EXCLUSION AND INCLUSION IN PROPERTY

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Abstract

Exclusion is in vogue in property discourse: the right to exclude is often considered property’s most defining feature. In this essay, I criticize exclusion-centrism in property theory and argue that inclusion is also a key component of property. Property is an umbrella for a diverse set of property institutions, and defies a perception viewing the right to exclude, or indeed any other feature, as the ultimate core of its definition. To illustrate this point, the essay points to three examples—the law of public accommodations, the copyright doctrine of fair use, and the law of fair housing, notably in the contexts of common-interest communities and leaseholds. The essay shows that limits on the right of owners to exclude, either by refusing to sell or lease or by insisting that non-owners refrain from physically entering their land, are quite prevalent in property law. It further argues that, in these examples, the right of non-owners to inclusion (to buy, rent, or physically enter) should not be viewed as an embarrassing aberration but rather as entailed by the very values that shape property institutions in the first place. I thus conclude that, although less characteristic, manifestations of inclusion are just as intrinsic to property as those of exclusion, and should not be analyzed as external limitations or impositions.
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Exclusion is in vogue in property discourse: the right to exclude is often considered property’s most defining feature. In this essay, I criticize exclusion-centrism in property theory and argue that inclusion is also a key component of property. Property is an umbrella for a diverse set of property institutions, and defies a perception viewing the right to exclude, or indeed any other feature, as the ultimate core of its definition. To illustrate this point, the essay points to three examples—the law of public accommodations, the copyright doctrine of fair use, and the law of fair housing, notably in the contexts of common-interest communities and leaseholds. The essay shows that limits on the right of owners to exclude, either by refusing to sell or lease or by insisting that non-owners refrain from physically entering their land, are quite prevalent in property law. It further argues that, in these examples, the right of non-owners to inclusion (to buy, rent, or physically enter) should not be viewed as an embarrassing aberration but rather as entailed by the very values that shape property institutions in the first place. I thus conclude that, although less characteristic, manifestations of inclusion are just as intrinsic to property as those of exclusion, and should not be analyzed as external limitations or impositions.
INTRODUCTION

Exclusion is in vogue in property discourse. After the bundle-of-sticks picture of property endorsed by the Restatement of Property had for decades been regarded as the conventional wisdom, several leading property scholars again consider the right to exclude as the most defining feature of property. While no one seriously thinks any longer that property always and necessarily entails unqualified dominion, Blackstone’s conception of property as “sole and despotic dominion” has been resurrected as the regulative idea of private property. The conception of “property as exclusion” now seems ingrained in the conventional narrative of property, almost inviting the claim that “the differentiating feature of a system of property [is] the right of the owner to act as the exclusive gatekeeper of the owned thing.”

The right to exclude is indeed typical of many property institutions, at least in liberal settings. But as Tony Honore insisted, neither this right nor any other feature typical of property is in fact the ultimate core of property. Property is a complex and heterogeneous legal construct, which regulates a wide range of human relationships. This heterogeneity explains why the institutions of property bear only a family resemblance to one another. Property law, in its wisdom, has always tailored different configurations of entitlements to different property institutions so that they fit both the social context and

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1 RESTATEMENT (FIRST) OF PROPERTY intro., §§ 1-5 (1936).
2 Even Blackstone did not. See Carol M. Rose, Canons of Property Talk, or, Blackstone’s Anxieties, 108 YALE L.J. 601 (1998); David B. Schorr, How Blackstone Became a Blackstonian, 10 THEORETICAL INQUIRIES L. 103 (2009).
3 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *2 (Univ. of Chi. ed. 1979) (1765-69).
4 See Jeremy Waldron, Property Law, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 6 (Dennis Patterson ed., 1999).
the nature of the resource at stake. In this way, each property institution is, at least ideally, designed according to the balance between property values that suits it best.8

Limits on the right of individual or group property owners to exclude, whether by refusing to sell or lease or by insisting that non-owners do not physically enter their land, are quite prevalent in property law.9 In certain circumstances, the right of non-owners to be included and exercise a right to entry is also quite typical of property10 and is not, or at least should not be, an embarrassing aberration. In this diverse11 set of circumstances, the right of non-owners to be included as buyers, lessees, or “physical entrants” is entailed by the very reasons—I call them property values—underlying the very support of our legal system for the pertinent property institution. Thus, although inclusion may well be less characteristic of property than exclusion, its manifestations are just as intrinsic to property and should not be perceived as external limitations or impositions.12

In Part I, the essay presents some recent provocative accounts of the right to exclude as the core of property. Part II offers a conceptual critique of this admittedly attractive but ultimately misleading trend of exclusion-centrism in property. Part III turns to the normative dimension, emphasizing the limits of the morality of exclusion and explaining why inclusion or entry is an internal feature of some property institutions. Finally, Part IV sketches some implications and applications of the status of non-owners’ right to entry as an intrinsic component of the right to property in specific types of cases and deals with

9 See, e.g., Kevin Gray & Susan Francis Gray, Civil Rights, Civil Wrongs and Quasi-Public Space, 1 EUR. HUM. RIGHTS L. REV. 46 (1999).
10 Advocating the non-owners’ right to entry by no means implies that the owners’ right to exit should be limited. On the right to exit, see Hanoch Dagan & Michael A. Heller, The Liberal Commons, 110 YALE L.J. 549 (2001). Compare Eduardo M. Peñalver, Property as Entrance, 91 VA. L. REV. 1889 (2005), who confuses the right to entry with limitations on exit.
11 As the text implies, there are differences between the various types of right to entry, notably between the right of (certain) non-owners to enter (certain types of) property and the rights of (certain) people to buy (certain types of) property. While these categories are distinct and maybe subdivided further, the discussion below seeks to highlight that they nonetheless share important similarities.
12 As the text intimates, rights to entry are often discussed in terms of the legitimacy or desirability of allowing public law to infiltrate private law. Discussing this admittedly important question is beyond the concern of this essay. Such public values, in my view, are often but not always relevant to private law, though their effect in the horizontal contexts of private law may be different from their effect in the vertical context of public law.
three examples: the law of public accommodations, with its rather early common law origins of vindicating such a right to entry; the copyright doctrine of fair use, which is unfortunately under attack in recent times; and the law of fair housing (notably in the contexts of common-interest communities law and landlord-tenant law), which currently codifies the right to entry in what may well be its most important manifestation in contemporary society.

I. EXCLUSION AS THE CORE OF PROPERTY

Modern champions of the right to exclude typically begin with a fierce critique of the disaggregation of property into a bundle of sticks. They then celebrate what is often perceived as the lay understanding of property as exclusion, highlighting the underappreciated wisdom in this conception, either in terms of autonomy or in terms of efficiency. The ensuing conclusion is that, although the penumbra of property may include shades and hues, its core is well captured by the owner’s right to exclude.

Three examples stand out. Thomas Merrill and Henry Smith advocate what they call “the traditional everyday morality of property,” which is “grounded in the right to

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13 There are also other manifestations of such a right to entry, such as the doctrine of necessity, which are best explained by reference to property values. See JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 130-39 (2006).


15 For the most extreme version of this view, see Thomas C. Grey, The Disintegration of Property, in NOMOS XXII: PROPERTY 69 (J. Ronald Pennock & John W. Chapman eds., 1980).

