Pluralism and Perfectionism in Private Law

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Abstract

Many private law scholars strive to divine broad unified normative theories of property, contracts, torts, and restitution (or, at times, even of private law as a whole). These monist accounts suggest that one regulative principle guides the various doctrines of these complex legal fields or that, even if more than one value shapes a given field, there is one particular balance of such values that guides the entire terrain. Notwithstanding the intuitive appeal of such structural monism, this Essay calls for a pluralist turn in private law theory and argues that a structurally pluralist and moderately perfectionist understanding provides a better account of private law generally and of property law more particularly. The multiplicity and complexity implied in such an understanding are also normatively valuable for liberal private law and should facilitate a variety of social spheres embodying different modes of valuation.
PLURALISM AND PERFECTIONISM IN PRIVATE LAW

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INTRODUCTION

Private law, more than any other part of law, structures our daily interactions. Justifiably, then, many private law theories view its doctrines as encapsulating some fundamental normative commitments. To be sure, explicitly, or more frequently implicitly, private law theories do recognize the gap between values that should guide us as moral agents and values that should be entrenched in law. Given that law backs up its normative prescriptions with coercive power,¹ at least in a liberal legal system its demands are typically more modest than those of morality. But even if we set aside the values that should be beyond the reach of the law, a category that theorists define in different ways, it is not surprising to find that values such as autonomy, utility, and community are the building blocks of private law theory.

Many private law scholars strive to formulate broad unified normative theories of property, contracts, torts, and restitution or, at times, even of private law as a whole. These monist accounts, as I call them, suggest that one regulative principle guides the various doctrines in these complex legal fields or that, even if more than one value shapes a given field, there is one particular balance of such values that guides the entire terrain. Thus, regarding property, my central example in this Essay, monist theorists typically argue – relying on either autonomy or utility or on an amalgam of the two – that “the core of property is the simple right of an owner to exclude the world from the resource,” and that other manifestations of property are situated at the periphery, being “refinements outside the core of property.”²

The structural monism of these theories, such as the one examined in Part I, seems appealing. By conceptualizing an entire legal field such as property as revolving around one idea such as exclusion, monist theories tend to be parsimonious and elegant, thus satisfying an important demand of the practice of theorizing. They also avoid the seemingly intractable difficulties of pluralist theories in addressing contextual conflicts of values or contextual applications of values. Finally, the broad coherence monist theories celebrate means that the law talks to the people with one voice and is thus deserving of their obedience.

But monist theories can hardly account for the vast heterogeneity of our private law doctrines. Private law tends to set up rather narrow categories, each covering only


relatively few human situations and governed by a distinct set of rules expressing differing underlying normative commitments. Thus, for example, property law includes, side by side, doctrines that by and large comply with a libertarian commitment to negative liberty (think fee simple absolute), alongside doctrines where ownership is mostly a locus of communitarian sharing (as in marital property) or the maximization and just distribution of the social pie of scientific knowledge and its products (as with patents), as well as many other doctrines vindicating various types of balance among these and other property values. A unifying theory of property that would be robust but would not turn into a straitjacket for such a diverse set of doctrines is hard to imagine.

Monist theorists seem to face rather unappealing choices. They can redefine their respective subjects (say property law) so as to marginalize the considerable sections that are not really responsive to the regulative principle they advocate. 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 indeed render that field monistically guided by their favorite regulative principle. Or, finally, they can come up with a sufficiently abstract and capacious regulative principle, so as to encompass the heterogeneous legal materials they theorize about. Insofar as this last strategy leads to a victory, it tends to be a Pyrrhic one, at least for those who purport to develop a legal theory: the common denominator of the wide terrain of legal doctrines covered by wholesale legal categories such as property, contracts, torts, or restitution is so thin that it can hardly illuminate the existing doctrines or be determinative enough to provide significant guidance as to their evaluation or development.

