FROM INDEPENDENCE AND INTERDEPENDENCE TO THE PLURALISM OF PROPERTY

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Abstract

This paper is one chapter of a collection of essays – Property, State, and Community – which will be published with the Oxford University Press in 2011. I discuss in this chapter two recent ambitious attempts to divine the core normative essence of property; relying, respectively, on Kant and Aristotle, one finds property as a castle of independence, the other – as the locus of interdependence. I recognize the normative appeal of these rival theories: independence must be a core value in every humanistic tradition; and our embeddedness in communities is not only an important feature of the human predicament, but also a significant aspect of human flourishing. And yet I show that both theories fail and that their failures are mirror images of one another. Each theory ignores and thus under mines the value emphasized by its counterpart, and this omission also backfires. By refusing to allow interdependence and responsibility to play any role in its conceptualization of property, the property as independence school may end up undermining its own cause by entrenching widespread human dependence. Likewise, by resisting the commitment to legally entrench liberal exit and by insisting that reciprocity should not cap communities’ demands of their members’ contributions, the property as interdependence camp may dilute, rather than fortify, the value of community.

I suggest that rather than trying to extract one regulative principle of the entire terrain of property, we should appreciate the value of the heterogeneity of property’s domain. The multiplicity of property institutions is the key to property’s normative promise. Property can be the home of both independence and interdependence (and can serve the other property values as well), and thus provide people with
valuable options of human flourishing. Only by facilitating such diverse forms of human interaction – different property institutions – can property promote (as it does) the freedom-enhancing value of pluralism and the individuality-enhancing role of multiplicity, which are so crucial to the liberal ideal of justice.
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TO THE PLURALISM OF PROPERTY

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May, 2010

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This paper is one chapter of a collection of essays – Property, State, and Community – which will be published with the Oxford University Press in 2011. I discuss in this chapter two recent ambitious attempts to divine the core normative essence of property; relying, respectively, on Kant and Aristotle, one finds property as a castle of independence, the other – as the locus of interdependence. I recognize the normative appeal of these rival theories: independence must be a core value in every humanistic tradition; and our embeddedness in communities is not only an important feature of the human predicament, but also a significant aspect of human flourishing. And yet I show that both theories fail and that their failures are mirror images of one another. Each theory ignores and thus undermines the value emphasized by its counterpart, and this omission also backfires. By refusing to allow interdependence and responsibility to play any role in its conceptualization of property, the property as independence school may end up undermining its own cause by entrenching widespread human dependence. Likewise, by resisting the commitment to legally entrench liberal exit and by insisting that reciprocity should not cap communities’ demands of their members’ contributions, the property as interdependence camp may dilute, rather than fortify, the value of community.

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INTRODUCTION

Among the most exciting developments in recent property scholarship is the blossoming of property theory. Much of the current debate hinges on the structure, or form, of property. Both the challenges to the earlier canonical understanding of property as a bundle of sticks and the interest in the \textit{numerus clausus} principle belong to this category. But alongside this new and undoubtedly important focus, which was at the center of the previous chapters, the more established property theory discourse that focuses on the normative underpinnings of property is also experiencing a renewal. We are witnessing the emergence of two additional voices in the longstanding debates on the normative underpinnings of property. Both schools use venerable heritages, Kant’s and Aristotle’s, in order to distill the regulatory principle of property. While their answers are not wholly new to students of contemporary property theory, they both contribute to the sharpening of two opposing understandings of property’s raison d’être: whereas one elucidates the idea of property for independence, the other fleshes out the meaning of property for interdependence.

One of the aims of this chapter is to highlight these new voices, a purpose that is certainly intrinsically valuable.\footnote{But it is also valuable instrumentally because the dissonance between the normative appeal of \textit{both} these accounts, their specific problems notwithstanding, and the sharp, even dramatic, contrasts between them, helps to unsettle the debate on the normative underpinnings of property. One possible conclusion of this apparent paradox is that property law and theory are doomed to a fundamental contradiction between these two poles, when each one’s virtues point to its counterpart’s vices. I will argue in this chapter that we should resist this disappointing conclusion.} In order to circumvent this normative deadlock, we need to pay attention to the common denominator shared by these two approaches as well as by many other normative accounts of property. Their joint implicit assumption is that one regulative principle guides property law or that, even if more than one value shapes property law,
there is one particular balance of property values that should guide the entire terrain. In this chapter, I challenge this tacit presupposition, claiming that this property monism, as I call it, is not only descriptively bankrupt but also normatively undesirable. (To clarify: neo-Aristotelians do acknowledge value pluralism and recognize the plurality of values that property can promote. Their monism refers only to the issue that is my focus here, namely, whether property has one unified underlying normative commitment, or whether different balances between the different property values should guide different property institutions.)

I maintain that the key move in the normative debate about property is to take the heterogeneity of our existing property doctrines seriously. This means settling the structural debate by endorsing the understanding of property as an umbrella of property institutions, as I described in the previous chapters and elaborate throughout the book, where each institution stands for a distinct balance of property values. Although this understanding does not per se resolve any normative inquiry, the pluralism of property helps to channel these inquiries into narrower human contexts, more likely to yield more determinate and satisfying answers. It also helps to demonstrate how property can serve both independence and interdependence, as well as other property values and various balances thereof.

I. NEW VOICES

Neither the notion that property is a stronghold of independence nor its understanding as a medium of cooperative interdependence is revolutionary. Property’s role in protecting the negative liberty of owners, shielding them from other individuals and from the community as a whole by decentralizing power in society, is one of the canonical justifications of the right to private property. Likewise, the idea that certain property arrangements serve to facilitate peaceable cooperation within a community of owners is also widely acknowledged by now. Nonetheless, the accounts surveyed in this section still make an important contribution to the corpus of property theory, both because they provide particularly rich and ambitious elaborations of these ideas and because of their intriguing relationship as mirror images of one another.
A. Property as Independence

Both Ernest Weinrib and Arthur Ripstein have recently developed neo-Kantian accounts of property. The bottom line of their theories, which I consider here jointly, is a regime in which the state functions both as a guarantor of people’s very robust property rights against one another, and as the authority responsible for levying taxes “in order to fulfill a public duty to support the poor.”4 Strong property rights and a viable welfare state, these authors claim, cluster as a matter of conceptual necessity.