16 For an even more radical view claiming that property in private law, as opposed to public law, is only about exclusion, see Ernest J. Weinrib, Poverty and Property in Kant’s System of Rights, 78 NOTRE DAME L. REV. 795 (2003). Weinrib’s account is heavily based on a strict division of labor between a strictly libertarian private law and a public law that remedies the entailed deficiencies in terms of other values. Although delving into the evaluation of his scheme’s details would require separate discussion, three conspicuous difficulties deserve brief mention. First, Weinrib’s account of why property rights at the stage of unilateral acquisition must be absolute and need not be tempered by something like the Lockean proviso is perplexing. Second, it is striking to note how much Weinrib’s scheme depends on the optimistic and indeed unrealistic assumption that public law can and does supplement private law with rules for redistributing resources, so that the latter might remedy the distributive distortions of a value-monistic private law. Finally, even if such a tax and redistribution scheme were to miraculously emerge, it would not ameliorate the distortions of such a private law system in terms of unjustified interpersonal dependence. For an extended critique of the fundamental idea of private law autonomy, see Hanoch Dagan, The Limited Autonomy of Private Law, 56 AM. J. COMP. L. 809 (2008).

exclude.” They hold that, because the morality of property must be “recognized by all members in society,” it is “implausible” to say that its “essential quality” is captured by “the metaphor of bundle of sticks,” implying that “the content of property rights mutates from one context to the next.” Instead, Merrill and Smith argue that, although “pragmatic situational morality” may curb exclusion in the periphery of property, “the core of property is the simple right of an owner to exclude the world from the resource.” Their insistence that exclusion is the core of property is founded on its in rem feature, which requires that property rights “be defined in such a way that their attributes can be easily understood by a huge number of people of diverse experience and intellectual skill.”

Merrill and Smith do not arbitrate amongst the “range of possible sources” of “robust moral notions” supporting rights to exclude. They do celebrate, however, the normatively fortunate result of having such rights “present in core property situations,” so as to provide “the generality, simplicity, and robustness necessary to coordinate basic expectations of large numbers of interacting members of a community.” These virtues, which are “central to peaceful coordinated social existence,” explain and justify “that exclusion retains its presumptive moral and legal force,” so that “efforts to supplement exclusion with various devices governing proper use” are perceived as “refinements outside the core of property.” The “broad presumption” of the law, in this view, is and should be “that owners can dispose of property as they wish.”

James Penner similarly argues “that property is what the average citizen, free of the entanglements of legal philosophy, thinks it is: the right to a thing,” or, more precisely, the right to exclusively “determine how particular things will be used.” The authority to exclusively determine the use of things, or the power to exclude others “from the determination of [their] use,” Penner explains, is significant “because of the freedom it provides to shape our lives,” which is an important part of “any fairly robust interest in autonomy.” Penner claims that “property rights can be fully explained using the concepts

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18 Shyamkrishna Balganesh, Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions, 31 HARV. J.L. & PUB. POL’Y 617, 661 (2008). Like Merrill and Smith, Balganesh argues that the right to exclude is “a manifestation of the norm of inviolability, on which the entire institution of property is centered.” Id., at 627.

of exclusion and use.” While use is more fundamental to autonomy than exclusion, the fact that “in the real world... the vast majority of the uses that a person will make of a thing are impossible if everyone tries to use the thing at the same time” entails the “obvious solution” of linking “rights of use with rights of exclusion.” In other words, “the interest we have in purposefully dealing with things,” either by way of “using in the narrow sense” or, more broadly, by “having some purpose in respect of the use to which the thing will be put,” serves “a justificatory role” for the right to property, while the right to exclude others from such things is “the formal essence of the right.” For Penner, this “interest in exclusively using things” unifies property because it is “regarded as a justification which explains and dictates the contours of the right which protects it.” Thus, understanding property as a bundle of sticks is misleading: all these sticks (or incidents), such as the right to possess, use, manage, and so forth, are mere elaborations of what the right to exclude encompasses or entails.20 Property is not “some bundled together aggregate or complex of norms, but a single, coherent right”: “the right to exclusive use,” which “correlate[s] with, or can be derived from, the duty of others to exclude themselves from the property.” Penner celebrates this idea of property not only because, as noted, it ensures a negative liberty that is in turn significant for autonomy, but also because—pace Blackstone’s critics—it is not anti-social: “the ability to share one’s things, or let others use them, is fundamental in the idea of property.”21 In property as exclusion, sharing comes about not as an external requirement but rather as a voluntary determination of the owner, so that permitting another to use one’s property is tantamount to “adopting that use as one’s own.”22

Finally, Larissa Katz offers an intriguing variation on the theme of property as an exclusive right. With other critics of the bundle picture of property, she insists that “ownership is a legal concept with a well-defined structure,” which indeed derives from

20 But notice that, for Penner, the right to sell or make other market transactions, as opposed to gifts, is not part of the right to property. See PENNER, supra note 6, at 87-93. Thus, insofar as my critique of the unfortunate implications of exclusion-centrism deals with alienability, it does not necessarily apply to him.

21 This point is further emphasized in James Penner, Ownership, Co-Ownership, and the Justification of Property Rights, in PROPERTIES OF LAW 166 (Timothy Benedict ed., 2006).

its nature as an exclusive right. Unlike Merrill and Smith, or Penner, however, Katz argues that this exclusive right does not entail that others keep out but that they comply with “the agenda the owner has set” for the resource. Katz concedes that equating ownership with exclusion, thereby suggesting that the owner’s gate keeping function is the essence of property, is wrong because the law simply does not define ownership along the lines of exclusion; rather, “[t]he form that ownership takes is much more closely allied to its purpose.” She claims that the defining feature of ownership “is that it is the special authority to set the agenda for a resource”: like a sovereign, “the owner’s authority to set the agenda is supreme, if not absolute, in relation to other private individuals.” Like with sovereignty, exclusion of others is neither necessary nor sufficient to ownership.  

Instead, what is necessary to vindicate the owner’s “exclusive agenda-setting authority,” and what the law in fact supplies, is protection against the usurpation of this authority. Property, then, puts others under an obligation “to fall in line with the owner’s agenda” so that they “have a subservient, rather than a competitive relationship with the owner, who is left in charge of the resource.” This supremacy in terms of agenda-setting, which includes “a right to misuse a thing,” meaning “to choose an agenda that is not to the liking of one’s peers,” is precisely what constitutes property as “a self-seeking sphere of action.” For Katz, therefore, “denying that the right to exclude forms the core of ownership” does not undermine “ownership’s link to freedom,” which is firmly based on “the owner’s ability to set the agenda for it, and do so for reasons that are truly her own.”

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23 Cf. Adam Mossoff, What is Property? Putting the Pieces Back Together, 45 ARIZONA L. REV. 371 (2003), who argues that exclusion is necessary, but not sufficient, for the concept of property, and that “the elements of exclusive acquisition, use, and disposal represent a conceptual unity that together serve to give full meaning to the concept of property.” Id., at 376.