The lure of private law monism can and should be resisted. Private law theory should take seriously the existing structural pluralism of private law and celebrate, rather than suppress (as variations on a common theme) or marginalize (as peripheral exceptions to a robust core) the multiple forms typifying private law. Part II considers four reasons for this position, and the two main ones should be briefly introduced here. One, straightforward, reason relies on value pluralism: as Isaiah Berlin famously observed, human life is replete with competing values that cannot be reconciled, as well as with legitimate wishes that cannot be truly satisfied. Furthermore, even critics of value pluralism as a foundational position should follow suit. Many of these critics – notably: foundational monists who hold that the only ultimate value is 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 choice) – should adopt the structural pluralist

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prescriptions due to their instrumental role in promoting this one foundational value. The pluralism of private law should not be confused with value neutrality. While careful not to impose a specific conception of the good life on the citizenry, and happy to introduce and facilitate diverse forms of human interaction and human flourishing, private law is – as I argue in Part III – far from being value-neutral. Each one of its categories targets, in its own way and with respect to some intended realm of application, a set of human values that can be promoted by its constitutive rules. Although many of these rules function as defaults, the number of frameworks of social interaction and cooperation that private law facilitates is limited and their content is relatively standardized. These features allow private law not only to consolidate people’s expectations regarding these core types of human relationships but also to express law’s normative ideals for these types of human interaction.

Accordingly, against the conception of property as exclusion, Part IV offers a pluralist conception of property. In this conception, which I defended at length in my book, *Property: Values and Institution*, property is an umbrella for a set of institutions, serving a pluralistic set of liberal values: autonomy, utility, labor, personhood, community, and distributive justice. Property law, at least at its best, tailors different configurations of entitlements to different property institutions, with each such institution designed to match the specific balance between property values best suited to its characteristic social setting. Thus, what looks like a random mess from a monist viewpoint, turns out to be a rich mosaic once the structural pluralist perspective is utilized. This mosaic is obviously important for foundational value pluralism. It is similarly valuable for people’s autonomy: while the fee simple absolute facilitates people’s independence (and is thus indeed indispensible for liberal societies), law’s support for other property institutions as well as the possibility of further tailoring a property institution to one’s choices are crucial for facilitating people’s ability to choose and revise their forms of interaction with other individuals respecting diverse types of resources.

I. ONE MONISTIC FAILURE

Property theory is a helpful case study of private law structural monism because it seems to be currently preoccupied with a search for a unified understanding of property. More

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6 Although Part II focuses on the premising of structural pluralism on autonomy as a foundational (monist) value, I hold it may also be assumed to rest on utilitarian foundations, a course of analysis I may wish to pursue in the future.


8 Property pluralism may be necessary for promoting people’s autonomy, but it is obviously not sufficient.
specifically, one of the important recent developments in property theory is the intellectual rehabilitation of Blackstone’s conception of property as “sole and despotic dominion.”9 After decades in which the bundle-of-sticks picture of property endorsed by the Restatement of Property10 had been regarded as the conventional wisdom, several leading property scholars are again considering 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.”11

These sophisticated accounts differ in their details and addressing all of them exceeds the scope of this Essay,12 but pointing out the common structure of the most appealing ones within this growing trend will suffice for my current purpose. To begin with, these accounts tend to be fiercely critical of the disaggregation of property into a bundle of sticks. By contrast, they celebrate what is perceived as the lay understanding of property as exclusion, highlighting the under-appreciated 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, James Penner’s influential account of property as exclusion.13 In Penner’s view, “property is what the average citizen, free of the entanglements of legal philosophy, thinks it is: the right to a thing,” or, more precisely, the right to exclusively “determine how particular things will be used.” The authority to exclusively determine the use of things, or the power to exclude others “from the determination of [their] use,” he explains, is significant “because of the freedom it provides to shape our lives,” which is an important part of “any fairly robust interest in autonomy.” Penner argues that “property rights can be fully explained using the concepts of exclusion and use.” While use is more fundamental to autonomy than exclusion, the fact that “in the real world… the vast majority of the uses that a person will make of a thing are impossible if everyone tries to use the thing at the same time” entails the “obvious solution” of linking “rights of use with rights of exclusion.” In other words, “the