The starting point of this analysis is Kant’s conception of the right to personal independence, which differs from other, more robust conceptions of autonomy, understood as the ability to be the author of one’s life, choosing among worthwhile life plans, and being able to pursue one’s choices. Kantian independence is inherently relational, and is exhausted by the requirement that no one gets to tell anyone else what purposes to pursue: “Autonomy can be compromised by natural or self-inflicted factors no less than by the deeds of others; Kantian independence can only be compromised by the deeds of others. It is not a good to be promoted; it is a constraint on the conduct of others, imposed by the fact that each person is entitled to be his or her own master.” Furthermore, because independence only requires that “nobody else gets to tell you what purposes to pursue,” it “is not compromised if others decline to accommodate you.”5

This understanding of the right to independence is crucial because it explains why, in this account, even when rights relate to issues beyond the physical organism of the self they must be absolute. If people are to be allowed “to exercise their freedom by controlling external objects of choice,” as they should, these objects must be under the sole discretion of the choosing subject, so that all others must be bound by virtue of the power of the proprietor’s unilateral will.6 As an “expression of [one person’s] purposiveness in relation to the purposiveness of others,” the right to property must “limit the conduct of others in relation to particular things.” “Your property constrains others because it comprises the external means that you use in setting and pursuing purposes; if someone interferes with your property, they thereby interfere with your purposiveness.”7
But allowing “one person coercively to restrict another’s freedom through unilateral acts that establish proprietary rights to exclude” is problematic, because it allows the proprietor “to subordinate others to his or her purposes,” and is thus “inconsistent with innate equality for all.” This difficulty is profound, as it threatens to undermine the very independence for which property rights are introduced. A full-blown regime of such rights of private property confines people’s “rightful possibilities…. to what might be left over from others’ efforts at accumulation.” This may make their ability to satisfy their basic needs or even their survival “dependent on the goodwill or sufferance of others,” or force them to subordinate themselves, “making [themselves] into a means for [these owners’] ends.”

The introduction of property rights thus creates a “conceptual tension” since these rights are required by the right to independence, but they also threaten this independence. This impasse can only be broken by a transition to “the civil condition of law-governed society,” which fulfills the (public!) duty to support the poor. In other words, *pace* Locke, “a purely unilateral act of acquisition can only restrict the choice of all other persons against the background of an omnilateral authorization, which is possible only in a condition of public right.” “The sovereign’s assumption of the duty to support the poor makes up for the possible inaccessibility of the means of sustenance” and thus eliminates “the danger of being reduced to a means for others.” Furthermore, because the duty to support the poor is aimed at resolving the “systemic difficulty that property poses,” it is a “collective duty imposed on the people,” so that “no-one’s subsistence is dependent on the actions of others.” In this way, although the poor are only “beneficiaries of a duty” (they cannot have a right to subsistence since they cannot coerce the state, which is the ultimate repository of legitimate coercive power), the operation of this duty re-establishes people’s non-dependence. Indeed, “the only way that property rights can be made [legitimately] enforceable is if the system that makes them so contains a provision for protecting against private dependence.”

This “civil condition is formed through a social contract that unites the will of all. This contract is not a historical event but an idea of reason under which law is legitimate to the extent that it could have arisen from the consent of everyone.” Indeed, it is this “notional union of all wills” that “transforms the external acquisition of unowned things
from a merely unilateral act on the part of the acquirer to an omnilateral act, to which everyone as possible owners of property implicitly consents and whose rights-creating significance everyone acknowledges.”

No valid social contract can be formed if some people “are completely beholden to the choice of another,” as is the case with no public duty to support the poor, because “the person who can only occupy space with the permission of others has no capacity to set and pursue his or her own purposes.” But while the legitimacy of private property requires that the state, through the legislature, indeed take upon itself the duty to support the poor, it is not dependent upon the details of this tax legislation. As long as that legislation “is not an instance of one person unilaterally choosing for another” but rather of “the public purpose of creating and sustaining a rightful condition,” the result is legitimate. “Whether the tax regime is the one that is most advantageous to you, or even to everyone, depends in part on particular decisions made by various officials, not all of which may be wise or prudent. So long as everyone acts in his or her official capacity, the result is authorized by law, and so is not arbitrary from the standpoint of freedom.” In other words, as long as “the legislature acts within its powers, the result is not merely unilateral,” and the “details of legislation” are “accidental from the standpoint of right.”

B. Property as Interdependence

Sharply contrasting with the preceding account of property as independence, Gregory Alexander and Eduardo Peñalver have recently developed, jointly and separately, a Neo-Aristotelian account of property that highlights the crucial role of property in fostering virtuous human interdependence. Whereas the core terms of the neo-Kantian theory of property are right and personal independence, the neo-Aristotelian counterpart focuses on obligation and community.

And yet, a significant resemblance between these two theories is also evident. Neo-Kantians present a monistic account, purporting to transcend a profound conceptual tension. Similarly, the neo-Aristotelian theory offers an understanding of property that purports to govern the entire terrain of property law. It starts off with the proposition that, because property rights are “inherently relational.... owners necessarily owe obligations
to others,” so that “ownership and obligation are deeply connected with each other” and “their mediating connection is community.” But then, it insists that “no inherent conflict exists between legal support of the communities that facilitate human flourishing and legal respect of the moral autonomy of the individual,” because “the obligation imposed on owners to sacrifice their property interests in some way can often be justified on the basis of cultivating the conditions necessary for members of our communities to live well-lived lives and to promote just social relations.”

The notion of community plays a key role in this account. Neo-Aristotelians adopt “an ontological conception of community that views the individual and community as mutually dependent.” This conception perceives “membership in or belonging to communities not as adventitious, but rather as inherent in the human condition.” People are “inevitably dependent upon communities, both chosen and unchosen, not only for [their] physical survival but also for [the] ability to function as free and rational agents.” Furthermore, not only do “we never cease to operate within and depend upon the matrix of the many communities in which we find ourselves in association” but, moreover, “[e]ach of our identities is literally constituted by the communities of which we are members.” Thus, “individuals and communities interpenetrate one another so completely that they can never be fully separated.” This constitutive role of community applies to property as well, because “[c]ommunities, including but not limited to the state, are the mediating vehicles through which we come to acquire the resources we need to flourish and to become fully socialized into the exercise of our capabilities.”