24 See Larissa Katz, Exclusion and Exclusivity in Property Law, 58 U. TORONTO L. J. 275, 275, 277-78, 281, 289-90, 296-98, 313, 315 (2008). Katz adds that “this raises important questions about abuse of right, or the inherent limits on agenda-setting authority: the pursuit of valued and valuable ends ought to count as a legitimate exercise of agenda-setting authority, no matter how trivial or idiosyncratic the ends sought.” Id., at 313 n.115. For Katz’s account of abuse of right, which focuses on owners’ illegitimate motives, see Larissa Katz, A Common Law Principle of Abuse of Right (unpublished manuscript).
II. NEITHER A BULWARK OF EXCLUSION, NOR A FORMLESS BUNDLE OF STICKS

Advocates of property as an exclusive right tend to rely, as we have seen, on the notorious dichotomy between the academic lawyers’ conception of property as an ad-hoc bundle of rights, and what is described as its lay understanding as exclusion or exclusivity.\textsuperscript{25} Since the former view does violence both to popular consciousness and to the important property values of efficiency and autonomy, so the argument goes, the latter must win the day. But the validity of such arguments depends on the plausibility of the conceptual choice they present, which relies on the presupposition that property is either one coherent idea or else must be disintegrated into formless bundles. Although this presupposition and the tragic choice it seems to generate are pervasive in property scholarship, they are fortunately flawed.

Neither the conception of property as a monistic institution revolving around ideas of exclusion or exclusivity nor that of property as a formless bundle of sticks open to ad-hoc judicial adjustments bears any resemblance to the law of property as lawyers know it or, even more importantly, as citizens experience it in everyday life. We should thus discard both these conceptions of property and adopt one more in line with property’s real life manifestations.

Some parts of the property drama do indeed consist in governing the productive struggle between autonomous excluders, with each individual cloaked in the Blackstonian armor of sole and despotic dominion. Yet, the notion that property as an idea is about the owner’s power to exclude from the resource or to exclusively set the agenda for it is a great exaggeration.\textsuperscript{26} Property can be understood as an exclusive right, and exclusion or exclusivity can exhaust the meaning of property and thus be properly described as its core only if we set aside, somewhat arbitrarily, large parts of what constitutes property law, at least according to the conventional understanding found in the case law, the Restatements, and academic commentary. To be sure, many property rules do indeed provide structures for the relationships between strangers or between market transactors,

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\textsuperscript{25} The source, or at least an important milestone, of this dichotomy, is BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977). For a recent manifestation, see Eric Claeys, Property 101: Is Property a Thing or a Bundle?, 32 SEATTLE U.L.J. 617 (2009).

\textsuperscript{26} Equating property with exclusion also improperly bolsters the cultural power of libertarian claims.
and as such can reasonably be accounted for within the exclusion/exclusivity paradigm. But numerous other rules prescribe the rights and obligations of members of local communities, neighbors, co-owners, partners, and family members, including rights regarding the governance of these property institutions. These property rules cannot be fairly analyzed in terms of exclusion or exclusivity: while these terms are silent as to the internal life of property, the whole point of these elaborate property governance doctrines is to provide structures for cooperative rather than competitive or hierarchical relationships.\textsuperscript{27} \textit{Pace} Penner, sharing and cooperation in these doctrines are not the choice of a person who already enjoys sole and despotic dominion, but rather a constitutive feature of the property institution, which defines the content of that person’s property right. Furthermore, in shaping the contours of these property institutions, concerns about insiders’ governance may be as or even more informative as concerns about outsiders’ exclusion.\textsuperscript{28} \textit{Pace} Merrill and Smith, these doctrines are not marginal or peripheral to the life of property, but deal instead with some of our most commonplace human interactions and thus tend to blend into our natural environment. Therefore, postulating exclusion or exclusivity as the lay understanding of property is not only condescending but also probably mistaken.\textsuperscript{29}

This failure of the exclusion/exclusivity conception of property does not mean that its bundle of sticks counterpart is any more successful. Again, understanding property as a bundle has a grain of truth. As Wesley Hohfeld rightly observed, property has no canonical composition and, therefore, a reference to the concept of property cannot, or at least should not, entail an inevitable package of incidents.\textsuperscript{30} But property is not, as the

\begin{itemize}
\item \textsuperscript{28} Think, for example, of the frequently implicit reasons underlying doctrines dealing with leveraged buyouts or with the conditions under which “legal accidents,” meaning contradictory claims raised by parties with no contractual privity, are resolved. Notice further that, at least theoretically, governance considerations may even shape a property institution from which no one is excluded (call it regulated open access, if you will).
\item \textsuperscript{29} Interestingly, Smith himself refers to exclusion as merely one of two strategies making up the poles of a spectrum for delineating property rights, with the other pole being governance. See Henry E. Smith, \textit{Exclusion Versus Governance: Two Strategies for Delineating Property Rights}, 31 J. LEGAL STUD. S453 (2002).
\item \textsuperscript{30} See Wesley Newcomb Hohfeld, \textit{Fundamental Legal Conceptions as Applied in Judicial Reasoning}, 26 YALE L.J. 710, 720, 733-34, 746-47 (1917).
\end{itemize}
bundle metaphor might suggest, a mere laundry list of rights with limitless permutations. Instead, as the *numerus clausus* principle prescribes, at any given time property law offers only a limited number of standardized forms of property.\(^{31}\) Not only do ordinary people not buy into the idea of open-ended bundles of rights, but property law itself has never applied it either.

Rather than a uniform bulwark of exclusion/exclusivity or a formless bundle of rights, property should be thought of the way it actually is in both law and life: an umbrella for a set of institutions—property institutions—bearing family resemblances.\(^{32}\) Each such property institution entails a specific composition of entitlements that constitute the contents of an owner’s right vis-à-vis others, or a certain type of others, with respect to a given resource. The particular configuration of these entitlements is, or at least should be, determined by its character, namely, by the unique balance of property values characterizing the institution at issue.\(^{33}\) At least ideally, these values both construct and reflect the ideal set of mutual interactions in a given category of social contexts—such as market, community, family—and with respect to a given category of resources—such as land, chattels, copyright, patents. Indeed, while the ongoing process of reshaping property as institutions is usually addressed with an appropriate degree of caution, the possibility of repackaging highlighted by Hohfeld makes it, at least potentially, an exercise in legal optimism, with lawyers and judges attempting to explicate and develop existing property forms by accentuating their normative desirability while remaining attuned to their social context. (As should by now be clear, I do not favor ad-hoc adjustments of property rights based on the equities of each particular case. Rather, I argue that “some legal actors, notably judges of appellate courts, should occasionally use


new cases as triggers for an ongoing refinement of rules, as opportunities to revisit the normative viability of existing rules *qua* rules.”

Some property institutions, then, are structured along the lines of the Blackstonian view of property as sole despotic dominion. These institutions are atomistic and competitive, and vindicate people’s negative liberty. Liberal societies justifiably facilitate such property institutions which serve both as a source of personal economic well-being, and as a domain of individual freedom and independence. In other property institutions, such as marital property, a more communitarian view of property may dominate, with property as a locus of sharing. In yet many others along the strangers-spouses spectrum, shades and hues will be found. In these categories, both liberty and community are of the essence, and the applicable property configuration includes rights as well as responsibilities.

