REMEDIES, RIGHTS, AND PROPERTIES

Hanoch Dagan*

*Tel Aviv University, daganh@post.tau.ac.il

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Abstract

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Remedies obviously serve as instruments of rights enforcement, but they also participate in the constitution of the rights they help enforce. Although institutional reasons bring about certain gaps between the content of rights and the judicial response to their infringement, the constitutive role of remedies introduces significant subtlety into the domain of rights. Thus, the choice of different remedies, as well as the possibility of incorporating qualifications, limitations, and even obligations, allows private law to accommodate qualitative (and normatively attractive) distinctions between different types of rights.

This phenomenon of the multiplicity of rights manifests itself in property law as well. Property law is composed of a distinct, though not infinite, number of property institutions, each reflecting a particular balance of values that is attached to a specific category of social contexts and a specific category of resources.

This variety and the contingent facts on which it partly relies should not be embarrassing. Quite the contrary: a truly liberal law must resist uniformity and endorse multiplicity, which is both freedom-enhancing and individuality-enhancing. By appreciating private law’s multiplicity and understanding the normative value of the (at times contingent) choices on which it relies, as well as their potential critical bite, private law theory can provide a better understanding of the order embedded in this complex legal mosaic and, possibly, even fruitfully contribute to its improvement.
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Hanoch Dagan

Tel-Aviv University Faculty of Law
Ramat Aviv, Tel Aviv 69978, Israel
Tel: 972-3-640-8652; Email: daganh@post.tau.ac.il

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INTRODUCTION

Remedies are often understood, and sensibly so, as the last stage of legal analysis. Choosing the appropriate remedy and calibrating its magnitude is indeed the last task of litigation, an issue to be addressed only after the more fundamental questions pertaining to the parties’ rights are properly resolved. Part of private law theory endorses this truism of legal practice, either by marginalizing the discussion of remedies, or by studying remedies as exogenous to the analysis of the parties’ rights. In this view, remedies are understood as means for enforcing rights. Choosing remedies and calibrating them properly is thus to be guided by concerns that have little to do with the content of these rights, such as the efficacy of effectuating such enforcement via the mechanism of a court order.¹

I have no quarrel with this perspective on remedies as such. But something significant is lost when we view remedies solely through these lenses, and the failure to integrate a theory of remedies into private law theory is thus unfortunate. Remedies serve not only as instruments of rights enforcement. They also participate, albeit in rather complex and imperfect ways, in the constitution of the rights they help enforce. This proposition does not collapse rights into remedies. Remedies fulfill an important enforcement function and, consequently, sometimes there are reasons (notably institutional ones) for certain gaps between the content of rights and the judicial response to their infringement. The constitutive role of remedies, discussed in Part I of this Essay, is nonetheless significant.

Part II addresses one implication of this claim. Using a typology of the available measures of recovery following cases of profitable appropriation of rights (such as trespass, conversion, or the infringement of intellectual property rights), I show that remedies infuse subtlety into the rights domain. Thus, this rich and rather intricate repertoire of seemingly technical alternatives provides the law with an important means for refining its doctrines. More specifically, choosing between monetary remedies is often a way for law to accommodate qualitative (and normatively attractive) distinctions between different types of rights. If and insofar as the remedies afforded in private law cases are constitutive components of rights, the multiplicity of potential remedies is but the outer manifestation of the heterogeneity of rights we can have as private law actors.

¹ This approach is reflected in, and may also be perpetuated by, the study of remedies as a separate subject in the curriculum. Incidentally, contract law theory is far less affected by this approach: contract theorists tend to address remedies and appreciate the significance of remedial choices to the understanding of contractual rights. The locus classicus for this is L. L. Fuller & William R. Perdue, Jr., The Reliance Interest in Contract Damages, 46 YALE L.J. 52 (1936). See Peter Benson, Introduction, in THE THEORY OF CONTRACT LAW: NEW ESSAY 1 (2001).
This lesson, drawn from the intersection of tort law and the law of restitution, should also be important to property law, which is the focus of Part III of this Essay. Property theorists strive to divine a unified conceptualization of property and fiercely defend competing accounts of the core of property, but rarely question the quest as such. Appreciating the heterogeneity of rights and its virtues might replace this type of inquiry with an alternative research agenda. Property theorists, I argue, should pay close attention to the way in which this phenomenon of multiplicity of rights, and thus also of remedies, manifests itself in property law as well. They should realize that property law is composed of a distinct, though not infinite, number of property institutions, each reflecting a particular balance of values attached to a specific category of social contexts and a specific category of resources. These property institutions do share a family resemblance but are sufficiently different from one another to render the search for property’s core futile and misleading, at least if this core is supposed to be robust enough to play a meaningful role in the development of property law.

By insisting that remedies law forces us to recognize property’s pluralism or, more generally, the multiplicity of rights, I do not mean to agonize over the integrity of property (or of rights) or undermine its role in facilitating freedom. Quite the contrary. As will be shown, neither the diversity that remedies law introduces into the realm of rights nor the heterogeneity of property institutions are boundless. Multiplicity does not mean chaos in either context but rather a more complex and nuanced structure that both limits the number of distinct types of rights and property institutions and standardizes their contents. Nor does multiplicity, again in both contexts, threaten freedom but indeed the opposite: it enhances both freedom and individuality.

I. RIGHTS AND REMEDIES

I begin with the relationship between rights and remedies. Theorists fluctuate between a view of rights and remedies as interdependent or independent, as well as between an approach that emphasizes rights and marginalizes remedies and its opposite. But a good case can be made for an intermediate position between interdependence and independence, which recognizes the importance of rights together with the significance of remedies. Gleaning some insights from prior contributions to this important topic will help to identify this position and appreciate its virtues.

A. From Hohfeld to Llewellyn, via Calabresi and Melamed

The starting point of almost every modern discussion of legal rights is (as it should be) Wesley Hohfeld’s celebrated search for “the lowest common denominators of the law.” Hohfeld maintained that not all legal relations may be reduced to rights and duties, and that in order to sufficiently cover the legal terrain and illuminate “common principles of
justice and policy underlying the various jural problems involved” we need to enlarge the list of fundamental legal conceptions from two to eight: rights (or claims), duties, privileges, and no-rights (dealing with interpersonal substantive relations) as well as powers, liabilities, immunities, and disabilities (dealing with interpersonal procedural relations).² This Hohfeldian scheme has important implications for a rights discourse. One significant insight it generates is that it is helpful to think of legal rights as jural relations; in fact, Hohfeld’s suggestion to express the eight fundamental legal conceptions in terms of their “opposites” and “correlatives” implies that defining them in a non-relational fashion is impossible. The awareness that legal rights and privileges constitute juridical relations is indeed crucial. If rights (broadly defined) are advantages to their holders to the extent that they are disadvantages to those subject to their correlatives, we cannot merely look at the putative holder of such rights to determine how to allocate rights, privileges, powers, and immunities between the parties involved but must also address the conflicting claims of those who would be vulnerable given such a right.³