In this neo-Aristotelian account, “freedom emerges, at least in part, from the imaginative possibilities fostered by life among a broad range of normative communities and from possessing the material means for attaching ourselves to them.” Property serves in this context “as a powerful vehicle for tying individuals more closely to their respective social groups.” In order to facilitate this function, and thus the “intrinsic good of stability” and “the value of continuity,” we must “reject the notion of the ideal community as one that is freely chosen and just as easily abandoned” and favor in its stead “a richer, stickier notion of community, one capable of satisfying the human need for stable companionship and sociability. These communities will often be given, not chosen, and there are reasons for thinking that they will often be characterized by
relatively high costs of exit.” Indeed, neo-Aristotelians do not support active restraints on exit.\textsuperscript{17} They do, however, criticize the liberal position stating that the role exit plays in preserving people’s independence requires law to strictly limit restraints on it. More particularly, as I explain below in Chapter Eight, Section II.A.1, liberals should sanction restraints on exit only insofar as they aim to ensure that exit decisions are informed rather than hasty and ignorant, and sincere rather than opportunistic. Neo-Aristotelians reject such a strong commitment to free legal exit because it “necessarily entails a commitment to discouraging or limiting people’s enjoyment of certain valuable types of relationships – such as the one between parent and child – that can only come about with high costs of exit.”\textsuperscript{18}

Thus conceived, communities, and notably involuntary communities, are sources of obligations. In other words, “acknowledgment of our human dependence upon others, on the social matrices that nurture the capacities that enable us to flourish, creates for us a moral obligation to support these matrices.” This obligation goes beyond what reciprocity requires; indeed, neo-Aristotelians criticize my endorsement of the long-term reciprocity discussed in Chapters Five and Eight as not virtuous enough, insisting that the appropriate measure of support must be “the need of others rather than what we have already received or expect to receive in the future.” Thus, this obligation “frequently and justifiably demand[s] disproportionate sacrifice from those who have more…. for the (disproportionate) benefit of those who have less.” This prescription intentionally rejects any pretense of serving owners’ self-interest because any reliance on “such self-interested calculation will undermine the very solidarity on which the social matrix depends. We owe and we pay because we have been, and continue to be dependent, and because we are members.”\textsuperscript{19} Owners’ obligation to provide society those resources that it “reasonably regards as necessary for human flourishing” is ultimately based on dependency, and not on reciprocity.\textsuperscript{20}

On its face, this broad formulation can “dangerously expose [] individuals to the risk of effacement.”\textsuperscript{21} We are still urged, however, to resist the suspicion of “demands for sacrifice” or “the notion that sacrifice may be a virtue” because the very fostering of communities that, by definition, respect human flourishing, “would repudiate such a state of affairs.” These communities would prevent systemic exploitation taking the form of
continuously compelling sacrifices from the same individuals or communities or from particularly disadvantaged or vulnerable subgroups. They would also avoid “subjugating the individual to communal ends to such a degree that the individual’s separate existence becomes meaningless.”

II. MIRRORING CRITIQUES

Both the neo-Kantian and the neo-Aristotelian accounts of property are splendid additions to contemporary property theory, not only because they revitalize revered authorities but also because they forcefully present pleasant utopias. People’s right to independence is, or should be, a core value in every humanistic tradition. Similarly, our embedment in communities is both an important characteristic of the human situation and a significant aspect of human flourishing. The exploration of ways in which such profound normative ideals can guide our understanding of property is a reason for academic celebration.

Before we subscribe to either of these emerging schools, however, I suggest that we pause and consider their respective problems. Not surprisingly, the difficulties discussed below again mirror one another and again share the same structure. Not only is it the case that each side ignores and may thus undermine the value emphasized by its counterpart, but this omission may also backfire. By refusing any role to interdependence and responsibility in its conceptualization of property, the property as independence school may end up undermining its own cause by entrenching widespread human dependence. Likewise, by resisting the legal entrenchment of liberal exit and by insisting that reciprocity not cap communities’ demands of contributions from their members, the property as interdependence camp may dilute rather than bolster the value of community.

A. Is Private Law Libertarianism Viable?

The neo-Kantian account of property offers the most sophisticated version of an attractive strategy for reconciling the two most fundamental liberal values of liberty and equality, notwithstanding their inherent tension. The basic idea is a “division of labor” between public law and private law. The concern for the well-being or, for neo-Kantians, the
independence of other people, is solely the responsibility of the government, through its tax and redistribution mechanisms. By contrast, individuals are not required to treat others with care or concern in utilizing their private property. On the contrary, insofar as they do not harm anyone, they are entitled to a self-interested attitude. Such a division of labor between public and private law is an appealing and, some say, the only way of preserving personal liberty, leaving the agent’s moral private space free of claims from others while remaining loyal to the egalitarianism entailed by the fundamental liberal maxim of equal concern and respect.

Is private law libertarianism indeed viable? In what follows, I argue it is not. To see why, consider two significant and related ambiguities of our neo-Kantian accounts. The first concerns the threat that robust, indeed absolute, property rights pose to propertyless people. On the one hand, our Kantians seem to recognize that ownership is a source of economic and therefore social, political, and cultural rights and powers, the correlative of which are other people’s duties and liabilities. Thus, they broadly define this threat as one of potential dependence that may apply, for example, as they themselves seem to acknowledge, to the numerous cases of propertyless workers who only rent living space or even live on the employer’s land without renting. This broad understanding of the threat posed by absolute property rights explains why neo-Kantians reject, and rightly so, Locke’s claim that unilateral acquisitions entailing no material disadvantage are easily justified. As they explain, in order to justify placing others “under a perfectly general obligation to refrain from using an object,” we need to satisfactorily “engage the issue of freedom.”

On the other hand, however, we read that the justified complaint of the propertyless according to these accounts is much more limited, and the threats to absolute property rights that need to be addressed concern only survival – the satisfaction of basic needs or the accessibility of means of sustenance. In a situation of pre-property-relations, adequate responses to threats to survival involving supply of basic needs or lack of access to means of sustenance may well have secured independence. In the civil condition of a law-governed society, however, the problem of dependence cannot be fully addressed by securing sustenance because property relations, especially if property rights are given the absolutist interpretation called for by neo-Kantians, introduce new and different modes of
dependence. In this world, our world, interpersonal dependence often takes the form of subordination, which is generated by severe inequalities even when everyone’s survival and basic needs are secured. Independence, then, can hardly be meaningfully secured without addressing these inequalities.

The second ambiguity of the neo-Kantian account of property relates to the cure that can properly address the threat to absolute property rights, and thus legitimize their enactment. On the one hand, neo-Kantians insist on a high threshold of legitimacy that would require all affected parties to be reasonably assumed to have consented to the resulting regime. The unilateralism of proprietors’ conduct, they claim, can only be validated by omnilateral authorization. This implies a demanding substantive threshold since, in order to assume such consent, one needs to demonstrate that no one has a plausible objection to the acquisition. Yet, if we take independence seriously, this cannot be the case if such an acquisition could result in someone’s subordination. On the other hand, we read that the required legitimacy is much less demanding, that the contractarian constraint relates merely to procedure, and that as long as the form of tax-and-redistribution legislation is in place, its substantive details are a matter of indifference insofar as the challenge of legitimizing robust property rights is met.