Property institutions also vary according to the nature of the resource at stake. The resource is significant because its physical characteristics crucially affect its productive

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37 See Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614, 655 (1988). Although Singer’s spectrum of social relationships is somewhat different from the one I use, it certainly serves as a source of inspiration. Because of this similarity, it may be helpful to describe how my account may differ from Singer’s. First, Singer’s claim that the reliance interest is an important premise of the entitlements of workers, spouses, adverse possessors, and so forth suggests that reliance can serve as at least part of an argument for property rights. But law never protects reliance per se; it protects reliance if and only if there is a good reason to encourage (or at least not discourage) the type and magnitude of the reliance at issue. Therefore, reliance, in and of itself, is a shaky ground for justifying entitlements. Reliance is desirable only when it facilitates some important human good. See Hanoch Dagan, *Mistakes*, 79 TEX. L. REV. 1795, 1803-04 (2001). Moreover, Singer maintains that the legal system may require a sharing or shifting of property interests from the owner to the non-owner to protect the more vulnerable party to the relationship. See Singer, *id.*, at 621, 623, 664-65, 668, 728, 730. Although “sharing” is indeed desirable at times I would reject “shifting” of property interests insofar as it legitimates an *a posteriori* approach to entitlement prescription. Shifting in this sense is undesirable because it generates considerable uncertainty, which might infringe too much on the property values of liberty and welfare. Furthermore, such uncertainty might even frustrate the property value of community, when the rules of the game are uncertain, the parties tend to be suspicious of one another.
use.\textsuperscript{38} Thus, for example, the fact that information consumption is generally non-rivalrous implies that, when the resource at hand is information, use may not always necessitate exclusion.\textsuperscript{39} The nature of the resource is also significant in that society approaches different resources as variously constitutive of their possessors’ identity.\textsuperscript{40} Accordingly, resources are subject to different property configurations: whereas the law vigorously vindicates people’s control of their constitutive resources, the more fungible an interest, the less emphasis property law will need to place on its owner’s control.\textsuperscript{41}

Given that the meaning of property is not homogeneous but varies instead with its social settings and with the categories of resources subject to property rights, searching for property’s core is futile and misleading. Trying to impose a uniform conception of property on these diverse property institutions, which enable diverse forms of association and therefore diverse forms of good to flourish, would be unfortunate, because it would undermine the freedom-enhancing pluralism and the individuality-enhancing multiplicity so crucial to the liberal ideal of justice.\textsuperscript{42} Furthermore, Merrill and Smith’s idea that only a uniform Blackstonian conception of property can facilitate large-scale social coordination is highly overstated. No technical competence is needed to see the basic thrust of the distinctions between the institutions of property.\textsuperscript{43} Leaving specifics aside,


\textsuperscript{40} See Margaret J. Radin, Property and Personhood, 34 Stan. L. Rev. 957, 992, 1013 (1982).


\textsuperscript{43} Critics of the “property pluralism” view defended in this essay tend to assume that the multiplicity of property institutions (and thus of the normative underpinnings of property) must be structured in the form of vague standards (as opposed to bright-line rules). They thus imply that a successful critique of open-endedness as a threat to legal stability undermines the position that refuses to accept exclusion as the core of property. See Henry E. Smith, Mind the Gap: The Indirect Relation between Ends and Means in American Property Law, 94 Cornell L. Rev. 959 (2009). See also, e.g., Jane B. Baron, The Repressed Politics of Property (unpublished manuscript) Pt. II. This is false, however. As the position defended here demonstrates, one can coherently argue both (1) that we need to talk less about property and more about property
nothing is mysterious or confusing about the different meanings of holding a traditional fee simple estate, owning a unit in a common interest community, or having a share in a publicly held corporation.\textsuperscript{44} Thus, we have no reason for thinking that these differences are not widely known and easily understood and internalized.\textsuperscript{45} In fact, the law is justified in limiting the number of these property institutions precisely because of their role as default frameworks of interpersonal interaction that serve to consolidate expectations and express the law’s normative ideals for core types of human relationships.\textsuperscript{46}

III. THE LIMITED MORALITY OF EXCLUSION AND THE RIGHT TO BE INCLUDED
The understanding of property as exclusion is not only descriptively and conceptually problematic; it is also normatively disappointing. Again, I do not deny that the right to exclude or to exclusively set a resource’s agenda sometimes plays a valuable role in terms of both autonomy and utility. These crucial property values, however, also caution against allowing exclusion or exclusivity to dominate property. They warn us against embracing too hastily a strong presumption of owners’ exclusive right as the rule, and potential limitations or qualifications as the exception, lest we thereby cloak important normative choices requiring open and contextual examination.\textsuperscript{47}

Moreover, these property values, together with the most appealing conceptions of citizenship and membership, necessitate the incorporation of some dimension of social institutions, and (2) that the (different) ways in which the various property values are embedded in these institutions are, or at least should be, rule-based. This allows supporters of property pluralism to actually endorse, in Smith’s terms, an “up front and across the board” approach that respects property’s stability and predictability.


\textsuperscript{45} The fact that people’s understanding of property follows the rough contours of its legal structure should not be surprising. Property, like many other important social institutions, is a legal concept and thus necessarily artificial. Therefore, although law’s constitutive power is undoubtedly limited, any appeal to everyday understanding, which implies that the concept is independent of law, is highly problematic. See Roy Kreitner, \textit{On the Use and Abuse of Blackstone – A Comment on Professor Schorr}, 10 THEORETICAL INQUIRIES L. FORUM, available at: http://services.bepress.com/tilforum/vol10/iss1/art1 (2009).


responsibility into the concept of property, a notion that is anathema to the idea of property as an exclusive right. At times, such social responsibility also entails an acknowledgment of non-owners’ right to entry. To be sure, exclusion and inclusion are not symmetric in property; in the limiting case of inclusion, namely, universal equal access, there is no owner. But insofar as the owners’ social responsibility and the non-owners’ right to entry are grounded in the very same property values that justify the property institutions at stake, they should not be marginalized vis-à-vis the owner’s right to exclude or to exclusively set the resource’s agenda.

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Advocates of property as a means of promoting social welfare, including many students of the economic analysis of law, explicitly or implicitly acknowledge that market failures and the physical characteristics of the resources at stake often require curtailing an owner’s dominion so that ownership of a certain type of resource, or in a certain type of social context, can properly serve the public interest. Likewise, personal autonomy, the most individualistic justification of private property, also implies a dimension of social responsibility. If the role of property is to provide control over the external resources necessary for individual autonomy, the law’s enforcement of property owners’ rights cannot be justified if the law does not simultaneously guarantee necessary resources to non-owners.


49 Notice the difference between these types of arguments: whereas the former merely shows that the most canonical defenses of property implicitly assume some dimension of social responsibility, the latter more directly defends the importance of incorporating social responsibility into our conception of property. The following paragraphs draw on Hanoch Dagan, The Social Responsibility of Ownership, 92 Cornell L. Rev. 1255 (2007).


(decentralizing decision-making power) as a prerequisite for individual liberty requires addressing cases in which concentrations of private property (i.e., private power) become “sources of dependency, manipulation, and insecurity.”

Not only does the social responsibility of ownership comply with the most compelling justifications of private property but it also corresponds to, and is indeed required by, the most appealing conceptions of membership and citizenship. Essentializing property as an exclusive right expresses and reinforces a culture of alienation that “underplays the significance of belonging to a community, [and] perceives our membership therein in purely instrumental terms.” In other words, this approach “defines our obligations qua citizens and qua community members as ‘exchanges for monetizable gains[,]’… [and] thus commodifies both our citizenship and our membership in local communities.” The impersonality of market relations is not inherently wrong; quite the contrary, by facilitating dealings “on an explicit, quid pro quo basis,” the market defines an important “sphere of freedom from personal ties and obligations.”

A responsible conception of property can and should appreciate these virtues of the market commitment to dispersal of access” and insisting that we design our property system so that it dynamically ensures that “lots of people have some” property and that “pockets of illegitimately concentrated power”—i.e., property—do not re-emerge.

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53 Hanoch Dagan, Takings and Distributive Justice, 85 Va. L. Rev. 741, 771 (1999). As the text below re-emphasizes, I do not argue that exclusion and impersonality have no legitimate role in property, nor do I claim that the property values underlying any given property institution should correspond to our general normative commitments as citizens.

