existing right in a constitutive resource and an expectation to have such a right.\textsuperscript{63}

\section*{III. OVER-INCLUSIVENESS IN ACTION}

By laying down the normative infrastructure of the law of proprietary competitions, Part II justifies the main innovation of the proposed code in this area: the unified regulation of these cases in one chapter of the code. But even in this context – of a coherentist move that is desirable – the proposal goes too far by including only a limited number of sections (five). As we will see in this part, the proprietary competitions arise in different contexts, and this heterogeneity entails normative, and thus also doctrinal, implications. The proposed code preserves – and rightly so – the distinction between "regular" cases of proprietary competitions and cases in which the defendant purchased the disputed entitlement under market overt conditions.\textsuperscript{64} But it ignores some crucial distinctions which Israeli jurisprudence has

\textsuperscript{61} In these cases as well, the difficulties of characterizing the original owner and the third parties may follow from our being entrenched in existing social categories. This constraint actually may increase the advantage of making the competing parties confront each other as a possible way of exposing "hidden social categories" and other relevant private information.

\textsuperscript{62} In many cases this rule would also promote bilateral distributive justice as well as social welfare. The former conclusion follows from the declining marginal utility of money; the latter derives from the observation that stronger parties are more responsive to the law's incentives than weaker ones.

\textsuperscript{63} For the last point, see Dagan, supra note 33, at 266-267.

\textsuperscript{64} See section 585 to the Proposal, supra note 1. The main reason and justification for separating out the market overt doctrine is that it regulates cases that involve a third party – the government that runs the land registry, or the merchant who deals in the sale of the type of good under dispute – a party who can serve as the insurer of the legal accident, thus taking much of the bite out of these types of competition. I argue that focusing on the capacity of that third party as an insurer – in terms of both avoidance capabilities and coverage – is the
developed between important categories of proprietary competitions law. In this sense, the proposed code may end up constituting a setback, rather than a step forward, in Israeli property law.

In what follows, I survey the state of the law with respect to the three most prevalent proprietary competitions regarding land: competition between purchasers and the general creditors of the seller; competition between two parties to whom an intermediary sold the same right; and competition that emerges out of the so-called "combination transactions," namely: those between landowners and purchasers of apartments that were built (or contracted to be built) by a contractor on the land before the contractor breached his obligations to the landowner (or went bankrupt). As we will see, the pertinent case law on all three fronts is rather sophisticated and in most cases corresponds to the theoretical analysis offered above. Unfortunately, the proposed code deals explicitly only with the second of these three categories, and even there prescribes a somewhat unsatisfactory rule.

A. Purchasers v. General Creditors

Our first category includes cases in which the seller of a piece of land turns out to be a "suboptimal debtor," thus triggering a proprietary competition between the purchaser and the seller's general creditors. The main type of case discussed by Israeli courts came about where a general creditor attempted to impose an attachment on the land and the purchaser, of course, raised an objection. The development of the pertinent doctrine is somewhat complex and need not be recapitulated here. All that is important for our purposes is the skeleton of this narrative and a somewhat more detailed analysis of the Aharonov case, which is the contemporary leading case in this context.

There are four important signposts in the history leading to the Aharonov case. (1) Prior to the Land Law of 1969, Israeli case law applied an equitable norm, which it borrowed from English law, according to which the purchaser prevails over a creditor who seeks to impose an attachment to the extent of the money she theretofore had actually paid. (2) In 1969, section 161 of the Land Law, entitled "no equitable rights," was enacted, prescribing that "from the coming into force of this Law, there shall be no right in immovable property except under Law." (3) Soon thereafter, and based on both section 161 and the Land Law's efforts to upgrade the land registry system and render registration of land constitutive – rather than merely evidentiary – the Supreme Court overruled the old equitable doctrine. The Boker case prescribes that a land transaction does not furnish any priority to the purchaser in the competition key to understanding and interpreting the specific market overt rules. See Dagan, supra note 39, at 263-84.

Another context involves the status of such purchasers in the debtor's bankruptcy, namely: the question of whether they enjoy a priority vis-à-vis the general creditors, or whether the land is part of the pool of the debtor's assets to be distributed pro rata among all the creditors (including these purchasers). See infra note 71.