If the only problem that needs to be addressed is survival or access to means of sustenance rather than the independence of the propertyless in a world where property relations significantly affect interpersonal power, or if the only requirement we can pose to a putative solution is one of form rather than substance, the justificatory challenge faced by private law libertarians is easily met. But if omnilateral authorization is not to be reduced to an ideological device of legitimation, the broad, even if hypothetical, consent it stands for must be plausible. This means that survival and the satisfaction of basic needs cannot be our only concern, and procedural adequacy cannot exhaust the justificatory burden at stake. Given the threat of dependence posed by property rights, and the far from optimal response of contemporary legislatures and governments to poverty, private law libertarians can justify a private law regime of absolute property rights only if they can plausibly demonstrate that the public law of tax and redistribution can substantively meet the problem of dependence, broadly defined. In other words, they need to demonstrate that public law is likely to supplement private law with rules that
would adequately remedy the injustices of a libertarian private law, at least in terms of interpersonal dependence if not in terms of distribution, so that omnilateral consent can be plausibly assumed.

This burden of persuasion is insurmountable for three reasons. The first is quite straightforward. The realities of interest group politics in the promulgation of tax legislation in liberal democracies make egalitarian tax regimes, such as one based on Rawls’ difference principle, a matter of political theory rather than of empirical reality. Rather than being a contingent failure, this unfortunate result is built into the idea of democracy. Democratic legislatures are expected to reflect the “grammar of democratic politics” which is “a hybrid of preferences and reasons.” Thus, there is a critical difference between justice and democracy: while “justice conceptually can count preferences as relevant reasons,” democracy “must always take (some) account of people’s preferences.” As long as these preferences diverge from what justice demands, their translation into legislative pronouncements is likely to fall short of what a just scheme of tax and redistribution requires.

Whereas the first reason is not unique to a regime of private law libertarianism, the second reason for doubting the viability of this strategy is. Not only does private law libertarianism reflect the noted usual disparity between our distributive ideals and the real-life consequences of redistribution through public law, but it is also likely to exacerbate them due to the pivotal role of our understanding of property in defining mutual legitimate claims and expectations in our daily interactions. I address these cultural effects of property (and their limits) in some detail in Chapter Six, Section IV below. For my current purpose, it is enough to claim that if our understandings of the responsibilities of owners and the limits of what we perceive to be the legitimate interests of owners are influenced by the conception of ownership applied by our private law, the self-regarding attitude generated by extreme private law libertarianism may undermine the hope for endorsing egalitarian policies when we come to shape our public law.

I obviously do not deny that people can and often do apply different and at times even opposing standards in different normative spheres. Yet our stance in one sphere may sometimes affect our stance in another, and in such cases, we should take such external
consequences into account. The possibility that an extreme libertarian private law regime might undermine social solidarity and dilute people’s responsiveness to claims from distributive justice is, I believe, a case in point. People who are not required to pay any attention to others’ fate in every action affected by private law, that is, in their numerous inter-personal interactions, are likely to doubt or belittle the legitimacy of others’ claims to significant fragments of their resources when the tax collector asks his due. Exact correspondence between these underlying values of private law and of the public law of tax and redistribution is, as noted, not required and even undesirable, as shown in the next section, but complete divergence in this context is probably impossible. While acknowledging the important benefits of anonymous, public law beneficence, private law should beware of entrenching attitudes that might hinder a just public order.

Finally, even if a sufficiently redistributive tax scheme miraculously emerged, it seems unlikely that it could sufficiently erase the distortions of a private law libertarian system in terms of unjustified interpersonal dependence, namely, in terms of freedom. Quite the contrary, treating the propertyless as passive recipients of welfare, mere beneficiaries of the public duty to support the poor, entrenches their dependent, subservient status rather than their dignity and independence. Even if government largess is recognized as an entitlement, dependency does not evaporate but shifts instead from the context of private law to that of one’s relationship with the state via the welfare bureaucracy. (I am not arguing that the welfare state should be dissolved. Indeed, its difficulties notwithstanding, a welfare state is superior to a society in which poverty is ameliorated solely through charity. My point is that, by pushing the entire burden of social responsibility and distributive justice to the welfare state, neo-Kantians do not avoid the problem of dependence.)

The neo-Kantians response to this concern is that “dependence involves a relationship with someone who, without breaching a duty, can withhold a benefit necessary for one’s survival,” and that because the state is under a duty to support the poor and “has no motivation to withhold support,” the receipt of state support “does not make the needy subservient to the will of others.” This response is tellingly articulated without mentioning the bureaucrats who run the welfare system and premised on a rather surprising analogy to the parent-child relationship, but is clearly far removed from
everything we know about the workings of modern welfare states. In order to make it somewhat more reliable, neo-Kantians should have at least advocated a radical reform of the welfare system to, for instance, one providing universal rather than means-tested entitlements, so as to avoid marking anyone as dependent. But even this reform would not have necessarily eliminated dependency given the features and dynamics of governmental bureaucracies. The notion of a welfare state without dependence is so detached from real life and from almost any imaginable welfare system run by real people as to become sheer window-dressing for an arrangement that would most likely generate widespread human dependence.

B. Are Illiberal Communities Desirable?

The neo-Kantian property scheme ultimately fails, I argued, because its lack of any sense of social obligation is likely to undermine its own utopia of universal independence. The failure of its neo-Aristotelian counterpart is, I will now claim, a mirror-image of self-defeat: its marginalization of personal independence by celebrating virtuous communities without ensuring proper legal safeguards for their members’ independence paradoxically risks undermining the community’s good.

To see why, note that the reluctance to allow any legal entrenchment of free exit is not merely a contingent but rather a constitutive feature of the dependency school. The availability of free exit threatens the flourishing of rich meaningful communities because exit tends to destabilize sharing and trust by exacerbating the difficulty of collective action, inviting opportunism, and thus threatening cooperation, even in long-term relationships. Furthermore, in most of the relevant contexts regulated by property law, such as co-ownership, common interest communities, or local governments, a regime that secures free legal exit can hardly facilitate the virtuous communities that neo-Aristotelians celebrate. When strict limits on restraints on exit are in place, strong and wealthy members who can anticipate that they might be required to invest significantly more than they expect to receive back in the long-term, either in the community or in the well-being of its weaker members, are likely to leave. Although the long-term calculus obviously need not be precisely balanced, when people have choices, as they do when
liberal exit is legally entrenched, rough long-term reciprocity is in reality the upper-limit of what property law can effectively promote. (In many contexts, community members will indeed voluntarily make significant sacrifices.)

The dependency school justifiably highlights what champions of independence marginalize but other liberal thinkers recognize: the significance of communities, constitutive ones in particular, in constructing human culture and thus individual identities. It is wrong, however, to insist that the law should seek to structure the property regimes of these communities around an ethics of virtue that finds long-term reciprocity a disappointing cap for members’ contribution. Hence, it is also wrong to legally validate exit restraints, even if they cannot be justified as assuring that exit decisions are informed and sincere. Significant communities, I argue, can flourish without compromising this liberal commitment to free exit. Sidestepping the liberal limits on legitimate exit-restraints might, eventually, also undermine the community’s good.