54 Id. at 772 (quoting Margaret Jane Radin, Contested Commodities 5 (1996)). For some empirical support, see Jonathan Remy Nash, Packaging Property: The Effect of Paradigmatic Framing of Property Rights, 83 Tul. L. Rev. 691 (2009), providing statistically significant support for the proposition that those who view the rights through the “discrete asset” paradigm are less likely to part with their rights than those who view the rights through the “bundle” paradigm.

55 See Anderson, supra note 42, at 145.
norms, assigning the owner’s power to exclude and to exclusively set the resource’s agenda its proper role. But at the same time, it should avoid allowing these norms to override those of the other spheres of society. Recall that property relations mediate some of our most cooperative human interactions as spouses, partners, members of local communities, and so forth. Imposing the impersonal norms of the market on these divergent spheres and rejecting the social responsibility of ownership that is part of these ongoing cooperative relationships would effectively erase these spheres of human interaction and human flourishing.

Thus far, I have criticized attempts to conceptualize property around owners’ dominion, be it in terms of a right to exclude or of a right to exclusively determine the resource’s agenda. In the remainder of this essay, I will focus on what may be the most far-reaching manifestation of this claim, namely, on categories of cases where property law vindicates the right of non-owners to be included or to enter the resource in defiance of the owner’s objection, thus directly undermining the view that property is essentially an exclusive right. In this part, I focus on the normative foundations of such right to entry and on its legitimate scope, which to a large extent derive from the reasons I have just outlined for justifying the constitutive role of the social responsibility to property. In the next and last part, I discuss some implications and applications regarding certain important property institutions: common-interest communities, leaseholds, public accommodations, and copyright.

My core claim here is, again, that some of the very justifications of the property institutions at hand point to substantial, albeit well-circumscribed, limits of the owners’ right to exclude, as well as to important reasons for allowing entry to non-owners.

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56 These norms are of course most suitable to the sphere of sophisticated commercial players. Cf. Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 YALE L.J. 541 (2003).

57 Cf. Joseph W. Singer, No Right to Exclude: Public Accommodations and Private Property, 90 NW. U.L. REV. 1283, 1303, 1466 (1996). As the text implies, ours is one example in which the reasons underlying the relevant parties’ entitlements are not relational, and yet their convergence is thick enough to justify, within the framework of private law, the responsiveness of the (correlative) entitlements of property owners and potential entrants. See generally Dagan, Limited Autonomy, supra note 16. Thus, in all three bodies of law discussed in Part IV below, some non-
Despite the diversity of the property institutions at stake, all implicate four important values: autonomy, personhood, community, and utility. None of these values sanctions an absolute right to exclude; furthermore, in varying degrees, they even positively require curbing such a right and recognizing a right to entry to non-owners.

Although autonomy appears to be the most obvious property value supporting a rigid understanding of property as an exclusive right, in fact it is not. As a general, right-based justification of property, the idea that personal autonomy requires individual property rights implies that every human being is entitled to some property or, more precisely, to the property needed to sustain human dignity.\(^5\)\(^8\) Such a claim by non-owners is obviously relevant vis-à-vis the government, but may also be pertinent in private contexts. To see why, consider property’s role in protecting people’s negative liberty. Private property protects people’s independence and security because it tends to spread decision-making power. Its protective effect, then, is not universally significant but rather particularly important to those who are either part of the non-organized public or of a marginal group with minor political clout.\(^5\)\(^9\) The combination of, on the one hand, the special significance of providing non-owners access to property and, on the other, the inverse relation between owners’ wealth and power and the importance of safeguarding their right to exclude, points to categories of cases in which our commitment to autonomy entails the non-owners’ claim to entry rather than the owners’ claim to exclude.\(^6\)\(^0\)

Similar and possibly more pointed conclusions emerge from an analysis of the property value of personhood. Whereas ownership of a fungible property plays a purely instrumental role in an owner’s life, holders of constitutive resources are personally attached to their properties since and insofar as they reflect their identity, because such


\(^5\)\(^9\) See Dagan, Takings and Distributive Justice, supra note 53, at 752.

\(^6\)\(^0\) This conclusion is but one manifestation of the important insight that negative liberty must always be analyzed as a means, important as it is, for people’s autonomy. It should thus be curtailed when it undermines, rather than serve, the more fundamental value of self-determination. See H.L.A. HART, Between Utility and Rights, in ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 198, 206-207 (1983); WILL KYMULICKA, CONTEMPORARY POLITICAL PHILOSOPHY 120, 123-125 (1990).
resources are external projections of their personality. Hence, the same property value that is particularly strict about curtailing a non-owner’s demand to enter (purchase, lease, use, or physically enter) a constitutive resource, such as one’s home, may be almost indifferent regarding a fungible resource. In some cases, the position of the property value of personhood is virtually reversed: when a resource is fungible for its owner but constitutive for another (say: its long-term lessee), the property value of personhood is particularly suspicious of the owner’s claim to exclude that particular other.

Consider next the property value of community. Recall that property institutions can, and often do, create an institutional infrastructure that facilitates the long-term cooperation necessary for successful communities. Community, by definition, requires some demarcation from the broader society, and thus some measure of practical and symbolic exclusion. But not every type of exclusion is sanctioned. The ways property serves community cover a wide spectrum, ranging from close-knit cultural communities to much thinner ones, where co-ownership is itself a significant medium for creating shared community values. Both types of situations prescribe only specific types of reasons legitimizing exclusion. One end of the spectrum authorizes exclusion if, and only if, exclusion is required to preserve a cultural community’s distinction from the surrounding society, as when a minority group practices segregation to preserve its distinctive way of life, and exclusion is indeed necessary to sustain a prosperous proprietary community. At the other end of the spectrum, involving a community partly constituted by the property

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61 For a synthesis of the philosophical and social-scientific literature on the subject, see DAGAN, UNJUST ENRICHMENT, supra note 41, at 38-42.


63 See generally Dagan & Heller, Liberal Commons, supra note 10.


structure, limitations on entry are even more restricted and justified only insofar as they prevent inclusion of “bad cooperators” likely to jeopardize the success of the commons property, or enhance shared cooperative values that are a necessary condition of such success. The property value of community is not only reluctant to sanction broad exclusionary practices but, in some cases, even positively requires entry. Our entire citizen body is also an important human community, so that preserving open boundaries between sub-communities also serves, at least to some extent, the property value of community.

Finally, we can look at the property value of welfare or utility. Generally, entitling the owner to determine the time and terms of a resource’s use will prove efficient. But in some cases, not necessarily marginal ones, granting strict legal sanction to an owner’s refusal to sell or lease, generally or to a certain subset of potential entrants, will prove detrimental to social welfare. One well-known category of such cases involves instances where high transaction costs, caused by the number of parties involved or by their placement in a bilateral monopoly, are likely to preclude efficient transactions. Another example deals with the increasingly important resource of information. Because the production of information depends on its broad availability, efficiency may not always necessitate exclusion. Some rights of entry, in the shape of open-access and sharing practices, may actually be conducive to efficiency.

IV. IMPLICATIONS AND APPLICATIONS

I turn now to several examples illustrating my view so far that property neither is nor should be solely about exclusion or exclusivity and that, at times, inclusion is part of what property is rather than external to its core. In what follows, it is not my purpose to offer a comprehensive account of the doctrines at stake, which have been aptly discussed by others.