65 See Dagan, supra note 39, at 216-25.
with the seller's general creditors even where – as was the case at hand – the purchaser has actually taken possession. If such a purchaser wants to set aside the creditors' attachments, she needs to pay off the debtor's debts.69 (4) Following Boker the Land Law was amended to negate the Boker rule where the purchaser registers a cautionary note before the imposition of the attachment was imposed. The added section 127(b) prescribes that "where after a cautionary note has been entered an attachment is imposed on the land, or the right in land, which is the subject of the note, or a receiving order in bankruptcy or a winding-up order is made against the owner of the land … then, so long as the note has not been struck out, such attachment, order or appointment shall not affect the rights of the person entitled, arising from the undertaking which is the subject of the note." After some initial confusion, the case law now recognizes that with this section, a cautionary note functions as a security interest on the land.70

The Aharonov case dramatically overruled the 30-year-old Boker rule, holding that even without a cautionary note a purchaser of land who parted with full value and took possession prevails over the general creditors of the seller even though her right has not yet been duly registered.71 Two lines of reasoning were advanced in support of the unanimous decision. The first, propounded by the majority, held that when a seller undertakes to sell the ownership of land, the purchaser receives not merely a contractual right, but an “Israeli-made” equitable right. (Section 161, argued these justices, only put an end to the incorporation of English equity into Israeli law, as opposed to the development of indigenous equitable rights.) This is a quasi-property right, which prevails over the right of a creditor of the seller’s who has imposed a later attachment.

The majority founded its pronouncement of this quasi-property right on an argument from the coherence of rules. Although the Land Law does not directly prescribe the content of the right purchasers of land receive, they argued, Section 9 of the Law, governing conflicting transactions, implies that this right is a quasi-property right. Section 9, which will be discussed in some detail below, prescribes that where a person sells rights in land, and – before the transaction is completed by registration of the purchaser’s rights – the seller undertakes to effect a conflicting transaction with another purchaser, the rights of the earlier purchaser shall prevail, provided that where the later purchaser has acted in good faith, given value, and the transaction with her was registered while she was still acting in good faith, her right shall prevail. The Aharonov majority insisted that the Boker court failed to give sufficient weight to this rule, which is, they claimed, a fundamental rule with myriad effects across the legal

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69 See R.C.A. 178/70 Boker v. The Anglo-Israeli Company for Management and Responsibility (1971) 25(2) P.D. 121. Two judges allowed an exception to this rule in extreme cases, where there was a conspiracy between the debtor and one of his general creditors or where a creditor in fact was aware of the sale and the transfer of possession at the time at which he advanced some credit to the seller. See id., at 132, 134.


71 At first blush the Aharonov rule does not cover cases of a bankrupt seller. But as the Court correctly noted in a later case, its rationale necessarily applies to these cases as well. See C.A. 3911/01 Kaspi v. Nes (2002) 56(6) P.D. 752, 760-761. For an analysis, as well as a critique of the more limiting approach to Aharonov, see DAGAN, supra note 39, at 234-36.
spectrum. For our purposes, the court held that because Section 9 prescribes that a later purchaser who failed to register her rights in good faith while giving adequate value must yield to the earlier purchaser’s rights, it must be interpreted as precluding the ability of a sheer creditor to defeat the earlier purchaser because the entitlement of the former cannot possibly be more robust than that of a later purchaser.72

Like most other claims of the coherence of rules, the majority's reasoning cannot withstand critical scrutiny. As we have seen,73 absent a normative analysis doctrinal incoherence can never prescribe its own cure. This general lesson is vividly vindicated here, because while the majority's opinion bolsters the significance of Section 9 of the Land Law, it renders Section 127(b) of the Land Law superfluous: even without a cautionary note, the earlier purchaser’s right in the land – a quasi-property right – trumps a subsequent attachment.74 (Likewise, nothing in the doctrinal materials necessitates the majority's intuitive argument that Section 9's prescription that a later purchaser fails to prevail over an earlier one should clearly apply respecting a general creditor.) I am not suggesting that this difficulty renders the majority's doctrinal structure indefensible: while the popular rule of construction according to which expression of one thing excludes another would limit the jurisdiction of a statutory rule to the specific circumstances mentioned therein, the opposite result can just as easily be established by employing analogical reasoning that expands such jurisdiction.75 But this (unsurprisingly) means that the doctrine alone cannot settle the case; after all, nothing in the doctrine itself tells us that Section 9 is more fundamental or more germane than Section 127(b). As usual, normative arguments are needed in order to settle the doctrinal indeterminacy; to choose which of these conflicting rules should direct the regulation of the case at hand.