While it is true that legally entrenched exit challenges the viability of communities, liberal exit and community can nonetheless coexist because, as Chapter Eight below demonstrates in some detail, law can use a mixture of expressive and material means to lessen the risk of opportunism raised by free legal exit. Law can make exit an option of last resort by facilitating voice as a dominant mode of property governance. It can also make trust and cooperation less risky by entrenching standards of acceptable behavior, providing safety nets that minimize the parties’ vulnerability by guaranteeing material long-term reciprocity, and by ensuring, relying on moderate constraints of exit, that participants’ decisions to leave are indeed informed rather than hasty and ignorant, and sincere rather than opportunistic. Furthermore, a property regime that structures material relationships among community members along the lines of long term reciprocity does not, as Alexander and Peñalver imply, reflect the type of calculated and self-interested state of mind antithetical to the solidarity on which communities rely. Quite the contrary. While cautious to avoid utopian views of community or its casting into a family model, the notion of long-term reciprocity does respect the significance of community. Rejecting atomistic, short-term strict accounting, this notion seeks to recognize the non-commodified meaning of membership alongside its more calculated and hence commodified aspect. Thus, although long-term reciprocity does not rule out
the role of community as a source of mutual advantage, it fosters its understanding as a locus of belonging. Preserving exit and discarding sacrifice thus need not imply giving up the pivotal human goods of community.

Securing legal exit, thereby making rough long-term reciprocity rather than a more virtuous standard the legal cap for interpersonal reliance in communities regulated by property law, is not only compatible with community. It is also necessary to ensure that membership in such communities does not threaten to overwhelm the members’ individual identity. Free legal exit is a prerequisite to geographic, social, familial, and political mobility, all essential for preserving individual freedom. Allowing for exit is also a crucial mechanism for disciplining social organizations and ensuring the responsiveness of groups to their members’ interests. Without exit, the claim of neo-Aristotelian property theorists that constitutive communities could not culminate in the systemic exploitation of weak members may end up as a hollow, dangerous hope.

Neo-Aristotelians resist the idea that liberal exit needs to be legally entrenched in order to protect individuals within communities. They argue that substantive norms, such as human rights, can replace exit without undermining the ability of non-abusing communities to make demands that happen to encumber one or more members at any given moment. They also claim that support for the legal entrenchment of liberal exit seems inconsistent with the accepted disregard of social constraints on exit, typically through informal pressure, which may be just as detrimental to exit as the resisted legal restraints.

The first of these counterarguments is inadequate because, although human rights and other protective norms may function as effective protective devices, liberal exit is above all a means to secure members’ independence. Allowing people to leave and dissociate is no less important than making sure they are not maltreated. The second is just as unpersuasive because one can consistently abstain from supporting active interference with social norms that diverge from the cap of justified exit restraints, and still insist on invalidating exit-restraints that deviate from this very same cap. A lenient approach toward moderate forms of social pressure, such as the disapproval of family and friends, is clearly justified because people can ultimately choose what to do in this regard,
whereas the power of the law cannot be escaped. A good case can also be made for refraining from interference with social constraints that would be considered invalid if framed in legal terms, even in the context of close-knit and pervasive religious communities in which social pressure is institutionalized in law-like fashion. At times, the law may have good reasons for avoiding interference with private or social practices it may find objectionable because it could eventually prove counterproductive or deemed too intrusive, even if justified. These reasons, however, need not justify allowing people to actively use the law as a means of supporting such practices. Legal statements also entail cultural implications that could support this distinction: non-interference in the social realm may signal some measure of legitimation, but is likely to be significantly lower than the legitimation gained from active support by the law. Thus, one can again coherently argue that the law should, at the same time, avoid interference with objectionable social practices, and resist its active recruitment in support of them. Even when exit is not viable due to robust social norms, entrenching the liberal cap of legally sanctioned exit-restraints is valuable because it preserves the hope that such an exit-friendly law can begin to ameliorate these illegitimate practices.

The problem with limiting legal exit is not confined to this concern of independence and touches upon the actual good of the community. By marginalizing independence, neo-Aristotelians may indeed end up undermining community, because part of what makes our normative communities meaningful is that they are realized through voluntary choice, if not ex ante, then at least ex post. Meaningful self-identification and its ensuing benefits should be part of the good life for individuals, not a legal duty they must bear regardless of its continuing appeal. In order to assure that any given community is good for people, law should ensure that the participation of individuals in social groups is legally voluntary by securing the ability of members to decide whether and for how long to participate. People are partly constituted by their participation in a community and by their relationship with other members, but they should be able to choose whether to abandon this part of their identity. Committed members of such liberal communities must be able to intermittently adopt a critical perspective on the communities with which they deeply identify, and even decide to exit them and that part of their identity.\(^49\) The phenomenology of a decision to exit such a community is interpretive: a member
contemplating exit considers the extent to which she is defined by her community, and then evaluates herself as that person. It is at this evaluative stage – “is this part of me good, or at least good enough?” – that the individual takes, and should take, center stage. Thus, only the legal power to exit can convert the daily life of a community into a continuous affirmation of its value in its members’ life.\textsuperscript{50}

III. PROPERTY AS INSTITUTIONS

If the analysis so far is convincing, we seem to have reached a deadlock. The neo-Kantian account builds on the indisputable value of independence, only to realize that without room for social responsibility within our understanding of property and taking this value to its logical conclusion, law would be self-defeating and yield widespread dependence. Its neo-Aristotelian counterpart leads to a structurally symmetrical conclusion: building on the value of constitutive communities, this account ends up celebrating involuntary communities of sacrifice that, by disregarding members’ right to exit, end up being both exploitative and inauthentic.