67 See Dagan & Heller, Liberal Commons, supra note 10, at 571.


But because I believe that part of the assessment of any theory of the law must lie in the appeal of its specific results and its ability to perform across a range of questions,\textsuperscript{71} I conclude with a brief sketch of three case studies, where the current state of the law either roughly accords with, or else can benefit from, my theoretical observations. Regarding all three manifestations of the right to entry, considerations external to property may also be relevant, and my focus on internal ones should not be interpreted as denying their potential effect. Rather, this focus entails that the idea of property as such embraces these rights to entry, so that even friends of property who doubt the relevance of such external considerations can follow suit.\textsuperscript{72}

\textit{A. Public Accommodations Law}

Public accommodations law is one of the most persistent doctrines of land law in the Anglo-American tradition. At its core is the instance of the common innkeeper, whose premises “have been subjected from time immemorial to special rules” prescribing a duty “to receive and provide lodging in his inn for \textit{all} comers who are travelers.”\textsuperscript{73} In the United States, as Joseph Singer meticulous research reveals, the scope of this common law doctrine has been the subject of some curious historical developments. Available sources show that, before the Civil War, such a broad duty to serve the public probably applied to “all businesses open to the public.” But later, “when the right to access was explicitly extended for the first time to African-Americans,” this duty was deliberately cut back so that only innkeepers and common carriers were so obligated, while other public places were entitled “to exclude patrons on the basis of race.”\textsuperscript{74} The current state of the law, as Singer further elucidates, is also somewhat puzzling. In some jurisdictions, the applicable statutory materials do not cover the entire array of either public accommodations or insidious discrimination. Some statutes do not explicitly prohibit race discrimination in retail stores,

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\textsuperscript{72} Furthermore, unlike with such external considerations, employing the internal property considerations generate conclusions which do not depend on the tormented form of legal reasoning of balancing.
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\textsuperscript{73} Gray & Gray, \textit{supra} note 9, at 83-84.
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\textsuperscript{74} Singer, \textit{supra} note 57, at 1298-1300.
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while others do not cover sex discrimination, and only one state has openly announced a common law doctrine whereby “all places open to the public have an obligation to serve people who enter their establishments unless they have a good reason not to do so.” Nevertheless, Singer seems persuasive when arguing that “most people, including many lawyers and law professors” believe that “businesses open to the public [do] have a duty to serve the public without unjust discrimination.”

The analysis in this essay suggests that such a general right to entry, obviously subject to the owner’s authority to prescribe reasonable rules of conduct appropriate to the purpose of the premises at hand, should indeed be recognized. Non-owners’ right to enter public accommodations is firmly grounded not only in the public law prescription of anti-discrimination, but also in the very commitments that underlie this property institution. Highlighting this internal foundation of public accommodations law is not only theoretically important. It is also significant in helping to circumscribe the scope of this general duty and defend its validity even against those who believe that public law values should have no—or at least no immediate or only limited—application to the horizontal relationships regulated by private law.

The common denominator of all privately-owned places purportedly subject to the right of entry prescribed by public accommodations law is that they “are deliberately laid open to public resort.” This feature obviously affects the possible infiltration of public law norms into the regulation of such private properties. More in keeping with my current purposes, this feature is also relevant to the appropriate construction of the property institution at hand. It prescribes, more precisely, the non-owners’ right to entry, which is shaped by a finely tuned balance between the owner’s reduced personhood interest and key autonomy and community interests of potential entrants.

Indeed, the property value of personhood easily explains the difference between ownership of a hotel or a retail store and ownership of a home. Our home is one of our

75 See id., at 1290-91.
76 Gray & Gray, supra note 9, at 99-100.
77 Gray & Gray, supra note 9, at 90.
78 Cf. Marsh v. Alabama, 326 U.S. 501, 506 (1946) (“The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it”).
quintessential constitutive resources, and as such should be a priori immune from public regulation. By contrast, most commercial businesses are held by their owners, which are frequently characterless corporations, in a purely instrumental fashion. Insofar as these public accommodations are concerned, the property value of personhood seems indifferent to a legal prescription of non-owners’ right to entry.

Autonomy is even more receptive to such a right. An unqualified right to exclude would obviously have strengthened the negative liberty of public accommodations’ owners. Its detrimental effect on other people’s autonomy, however, would have been much more significant, given that the ability to physically enter such places is a precondition for accessing many social and economic opportunities crucial for personal development in contemporary society. This function of public accommodations as a locus of opportunities and development further explains the insult and alienation implied by exclusion.

Similar conclusions emerge from an analysis of public accommodations when considered from the perspective of the property value of community. Preserving open boundaries between the various sub-communities making up our citizen body, as noted, is a meaningful entailment of this value. This prescription explains and justifies noteworthy property rules that govern classical socialization loci, such as parks and beaches. It is also relevant to other venues, notably businesses of the type discussed in this section, because they constitute an important sphere of social life (the market) that should be open to universal participation.

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80 There are, to be sure, also hard cases of “mom and pop stores” that reflect their owners’ prejudices. Such cases may well result in “a standoff from the perspective of personhood,” which must be resolved by invoking other property values or external normative considerations. See Radin, supra note 40, at 1011.


82 See Rose, supra note 68.

83 See Singer, supra note 57, at 1448, 1476.
B. Fair Use

In what may seem a dramatic shift, but is hardly so from a right to entry perspective, I turn from the patrons of a restaurant, a theatre, or a shopping mall to the public having recourse to music, to a novel, or to computer software. People making use of these resources may wish to access the copyrighted work or engage it in their own creative activity.\textsuperscript{84} If exclusion/exclusivity is the regulative principle of property, and if copyright is a species of property (a property institution in my vocabulary),\textsuperscript{85} then both forms of use should be dependent upon the copyright owner’s consent. In many cases, however, users figuratively enter the owners’ domain and legitimately bypass their consent. One important category of cases governed by such a right to (free) entry is the fair use doctrine.

Like public accommodations law, fair use is a veteran doctrine dating back to the 1840s,\textsuperscript{86} which explicitly limits the owner’s exclusive rights.\textsuperscript{87} In its now codified form, this doctrine prescribes that “the fair use of a copyrighted work, including such use by reproduction in copies … for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” A determination of fair use in this context requires the consideration of these factors: “(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.”\textsuperscript{88}

\textsuperscript{84} See generally Joseph P. Liu, Copyright Law’s Theory of the Consumer, 44 B.C.L. REV. 397 (2003). Liu criticizes the caricature of a passive “couch potato” consumer and highlights the active dimensions of consuming informational products.

\textsuperscript{85} Some scholars resist this classification of copyright. See, e.g., Lawrence Lessig, Re-crafting a Public Domain, 18 YALE J. L. & HUMAN. 56 (2006). I have criticized this position, which implicitly (and paradoxically) adopts the Blackstonian conception of property, in Dagan, Property and the Public Domain, supra note 52.


\textsuperscript{87} The title of 17 USCS §107 is “Limitations on exclusive rights: Fair use.”

\textsuperscript{88} Id.
Like public accommodations law, fair use does not need to summon normative concerns external to the property institution to which it belongs. The opposite is true: although such external considerations, notably those grounded in free speech, are certainly relevant, fair use can also neatly fit the normative underpinnings of copyright as a property institution. To establish this point, I do not need to delve into the voluminous literature on the foundations of copyright or resolve any of its debates.\footnote{For a useful survey of the various approaches to copyright, see William Fisher, \textit{Theories of Intellectual Property}, in \textit{NEW ESSAYS IN THE LEGAL AND POLITICAL THEORY OF PROPERTY} 168 (Stephen R. Munzer ed., 2001).} The following, rather uncontroversial propositions, will suffice.