This lesson will be the cornerstone of my celebration of the multiplicity of rights and of property. Reaching that point, however, requires first considering another Hohfeldian assertion that, unlike this one, may confuse rather than clarify the understanding of legal rights. Hohfeld claims that rights should be carefully distinguished from, and not only be thought as dependent on, both “the character of the proceedings by which [they] may be vindicated” and the remedies arising from their violation.⁴ For Hohfeld, the purpose of this proposition may have been rather limited and innocuous: to dissipate two “seriously erroneous notions” that follow from the view that there is a “rigid interdependence” between rights and remedies. Regarding both these specific concerns, Hohfeld was correct. Indeed, “the vindication proceedings” of in rem rights may be in personam. By the same token, not every case of in rem rights necessarily allows a dispossessed owner “the remedy of recovery of possession.” In numerous cases, the owner of in rem rights may be divested “on various grounds of policy and convenience” so that he will be in fact unable to recover possession.⁵

Hohfeld’s former claim may be premised on institutional reasons that, as shown below, explain and justify certain gaps between rights and remedies, whereas his latter

² Wesley Newcomb Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16 (1913).
⁴ Wesley Newcomb Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning, 26 YALE L.J. 710, 753 (1917).
⁵ Id., at 754-57, 763.
claim reveals some of the limitations of owners’ dominion, which I will also address below. Both of these propositions vindicate Hohfeld’s critique of the view that a rigid and necessary interdependence prevails between rights and remedies. But Hohfeld can be read as making a stronger argument: that remedies are in fact conceptually independent of rights. This position, perhaps somewhat ambiguous in Hohfeld’s account, is much clearer in Guido Calabresi and Douglas Melamed’s influential theory of property rules vs. liability rules.

For Calabresi and Melamed, resource allocation requires the law to make two distinct determinations: one for rights, another for remedies. First, the law must decide “which of the conflicting parties will be entitled to prevail.” Having made this initial choice of entitlements, the state must also make “second order decisions” on the manner of protecting these entitlements. Insofar as these second-order decisions are concerned, the scheme of Calabresi and Melamed offers a choice between two rules: a property rule or a liability rule. A property rule compels “someone who wishes to remove the entitlement from its holder to buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon the seller.” No one can appropriate the entitlement without first securing its holder’s consent; a court will issue an injunction in case anyone attempts to do so. By contrast, where a liability rule applies, “someone may destroy the initial entitlement if he is willing to pay an objectively determined value for it.” Thus, liability rules are intended to facilitate the forced transfer of the entitlement from its holder. Where liability rules apply, injunctions are unavailable. Liability rules employ an external, objective standard of value for ex post compensatory damages.

Like Calabresi and Melamed’s own account, most of the voluminous literature it evoked concentrates on the differential costs of property rules and liability rules as simply different means of entitlement protection, thus perpetuating the purported independence of remedies from rights. But such a radical disjunction is suspicious, because one way we understand the meaning and content of a right is by looking at how we protect it.

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6 For an account of tort law that accepts a similar disjunction between the trigger for the plaintiff’s right of action and the available remedies, see Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 Geo. L.J. 695, 710-13, 735, 748-52 (2003).


8 Jules Coleman and Jody Kraus emphasize this point in their analysis of Calabresi and Melamed’s framework, which resists the conventional treatment noted in the text. Coleman and Kraus argue that this framework makes little sense if we understand rights as “secured or protected liberties,” demarcating “a realm of liberty or control.” If the point of rights is “to secure a domain of control,” rather than “to guarantee a particular level of welfare or utility,” rights cannot be “reducible to or otherwise identifiable with a point on a right bearer’s indifference curve… certainly, not if one wants to maintain the distinction between autonomy and utility.” Because “the most liability rules can secure is a level of welfare equal to the value of the right bearer’s interest, including even his interest in his autonomy… liability rules cannot, in this view,
Remedies should not be discussed independently of the rights they protect or vindicate, nor can rights be adequately analyzed and understood separately from the remedies their infringement may entail, because rights delineation is part of a deliberative process that ends with the application of law’s coercive power. Because the remedies provided by private law to the plaintiff invoke such a power against the defendant, they must be justified along with the rights which they protect or vindicate.

Situating remedies at the core of our understanding of rights, that is, perceiving remedies as constitutive components of rights, is one of the most important (and forgotten?) lessons of legal realism. Karl Llewellyn’s discussion of the historical transition from a discourse of remedies to a discourse of rights is particularly instructive. Under the former, the pertinent question was: “On what facts could one man make use of any specific one of the specific ways of making the court bother another man?” This seems problematic to later writers. “Remedies seem to them to have a purpose, to be protections of something else. They could imagine these somethings and give them a name – rights, substantive rights.” Rights have thus become the center of attention and remedies “relegated to the periphery” as “‘adjective law’ merely – devices more or less imperfect for giving effect to the important things, the substantive rights.” But this conception of rights, Coleman and Kraus claim, is mistaken because it confuses one specific justification of rights with the meaning of rights, whereas “whether rights provide autonomy or are designed purely to guarantee a level of welfare is a contingent feature of them.” And once we open up the possibility that rights can designate either liberties or interests “as warranting a privileged status,” we realize that both property rules and liability rules are best understood not as different means of entitlement protection but rather “as devices for generating or specifying the content or meaning of such rights.” Thus, Coleman and Kraus conclude, the choice between these types of rules depends on the purpose we want the right at issue to serve, which in turn is determined by the pertinent foundational or normative theory we adopt “and the facts of the world: that is, by a theory of what is desirable as constrained by what is feasible.” See Jules L. Coleman & Jody Kraus, Rethinking the Theory of Legal Rights, 95 YALE L.J. 1335, 1339-40, 1345, 1369-71 (1986).


Taking this point to what may be perceived as its logical conclusion leads to a strong version of the interdependence thesis. See, e.g., ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 135 (1995); Avihay Dorfman, What is the Point of the Tort Remedy?, * AM. J. JURISP. * (2010). But this point should not be taken to its logical conclusion because the justificatory burden re the content and structure of the remedial apparatus applied by private law is only part of the justificatory burden of our private law. Cf. Hanoch Dagan, Just and Unjust Enrichments, in THE GOALS OF PRIVATE LAW 423 (Andrew Robertson & Tang Hang Wu eds., 2009).

which make up the substance of the law.” The substantive right, in this view, has a shape and scope independent of the accidents of remedies.

Llewellyn acknowledges the advantages of the shift from a remedies discourse to a rights discourse. This shift helped scholars realize that “procedure, remedies, existed not merely because they existed, nor because they had value in themselves, but because they had a purpose.” From which follows immediate inquiry into what the purpose is, and criticism, if the means to its accomplishment be poor.” Llewellyn, however, insists that this advantage “should not obscure the price that was paid for the advance.” One such setback is that the rights discourse tends to “double the tendency to disregard the limitations actually put on rules or rights by practice and by remedies.” Coloring rules in terms of rights suppresses their relativity and the proper limitations of their propositions (which is, as may be recalled, an important lesson of understanding legal rights as jural relations). This simplification of legal doctrine artificially strengthens the apparent moral validity of the right-holder’s claim, unjustifiably implying that no limitations, or at least as few as possible, should be recognized. In order to circumvent this trap, Llewellyn argues, we must understand that remedies are constitutive features of rights: rights should be understood as “convenient shorthand symbols for the remedies, the actions of the courts.” Hence, for Llewellyn, not only “no remedy, nor right,” but “precisely as much right as remedy.”

Indeed, in order to avoid the pitfalls of both a pure remedies discourse and a pure rights discourse we must: (1) realize that legal rights are neither necessarily absolute nor one-dimensional but are rather complex and variable, notably respecting their normative roles; (2) appreciate the diversity of possible remedies available respecting such rights in various contingencies as well as the constitutive role of remedies as per the content and meaning of rights; and (3) insist that while remedies indeed exist for a purpose that is captured in the language of rights, the scope and content of rights (and thus the availability of various types of remedies) are, or at least can and should be, carefully circumscribed according to their underlying rationales.