Fortunately, Justice Strasberg-Cohen’s separate opinion, which placed much less burden on Section 9, can fill this gap. The crux of her opinion lies in arguments of normative coherence, analyzing the competition between purchasers and general creditors in terms of the normative infrastructure of the law of proprietary competitions. In this context, Strasberg-Cohen suggested three reasons for the Aharonov rule: (1) A contractual right to purchase a specific property is weightier than an attachment imposed on the same property by a general creditor because the former is a substantive right in that specific property while the latter is merely a procedural instrument which is used in order to secure the realization of the creditor’s

72 See Aharonov, supra note 67, at 239-40, 244, 246-47, 249, 251-54, 261, 264-65, 271, 277, 287.
73 See supra Section I.A.
74 Justice Cheshin attempted to overcome this difficulty by suggesting that Section 127(b) is still relevant for cases that involve a bankrupt seller. Aharonov, supra note 67, at 278. This suggestion is unconvincing because there is no possible reason to distinguish these two cases. See also supra note 71.
75 This is, of course, only one example of the doctrinal indeterminacy of our canons of interpretation – see Karl L. Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed, 3 Vand. L. Rev. 395, 405 (1950) – which is, in turn, an example of the phenomenon of rule multiplicity, which is the ultimate reason for the indeterminacy of legal doctrine. See Hanoch Dagan, The Realist Conception of Law, 57 U. Toronto L.J. * (forthcoming 2007). In any specific setting, of course, lawyers would appreciate the scope of conflicting rules of interpretation. But – like legal determinacy more generally – this determinacy is conventional, not doctrinal. Id., at *.
rights against the debtor's estate; (2) Prioritizing purchasers of land is justified because typically purchasers are likely to suffer much greater harm should a later attachment trump their rights. This is true because while attachments are generally imposed by profit-making institutions such as banks, which can self-insure against the risk of a debtor's failure, purchasers are usually ordinary people who invest their life savings in this one land transaction and who will be devastated should the law allow the imposer of the attachment to prevail; (3) While in other contexts the possibility of registering a cautionary note is a viable – indeed the cheapest – way of avoiding a proprietary competition, there are many cases in which such registration is impossible and even if it were possible would not have helped prevent the creditor's predicament.  

This reasoning nicely fits the analysis of Part II of this Article. It considers both the parties' comparative avoidance ability (which is the point of Strasberg-Cohen's third reason) and their comparative vulnerability (which is what her second reason is all about). It does not accord the former issue a lexical priority over the latter. And it shows how the personhood value of property can be translated into legal rules, proposing in effect that we need to consider the qualitative vulnerability of the competing parties and not only their quantitative vulnerability (this is the crux of Strasberg-Cohen's first reason). Although the Aharonov rule is not doctrinally predetermined, it is indeed the correct rule, because it is clearly required by all the pertinent normative considerations.

The lessons from this analysis are all relevant to the codification project. The Aharonov case vividly demonstrates both the inevitable failure of most attempts to reason based on the coherence of rules and the potential advantages in contextualizing arguments of normative coherence, namely: in opting for local, rather than global, coherence. In particular, it suggests that the unique characteristics of proprietary competitions between purchasers and general creditors are sufficiently significant to justify a distinct analysis. Thus, it implies that it would be better for a chapter in the code that regulates proprietary competition to include a specific section that codifies Aharonov.

If indeed such a section is to be added, it will need to address at least one question that remained unanswered in Aharonov: whether its rule also applies where the purchaser has not yet parted with full value. Here, my critique of the majority's reasoning and my endorsement of Strasberg-Cohen’s analysis helps resolve this practically important matter. If we adopt the majority's approach, the purchaser's equitable right to the land must come into effect from the moment the seller's obligation to sell came into being. Since the question of how much value the earlier purchaser has already parted with is irrelevant under Section 9, such a purchaser

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76 See Aharonov, supra note 67, at 219, 221, 232-33, 235-36.
77 The reason for this last observation, which Strasberg-Cohen does not mention, is that general creditors cannot in any event preclude the possibility of a subsequent sale of their debtor's land and moreover cannot know how many more creditors will seek recovery from that land.
78 The other issue that will need to be explicitly fleshed out is the scope of the section, and in particular its relevance to cases of the debtor's bankruptcy. See supra note 71.
prevails over the seller's general creditors even when she has only so far given partial – maybe even nominal – payment in consideration for the property. This outcome, which – as we have seen – is not doctrinally inescapable, is normatively inferior to the pre-Boker rule, which limited the purchaser's priority to her actual out-of-pocket payment. In fact, it is the pre-Boker rule which follows (at least roughly) from the normative rationale that justifies Aharonov.

Proprietary competitions that involve purchasers who in fact did not part with a great deal of money require some modifications in the analysis of the pure Aharonov scenario. First, the quantitative comparative vulnerability test is not as determinative respecting a purchaser who paid only a fraction of the value of the land at stake as it is regarding a fully-paid purchaser: for the former type of purchaser it is no longer the case that her potential loss dramatically outweighs the loss of the general creditors such as the seller's suppliers, employees, or tort victims. Second, the qualitative comparative vulnerability test is likewise affected: the earlier the contractual stage of the purchaser-seller transaction, the weaker her claim that the asset at stake is constitutive for her personhood and thus the higher the similarity between purchaser and general creditor. The pre-Boker rule captures these important distinctions.