One major welfarist goal of copyright law concerns the encouragement of creative activity. Providing such incentives is important because: (1) Creative activity serves human flourishing by facilitating both human culture and the processes of self-governance. (2) Creative resources may otherwise be undersupplied because the expected costs of their production tend to be high while the costs of their copying, which may turn the copier into a competitor, are rather low.\footnote{Similar conclusions follow the most charitable reading of the labor theory of property, in which “laborers merit a reward because by engaging in value-creating activities they contribute to the betterment of the human predicament.” Dagan, \textit{Property and the Public Domain}, supra note 52, at 90-91. For other, dubious uses of labor theory see Alfred Yen, \textit{Restoring the Natural Law: Copyright as Labor and Possession}, 51 OHIO ST. L.J. 517 (1990).} Both propositions are significant for my purposes. The latter implies that the scope and the content of authors’ rights should be carefully delineated in order to avoid the unfortunate predicament of society paying too much for its creative resources or undermining future creativity, which inevitably engages, invokes, and is inspired by preexisting cultural raw materials. The former proposition reminds us that copyright must never aim only at maximizing the size of the creative pie without looking at its distribution, and that the widespread dissemination of creative resources is important not only because of our public commitment to distributive justice, but also because of the cultural and democratic purposes inherent in the property institution of copyright.

Besides encouraging creativity, copyright also serves a more individualistic value based on the unique significance of creative resources to the authors’ identity. Notwithstanding counter examples, copyright protects, at its core, works that constitute “the
personal reaction of an individual upon nature,"\textsuperscript{91} that is, significant manifestations of the self. Copyright is thus a classic example of a constitutive resource, which invokes the property value of personhood.\textsuperscript{92} This value entails complex implications: it substantiates the entitlements of current holders of constitutive resources, but it also emphasizes the significance of distributing constitutive resources widely by implying that everyone must have such resources.\textsuperscript{93} This corollary is also relevant to the current context: founding authors’ entitlement to their creative products on the latter’s significance as channels for the unique property relationship of reflection and attachment typical of constitutive resources implies that opportunities for creative activity are significant to all people, \textit{qua} potential authors.\textsuperscript{94}

Appreciating that these purposes are internal to fair use as a property institution helps to explain why this doctrine should not be interpreted as merely a solution to market failures, as it might appear to someone adopting the exclusion/exclusivity paradigm.\textsuperscript{95} It also points out the proper interpretation of fair use as a device for setting aside the entitlement of copyright holders to deny access, overriding their claims to exclusion or to exclusivity in setting the resource’s agenda when these claims undermine the reasons for their having copyright in the first place. Delving into the implications of this prescription is well beyond the scope of this essay.\textsuperscript{96} Two examples, one that applauds existing doctrine and another that calls for its reform, will suffice. The by now

\textsuperscript{91} Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 250 (1903).

\textsuperscript{92} This is true notwithstanding the recent critique of “the romantic author,” which is said to be a modern invention triggered by commercial concerns. While this legacy may justify some caution concerning the pertinent alliance between the property value of personhood and copyright, it cannot undermine this alliance’s intrinsic justificatory power. \textit{See} Guy Pesach, \textit{The Theoretical Foundations of Copyright}, 31 MISHPATIM 359, 383-84 n.79 & 385 n.83 (2001) [Heb.].

\textsuperscript{93} \textit{See} WALDRON, \textit{supra} note 52, at 377–378, 385–386, 429, 444.

\textsuperscript{94} \textit{Cf.} Molly Shaffer Van Houweling, \textit{Distributive Values in Copyright}, 83 TEX. L. REV. 1535 (2005).

\textsuperscript{95} \textit{See} Wendy J. Gordon, \textit{Fair Use as Market Failure: A Structural and Economic Analysis of the Betamax Case and Its Predecessors}, 82 COLUM. L. REV. 1600 (1982). Gordon suggests that fair use is a legal device aimed at permitting “uncompensated transfers that are socially desirable but not capable of effectuation through the market.” \textit{Id.}, at 1601.

\textsuperscript{96} For other promising proposals that fit this prescription, see, e.g., Lessig, \textit{supra} note 85, at 72-75; Liu, \textit{supra} note 84, at 428; Shaffer Van Houweling, \textit{supra} note 94, at 1567-68.
canonical test of transformative use\textsuperscript{97} follows the injunction of providing opportunities for potential authors. By contrast, if fair use doctrine is to take seriously its role in making creative products widely available, it needs to extend educational uses far beyond current levels.\textsuperscript{98}

**C. Fair Housing**

The story of fair housing may well be the pivotal case, at least in recent history, of prescribing a right to entry in defiance of the property owners’ will. And yet, it is rarely told as a story about the meaning of property. Thus, the landmark case of *Shelley v. Kraemer* held that judicial enforcement of racially restrictive covenants is an exercise of state action that violates the Fourteenth Amendment.\textsuperscript{99} With the later enactment of the Fair Housing Act,\textsuperscript{100} which now prohibits discrimination in the sale or rental of residential dwellings on the basis of race, color, religion, sex, familial status, national origin, or handicap, the lawfulness of exclusionary measures by common interest communities as well as by other sellers and by landlords moved from the constitutional to the statutory realm.\textsuperscript{101} Either way, the right of entry in this context is ostensibly peripheral to property, in line with Merrill and Smith’s account whereby any supplement to, or qualification of, the owner’s exclusionary prerogative is perceived as a refinement outside the core of property.

This is the most common framework for the analysis of the right to entry to fair housing.\textsuperscript{102} But a vital element is lost when we lose track of the reasons from property,


\textsuperscript{100} Fair Housing Act, 42 U.S.C. 3601.

\textsuperscript{101} See also Civil Rights Act of 1866, 42 USC §1982, which prescribes that “all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” Jones v. Alfred Mayer Co., 392 U.S. 409 (1968) held that this prescription applies not only to public discrimination, but also to private discrimination.

both in Shelley and in the Fair Housing Act. Thus, Carol Rose described Shelley as posing “a state action enigma”: both prior and later decisions show that the bare potential of judicial enforcement of private arrangements and preferences does not transform them into state action. Rose suggests that this puzzle can be solved by referring to racially restrictive covenants as property. More specifically, she refers to the welfarist commitment of property law to minimize negative externalities on third parties who may not share the preferences of the existing transactors. But, as Rose herself admits, making the protection of third parties from the idiosyncratic preferences of current transactors the core of property raises difficult questions for cases such as Shelley, where third parties are likely to share these current preferences. Thus, Rose’s specific explanation may well be partial and unsatisfactory. And yet, her more general claim that Shelley presents “some of the best instincts of property law” is right on point. In fact, these instincts are founded on property values, that is, on the values that justify property institutions as a whole and, more specifically, the property institutions at hand, notably common-interest communities and leaseholds. For this task, Rose invokes the property value of utility that, on its face, also seems to support the Fair Housing Act’s limitations on landlords’ power to exclude. But the values of autonomy, personhood, and community are even more determinative.