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12 Taking this important point seriously requires resisting views that conceptualize tort law around the remedial obligations following tortuous activities, thus obscuring the priority of discharging the primary obligations over remedying failures to do so. See Dorfman, supra note 10; Gregory C. Keating, Is Tort a Remedial Institution? (unpublished manuscript).

13 Cf. Leif Wenar, The Nature of Rights, 33 Phil. & Pub. Aff. 223 (2005). Wenar develops “a several functions theory” of rights and defends it against both the monistic will and interest theories of rights and the “any-incident” theory of rights. Wenar argues that “there is no one thing that rights do for rightholders. Rights have no fundamental normative purpose in this sense. Rather, rights play a number of different roles in our lives…. [T]hey mark exemption, or discretion, or authorization, or entitle their holders to protection, provision, or performance.” Id. at 248, 252.
B. A Cautionary Note: The Gaps

Notwithstanding this significant contribution of Llewellyn to the understanding of remedies as constitutive components of rights, realists are accused of conflating the distinction between right and remedy.\(^\text{14}\) This charge, although somewhat overstated, is nonetheless justified and can help to refine the lessons of the previous section. Llewellyn, as noted, points to the different functions of rights and remedies: whereas the former stand for the purpose of legal rules, the latter serve as the means for calibrating their specific content. He does not, however, allow any space for gaps between rights and remedies (“precisely as much right as remedy”), which proves mistaken on two grounds: it obscures the fact that Hohfeld had highlighted, whereby right infringements may not always trigger a remedy that fully vindicates the right at stake, and it obscures the significance of the institutions that are responsible for right-enforcement.

Stephen Smith offers a critique of this understanding of the remedies provided by courts as if they always, and necessarily, “confirm or ‘replicate’ already-existing duties that defendants owe to plaintiffs.”\(^\text{15}\) This conception of the relationship between rights and remedies, which he dubs “the rubber-stamp view,” obscures the distinction between “the question of how citizens should behave towards one another” and “the question of what courts should do on proof that a citizen has misbehaved.” The realist focus on what courts do, Smith insists, is obviously significant as per the latter issue, but cannot be determinative as per the former: in order to know what legal rights we have, one also needs to take seriously “what courts say” and “consider why, and when, it might be reasonable for courts to refuse to make an order notwithstanding that the defendant had a legal duty to do the very thing the court was asked to order the defendant to do.” Smith mentions three reasons for such possible gaps: (1) while “cost considerations [may be] irrelevant when asking what justice requires of citizens in their interactions with other citizens,” they are “clearly relevant when considering how the state should go about delivering justice”; (2) because remedies invoke law’s enforcement mechanisms more immediately than rights, “the question of when and how courts should make orders is closely tied to the question of when and how plaintiffs ought to be able to invoke the state’s coercive powers”; and (3) remedies are “personalized directives, issued by a court,

\(^\text{14}\) See, e.g., Coleman & Kraus, supra note 8, at 1347 & n17. Coleman and Kraus also mention that legal realists fail to appreciate that “entitlements specify the conduct others must exhibit if they seek to conform to the relevant norms, not just the sanctions or liabilities they are likely to incur in the event their conduct fails to conform.” This proposition is correct, but is not necessarily threatened by Llewellyn’s account. In fact, notwithstanding Hart’s fierce critique of Oliver Wendell Holmes (and John Austin) for their dismissal of law’s normativity, a charitable reading of the realist legacy suggests a much more subtle position re law’s power and its normativity. See Dagan, supra note 9, id.

that command a specific individual to do a specific thing” and this specificity may mean that there may be things that remedies simply cannot do.

Smith concedes that “many, probably most, court orders” are “replicative.” After all, “courts should ensure, so far as possible, that justice is done or achieved in society.” Because they should also assume that the legal prescriptions should follow what justice requires, their “basic role, when they make orders, should be to ensure that the rights articulated in private law are affirmed in their orders.” And yet, he argues that given the reasons mentioned above, there are also other ways in which rights and remedies are related: (1) At times, remedies transform rights into near substitutes as when, due to the “well-known institutional disadvantages associated with orders to [perform] non-monetary obligations,” “courts refuse to order defendants to perform their private law duties, and instead order them to pay plaintiffs sums of money equal to the cost of engaging third parties to perform those duties.”16 (2) Another, more significant type of gap, occurs when courts “refuse entirely to order defendants… to do what the private law requires them to do” due to the expiration of the limitation period governing that right: a limitation period is generally understood to be premised on considerations particular to the litigation and thus not to extinguish the plaintiff’s private duty but only the defendant’s right to a court order. (3) Finally, Smith alludes to cases in which courts issue orders that “create entirely new duties,” focusing on orders to pay punitive damages, nominal damages, and damages for pain and suffering, which he analyzes as “symbolic orders.”

One may question whether Smith does not exaggerate the significance of these exceptions.18 The first, transformative, type of remedy applies only where the substitute it provides is indeed close to the original: as Smith acknowledges “[t]hese institutional advantages of monetary orders would count for little if substituting a monetary obligation for a non-monetary obligation amounted to denying the plaintiff’s rights or imposing an unfair burden on the defendant.” The second type of cases, in which courts refuse to issue

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16 Smith uses this point in order to critique the efficient breach theory of contract. Insofar as the prevalence of expectation damages, as opposed to specific performance, indeed relies on such institutional concerns, it cannot serve as evidence for the content of promisees’ right. It is not clear, however, that these considerations can adequately account for many types of cases in which specific performance is denied, and that there are no good reasons for conceptualizing this right in these cases as indeed limited to the expectation interest. See Alan Schwartz & Daniel Markovitz, The Myth of Efficient Breach (unpublished manuscript).

17 Smith also mentions cases, notably in the context of family law, in which the court’s wide discretion implies that remedies are given where plaintiffs have no rights.

18 Smith argues that remedies (or court orders in his terminology) are not part of private law, although they may be of evidential value to it. Rather, in his view, “[t]he law of court orders is fundamentally a branch of public law,” as it determines our rights against courts (and not against one another).
an order, is “rare.” And the third category may be far narrower than Smith proclaims because at least some of the orders he typifies as symbolic may be conceptualized as vindicating plaintiffs’ rights, as is the case where punitive damages are carefully addressed at the aggravated injury inflicted on the plaintiff by the defendant’s malevolence, which injures her feelings of dignity and self-worth.\textsuperscript{19}

Still, Smith’s analysis correctly challenges Llewellyn’s rubber-stamp account of remedies. But rather than supplant Llewellyn’s account, his analysis can, and should, supplement it. Smith’s – and Hohfeld’s – references to the possible gaps between rights and remedies can be so integrated because, as Smith acknowledges, the instances of remedies deviating from this account are the exception rather than the rule.\textsuperscript{20} This means that Llewellyn’s excesses can be corrected and his account refined by taking account of the possible gap between right and remedy, and studying the types of cases where such a gap is likely to exist.\textsuperscript{21}

\section*{II. A Coherent Multiplicity}
\subsection*{A. Chaos and Order in Pecuniary Recovery}

These cautionary notes notwithstanding, the notion that remedies are not merely means to protect rights but rather constitutive features of these rights may seem troubling to private law theorists. If indeed different remedial responses constitute differing types of rights, the diversity of remedial apparatuses found in private law translates into a multiplicity of legal rights, which in turn appears to threaten the coherence of private law. This challenge is further aggravated once we realize that, alongside the heterogeneity of remedies, our private law rights are also distinguished from each other by their applicable

\textsuperscript{19} See Ernest J. Weinrib, \textit{Punishment and Disgorgement as Contract Remedies}, 78 CHI.-KENT L. REV. 55, 91, 98 (2003). \textit{Cf.} Dorfman, \textit{supra} note 10, at * (“insofar as the engagement-based remedial process between victim and wrongdoer aspires to turn the former from a mere factor of production (in the latter’s service) into a free and equal agent meriting, by virtue of being a person, the sort of respectful recognition mandated by tort law, imposing an additional cost on the wrongdoer owed to the victim becomes appropriate”).