Neo-Kantians may try to resist the symmetry by insisting that my critique of their view is merely pragmatic and thus contingent, whereas that of the Aristotelian position is conceptual. My critique of property as independence, they may argue, relies on the selfishness of owners and the pettiness of bureaucrats, so that in a decent world it would be irrelevant. Even in such a world, however, a community failing to adequately respect its members’ choices cannot be genuine.\textsuperscript{51} But neo-Aristotelians actually raise a parallel argument. They claim, as noted, that the grounds on which norms set by communities might fail to secure members’ independence, and thus the authenticity of such communities, are similarly contingent. True communities of virtue, they argue, would properly vindicate their members’ independence. I am not convinced. But I also fail to see why the notion of such virtuous communities is any less fantastic than that of a full blown welfare state with respectful bureaucrats, emerging alongside a regime that perpetuates a rigid understanding of property as well as a restrictive view of people’s mutual obligations in their daily interactions. Both seem to me unattainable, and attempts
to realize either of them in real life strike me as equally likely to undermine their own declared ideals.\footnote{52}

On its face, then, the dialogue between these new additions to property theory restates what Duncan Kennedy calls a fundamental contradiction, namely, that “relations with others are both necessary to and incompatible with our freedom.” This contradiction, Kennedy noted, is both “an aspect of our experience of every form of social life” and the most fundamental dilemma faced by every single doctrine. As he claimed, others “are necessary if we are to become persons at all – they provide us the stuff of our selves and protect us in crucial ways against destruction… But at the same time that it forms and protects us, the universe of others… threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad.” For Kennedy, the fundamental contradiction precludes “the assurances of reason” and allows us to proceed only “on the basis of faith and hope in humanity.”\footnote{53}

Although the circumstances that Kennedy describes are not, strictly speaking, a contradiction but rather a dilemma,\footnote{54} this dilemma seems to yield a deadlock in the normative debates about property. Is normative property theory, then, which purports to represent reason as per property law, indeed doomed? Are property lawyers better off shunning the normative prescriptions suggested by property theorists and relying instead on faith and hope? I claim that, although we must indeed recruit both faith and hope in humanity, reason can and should play a role in property law. The most promising way out of the deadlock identified in the previous section, I argue, is to reject totalizing, monistic theories of property such as those offered by both neo-Kantians and neo-Aristotelians, and endorse instead a pluralistic account of property.\footnote{55}

* * *

Rather than trying to reconcile all human values – in particular, independence and community – under one normative scheme, the pluralist account of property developed in this book starts with Isaiah Berlin’s seemingly mundane observation that human life is replete with competing values that cannot be reconciled and with legitimate wishes that cannot be truly satisfied. Because some values intrinsically conflict and because we cannot have everything we want, explains Berlin, “[t]he need to choose, to sacrifice some
ultimate values to others, turns out to be a permanent characteristic of the human predicament." This pluralistic value position typical of liberal law is premised on a healthy suspicion of meta-ethical universalism. It is not, however, reducible to the philosophically suspect meta-ethical positions of relativism, skepticism, or nihilism, which undermine any possibility of moral justification, evaluation, or for that matter, criticism, thus undermining the idea of law itself. Rather, alongside a laudable recognition of a broad menu of incommensurable human alternatives, liberal law justifiably acknowledges a minimal core of moral truths. “Forms of life differ. Ends, moral principles, are many. But not infinitely many: they must be within the human horizon.”

The plurality of values provides lawgivers some latitude and imposes on them a distinct obligation. Latitude is given for making choices, where such choices are necessary, amongst morally acceptable possibilities: if value pluralism is correct, any such good faith choice is legitimate. The obligation is indeed to make these choices for people only when necessary and, in all other cases, to create and facilitate different types of institutions, each incorporating a different value or different balance of values, so that people can choose their own ends, principles, forms of life, and associations by navigating their own way among them.

The fact that, within limits, different societies are morally permitted to choose both explains and justifies some measure of cross-cultural variability. It thus renders some of our social choices contingent. But this contingency does not undermine the moral significance of our social conventions. Thus, for example, although certain human activities are only contingently valuable – and are absent from, or marginal in, other social environments in other places or other eras – they may still “provide us with invaluable channels through which we are able to express ourselves or with means that expand our options and allow us to achieve objectives we would otherwise be unable to achieve.” This appreciation of our existing social world is by no means a recipe for uncritical affirmation of the status quo because, in order to validate our current practices, we must be able to explicitly justify their value. “The requirement of justification is always potentially challenging to some of our conventional opinions because it requires at least a respectable universalistic façade, an idealized picture, that can be – and often is – a fertile source of social criticism, for it sets standards that our current practices do not
necessarily live up to. The idealism of our social world, even if it is a hypocritical 
idealism, is the best source of any critical engagement."61

A commitment to pluralism leads us not only to value and critically reexamine our 
existing social and, in the current context, legal conventions. It also requires us to realize 
that these legal constructs need not all be guided by the same underlying normative 
commitments. In fact, as noted, value pluralism makes it reasonable, even desirable, for 
the law to adopt more than one set of principles and thus more than one set of coherent 
doctrines.62 The plurality of potentially authentic but conflicting ideals and conceptions 
of the good requires law to recognize and promote the freedom-enhancing function of 
pluralism and the individuality-enhancing role of multiplicity. Thus, a liberal law should 
facilitate, within limits, the co-existence of a variety of social spheres that embody 
different modes of valuation.63 This is one of the reasons why, notwithstanding the failure 
of the attempt to neatly separate private law from public law along the neo-Kantians lines 
discussed above, the law is nonetheless justified in preserving some differentiation 
between the private and the public. Retaining separate legal constructions of horizontal 
and vertical social interactions is an important means of fracturing and multiplying 
human authority.64 Moreover, and more importantly for the purposes of this chapter, 
given that property law governs so many aspects of human action and interaction, this 
commitment to pluralism is also a major reason for property theory to resist unifying 
normative accounts of property law in its entirety. Acknowledging, indeed celebrating the 
multiplicity of property, need not and does not render property disharmonious. Rather, it 
means that because property is analogous to a complex piece of music, with full 
orchestration, looking only at a melody line risks missing most of the performance.65

* * *

The pluralist account of property thus begins with the happy observation that property 
law indeed complies with this plea for multiplicity. As both lawyers and citizens easily 
recognize, there are dramatic differences between meanings of ownership in different 
social contexts and with respect to different resources. As noted in Chapter Two, some 
(not the ones discussed here) advocates of monistic theories of property try to excuse 
away these differences by, for example, describing some configurations of property as
peripheral to an imagined uniform core. But once property theory is relieved of the spell of monism, this heterogeneity can be respected for what it is: a testimony of property law’s appreciation of the significance of facilitating multiple forms of human interaction that, as I have just suggested, is an important precondition for human flourishing.

Sheer multiplicity is obviously not sufficient. The legal conventions encapsulated in property law, the property institutions as I call them, do not merely supply an assortment of disconnected choices. Rather, as much of this book demonstrates, they offer a repertoire that responds to various forms of valuable human interaction. Some of the property institutions at hand, such as the fee simple absolute, allocate a rather robust bundle of entitlements to owners, thus providing the safe haven from others’ demands that is indeed a precondition for independence. Other property institutions, such as co-ownership or marital property, provide diverse frameworks for various types and degrees of interdependence, mutual responsibility, and solidarity. Moreover, not only is the existing menu of property institutions responsive to the social context, individualistic or communitarian; it also differentiates different types of resources. Thus, while owners’ control is more vigilantly preserved in cases of constitutive holdings such as homeownership, utilitarian considerations take precedence when more fungible resources, such as patents or shares traded on national securities exchanges are concerned.