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9 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *2 (Univ. of Chi. ed. 1979) (1765-69).
10 RESTATEMENT (FIRST) OF PROPERTY intro., §§ 1-5 (1936).
12 I discuss these accounts in DAGAN, supra note 7, at chs. 2 & 3. This part draws on these chapters.
interest we have in purposefully dealing with things,” either by way of “using in the narrow sense” or, more broadly, by “having some purpose in respect of the use to which the thing will be put,” serves “a justificatory role” for the right to property, while the right to exclude others from such things is “the formal essence of the right.” For Penner, this “interest in exclusively using things” unifies property because it is “regarded as a justification which explains and dictates the contours of the right which protects it.” Thus, understanding property as a bundle of sticks is misleading: all these sticks (or incidents), such as the right to possess, use, manage, and so forth, are mere elaborations of what the right to exclude encompasses or entails.  

Property is not “some bundled together aggregate or complex of norms, but a single, coherent right”: “the right to exclusive use,” which “correlate[s] with, or can be derived from, the duty of others to exclude themselves from the property.” Penner celebrates this idea of property not only because, as noted, it ensures independence that is in turn significant for autonomy, but also because – pace Blackstone’s critics – it is not anti-social: “the ability to share one’s things, or let others use them, is fundamental in the idea of property.” In property as exclusion, sharing comes about not as an external requirement but rather as a voluntary determination of the owner, so that permitting another to use one’s property is tantamount to “adopting that use as one’s own.”

While understanding property as a formless bundle of sticks open to ad-hoc judicial adjustments indeed bears no resemblance to the law of property as lawyers know it or, even more importantly, as citizens experience it in everyday life, neither is the conception of property as a monistic institution revolving around the idea of exclusion. To be sure, some parts of the property drama do indeed consist in governing the productive struggle between autonomous excluders, with each individual cloaked in the Blackstonian armor of sole and despotic dominion, and, as such, can reasonably be accounted for within the exclusion paradigm. And yet, the notion that property as an idea is about the owner’s power to exclude is a great exaggeration (and a rather damaging one, since it tends to improperly bolster the cultural power of libertarian claims).

Property can be understood as an exclusive right, and exclusion or exclusivity can exhaust the meaning of property and thus be properly described as its core, only if we set aside somewhat arbitrarily large parts of what constitutes property law, at least according to Penner, however, the right to sell or make other market transactions (as opposed to gifts) is, quite idiosyncratically, not part of the right to property. See PENNER, supra note 11, at 87-93. Thus, insofar as my critique of the unfortunate implications of exclusion-centrism deals with alienability, it does not necessarily apply to him.

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

The source, or at least an important milestone in this notorious and misleading dichotomy, is BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977).
to the conventional understanding found in the case law, the Restatements, and the academic commentary. Indeed, many property rules that prescribe the rights and obligations of members of local communities, neighbors, co-owners, partners, and family members, including rights regarding the governance of these property institutions, cannot be analyzed fairly through terms of exclusion. While exclusion is silent as to the internal life of property, these elaborate property governance doctrines provide structures for cooperative, rather than competitive or hierarchical, relationships. **Pace Penner**, sharing and cooperation in these doctrines are not the choice of a person who already enjoys sole and despotic dominion but rather a constitutive feature of the property institution, which defines the content of that person’s property right. Furthermore, in shaping the contours of these property institutions, concerns about insiders’ governance may be as or even more informative than concerns about outsiders’ exclusion. **18**

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 also quite prevalent in property law. **19** In certain circumstances, the right of non-owners to be included and exercise a right to entry is also quite typical of property, as in, for example, 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. **20** These rights of entry of non-owners are not an embarrassing aberration: although inclusion is less characteristic of property than exclusion – in the limiting case of inclusion, namely, universal equal access, there is no owner – its manifestations are just as intrinsic to property and should not be perceived as external limitations or impositions. This is the case because, 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 reasons – the very same property values – that justify the support of our legal system for the pertinent property institution. **21**

17 **See generally** DAGAN, supra note 7, at chs. 8-10.