\textsuperscript{20} This proposition is limited to the gap between our private law rights and the remedies provided by courts in response to claims following their violations. The gap may unfortunately be much wider, with rights far less protected or vindicated, if we include cases where no such litigation is instigated or followed through for a variety of reasons, or where court orders are not properly enforced. In other words, though we know injustice is rampant out there, we expect courts to refuse to give it their approval once they have a say. I am grateful to Roy Kreitner for this point.

\textsuperscript{21} These claims should have been integrated into his account also because Llewellyn, particularly as a realist, should have taken account far more carefully of various institutional contexts wherein rights are translated into remedies. For a recent discussion of the realist commitment to institutional analysis, see Roy Kreitner, \textit{Biographing Legal Realism}, 35 L. & SOC. INQ. 765 (2010).
qualifications, limitations, and exceptions. (In fact, I discuss remedies in Part I and in this section only as one, albeit particularly important, example of a source of the potential complexity of our private law rights. The last part of this Essay no longer focuses on remedies, and builds on the lessons of Parts I and II as per the multiplicity of legal rights in order to spell out the outline of a pluralistic account of property.)

On its face, the multiplicity of legal rights may indeed imply unbridled discretion for legal decisionmakers, which means that our private law is unprincipled and is thus unpredictable (maybe even unintelligible), and illegitimate. But before agonizing over the demise of private law, we should try to read the law more charitably and consider the possibility that such multiplicity can coexist with order and predictability and might, even more importantly, be normatively attractive.

I obviously cannot hope to adequately vindicate this optimistic proposition here, but I do hope that the following test case, which builds on my previous work, is suggestive enough. My test case deals with rules governing monetary recovery following the profitable appropriation of different types of resources: land and chattels; copyright, trademarks, and patents; trade secrets, contractual relations and performance, and pre-contractual expectations; individual reputation and dignity, commercial attributes of personality, and even identity and physical integrity. This category of cases is deliberately simple in two ways. First, I focus only on claims for pecuniary remedies, thus making my example relatively less vulnerable to the institutional reasons, discussed earlier, for gaps between rights and (typically non-monetary) remedies. Second, I do not discuss the entire terrain of rights infringements. Rather, I refer only to a subset of cases wherein the defendant knowingly appropriates an interest of the plaintiff in order to pursue a profitable activity that, in principle, is also possible without such an infringement. This paradigm is obviously much simpler than the typical accident case where the defendant engaged in an activity that necessarily but only statistically infringes others’ rights. (As I hint in the next section, I hope that some of the lessons of the

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22 These are the two challenges posed more generally by legal realism. See Anthony T. Kronman, Jurisprudential Responses to Legal Realism, 73 CORNELL L. REV. 335, 335-36 (1988).

23 This would also mean that although rights are rather multifaceted they are not reducible to rules. Cf. Joseph Raz, On the Nature of Rights, 93 MIND 194 (1984).

24 See HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES chs. 2 & 4 (1997), on which the remainder of this section draws.

25 An additional important distinction that makes my test case easier is that, because I deal with cases of profitable invasions, the choice of applicable measure of recovery can credibly serve as evidence as to whether the law indeed sanctions a transfer subject to compensation, or refuses to treat such compensation as a substitute to consent. By contrast, because in most accident cases the plaintiff’s harm is greater than the defendant’s profits, the fact that law’s typical remedy in such cases is aimed at making the plaintiff whole cannot arbitrate between these rival interpretations. For a recent attempt to resolve this ambiguity, see Mark A. Geistfeld, Tort Law and the Inherent
discuss the discussion below may be helpful in this type of cases as well. But the two distinctions just noted add crucial dimensions that are missing in our test case, which suggest that it should not be read as simplistically applicable also in the context of accidents.)

Not all cases of appropriation of the various resources mentioned above lead to the same measure of recovery; rather, private law applies different measures of recovery to different resources. Thus, concerning some resources, mere appropriation triggers a rather severe measure of recovery that allows the resource holder to choose between the fair market value of the resource or its unauthorized use and the net profit gained by the appropriator. In American law, this is the case in respect of appropriations that are infringements of the plaintiff’s rights to her identity, physical integrity, or land. On the other hand, the invasion of other types of resources triggers pecuniary recovery only if the defendant employed improper means. Thus, the sheer appropriation of trade secrets or pre-contractual expectations triggers no liability. In between these two poles, there are several other interesting points. Thus, the infringement of copyright allows the plaintiff to choose between the fair market value of the copyright at issue and a proportional part of the defendant’s profits. The infringement of patents, however, allows a plaintiff only the recovery of fair market value.

This diversity of recovery measures concerning the appropriation of different resources may seem perplexing at first sight. Indeed, if remedies are analyzed along the lines of the Calabresi-Melamed framework of examining the comparative efficiencies of different measures of recovery as different means of protecting entitlements, it is not easily explicable. For anyone who appreciates the constitutive role of remedies but resists a pluralist conception of legal rights, this remedial diversity seems even more arbitrary.


26 This was first noted in Daniel Friedmann, *Restitution of Benefits Obtained through the Appropriation of Property or the Commission of a Wrong*, 80 Colum. L. Rev. 504, 512-13, 556-57 (1980).

27 Admittedly, this aspect relates to the exact scope of the right, rather than the type of remedy. It nonetheless serves my discussion here because, as noted, remedies variability is only one example for the more general point of rights multiplicity.

28 A possible economic explanation for some remedial diversity may focus on the divergent subjective disutilities people may experience from the appropriation of different types of resources. The difficulties of verifying these harms and the entailed risk of their under-compensation may suggest that, where transaction costs are not too high, the appropriation of constitutive resources triggers harsh measures of recovery. I am not familiar with any full-blown account of the appropriation paradigm along these lines and am somewhat skeptical that it may successfully account for this doctrine, given its need to carefully balance the different risks of under-compensation and the divergent levels of transaction costs.
This diversity, however, is by no means chaotic or unprincipled. The different pecuniary measures available to the injured party – from profits garnered by the appropriator at the resource-holder’s expense, through various intermediate measures such as fair market value of the resource (or its use), and up to mere compensation for the harm suffered – stand for different types of rights. The profits measure of recovery renders infringements pointless to potential invaders, thus implying that transfers can be made legitimate only by obtaining the resource-holder’s consent prior to the transfer. By deterring nonconsensual invasions and insisting on consent as a prerequisite to any legitimate transfer, the profits remedy constitutes an entitlement that defines a domain of individual control over a resource. The remedy of fair market value, in contrast, does not deter appropriations – indeed, at times, it may even encourage them. Thus, where fair market value caps liability, the forced transfer of the relevant resource seems legitimate: unless such a limitation can be attributed to some institutional reason along the lines discussed in the previous section, the *ex post* pecuniary recovery seems to serve here as a surrogate for *ex ante* consent. Fair market value as a remedy secures the economic value of the entitlement that, since no better proxy is available, measures its (objective) level of well-being or utility to its holder. Finally, recovery limited to compensation for the harm suffered sanctions the appropriator’s claim to a share of the resource-holder’s entitlement so long as the former does not actually diminish the latter’s estate. Thus, the harm-based measure of recovery vindicates the value of sharing; it can be understood as a form of limited institutionalized altruism, a legal device that calls for other-regarding action and seeks to instill other-regarding motives.