Regarding many of these property institutions, the law-in-action as well as the law in the books often falls short of the human ideals they represent. But, as noted, these gaps only demonstrate the significance of fleshing out these ideals so that contestants can utilize them to force these property institutions to live up to their own implicit promises. Thus, for property pluralists, the main task of property theory is not to ascertain a uniform core meaning of property but rather to distill the distinct human ideals of the various property institutions, to elucidate the ways each of them contributes to human flourishing, and to offer reform, if needed. At times, even this exercise may not suffice, and such critical examination may lead to the conclusion that even more radical transformations are required in order to adequately serve the full range of valuable types of human interaction, such as the abolition of an existing property institution or the invention of a new one.
Largely, boundaries between the multiple property institutions are open, making navigation within this variety a matter of individual choice. Nothing in our commitment to human independence objects to such multiplicity. Therefore, pace Weinrib and Ripstein, independence neither necessitates the hegemony of the fee simple absolute, the property institution that best vindicates independence, nor undermines the value of other, more communitarian or utilitarian property institutions. To be sure, the eradication or marginalization of the fee simple absolute could well have threatened liberal ideals about property. Insofar as this property institution remains a viable alternative, however, the availability of several different but equally valuable and obtainable proprietary frameworks of interpersonal interaction makes autonomy more meaningful instead of undermining it.66 Pace Alexander and Peñalver, people’s freedom to pick the property institution of their choice is not harmful to the goods of community. The variety of property law and the attendant choice it enables ensures the authenticity and hence the significance of membership for individuals, including many of us, who choose to participate in property institutions that constitute and preserve significant communities.

Alexander and Peñalver are still likely to be dissatisfied. Would not a liberal property regime of that kind pay too little attention to distributive justice? Does not my endorsement of multiplicity frustrate the possibility of inculcating social responsibility through private law, thus collapsing after all into the problematic position of private law libertarianism? I would say no. The variety typical of property law does not preclude the significant role it plays in inculcating such normative ideals as interpersonal cooperation and social responsibility. Because at any given time property law offers only a limited number of standardized property institutions as the *numerus clausus* principle prescribes, these institutions serve, as I argued in Chapter One above, as intermediary social constructs through which law both reflects and shapes our social values.67 Thus, the contribution of property theory that is most conducive to the strengthening of communitarian ideals is disavowing monism and making communitarian property institutions attractive, not the promotion of a monistic conception of property that celebrates virtuous communal values but underrates the significance of exit. As Part III of this book argues in some detail, the former task is best served by providing internal governance mechanisms that facilitate participatory cooperation and enable these groups
of owners to capture the economic and social benefits from their cooperative use of a scarce resource, while simultaneously limiting minority oppression and allowing exit.

These happy liberal communities may fall short of the degree of redistribution demanded by justice demands. And while Part II of this book considers ways in which distributive justice concerns can and should inform takings law, these suggestions are mostly aimed at guarding against the real risk of a seemingly neutral takings doctrine generating distributively regressive outcomes. In line with my acceptance of some differentiation between private and public law, then, the bulk of the burden of promoting distributive justice should be borne by the mechanisms of tax-and-redistribution law, which are distinctly designed for this purpose. And yet, property law and theory can still make a significant, even if limited, contribution to distributive justice. Properly understood, property law and theory can and should help dispel from public consciousness the notion of property absolutism that, notwithstanding the heroic efforts of Weinrib and Ripstein, is the archenemy of distributive justice. Moreover, as noted, by devising attractive property institutions that facilitate cooperation among free individuals and serve as the infrastructure of meaningful, constitutive liberal communities, property law can help support the cultural alliance of property with social responsibility and solidarity.68

CONCLUDING REMARKS

The role of property in vindicating people's independence, which is in turn a precondition for their autonomy, is crucial. Property's function in providing the infrastructure for productive cooperation and meaningful interdependence in constitutive communities is no less significant. But when theorists seek to rest the entire terrain of property law either on dependence or on interdependence, they end up undermining the very value they seek to vindicate. Their difficulties are not failures of reasoning. Rather, they derive from a misguided property monism. Given the heterogeneity of property law, trying to envisage one single normative foundation of property is not only a hopeless mission but also an ill-conceived enterprise, oblivious to the virtue of property's pluralism. This conclusion by no means precludes the significance of normative critical reflection on property. Quite the
contrary: it highlights the significant role of this type of property theory in analyzing, refining, and reforming the various property institutions assembled under the umbrella of property. This is the task I assume in the remainder of this book.

1 Let me clarify at the outset that, although I find the entry of these new voices valuable, I do not pretend to offer a full description and assessment of either position on its own terms. My main mission in this chapter is to use the comparison between the neo-Kantian or neo-Aristotelian accounts of property to make my own observations regarding property’s pluralism. This undertaking explains both the broad brush I use to present both positions, and the external perspective I employ in describing them. These features of Section I may be particularly conspicuous in my description of the neo-Kantian position, which leaves out the sequential nature of the Kantian argument and its insistence that property can only be characterized formally.


3 The locus classicus is of course ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION (1990).

4 ERNEST J. WEINRIB, POVERTY AND PROPERTY IN KANT’S SYSTEM OF RIGHTS, IN [ADD].

5 ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY 14, 34, 45 (2009).

6 WEINRIB, supra note 4, at [*].

7 RIPSTEIN, supra note 5, at 93, 91.

8 WEINRIB, supra note 4, at [*].

9 RIPSTEIN, supra note 5, at 90.

10 WEINRIB, supra note 4, at [*].

11 RIPSTEIN, supra note 5, at 278.

12 WEINRIB, supra note 4, at [*].

13 RIPSTEIN, supra note 5, at 279-80.

14 RIPSTEIN, supra note 5, at 192, 197-98.


16 Gregory S. Alexander & Eduardo M. Peñalver, Properties of Community, 10 THEORETICAL


18 Alexander, supra note 15, at 771, 774.

19 Here Alexander & Peñalver refer to my critique in Reimagining Takings Law (chapter 7).


21 On this tension see, e.g., ISAIAH BERLIN, introduction to FOUR ESSAYS ON LIBERTY I-li (1969). For another prominent version of this strategy, see RONALD DWORKIN, LAW’S EMPIRE 292-94, 296, 299-304, 309-12 (1986). For an early critique of this position, see Anthony T. Kronman, Contract Law and Distributive Justice, 89 YALE L.J. 472, 503-07 (1980), demonstrating that taxation as a method of redistribution is not inevitably less intrusive and hence less restrictive of individual liberty than private law. Other advocates of private law libertarianism rely on welfarist grounds, arguing that tax-and-transfer mechanisms are always, or at least typically, the most efficient way of redistributing welfare. For a fair description and critical analysis of these arguments, with particular emphasis on their application to property, see Daphna Lewinsohn-Zamir, In Defense of Redistribution Through Private Law, 91 MINN. L. REV. 326 (2006).