18 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.

19 **See, e.g.,** Kevin Gray & Susan Francis Gray, Civil Rights, Civil Wrongs and Quasi-Public Space, 1 EUR. HUM. RIGHTS L. REV. 46 (1999).

20 **See** DAGAN, supra note 7, 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.

The claim that limitations on exclusion are internal to property seems rather obvious insofar as they are grounded in collectivist justifications for private property, such as the welfare or utility value of property. But this claim applies also to individualistic justifications, such as autonomy. 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 surely 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 is often justified by reference to its function in protecting people’s independence and security by spreading or decentralizing decision making power. This protective role, however, is not universally significant but rather particularly important to those who are part of the non-organized public or of a marginal group with minor political clout. The special significance of providing access to property to non-owners, together with the inverse relation between owners’ wealth and power and the importance of safeguarding their right to exclude, point to categories of cases wherein our commitment to autonomy entails the non-owners’ claim to entry rather than the owners’ claim to exclude.

22 In general, entrusting the owner to determine the time and terms of a resource’s use may well prove efficient. In certain types of cases, however, and not necessarily marginal ones, granting strict legal sanction to an owner’s refusal to sell or lease, generally or to a certain subset of potential entrants, will prove detrimental to social welfare.

23 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 one; as general arguments, they rely on the importance of an individual interest as such rather than on a specific event, as do special right-based arguments. For an analysis of this distinction and its distributive implications, on which the text relies, see Jeremy Waldron, The Right to Private Property 115-17, 423, 425-27, 430-39, 444-45 (1988).


27 This conclusion is but one manifestation of the important insight that negative liberty must always be analyzed as only a means, however important, for people’s autonomy. Hence, when it undermines rather than serve the more fundamental value of self-determination, it should be curtailed. See H. L. A. Hart, Between Utility and Rights, in Chapters in Jurisprudence and Philosophy 198, 206-207 (1983); Will Kymlicka, Contemporary Political Philosophy 120, 123-125 (1990).
Exclusion theorists need to choose among three alternatives, none of which seems particularly promising. One – probably the most prevalent – option is to redefine property law so as to set aside the rather capacious aspects of it where inclusion or governance loom large. Merrill and Smith argue in this vein that an owner’s right to exclude is “the core of property,” and that the “broad presumption” of the law is “that owners can dispose of property as they wish” so that “efforts to supplement exclusion with various devices governing proper use” are perceived as peripheral “refinements to the core exclusionary regime of property law.”28 This strategy is doomed to fail because the doctrines that do not comply with the exclusion principle are in fact not marginal or peripheral to the life of property, but deal instead with some of our most commonplace human interactions regarding resources.29

Alternatively, exclusion theorists may discard any pretense to account for our existing legal landscape and present their theory as reformist, advocating a significant legal change that will use exclusion as property’s sole regulative principle, thus making property law truly libertarian. This seems to be the (implicit) path of the recent revival of the Kantian conception of property,30 which I cannot address in this Essay (but discuss and criticize elsewhere31). For my purposes here, stating the obvious price of this strategy should suffice: once a significant gap is shown to separate such a theory from the existing legal landscape, it can no longer purport to be a theory of property law as we know it.