This (skeleton of a) translation scheme of measures of recovery into types of entitlements helps to expose the order that governs the diversity of measures of

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29 The full translation scheme is captured in the following table (from Dagan, supra note 24, at 22):

<table>
<thead>
<tr>
<th>Measure of Recovery</th>
<th>Rationale</th>
<th>Vindication of . . .</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 Harm</td>
<td>Sharing</td>
<td>the invader’s claim to share the entitlement with its holder without unduly harming her</td>
</tr>
<tr>
<td>2 Fair Market Value</td>
<td>Well-Being</td>
<td>the resource holder’s well-being</td>
</tr>
<tr>
<td>3 Proportional Profits (where Proportional Profits exceeds Fair Market Value)</td>
<td>Well-Being &amp; Hypothetical Consent</td>
<td>both the resource holder’s well-being and her hypothetical consent</td>
</tr>
<tr>
<td>4 Profits</td>
<td>Control</td>
<td>the resource holder’s control over the resources at her disposal</td>
</tr>
</tbody>
</table>
recovery dealing with cases of appropriation. Translating these remedies into types of entitlements while remembering that the distribution of entitlements is organized by resource is key to understanding – and maybe even justifying – law’s diversity. Different resources are subject to different types of entitlements due to the qualitative distinctions between their respective social meanings. More specifically, the qualitative distinctions between the various resources people hold, mirror (and arguably also shape) the intrinsic significance of those resources in their holders’ lives, the degree to which they are perceived as constitutive of their holders’ identities. The law vigorously vindicates people’s control of their most precious, constitutive resources: their identities, physical integrity, reputations (as dignity), and land. Interests invested with a lesser degree of personhood – copyright and (to a smaller degree) the commercial attributes of one’s personality and patents – are less protected. Finally, the mere appropriation of resources from the third group (which includes the least personal resources – contractual relations and performances, and information) does not trigger liability unless the invasion was conducted by improper means. It is mostly with regard to resources that are relatively remote from the crux of selfhood that a prescription of sharing applies.

B. Contingency, Normativity, and Critique

This understanding of the law of pecuniary remedies following appropriations may indeed bring order to a heterogeneous legal terrain, but this order seems to come at a price. The relative intrinsic value of resources is premised, after all, on socially contingent facts: the privileged resources mentioned above are resources to which people, here and now, are arguably attached because they are understood both by those people and by their society as reflecting their holders’ identities. In other words, the social meaning of the resource in question – which is local rather than universal, contingent

<table>
<thead>
<tr>
<th></th>
<th>max (Fair Market Value, Profits)</th>
<th>Well-Being &amp; Control</th>
<th>both the resource holder’s well-being and her control</th>
</tr>
</thead>
<tbody>
<tr>
<td>5</td>
<td>Proceeds</td>
<td>Control &amp; Condemnation</td>
<td>both the resource holder’s control and society’s condemnation</td>
</tr>
</tbody>
</table>

30 If one focuses on the availability of injunctions in these various contexts, one would admittedly find much more uniformity. But this uniformity seems to be misleading, because if indeed the general availability of injunctions would have stood for a uniform Well-Being & Control type of entitlement, it would have not make much sense for the law to limit the ex post pecuniary recovery to less than max (Fair Market Value, Profits) in any of the categories mentioned above. Therefore, it seems that the broad availability of injunctions must be analyzed in terms that deviate from the contours of the rights they vindicate. In other words, this is yet another gap between rights and remedies, which – as we have seen – makes translation exercises quite difficult and nuanced.

31 See Margaret J. Radin, Property and Personhood, 34 STAN. L. REV. 957, 992, 1013 (1982).
rather than necessary – determines its relative value. But relying on such socially contingent facts seems problematic. Why should they matter to private law? What, in other words, is their moral significance? And is it possible to allow such facts of our existing social world to affect our legal prescriptions without collapsing into a legal regime that unreflectively entrenches our contingent reality?

I believe that the contingency of the value that we, as a society, ascribe to certain resources, does not undermine its moral significance. This proposition does not rely on 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. Value pluralists, who reject these problematic positions, still insist that some significant degree of cross-cultural variability is morally acceptable. Following Isaiah Berlin, value pluralists maintain that human life is replete with competing values that cannot be reconciled, as well as with legitimate wishes that cannot be truly satisfied. Because some values intrinsically conflict and because we cannot have everything we want, we must make choices. “The need to choose, to sacrifice some ultimate values to others, turns out to be a permanent characteristic of the human predicament.”

Many of our private law claims to resources (and activities) require the law to make such difficult accommodations. Every society is called upon to pick and choose certain resources (and activities) as more valuable and, given value pluralism, there is no single right choice. Frequently, the contingent social meanings of resources (and activities) will themselves determine the resources in which people invest their personalities and the activities they perceive as indispensable to their lives.

32 A similar characteristic applies regarding the way accident law makes qualitative distinctions between different types of activities based on their contingent social meanings. The claims that follow apply mutatis mutandis to this phenomenon, as the text that follows implies. See Hanoch Dagan, Qualitative Judgments and Social Meanings in Private Law: A Comment on Professor Keating, 4 THEORETICAL INQ. L. 89 (2003).


36 Usually, there is no reason to think that subjective valuations will be particularly idiosyncratic. Resources gain their significance as reflections of the self socially. People perceive certain resources as reflecting their personalities better than others, and thus attach subjective value to them because other people in society, to whom the self’s external image is communicated, share with them the same symbolic understanding. Therefore, not only considerations of rule of law but also the nature of the very phenomenon of constitutive property justifies law’s reference to social (objective) meanings.
The contingency of the list of privileged resources does not render it morally insignificant. The practice of personality-reflection in resources is morally valuable because external identifications and registrations of the self in socially contingent resources impose consistency, permanence, and stability upon people’s resolutions, plans, and projects; whichever these resources turn out to be as a matter of contingent social fact, this practice requires responsibility, self-discipline, and maturity, and thus fosters people’s moral development. Indeed, many social practices that are absent from or insignificant in other social environments, other places, and other eras may well provide us with invaluable channels of self-expression or with means that expand our options and allow us to achieve objectives that would otherwise be unattainable. Because these resources (and activities) are justifiably valuable, private law is justifiably deferential to these socially contingent facts.

Yet, by no means does it follow that we must blindly accept the contingent content of our social world, either in general or in legal discourse. Quite the contrary: although private law theory needs to rely on contingent social practices, it can and should lead us to constantly reexamine our too often implicit and even subconscious assumptions about the relative value of resources (and activities). By making these assumptions explicit, private law theory is potentially subversive because it helps us realize that in order to validate our current practices we need to justify the relative value we attribute to resources and activities. The requirement of justification is always potentially challenging to some of our social practices because it requires a respectable universalistic façade at the very least, an idealized picture that can be, and often is, a fertile source of social criticism because it sets standards that our current practices do not necessarily live up to. The idealism of our social world, even if hypocritical, is the best source of any critical engagement.