Notice that where this rule applies, a purchaser who wishes to complete the transaction needs to buy her priority from the general creditors by paying them the value of that portion of the asset with respect to which they are prioritized. This means that in many cases – where the present value and the contract value of the asset are roughly the same – there is no practical difference between reviving the pre-Boker rule and furnishing the partially-paid creditor with full priority, because in both cases such a mutually beneficial deal is likely to follow. The practical effect of the choice between these relates to the allocation of the entitlement to increases the value of the asset from the time of the transaction to the time of the seller's failure. Applying the Aharonov full priority rule allocates this entitlement to the purchaser, while the pre-Boker rule allocates it to the general creditors. The pre-Boker rule fully protects the purchaser's investment, while insisting that she cannot also expect to enjoy the full benefits of a transaction while the seller's general creditors compete over his meager

79 See Aharonov, supra note 67, at 247-48, 285-86 (per Barak and Englard, JJ.).

80 Indeed, two justices – Strasberg-Cohen and Dorner – were reluctant to join Barak and England's suggestion on this front. See id., at 238, 288.

81 As the next paragraph shows, the need for a different doctrinal treatment to proprietary competitions that involve purchasers who in fact did not part with a great deal of money derives from the appreciation of the significance of the context to the normative analysis, which also underlies the prescription to prefer local coherence over global coherence.

82 One may be tempted to learn from these observations that each case of a partially paid creditor should be analyzed on its own facts. This temptation should be resisted because here – as elsewhere in the law of proprietary competitions – vague standards are inferior to clear rules.

83 The pre-Boker rule is unlikely to encourage general creditors to hold out their consent because this is clearly also the best deal for them given the significant savings in transaction costs associated with following through with this completed transaction, and given the low probability, known to both parties, of finding a third party who would be interested in buying the portion of the asset to which they are entitled. In any event, the unlikely case of such a holdout is likely to be deemed by a court as an illegitimate (mala fides) abuse of rights. See section 14 of the Land Law, 5729-1969.
estate. This middle-of-the-way solution seems justified given that both quantitative and qualitative comparative vulnerability tests require that the priority of the partially-paid purchaser will be weaker than that of the fully-paid purchaser.

**B. Conflicting Transactions**

Another type of proprietary competition that the proposed code explicitly regulates is that of conflicting transactions. Section 588 of the proposal – which is supposed to replace Section 9 of the Land Law – can be read as the culmination of a long process of common law evolution. As we will see, the main thrust of this process, and thus the core effect of Section 588, is normatively desirable. Furthermore, I also have no quarrel with the width of this category of proprietary competitions. As long as section 588 is not expected to govern other types of competitions (such as the ones discussed in the previous and the next sections of this part), the proposed code, like Section 9 of the existing Land Law, is not faulted by over-inclusiveness. And yet, even in this happy context a few substantive comments are in place.

A brief description of the two most important developments in the history of the modern law of conflicting transactions may help explain both my endorsement of the core point of Section 588 and my specific criticisms. First there was the Wertheimer case. This case involved a classic tragedy of conflicting transactions: The Hararis sold their apartment twice – first to the Wertheimers and then to the Binyaminis. The former paid only a nominal sum of money, while the latter paid a substantial amount. Neither transaction was registered. The majority of the Court applied Section 9 strictly and thus held that because Binyamini failed to register their rights, Wertheimer must prevail notwithstanding the fact that his loss was 70 times higher than the loss of Wertheimer would have been had Binyamini been declared victorious. The majority insisted that it could not circumvent the explicit wording of Section 9, and thus rejected the dissent’s suggestion to avoid this uncomfortable outcome by applying Section 3(4) of the Law of Contracts (Remedies for Breach of Contract) Law, 5731-1970, which prescribes that a contract is unenforceable where justice so requires. It further justified its conclusion by arguing that conflicting transactions should be subject to clear rules, rather than vague standards, and by claiming that without more information regarding the conflicting parties' overall predicaments, the sheer gap between the payments cannot determine their comparative vulnerability. In passing, the Court on its own initiative, raised, but left open the question of whether an earlier purchaser’s failure to register a cautionary note, where such registration was possible, should affect the outcome.