Finally, exclusion theorists may follow Felix Cohen in claiming that every property right involves some power to exclude others from doing something.32 But as Cohen further emphasized, this is a rather modest truism, which hardly yields any practical implications. Private property is also, as noted above, often subject to limitations and obligations, and “the real problems we have to deal with are problems of degree,

28 Merrill & Smith, supra note 2, at 1851-52, 1891-92. Merrill & Smith argue that conceptualizing property around the owner’s right to exclude is justified from a “range of possible sources” of “robust moral notions.” Id., at 1855. But this commitment to value pluralism does not lead them to acknowledge the virtues of structural pluralism. Quite the contrary: their account of property as exclusion is one of the most influential accounts of structural monism.

29 See DAGAN, supra note 7, at chs. 2, 4, 8-10.

30 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). 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.

31 See DAGAN, supra note 7, at ch. 3.

32 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 non-owners. 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.
problems too infinitely intricate for simple panacea solutions."

In other words, exclusion theorists adopting this strategy implicitly admit that their suggested conception of property can hardly arbitrate between different property configurations and thus offers (almost) no guidance as to the interpretation or development of property law. (This does not imply that carefully delineated statements about 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 concerning the correct level of abstraction is contingent on the purpose of the 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.)

While all three options are indeed disappointing, the failure of exclusion theory does not necessarily condemn other monistic accounts of property, let alone other parts of our private law. But given the prominence of exclusion as a characteristic feature of property and the way that at least some of its critique applies mutatis mutandis to other attempts to divine the conceptual core of property, it seems advisable to pause in the quest for property’s core and consider an altogether different way of thinking about property. This alternative conception of property, to which I now turn, takes to heart the reasons why private law should follow the prescriptions of structural pluralism.

II. REASONS FOR PLURALISM

The common (and implicit) presupposition of exclusion theories of property is that property law is, or should be, governed by one value or by one particular balance of values. But because structural monism is descriptively weak and, as I argue below, also normatively impoverished, it should be rejected. Rather than looking for the core unified normative foundation of property or, for that matter, of its sister private law doctrines, private law theory should offer pluralist accounts of its subject matters. The heterogeneity of private law in these accounts is not merely a result of differing applications of the same regulative principle as required by the different types of contexts covered by private law, a phenomenon many private law monists are happy to acknowledge. Rather, structural pluralism insists that the heterogeneity of private law goes much deeper, that different parts of private law (or, better, of its distinct branches) respond to and vindicate

34 See DAGAN, supra note 7, at ch. 3.
35 One conspicuous example of this (modest) type of pluralism is manifest in the account of private law as driven by concerns for communication costs, which Merrill and Smith have advanced in recent years regarding various property issues as well as other private law contexts. See, e.g., Henry E. Smith, Modularity and Morality in the Law of Tort, * J. TORT L. * (2011).
different values or different balances of values. The profound heterogeneity typical of existing law may be the result of compromises or sheer accident rather than of deliberate normative choices. Nevertheless, I believe that a pluralist turn in private law theory rests on good reasons, and should therefore be welcomed and embraced.

Structural pluralism can rely on a pluralist theory of value that, as Elizabeth Anderson claims, is appealing because “[o]ur evaluative experiences, and the judgments based on them, are deeply pluralistic.” Worthwhile and potentially incompatible virtues and projects are many and diverse. Goods, more generally, are qualitatively different in the sense that they are governed and evaluated by specific norms, so that there are various “attitudes it makes sense to take up toward them and ... distinct social relations and practices that embody and express these attitudes.” Adopting a monistic theory of value, which “attempts to reduce the plurality of standards to a single standard, ground, or good-constituting property” would do violence to “the self understandings in terms of which we make sense of and differentiate our emotions, attitudes, and concerns.” Anderson admits the appeal of value monism, which provides a simple algorithm (“maximize value”) for settling questions about what to choose, while pluralism has a hard time addressing these demands of practical reason given its claim of incommensurability.36 But she still insists that pluralism allows comparative value judgments (and that when it does not, it is rational to rely on sheer preferences). Thus, and of particular importance for our purposes, goodness-of-a-kind judgments facilitate comparisons within practices given the “values internal to and constitutive of [these] practices.” Such impersonal rankings are admittedly pointless in “more global judgments of overall value” given that no single ranking of a wide variety of competing ways of life is valid for everyone. And yet, choice among incommensurable states of affairs can be more or less rational based on contextual considerations, such as its meaning for the choosing person. Likewise, because incommensurability is rarely lexical, it may permit “tradeoffs of higher for lower goods” while prohibiting other such tradeoffs “chosen for particular reasons or in such a way as to express an inappropriate regard to the higher good.”37