Take, for example, our understanding of land as constitutive property and the corresponding significance we attach to land ownership. Traditionally, land has been one of the most prominent objects of property rights in Western culture, accorded unique status as a symbol of the self and as a resource closely linked to personal freedom, rank,

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and power.\textsuperscript{41} This social value invites a certain degree of refinement: the distinction between “personal land” (like the family home or farm) and “fungible land” (used solely for commercial purposes). If some of the legal privileges accorded to landowners are justified by reference to the nature of land as property of a constitutive nature, as they frequently are, then arguably these privileges should be limited to personal land only.\textsuperscript{42} Indeed, thus used, the language of rights not only avoids the risk of reifying contingent choices that Llewellyn alluded to, but can also actively participate in reforming our non-ideal social reality. Rights discourse can perform this task by helping us see the gaps between existing doctrinal rules and their justificatory premises, thus forcing us to rethink those cases in which the law does not live up to its latent ideals.\textsuperscript{43}

III. FROM PROPERTY TO PROPERTIES

The idea that our private law rights are heterogeneous is far from being radical. Contract law, for example, used to be arranged according to “typical contractual relationships,” and notwithstanding (or is it due to?) the great unifying force of the classical contract theory that followed, we have witnessed a constant development of specialized fields of contract. As Roy Kreitner maintains, this “grouping… of fact situations by contract type” is a salutary strategy because it supplies “some guidance regarding the relative weight of conflicting contract principles.” In line with the claims of this Essay, Kreitner argues that only such focus on contract types can properly provide “an understanding of contract that respects the multiplicity of … purposes inherent in contract law” and the way in which different purposes “take on varying levels of importance with regard to the different types of contract,” thus appropriately linking contract theory “with the practices of contracting


\textsuperscript{42} First clues to such a distinction can be found in Hawkes Estate v. Silver Campsites, [1994] 7 W.W.R. 709, 721 (B.C.); Centex Homes Corp. v. Boag, 820 A.2d 194 (Sup. Ct. N.J. 1974). See also Margaret J. Radin, \textit{Reinterpreting Property} 12 (1993). More generally, if land or some other resource is important to the individual because only by owning and controlling it will property ensure a stability and maturity that would not otherwise be possible, meaning that, if absent some constitutive ownership people’s moral development would be seriously at risk, then property, that is, potentially constitutive property, must be available to all. See Waldron, \textit{supra} note 38, at 377-78, 385-86, 429, 444.

parties and the courts." As this part demonstrates, things are not that different insofar as property law is concerned. And yet, while Kreitner recently observed that “[p]luralism is on the agenda of contract theory,” property theory in recent times seems to have taken a different, indeed opposite, direction. 

A. Criticizing Property Monism

Property theory is indeed currently preoccupied with a search for a unified understanding of property. More specifically, one of the most exciting recent developments in property theory is the intellectual rehabilitation of Blackstone’s conception of property as “sole and despotic dominion.” After decades in which the bundle-of-sticks picture of property endorsed by the Restatement of Property had been regarded as the conventional wisdom, several leading property scholars again consider the right to exclude as the most defining feature of property. As Thomas Merrill and Henry Smith argue, “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 details of these sophisticated accounts differ, and cannot all be properly addressed in this Essay. For our purposes, it is sufficient to highlight the common structure of the most appealing accounts that are part of this growing trend. These

45 Kreitner identifies three recent variants of pluralism in contract theory, and offers a “pluralist statement” of the conception of contract as “an encompassing and multi-faceted institution” that has no core: “there is no one idea that encapsulates the sine qua non of contract, no nodal point from which all the instantiations of the institution of contract flow.” Contract in this view is “a framework for cooperation among societal agents,” which “serves as an infrastructure that provides a means to carry out a range of collaborative projects.” This infrastructure, Kreitner adds, “provides benefits even to those who are not using it at any given moment, because it structures in productive ways the interactions (actual and potential) among past, present, and future participants.” Roy Kreitner, On the New Pluralism in Contract Theory 8-9 (unpublished manuscript).
47 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *2 (Univ. of Chi. ed. 1979) (1765-69).
48 RESTATEMENT (FIRST) OF PROPERTY intro., §§ 1-5 (1936).
50 I discuss these accounts elsewhere. See HANOCH DAGAN, PROPERTY: VALUES AND INSTITUTIONS chs. 2 & 3 (2011). This part draws on these chapters.
accounts typically begin with a fierce critique of the disaggregation of property into a bundle of sticks. They then celebrate what is 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 nicely captured by the owner’s right to exclude.

Consider, for example, the most influential member of the “property as exclusion” family. Merrill and Smith advocate what they call “the traditional everyday morality of property,” which is “grounded in the right to 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 \textit{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 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.”\(^{51}\)

As the core/periphery language already implies, the notion that property as an idea is about the owner’s exclusive right works only if one sets aside or marginalizes some parts of what is property law. But looking closer at the implications of such marginalization demonstrates the difficulties of this exercise, as it needs to downgrade the significance of numerous property doctrines dealing with some of our most commonplace human interactions regarding resources. To be sure, many property rules provide structures for the relationships between strangers and, as such, can reasonably be accounted for within the exclusion paradigm. (Even in these contexts utilitarian considerations sometimes push towards less rigid configurations.\(^{52}\)) But various other rules, including very significant ones, prescribe the rights and obligations of members of local communities, neighbors, neighbors,


\(^{52}\) See, e.g., \textsc{Richard A. Posner}, \textit{Economic Analysis of Law} 31-34, 37-38 (7th ed. 2007).
co-owners, partners, and family members. These property rules cannot be fairly analyzed in terms of exclusion: while exclusion is 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{53} 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{54} 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. This diversity of property rights is not surprising nor should it be disappointing, given the general complexity and heterogeneity of rights discussed above.

Admittedly, as Felix Cohen demonstrated, every property right indeed involves some power to exclude others from doing something. But as Cohen further emphasized, this is a rather modest truism, which hardly yields any practical implications. Private property is also often subject to limitations and obligations, and “the real problems we have to deal with are problems of degree, problems too infinitely intricate for simple panacea solutions.”\textsuperscript{55} More specifically still, 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.\textsuperscript{56} In certain circumstances, the right of non-owners to be included and exercise a right to entry is also quite typical of property. Think, for example, of 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 law, and landlord-tenant law.\textsuperscript{57}

These rights of entry to non-owners are not an embarrassing aberration. 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 in a rather diverse set of circumstances, the limitations and qualifications of exclusion and the rights of non-owners to be included as buyers, lessees, or “physical entrants” are grounded in the very

\textsuperscript{53} See generally DAGAN, supra note 50, at chs. 8-10.

\textsuperscript{54} Think, for example, of the frequently implicit reasons underlying doctrines dealing with leveraged buyouts, or with the conditions under which legal conflicts between owners and third parties are resolved.