This last *obiter dictum* brought about a vibrant legal discourse. As Nili Cohen explained, the doctrinal source of the difficulty lies in the mixed message of the Land Law. On the one hand, Section 9 prioritizes an earlier purchaser unless a later purchaser registers her rights in good faith while giving adequate value. On the other hand, Sections 126 and 127 established a new regulatory mechanism – the registration of a cautionary note – that facilitates the ability of an earlier purchaser to easily and cheaply notify third parties about his claims, thus preventing the occurrence of legal accidents in the first place. The existence of such a mechanism may imply that one

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84 As well as Section 80 of the Land Law and Section 12 of the Chattels Law, which regulate, respectively, conflicting leases and conflicting chattels sale transactions.

who fails to employ this means should not be allowed to prevail should such an accident eventually take place.\textsuperscript{86}

For many years the Court was reluctant to settle the matter, and in practice allowed earlier purchasers to prevail notwithstanding their failure to register a cautionary note. But in the \textit{Ganz} case it dramatically changed its course.\textsuperscript{87} \textit{Ganz} held that the omission of an earlier purchaser who was able, but failed to register a cautionary note regarding his rights in the land for a long period of time amounts to an infringement of the overarching duty of good faith. Therefore, in such cases, even later purchasers who have not registered their right will prevail despite Section 9. The Court did not purport to resolve the doctrinal indeterminacy just mentioned by resorting to purely doctrinal means. Rather, in line with one of the main themes of this Article, it invoked normative arguments that substantiate as well as refine the scope of its new holding.

The crux of the Court's reasoning lies in the comparative avoidance ability test, which, in many such cases yields the definite answer advanced by the Court. In the typical case the registration of a cautionary note is an obvious and rather trivial means to prevent a legal accident. Failure to do so in such circumstances invites the potential of such unhappy contingencies and is thus tantamount to an inexcusable disregard for other people's interests in clear violation of the social responsibility value of property. Depriving an earlier purchaser who failed to register a cautionary note of the priority set by Section 9 is an appropriate \textit{ex post} response as well as proper incentive for other such parties to do the right thing.

This simple but persuasive rationale explains two exceptions to the \textit{Ganz} rule that the Court mentioned, in which the earlier party is clearly \textit{not} the cheapest cost avoider of the legal accident, namely: cases in which it is impossible to register a cautionary note; and cases in which the earlier purchaser's failure did not cause the legal accident, either because the later purchaser actually knew about the first transaction or because she made the purchase without examining the registration or the land that was already possessed by the earlier purchaser. Moreover, explaining the \textit{Ganz} rule on this basis also justifies excluding from its coverage cases in which inducing the registration of a cautionary note by the earlier party is undesirable, hence the third exception mentioned in \textit{Ganz} concerning cases in which the first in time contender is married to the formal owner.

Section 588 of the proposed code adopts the general thrust of the \textit{Ganz} holding, and it is indeed for this reason that it is generally desirable. However, \textit{Ganz} left open at least three questions.\textsuperscript{88} Unfortunately, regarding all three, the position of Section 588 is rather disappointing.

\textsuperscript{86} See Nili Cohen "A Minor's Contract to Acquire an Interest in Land, as Against the Vendor's Creditor" 41 \textit{Ha-Praklit} 161 (1993).

\textsuperscript{87} \textit{Ganz} v. British & Colonial et al. (2003) 57(2) P.D. 385.

\textsuperscript{88} There is in fact a fourth issue: whether the later purchaser's own failure to register a cautionary note deprives her of the ability to rely on the \textit{Ganz} rule in order to gain priority. In \textit{Ganz} the Court seemed to answer this question in the negative. \textit{Id.}, at 408. The proposed code prefers the opposite answer. See the suffix of Section 588(b). As I explain elsewhere, the Court's rule is preferable. See DAGAN, supra note 39, at 255.
The first open question in *Ganz* is how stringent this new rule is. There are two aspects to this question, one of form, the other of substance. The former was implicitly raised in *Ganz* by Justice Matza, who urged the Court to restate its holding as making the earlier purchaser's priority subject to the good faith duty without prescribing specific rules regarding the registration of cautionary notes or implying that there are no other ways in which this duty can be deemed violated. In addition, two other justices, who also concurred in the *Ganz* outcome, insisted that the failure to register a cautionary note can upset the priority rule of Section 9 only in exceptional cases, such as the case at hand, in which the delay in registration was outrageous (17 years!) and the later purchaser had already taken title. Even Justice Barak, who delivered the main opinion in this case, opened the door to the possibility of limiting *Ganz* by suggesting that it may not apply where the earlier purchaser and the formal owner agree to postpone the registration of a cautionary note until the latter perform certain acts, such as the payment of a certain percentage of the agreed price.