Foundational pluralism is controversial.38 But even its critics may find good reasons for normative and thus also structural pluralism, at least given certain foundational views.39 Consider the ideal of personal autonomy stating that people should, to some

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36 Cass Sunstein, who relies heavily on Anderson, offers a definition of incommensurability that is particularly helpful in legal contexts: “Incommensurability occurs when the relevant goods cannot be aligned along a single metric without doing violence to our considered judgments about how these goods are best characterized.” Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994).

37 ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 1, 5, 7, 12, 45, 49, 56-58, 63, 66-70 (1993).

38 See, e.g., RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 88-122 (2011).

39 For the distinction between foundational and normative pluralism, see Elinor Mason, *Value
degree, be the authors of their own lives. As Joseph Raz explains, autonomy requires not only appropriate mental abilities and independence but also “an adequate range of options.” While a wide range of valuable sets of social forms is available to societies pursuing the ideal of autonomy, autonomy “cannot be obtained within societies which support social forms which do not leave enough room for individual choice.” For choice to be effective, for autonomy to be meaningful, there must be (other things being equal) “more valuable options than can be chosen, and they must be significantly different,” so that choices involve “tradeoffs, which require relinquishing one good for the sake of another.” Thus, because autonomy admits and indeed emphasizes “the value of a large number of greatly differing pursuits among which individuals are free to choose,” valuing autonomy inevitably “leads to the endorsement of moral pluralism.”

At the foundational, meta-ethical level, subscribing to a form of value pluralism based on a (monist) commitment to autonomy is clearly different from advocating value pluralism as a free-standing persuasion. Autonomy-based value pluralism recruits other values and supports the fracturing of our legal domain so as to properly promote them all as a means that is premised on, and should thus be guided by, the ultimate value of facilitating people’s ability to be authors of their own lives. By contrast, foundational pluralism hesitates to grant a priori dominance to any value, including autonomy. Rather, it insists that, given the incommensurability of values, their relative importance is always and necessarily contextual. On its face, this difference may also suggest that prescriptions to law resting on an autonomy-based pluralism would be different from, and arguably more demanding than, those based on a foundational pluralism. But there are reasons to believe that the practical prescriptions that these positions will offer law will probably largely converge. An autonomy-based pluralism must take seriously the state’s obligation to provide a sufficiently diverse set of robust legal frameworks for people to organize their lives. And while structuring private law around the divergent values (and balances of values) underlying distinct legal doctrines is instrumental to autonomy, none

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40 Indeed, the ideal of personal autonomy that I rely upon should be strictly distinguished from Kant’s conception of personal independence. As Arthur Ripstein explains, Kantian independence is exhausted by the requirement that no one gets to tell anyone else what purposes to pursue. Therefore, unlike autonomy, Kantian independence is not a good to be promoted but a constraint on the conduct of others. See Ripstein, supra note 30, at 14, 34, 45. By contrast, with Raz, this Essay discusses autonomy within teleological morality. See also, e.g., James Griffin, On Human Rights 36-327, 68-69, 149-58 (2008).


42 I do not mean to dismiss a priori the possibility of meaningful divergences too. This is an interesting contingency that I do not discuss here.
of them is reducible to autonomy. Correspondingly, a foundational pluralism should neither dismiss nor downgrade the value of autonomy as a justification for respecting the diversity of human goods and responding to their distinct constitutive values (even if not as the regulative principle of every given legal doctrine).