\textsuperscript{57} See DAGAN, supra note 50, at ch. 2. See also, e.g., JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 130-39 (2006), discussing the doctrine of necessity.
reasons – the very same property values – that justify the support of our legal system for the pertinent property institution. And again, this is not surprising given the lessons of the previous parts of this Essay. There is no reason to think that the notion that underlying rationales of rights also prescribe their limits is in any way less significant for property rights. Moreover, Llewellyn’s warning against the pitfalls of rights monism also immediately applies: entrenching an understanding of property as an exclusive right might misrepresent the limits of owners’ right to exclude and the rights of non-owners to entry as necessarily suspicious intrusions into property, obscuring their possible nature as premised on property’s own normative foundations.

To see how property values could entail limitations on exclusion and even require that owners’ curb their right to exclude and recognize a right to entry to non-owners, consider personal autonomy and personhood, the most individualistic justifications of private property. As a general, rights-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. 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 or decentralize 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. The combination of the special significance of providing access to property to non-owners on the one hand and, on the other, the inverse relation between owners’ wealth and power and the importance of safeguarding their right to exclude, points to


59 General rights-based arguments for private property – such as autonomy and personhood – are distinct from two other types of arguments. As right-based arguments, they rely on an individual interest, as opposed to a collective interest; as *general* arguments they are distinct from *special* right-based arguments which rely not on the importance of an individual interest as such, but rather on a specific event. For an analysis of this distinction and its distributive implications, on which the text relies, see WALDRON, *supra* note 38, at 115-17, 423, 425-27, 430-39, 444-45.


categories of cases in which our commitment to autonomy entails the non-owners’ claim to entry rather than the owners’ claim to exclude.62

Similar and possibly more pointed conclusions emerge from an analysis of the personhood value of property mentioned in Section II.A. 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 resources are external projections of their personality. Thus, while personhood is particularly strict about curtailing a non-owner’s demand to enter (purchase, rent, use, or physically enter) a constitutive resource, such as one’s home, it is almost indifferent regarding a fungible resource. Moreover, appreciating the personhood value of property entails complex distributive implications regarding constitutive resources: 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 them.63 The combination of these two propositions entails that, in some cases, the position of the personhood value of property provides significant support for the right to entry. When a resource is fungible for its owner but constitutive for another, the personhood value of property is particularly suspicious of the owner’s claim to exclude that particular other.64

As I show elsewhere, the core cases covered by both public accommodations law and the Fair Housing Act65 successfully combine the lessons of this brief analysis of the autonomy and personhood values of property.66 To be sure, justifying non-owners’ right to entry as a matter of private law67 requires explaining not only the desirability of the resulting

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62 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 CHAPTERS IN JURISPRUDENCE AND PHILOSOPHY 198, 206-207 (1983); WILL KYMMLICKA, CONTEMPORARY POLITICAL PHILOSOPHY 120, 123-125 (1990).

63 See WALDRON, supra note 38, at 377–78, 384–86, 429, 444.


65 Fair Housing Act, 42 U.S.C. 3601.

66 See DAGAN, supra note 50, at 48-50, 52-54.

67 As the text implies, many of the manifestations of the right to entry are often discussed in terms of public law. I do not deny such potential effect of public law considerations, though their implications in the horizontal context of private law may be different from their effect in the vertical context of public law. But I claim that at times the very same justifications for the property institutions at issue embrace these rights to entry, so that even friends of property who doubt or contest the relevance of these public law considerations can (and should) follow suit.
outcome as a matter of public policy. Rather, both the entitlement of potential plaintiffs to such a remedy and the burden it imposes on the pertinent owners (common-interest associations, lessors, owners of public accommodations, and the like) should be accounted for. On its face, overcoming this additional justificatory burden, which derives from Hohfeld’s insight re the characterization of legal rights as jural relations, is not an easy task because the justification of a given right to entry and the justification for limiting the right to exclude of the relevant type of owners often are not relational, namely, the reasons for the parties’ entitlements are not always internal to their relationship. And yet, when the convergence of these reasons is thick enough it can justify, within the framework of private law, the responsiveness of the (correlative) entitlements of property owners and of potential entrants.68 Insofar as this is indeed the case, these types of non-owners can nonetheless justify to owners not only why they should be entitled to a right to entry, but also why the latter should be the ones who carry the burden.

More generally, this discussion shows that although inclusion is less characteristic of property than exclusion, its manifestations are just as intrinsic to property and should not be perceived as external limitations or impositions. The very values underlying property 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 – as, again, Llewellyn warned regarding rights discourse – cloak important normative choices requiring open and contextual examination.

Exclusion theorists seem to face a rather unappealing choice. They can redefine property law so as to set aside the rather capacious aspects of it in which inclusion or governance loom large. Alternatively, they can discard any pretense to account for our existing law and present their theory as reformist, advocating a significant legal change that will use exclusion as property’s sole regulative principle, thus making private law truly libertarian.69 Or, finally, they can follow Felix Cohen in admitting that property involves some measure of exclusion,70 thus openly recognizing that their suggested


69 The recent revival of the Kantian conception of property follows this path. Neo-Kantians advocate a legal architecture of a rather strict division of labor between private and public law. Strong property rights and a viable welfare state, these authors claim, cluster as a matter of conceptual necessity. See ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY (2009); Ernest J. Weinrib, Poverty and Property in Kant’s System of Rights, 78 NOTRE DAME L. REV. 795 (2003). I discuss and criticize this position in DAGAN, supra note 50, at ch. 3.

70 Cf. Avihay Dorfman, Private Ownership, 16 LEGAL THEORY 1 (2010). Dorfman’s account of ownership centers on the normative status of owners vis-à-vis nonowners. Dorfman avoids the difficulty of smuggling normatively disputed claims into the conceptual analysis by arguing that the only conceptual requirement of ownership is that owners have some measure of authority.
conception of property can hardly arbitrate between different property configurations and thus entails (almost) no guidance as to the interpretation or development of property law.\footnote{This does not deny that such carefully-delineated statements as to the thin common denominator of the wide legal terrain covered by the wholesale category of property are meaningless or useless. As usual, the answer to the question of the correct level of abstraction is a function of the purpose of our inquiry. Thus, thin propositions like Cohen’s may well be useful if, for example, they are invoked in the context of examining the proper boundaries of property law.}

All three alternatives are indeed disappointing. To be sure, the failure of exclusion theory does not necessarily condemn other monistic accounts of property. But given the prominence of exclusion as a characteristic feature of property and the way at least some of its critique applies \emph{mutatis mutandis} to other attempts to divine a robust conceptual core of property,\footnote{See Dagan, supra note 50, at ch. 2 & 3.} and considering the lessons of our more general discussion as per the multiplicity of rights, it seems advisable to pause in the quest for property’s core and consider an altogether different way of thinking about property.

\textbf{B. Property as Institutions}

Recall that exclusion theorists imply that rejecting the notion that property is a monistic institution revolving around a core idea of exclusion necessarily means that we are left with the understanding of property as a formless bundle of sticks open to ad-hoc judicial adjustments. The bundle conception of property has a grain of truth: as 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.\footnote{See Hohfeld, \emph{supra} note 4, at 710, 720, 733-34, 746-47.} But property is not, as the bundle metaphor might suggest, a mere laundry list of rights with limitless permutations. Instead, as the \emph{numerus clausus} principle prescribes, at any given time property law offers only a limited number of standardized forms of rights.\footnote{See Thomas W. Merrill & Henry E. Smith, \emph{Optimal Standardization in the Law of Property: The Numerus Clausus Principle}, 110 YALE L.J. 1, 9-24 (2000).} 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.