22 This truism is one of the most important contributions of legal realists to property theory. See Morris R. Cohen, Property and Sovereignty, 13 CORNELL L.Q. 8, 11-14 (1927); Robert L. Hale, Coercion and Distribution in a Supposedly Non-Coercive State, 38 POL. SCI. Q. 470, 470-79 (1923). Neo-Kantians sidestep the claim that expanding one person’s range of choices by allowing property rights in external object potentiality limits another’s. See RIPSTEIN, supra note 5, at 61-63. This move has been effectively criticized elsewhere. See JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 115-117, 423, 425-427, 430-439, 444-445 (1988). But see J.E. PENNER, THE IDEA OF PROPERTY IN LAW 206-207 (1997). Be it as it may, neo-Kantians concede that the legitimacy of these rights, as noted, ultimately depends on showing that universal non-domination can nonetheless be secured. The plausibility of success at this task, which they recognize as essential, is the target of my critique.

23 RIPSTEIN, supra note 5, at 98.


27 Robert E. Goodin, Democracy, Justice and Impartiality, in JUSTICE & DEMOCRACY 97, 104
Obviously, this proposition does not imply the collapse of democratic politics into the logic of the market. Rather, it implies that democratic politics is situated “between the realm of the market (that focuses on preferences) and that of the law (that must always strive for public-regarding justification).” Dagan, supra note 28, at 356.

Notice that my critique is targeted at an extreme division of labor between private law and public law. I am not addressing the division of work between the personal and the political: nothing in my argument requires that people should apply the same standards of justice while making choices that are unregulated by law. Compare G.A. Cohen, Where the Action Is: On the Site of Distributive Justice, 26 PHIL. & PUB. AFF. 3 (1997), pp. 3-30.

See HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 39 (1997). For the way in which our ideas of justice are affected by our perception of the relationship generally prevailing in the set of people within which the distribution is going to occur, see David Miller, Distributive Justice: What the People Think, 102 ETHICS 555, 590 (1992).

For a delicate account of the intricate relationship between personal and corporate responsibility for the needs of the disadvantaged, see Isadore Twersky, Some Aspects of the Jewish Attitude Toward the Welfare State, in A TREASURY OF “TRADITION” 221, 228-29, 323-33 (Norman Lamm & Walter S. Wurzburger eds. 1967).


Id., at 212-21, 236-37.

WEINRIB, supra note 4, at [n].

RIPSTEIN, supra note 5, at 194.


This is particularly true in the neo-Kantian utopia where the poor have no enforceable rights.

See infra section III.A.3, chapter 8.


To some extent, this is different insofar as the community at issue is the state, given the significant non-legal obstacles to exit in this context. The possibility of a solidarity-based tax-and-redistribution scheme is thus greater at the state level than at the community level. (This cautious formulation reflects the current limitations to the truisms of limited international mobility, which indeed constrain the ability to go beyond reciprocity insofar as the more mobile segments of society are concerned; see Tsilly Dagan, Just Harmonization, U.B.C.L. REV. (2010). Such a solidarity-based tax-and-redistribution scheme is not free from normative difficulties either. See José Brunner, Property, Solidarity and (German) History, 10 THEORETICAL INQ. L. FORUM 9, 15-16 (2009.).)

See, e.g., JOSEPH RAZ, ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND
Indeed, not all forms of exit taxes are problematic. As I explain below, however, we should beware of making exit so costly as to undermine mobility and weaken exit’s effect as a means of disciplining groups and validating their intrinsic worth.

44 See infra section II.A.2 of chapter 5. Furthermore, because law is never self-executed, anti-opportunistic legal mechanisms never guarantee risk-free cooperation. Leaving some measure of risk is important because interpersonal trust involves interpersonal vulnerability. See ANNETTE C. BAIER, MORAL PREJUDICES 133, 137, 139 (1994).


47 See supra text accompanying note 22.

48 See Peñalver, supra note 18, at 1919-29.


50 See Kenneth L. Karst, The Freedom of Intimate Association, 89 YALE L.J. 624, 632, 637 (1980). See also MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 234–39 (1983); MARILYN FRIEDMAN, WHAT ARE FRIENDS FOR? 208 (1993). Parenthood may well be a different matter; indeed, it may be a context in which duty should precede right.

51 I am grateful to Arthur Ripstein and to Itzik Benbaji for raising this objection.

52 The failure of exaggerated expectations from mere mortals does not apply to the pluralistic ideals I endorse below. Pluralism, by its very nature, fractures and multiplies human authority. See DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 156, 166-68, 173-75 (1989). Fracturing human authority, in turn, dilutes the concerns ensuing from placing all the burden of public-spiritedness on the same group of people, be they the welfare state’s bureaucrats or the virtuous communities’ leaders.


55 This conclusion should obviously not be read as a claim of logical necessity because the failures of the theories discussed above do not necessarily imply that all other totalizing theories are also bound to fail.

56 Berlin, supra note 23, at 1-li.


59 This point, interestingly enough, is one of the most important insights of the natural law tradition. See Neil MacCormick, Natural Law and the Separation of Law and Morals, in Natural Law Theory 105 (Robert P. George ed., 1992).

60 Hanoch Dagan, Qualitative Judgments and Social Meanings in Private Law: A Comment on Professor Keating, 4 Theoretical Inquiries in Law 89, 100 (2003).

61 Id., at 101.

62 See RAZ, supra note 42, at 281-282, 291-304. As Raz argues, in a world of incommensurable human values, a monistic legal voice is repressive. The plurality of normative voices may thus be conducive to our collective coexistence. Raz therefore rejects coherence as an independent value while acknowledging 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 on a given balance among pertinent values.


64 See Hanoch Dagan, The Limited Autonomy of Private Law, 56 Am. J. Comp. L. 809, 819 (2008). There is at least one more reason for this differentiation: fundamental principles of democratic governance also justify imposing on public authorities particularly demanding obligations of trust that are inappropriate to most, though not necessarily all, private actors. Id.


67 For a more general argument regarding the compatibility of pluralism and perfectionism, see Raz, supra note 66, at 161.

68 Even Robert Nozick, the most eloquent spokesperson of libertarianism, recognized the legitimacy of using law as a means for giving public expression to our bonds of concern and solidarity with others. See Robert Nozick, The Examined Life: Philosophical Mediations 288-92 (1989).