At least a literal reading of the proposed Section 588, which reverses the earlier purchaser's priority if her failure to register a cautionary note is negligent suggests, or in any event opens up the possibility of recasting the earlier purchaser's obligations as open-ended (along the lines of Matza's position) and furthermore allows an exception based on the terms of his agreement with the formal owner. Both of these directions seem to me misguided. *Ganz*'s rather precise formulation of the circumstances in which a failure to register a cautionary note is preferable to Matza's approach because, as I have already intimated, there is a particular significance in our context to keeping the law clear and predictable. The law of conflicting transactions affects many cases, which typically involve significant amounts of money. The social welfare value of property requires prescribing clear rules in such cases. Such clear rules minimize the parties' litigation costs. Even more importantly, they preserve the clear message of the law that in general only by registering a cautionary note – and thus preventing potential legal accident – can earlier purchasers be secure against conflicting transactions. Furthermore, in such competitions over what is typically a constitutive resource to both parties, the parties are likely to be locked into a bilateral monopoly, which is in turn likely to produce regressive outcomes. Therefore, the distributive justice value of property also opposes the use of open-ended standards of liability in our context.

The possibility of allowing the seller and the earlier purchaser to bypass the *Ganz* rule via a consensual arrangement should likewise be firmly rejected. Supporters of this putative exception to *Ganz* found it on the freedom of contract and further explain that it is particularly warranted in cases where the seller's objection to the registration of a cautionary note is temporary and is indeed limited to the first stages of this transaction, until the earlier purchaser parts with a substantial amount of money. This reasoning is a non sequitur. There is neither a conceptual nor a normative connection between the proper scope of the liberty of contracting parties to

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89 *Ganz*, supra note 87, at 425-426.
90 *Id.*, at 415-416, 430-432.
91 *Id.*, at 400, 404-408.
92 See *supra* text accompanying note 55.
consensually shape the terms of their agreement and the rights of third parties who may be affected by such an agreement. More specifically, an accommodating approach to freedom of contract – which I generally support – should not be interpreted as validating terms that are detrimental to third parties. Even where the contractual parties find such terms appealing, the law has good reasons to intervene and prevent such negative externalities, either by invalidating these terms as being opposed to public policy or by negating them because of their detrimental effect on third parties. This last result seems particularly called for in the case of a temporary delay in placing the cautionary note. The seller's request of such a delay is understandable and an earlier purchaser's concession on this front may well facilitate their transaction. But the risk this term imposes on third parties cannot be redeemed by virtue of this happy union of the two parties' wills. Furthermore, the fact that the earlier purchaser did not yet part with any significant value cannot salvage this unjustified external effect. If anything, such a lack of detrimental reliance seems to point to the other direction, because it implies that this purported consensual exception applies where the comparative vulnerability test suggests that the later purchaser must prevail.

The second question left open in Ganz is whether the Wertheimer rule is still good law. In Ganz Barak insisted that it is, explaining that the new rule he prescribed does not sanction the consideration of the parties' comparative vulnerability, but only the consideration of their relative ability to avoid legal accidents. The two other Justices who addressed this question questioned this view, implying that once the law relieves the stringency by which it enforces the priority set by Section 9 of the Land Law, the way is cleared for a reassessment of Wertheimer allowing for taking into account a later purchaser's excessive vulnerability, in particular where by the time the conflict was brought to light she had already taken possession.

Section 588 does not take any affirmative position on this front, but at least on its face seems to endorse the Wertheimer rule, so that in cases where the earlier purchaser was justified in his failure to register a cautionary note, he will prevail even if he parted with much less value than the later purchaser. It would be unfortunate if this moment of reconsideration of Israeli private law were not used for an explicit reversal of the unhappy Wertheimer rule. To be sure, I do not claim that Ganz logically requires such a reversal. As a formal matter, both rules can indeed co-exist. But Ganz does set the stage for the reconsideration of Wertheimer by its implicit recognition that nothing in the language of Section 9 of the Land Law necessitates the dominance ascribed to it in Wertheimer. More precisely, it implies that just as the registration provisions and the duty of good faith can set limits to its scope in cases of the earlier party's failure to register a cautionary note, so can Section 3(4) of the Law of Contracts (Remedies for Breach of Contract) Law, 5731-1970 provide a possible doctrinal hook in order to refine its prescriptions. The sheer doctrinal indeterminacy is obviously not a good reason in and of itself to upset Wertheimer (although it does mean that, as usual, the Wertheimer Court's claim that it is bound by the language of Section 9 was simply fallacious). But there are good, normative reasons to seize the opportunity and reverse Wertheimer.