Although the binary choice offered by exclusion theorists is natural for anyone who looks for a monistic understanding of property, it is fortunately wrong and misleading. While both the exclusion and the bundle conceptions of property betray our experience, a third possibility is more in line with property’s real life manifestations and, furthermore, is also normatively appealing. Rather than a uniform bulwark of exclusion or a formless bundle of rights, I suggest understanding property as an umbrella for a set of institutions
property institutions – bearing family resemblances. Each such property institution entails a specific composition of entitlements that constitute the contents of an owner’s rights vis-à-vis others, or a certain type of others, with respect to a given resource. The particular configuration of these entitlements is by no means arbitrary or random. Rather, it is, or at least should be, determined by its character, namely, by the unique balance of property values characterizing the institution at issue. At least ideally, these values both construct and reflect the ideal ways in which people interact with each other 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. The ongoing process of reshaping property as institutions is rule-based and is usually addressed with an appropriate degree of caution. And yet, 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.

Some property institutions 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 well-being and as a domain of individual freedom and independence.\(^\text{75}\) 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 various categories of cooperative property institutions, both liberty and community are of the essence, and the applicable property configuration includes rights as well as responsibilities.\(^\text{76}\) Thus, while property law appropriately facilitates the “sphere of freedom from personal ties and obligations”\(^\text{77}\) constituted by the impersonal norms of the more market-oriented property institutions, it does not allow these norms to override those of the other spheres of society. Property relations mediate some of our most cooperative human interactions as spouses, partners, members of local communities, and

\(^{75}\) See John Rawls, Political Liberalism 298 (1993).

\(^{76}\) Indeed, property law supports a wide range of institutions that facilitate the economic and social gains possible from cooperation. Some of these institutions, such as a close corporation, are mostly about economic gains – securing efficiencies of economies of scale and risk-spreading – with social benefits being merely a (sometimes pleasant) side-effect. Other institutions, such as marriage, are more about the intrinsic good of being part of a plural subject, where the raison d’être of the property institution refers more to one’s identity and interpersonal relationships, while the attendant economic benefits are perceived as helpful byproducts rather than the primary motive for cooperation. The underlying characters of the divergent relationships prove to be the key to explaining the particular property configuration that serves as the default for the property institution at hand. See Dagan, supra note 50, at ch. 10.

so forth. And imposing the impersonal norms of the market on these divergent spheres would effectively erase these spheres of human interaction and human flourishing.

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 use. 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. The nature of the resource is also significant in that, as we have seen, society approaches different resources as variously constitutive of their possessors’ identity. 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.

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 indeed futile and misleading, at least if this core is supposed to be robust enough to have a meaningful role in the development of property law. Trying to impose a uniform understanding 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. 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. Leaving specifics aside, 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. Thus, we have no reason for thinking that these differences are not widely known and easily understood and internalized. In fact, the law is justified in limiting the number of these property

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81 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, the appeal of exclusion theorists to the everyday understanding of property, which implies that the concept is independent of law, is highly problematic. See Roy Kreitner, On the Use and Abuse of Blackstone, 10 THEORETICAL INQUIRIES L. FORUM, available at: http://services.bepress.com/tilforum/vol10/iss1/art1 (2009).
institutions and standardizing their incidents, constructing them in a rule-based fashion 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.

Indeed, the conception of property as institutions not only resists subscribing to one normative commitment as the sole regulative principle which guides property law, but it also rejects the notion that one particular balance of property values should guide the entire property terrain. Instead, it insists that we take the heterogeneity of our existing property doctrines seriously and endorse the understanding of property as an umbrella of property institutions where each institution stands for a distinct balance of property values.

Thus, the conception of property as institutions follows the pluralist spirit of the previous parts of this Essay. The plurality of property values provides lawmakers 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 freely choose their own ends, principles, forms of life, and associations by navigating their own way among them. Indeed, the plurality of potentially authentic but conflicting conceptions of the good requires law to promote – rather than undermine, as property monism does – the freedom-enhancing function of

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82 Critics of value pluralism in property 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). This is false, however. One can coherently argue that we need to talk less about property and more about property institutions and yet insist that: (1) The (different) ways in which the various property values are embedded in these institutions are, or at least can and should be, rule-based (rather than affected by the equities of each particular case), so that only some legal actors, notably judges of appellate courts, occasionally use new cases as triggers for an ongoing refinement of existing rules qua rules; and (2) These rules can be reasonably founded on a contextual application of normative judgment rather than on the decision makers' subjective preferences. This allows supporters of property pluralism to actually respect property’s stability and predictability Cf. Gregory S. Alexander, The Complex Core of Property, 94 CORNELL L. REV. 1063, 1063-68 (2009).

83 See DAGAN, supra note 50, at ch. 1.

84 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).
pluralism and the individuality-enhancing role of multiplicity. Law in general, and property law more particularly, should facilitate, within limits, the co-existence of a variety of social spheres that embody different modes of valuation.\textsuperscript{85} As long as the boundaries between the multiple property institutions are open, and navigation within this variety is a matter of individual choice,\textsuperscript{86} the commitment to personal autonomy that probably drives most supporters of the conception of property as exclusion does not necessitate the hegemony of the fee simple absolute, nor does it undermine the value of other, more communitarian or utilitarian property institutions.\textsuperscript{87} 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.\textsuperscript{88}

Sheer multiplicity is obviously not sufficient. As described, the legal conventions encapsulated in property law, the property institutions as I call them, do not merely supply an assortment of disconnected choices. Rather, they offer a repertoire that responds to various forms of valuable human interaction. Admittedly, regarding many property institutions, law often falls short of the human ideals they represent. But as noted in Section II.B, these gaps only validate the normative teeth of a pluralist account of property. These imperfections of property law imply that, rather than searching for a unifying normative account of property law in its entirety, the main task of property theory is 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, if needed,
a reform that would force these property institutions to live up to their own implicit promises.  

CONCLUDING REMARKS

Private law theory in general and property theory in particular tend to shy away from pluralistic accounts. But private law in general and property law in particular know better. They tend to set up rather narrow categories corresponding to the differentiated segments of human conduct and interaction into which our lives are divided.  

The different types of available remedies and of possible qualifications, limitations, and even obligations, which some theorists may be tempted to treat as legalistic details, help private law to construct various types of rights and allow property law to facilitate various types of property institutions. This variety and the contingent facts on which it partly relies should not be embarrassing. Quite the contrary: a truly liberal law must resist uniformity and endorse multiplicity, which is both freedom-enhancing and individuality-enhancing. Furthermore, while there may be value in looking for a rather thin common denominator of the wide terrain of legal doctrine covered by wholesale legal categories such as contracts, torts, or property, it is remarkable to assume that such a common denominator can be robust enough to illuminate the existing doctrines or determinative enough to provide significant guidance as per their evaluation or development. Only by appreciating private law’s multiplicity and understanding the normative value of the (at times contingent) choices on which it relies, as well as their potential critical bite, can private law theory provide a better understanding of the order embedded in this complex legal mosaic and, possibly, even fruitfully contribute to its improvement.

89 In other words, the practical payoff of discarding property monism in favor of property pluralism lies in the fact that the latter approach situates the normative inquiries regarding property law at the correct level. Thus, on the one hand, it resists smuggling normatively disputed claims by way of a purportedly-conceptual presumption, and on the other hand it structures these normative inquiries so that they properly address both the social context and the nature of the resource.