Consider how both Shelley’s rule and the basic entry rule set by the Fair Housing Act can be firmly premised on the property value of autonomy. The limitation on entry struck down in Shelley, for example, so sweepingly restricted alienability—depriving current owners of a substantial pool of buyers—that it is practically tantamount to a substantial limitation on exit. Exit, however, referring to the ability to dissociate, to cut oneself off from relationships with others, is a bedrock liberal value. A strong commitment to exit, to the idea of open boundaries that enable geographical, social, familial, and political mobility, “enhances the capacity for a self-directed life, including the capacity to form, revise, and pursue our ends.” Indeed, because impeding exit is incompatible with the

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103 See Carol Rose, Shelley v. Kraemer, in PROPERTY STORIES 169 (Gerald Korngold & Andrew P. Morriss eds., 2004).
most fundamental liberal tenets, property law has always been suspicious of restraints on alienation.\footnote{Admittedly, this is not the only justification of these inalienabilities, and a further one is efficiency. See Michael A. Heller, The Boundaries of Private Property, 108 YALE L.J. 1163, 1199-1201 (1999). Notice, however, that even consensual restraints that limit mobility are perceived as dubious, not only due to rationality deficiencies such as excessive optimism and lack of foresight. “These limits are also, and perhaps even primarily, premised on the commitment to a conception of individual liberty that puts a high value on people’s ability to reinvent themselves.” Dagan & Heller, Liberal Commons, supra note 10, at 569.} Furthermore, not only is the autonomy of property owners’ at stake here. Implicit in the discussion of their right to exit is a concern for the autonomy of potential entrants, which is no less and perhaps even more significant. Limiting the opportunities of certain people to buy or lease houses or apartments in a certain geographical area undermines the role of property as a locus of individual control. In other words, exclusionary practices that unreasonably limit the mobility of the excluded persons and thus their autonomy must be invalidated.\footnote{See Gillette, supra note 64, at 1437-39. For a provocative application of this maxim, see Robin Paul Malloy, Inclusion by Design: Accessible Housing and Mobility Impairment, 60 HASTINGS L.J. 699 (2009).}

True, concern for the autonomy of entrants seems to be rightly defeated in some settings by the autonomy and personhood concerns of property owners. Thus, the Fair Housing Act vigorously protects the right to exclude in intimate settings, where the personhood value of the owner (potential landlord) trumps any possible interest of potential tenants.\footnote{See the Act’s exceptions for intimate associations: single families (§3603(b)(1)) and small owner-occupied multiple unit dwellings (§3603(b)(2)).} Yet, as mentioned above, the Act reverses this rule and recognizes a rather capacious right to entry when the lessor is a commercial entity. One who acknowledges that negative liberty is not an ultimate value but rather a means for individual autonomy must recognize that the claims of people who wish to establish their life in a certain locus override those of people who perceive property as a fungible asset.\footnote{See Singer, supra note 37, at 676-77, 683-84; D. Benjamin Barros, Home as a Legal Concept, 46 SANTA CLARA L. REV. 255, 284 (2006).} This is particularly true when the latter’s refusal to rent is contemptuous, namely,
related to conspicuous features of the potential lessee’s identity.\textsuperscript{110} Prima facie, this conclusion is limited to cases where the landlord enjoys a local monopoly in the relevant area. But the scope of legitimate entitlements to force entry is not limited to these extreme instances and includes cases where, due to the convergence of local owners’ attitudes in a certain area, a non-owner’s right to entry is virtually meaningless without the power to curtail the owners’ exclusionary practices. In all these cases, landlords enjoy the exclusive right to determine the use of their premises and the terms of their leasing, but they neither are nor should be entitled to an absolute right to exclude unwanted lessees or to exclusively determine the type of lessees that qualify. Their attempt to do so would undermine rather than serve the property values of autonomy and personhood, as well as that of utility mentioned above.\textsuperscript{111}

Similar conclusions follow from the community value of property. As noted, there are limits to the legitimate authority to exclude in close-knit cultural communities as well as in thinner common interest communities, where the shared community values ensue from rather than precede the community-friendly property institution. My brief above discussion of these limits\textsuperscript{112} suffices to support two conclusions about these two types of communities. \textit{First}, the law should, as it does, police exclusionary practices in residential communities insofar as these are used against, rather than by, cultural minority groups.\textsuperscript{113} \textit{Second}, the law should make sure that the limits on entry applied by garden-variety or thin common interest communities are indeed necessary to ensure that those excluded are “bad cooperators” likely to jeopardize the success of the commons property, and that shared

\textsuperscript{110} Unfortunately, various insidious techniques are in use, which preserve residential segregation in defiance of both \textit{Shelley} and the Fair Housing Act. \textit{See} Richard R. W. Brooks, \textit{Covenants \& Conventions}, 9-13, 33-40 (Northwestern Law and Econ Research Paper No. 02-8, 2003), \url{www.northwestern.edu/ipr/publications/papers/2002/WP-02-03.pdf}; Robert G. Schwemm, \textit{Why Do Landlords Still Discriminate (and What Can Be Done About It)?}, 40 \textit{JOHN MARSHALL L. REV.} 463 (2007). Discussing the complex questions raised by this unfortunate predicament exceeds the scope of this essay, and I will confine myself to stating the obvious: the law must attempt to prevent even “sophisticated infringements” of its prescriptions.


\textsuperscript{112} \textit{See supra} text accompanying notes 63-68.

\textsuperscript{113} \textit{See}, e.g., Roderick M. Hills, Jr., \textit{You Say You Want a Revolution? The Case against the Transformation of Culture through Antidiscrimination Laws}, 95 \textit{MICH. L. REV.} 1588, 1592-1614 (1997).
cooperative values are fostered. This means that courts need to supervise admissions criteria in such communities as well as the way they are implemented on the ground.\textsuperscript{114} One implication of this prescription is that rejections of applicants for admissions must be reasoned, and that the reasons must be sufficiently detailed so that both their evaluative and factual components can be properly scrutinized.

Friends of the exclusion/exclusivity paradigm tend to resist this significant prescription. They argue that a duty to reason can undermine the ability of such communities to achieve the legitimate goal of a desirable social composition because of its entailed litigation costs, including the costs of possible judicial errors, and because of the risk that revealing the admissions criteria would generate strategic pretence by applicants.\textsuperscript{115} These concerns are not without theoretical merit, but I doubt whether their weight is substantial enough to outweigh those mentioned above, at least for those of us who refuse to perceive utility as the only value at stake. The law requires judges to make similarly or even more complicated decisions in many other contexts, and I doubt that the marginal risk of strategic pretence generated by transparency is significant. Indeed, the duty to justify would probably improve the quality of admission procedures, since it requires information-gathering and makes reliance on prejudice more costly.

CONCLUDING REMARKS

In many contexts, owners justifiably enjoy a robust right to exclude and to exclusively determine the resource’s agenda. Yet, the proposition that either of these rights is the differentiating feature of property and that property at its core is an exclusive right, is a gross overstatement. Exclusion and exclusivity are typical of many property institutions because \textit{and to the extent that} they serve the property values underlying these institutions. Property institutions vary, however, and each type is characterized by a different balance of such property values as autonomy, personhood, utility, community, and social responsibility. Exclusion and exclusivity, therefore, are often limited and at times superseded by the claim of potential entrants to be included. Like the owner’s right to

\textsuperscript{114} Cf. Alexander, \textit{supra} note 64, at 55-60.

exclude in other contexts, claims by potential entrants to fair housing, fair use, or entrance into a public accommodation derive from the pertinent property values and are thus intrinsic to property rather than external limitations or impositions. Property turns out to be about both exclusion and inclusion. In their different domains, the right to exclude and the right to entry can peacefully cohabit under the heterogeneous, though not formless, umbrella of property.