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94 See Dagan, supra note 18, at 1543-1557.
95 Ganz, supra note 87, at 398-399, 408-409.
96 Id., at 415, 429, 431.
The crux of the matter lies, of course, in Wertheimer's disregard for the significance of the comparative vulnerability test. The Wertheimer court addressed this concern, of course, and insisted that in order to take this concern into account a comprehensive examination of the conflicting parties' overall predicament, rather than a much narrower comparison of the values they parted with, is required. Clearly, this proposition is correct insofar as our goal is to insure that we always make accurate assessments. Thus, if we had known that Wertheimer was in fact extremely poor while Binyamini belonged to society's uppermost echelon, we would have admitted that even a rather minor objective harm to the former would be more severe than a much larger (70 times larger) objective harm to the latter. (This conclusion derives, of course, from the diminishing marginal utility of money.) But the Wertheimer conclusion from this observation does not follow. The Court presents the strategy of a comprehensive assessment of the parties' overall predicament and the option of ignoring altogether the comparative vulnerability test as if they had exhausted all alternative courses of action, and opts for the latter due to the obvious problems (in terms of commercial stability as well as the rule of law) of the former. But this binarism is simply wrong: alongside these two alternatives, there is a third possible course of action, which is in fact more desirable than either of the other two: using the comparison of the payments paid by both parties as a proxy for their comparative vulnerability. As a proxy, it is admittedly imperfect, as the hypothetical of a poor Wertheimer and a wealthy Binyamini demonstrates. But this is indeed a rather exaggerated hypothetical. In many, perhaps most cases, purchasers of a given piece of real estate belong to roughly the same socio-economic stratum. And in these cases the technical and innocuous comparison of the payments they parted with – in other words, their respective losses should they each lose in the proprietary competition and find themselves with an almost worthless claim against the intermediary – is a good indication of their comparative vulnerability.

Finally, the Ganz case left open the question of its relationship with the Aharonov rule, and – maybe because it did not bother to codify Aharonov – the proposed code does not help in resolving this difficulty. On it face, these two cases run in opposite directions: while Aharonov curbs the role of the land registry and fortifies Section 9, Ganz strengthens the reliance on registration and limits the scope of Section 9. But a proper appreciation of the important qualitative distinctions between these two types of proprietary competitions, and thus of the normative underpinnings of these two seminal cases, demonstrates that both of these rules can, and indeed should, be easily accommodated together. Recall that the Aharonov rule regulates competition between a purchaser and the seller's general creditors in which both the quantitative and the qualitative vulnerability tests privilege the former and the comparative advance test does not lean, at least not heavily, in favor of the latter. By contrast, the Ganz rule deals with conflicting transactions in which in many cases the parties' vulnerability is less determinative, while their comparative avoidance ability is rather sharp. Therefore, Ganz should not be read as reversing Aharonov, at

97 The most conspicuous exception to this may be cases in which one party purchases an apartment for its own use and another apartment to rent.

98 This point was recognized in C.A. 790/97 Bank Ha-Mizrachi Ha-Meuchad v. Gadi (2004) 59(3) P.D. 697.
least not insofar as the purchaser is an individual, as opposed to a commercial entity, who buys real estate for his or her own use. 99

C. Combination Transactions

I turn now to the third and final type of proprietary competition to be considered in this Article: the important and rather prevalent case of "combination transactions," which end up in competitions between landowners and third parties who purchase apartments built on their land from an intermediary: the contractor. The proposed code, like the current Land Law, is silent on this matter. This silence is puzzling given the rich judicial doctrine that has been developed over the years. As the pages below demonstrate, the common law nicely adjusts the general normative underpinnings of the law of proprietary competition laid down in Part II below to the particular setting under consideration. The codification process should and can supply a fine opportunity for codifying, and maybe also refining, this emerging body of law.

A combination transaction is a transaction according to which a contractor builds an apartment building on someone else's real estate. The completed building is then registered as a condominium and the landowner transfers a defined set of its apartments to the contractor or to those who in the meantime purchased from the contractor the right to receive such apartments, while remaining the owner of the other apartments. An important benefit of such an arrangement to the parties involved is that most or all of the needed financing is supplied from the sales of the apartments that are yet to be built.

Difficulties arise, however, where the contractor materially breaches its obligations to the other parties, which typically occurs where he becomes insolvent or is on his way to insolvency. The landowner can obviously cancel her contract with the contractor. The important question is, however, can she also strike out the cautionary note registered by the purchasers based on the claim that this cancellation amounts to the elimination of the cause underlying this cautionary note? 100 An affirmative answer to this question places the costs of the legal accident at hand on the apartment purchasers; a negative answer places it on the landowner. The rule adopted by the Court opts for the latter alternative, prescribing that in cases of combination transactions the registration of cautionary notes on a landowner's real estate creates an independent legal relation between her and the apartment purchasers (or their financing banks). This rule implies that a landowner's consent to the registration of cautionary notes creates a direct obligation towards the purchasers (or their financiers) that protects them in the interim period in which she still owns the land. 101 Thus, canceling the landowner's contract with the contractor does not affect, in and of itself, the validity of the cautionary notes and cannot justify their eradication. 102


100 See section 132(a)(2) to the Land Law, 5729-1969.

101 The landowner's obligations are assignable to the purchaser's transferees. See C.A. 886/97 Burstein v. Hudad (1998) 52(4) P.D. 68.

The direct obligation doctrine is normatively desirable because it mimics the rule that most rational parties are likely to adopt, thus facilitating the maximization of the contractual surplus that combination transactions offer. The reason for this is intimately related to the normative infrastructure of the law of proprietary competitions: this rule assigns the burden of legal accidents that may occur following such transactions to the cheapest cost avoiders of such accidents. As Uriel Reichman noted, because the landowner is the most effective risk preventer, a landowner who allows apartment purchasers to register cautionary notes on her land and fails to protect herself by taking any kind of security from the contractor, should bear the cost of any ensuing legal accident. This proposition, in turn, seems valid for two reasons: (1) in most cases there are many apartment purchasers and only one (or a few) landowner(s), so that it is more efficient to concentrate the avoidance efforts on the party that is least likely to face collective action difficulties performing it; (2) the landowner typically enjoys (probably due to economies of scale) superior legal advice and better ability to affect and supervise the triangular arrangement. Given this conclusion of the comparative advance test – and the fact that typically there is no reason to believe that landowners are more (or less) vulnerable than apartment purchasers – the direct obligation doctrine is indeed warranted.

This conclusion does not mean, to be sure, that the doctrine should be immutable. Quite the contrary: unlike the other types of proprietary competitions discussed above, competitions that result from combination transactions occur in a contractual setting. Thus, the fact that there are good reasons for prescribing the direct obligation rule as the default rule, should not affect the parties' freedom of contract should they decide to assign the risk of the failure of their triangular arrangement in a different way. The law should allow the parties to opt out of this rule in cases where it doesn't fit their preferences as long as the apartment purchasers are fully aware of the consequences of such an opt out so that they can properly price the added risk that is thus shifted to them. This indeed is the rule of the Israeli common law in our context. The Court is rather strict with landowners who want to opt out, requiring that they use explicit and unequivocal language. But once such language is employed, it is given full effect even where this means assigning the risk of a contractor's insolvency to apartment owners who are thus treated as any other creditor, notwithstanding the fact that they may already possess an apartment in the building. This result is difficult but nonetheless justified because the existence of an explicit and unequivocal proviso to the landowner's obligation in her contract with the contractor renders the apartment owner the better avoider of any legal accident that derives from her reliance on a more robust obligation.


103 The justification the Court itself provided for this rule is dubious. See DAGAN, supra note 39, at 258-259.


106 See G.E.G., supra note 102, at 746-747.
In addition to the benefit of putting these desirable rules into statutory language, a section in the code that dealt with combination transactions would facilitate the resolution of at least one important question that is still open, namely: whether the direct obligation rule applies also in cases where the contractor has in fact not yet started the construction of the building and the apartment purchasers accordingly have only parted with relatively nominal sums of money. If the law were to focus exclusively on the avoidance comparative test, this fact would be deemed irrelevant. But if, as I have argued above, the comparative vulnerability test should also be considered, these cases should prompt an exception to the direct obligation rule, so that following the contractor's breach the landowner will be able to erase the cautionary notes she allowed to be registered.

CONCLUSION

The codification of private law is a heroic enterprise. A codification process can facilitate the reexamination and the refinement of our existing rules and furthermore contribute to their coherent coexistence. We should, however, take codifiers attempts to improve the coherence of private law with a grain of salt remembering that in most cases the only defensible coherentist moves are normative (rather than doctrinal) and local (rather than global). This important lesson requires rethinking two unfortunate suggestions included in the proposed Israeli civil code: unifying the remedial principles of contract law and tort law and creating a super-category of property covering all types of assets.

By contrast, the proposed consolidation in one chapter of the law of proprietary competitions is a laudable suggestion. The rules regulating this amalgam of cases need to face similar normative questions and thus justify unified treatment. Yet, even in this context important factual differences between the different types of competitions entail significant contextual refinements that an overly broad treatment obscures. An improved version of the proposed Israeli civil code should clearly address these subtleties, which the existing common law already reflects.

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107 Another open question deals with the precise content of the landowner's (default) obligation. Here the better answer seems to be that the cautionary note serves as a security interest. See Reichman, supra note 104, at 346-352.

108 This issue was debated between Justices Shamgar and Goldberg in Nachshon, supra note 102, at 350-352.