Either way, because many of these plural values cannot be realistically actualized without active support of viable legal institutions, law should facilitate (within limits) the coexistence of various social spheres embodying different modes of valuation. Indeed, despite the appeal of monism’s global coherence, value pluralism makes it reasonable and even desirable for law to adopt more than one set of principles and, therefore, more than one set of coherent doctrines.43 The commitment to facilitate a plurality of reasonable but conflicting ideals and conceptions of the good 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.44 The obligation, however, is to make these choices for people only when necessary, and thus to create and facilitate a structurally pluralist legal regime. (Indeed, what makes a legal doctrine a legal institution is the fact that it is internally monist, namely: is governed by a given value or a given balance of values. This also means that legal institutions and social spheres do not overlap: while the former reflect, and to some extent shape the latter, legal institutions are likely to be narrower than social spheres.45)

A structurally pluralist private law includes different and sufficiently diverse types of institutions, each incorporating a different value or different balance of values. The boundaries between these institutions should be open, enabling people to freely choose their own ends, principles, forms of life, and associations by navigating their way among them. While at a certain point the marginal value from adding another distinct institution is likely to be nominal in terms of autonomy, pluralism implies that law’s supply of these multiple institutions should be guided not only by demand. Demand for certain institutions generally justifies their legal facilitation, but absence of demand should not

43 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. See JOSEPH RAZ, The Relevance of Coherence, in ETHICS IN THE PUBLIC DOMAIN: ESSAYS IN THE MORALITY OF LAW AND POLITICS 261, 281-282, 291-304 (1994).

44 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).

necessarily foreclose it insofar as these institutions add valuable options of human flourishing that significantly broaden people’s choices. (This effect is likely to be particularly noteworthy regarding institutions that are relatively different from existing institutions, especially from the more popular ones.) Only in this way can law recognize and promote the autonomy-enhancing function of pluralism and the individuality-enhancing role of multiplicity.46

These conclusions are further strengthened in the context of the current discussion on the desirability of structural pluralism, namely, in private law. Consider first the prudential significance of the fact that at stake is law, as opposed to other, less coercive domains of practical reasoning. Any discussion about the law must, as noted, pay attention to its coercive power. The concern with coercion is justified not only by the obvious fact that judgments prescribed by law’s carriers can recruit the monopolized power of the state to back up their enforcement,47 but is also premised on the institutional and discursive means that tend to downplay at least some of the dimensions of legal power. The institutional division of labor between “interpretation specialists” and the actual executors of their judgments, and our tendency as lawyers and even as citizens to “thingify” legal constructs and accord them an aura of obviousness and acceptability are built-in features of law that make the danger of obscuring its coerciveness particularly troubling.48 We should consequently beware of assigning too much power to lawmakers who, as fallible human beings, may make mistakes and at times even prefer their self-interest to the public good.49

A commitment to structural pluralism can limit the coercive effects of private law. At pathological moments of breakups followed by litigation, the power over the litigants that a pluralist regime assigns decision-makers may be no different than that allocated by a monist system. But the dramas at the endgame of interpersonal relationships and legal institutions should not obscure the significance of the ex ante choices available to people entering and shaping these relationships. From this perspective, a structurally pluralist

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46 Cf. RAZ, supra note 41, at 417-18, 425.
49 A similar consideration underlies one of the strongest instrumental arguments for freedom of speech, relying on “a distrust of the ability of government to make the necessary distinctions, a distrust of governmental determinations of truth and falsity, an appreciation of the fallibility of political leaders, and a somewhat deeper distrust of governmental power in a more general sense.” FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 86 (1983).
private law along the lines noted seems superior to its monist counterpart because it opens up options for choice rather than channeling everyone to the one possibility privileged by law. 50 (Consider, for example, the choice offered by law between various forms of commercial incorporation.) A pluralist private law regime thus allows individuals to navigate their course so that they bypass certain legal prescriptions, avoiding their potential implications and hence the power of the people who have issued them. 51 This effect of structural pluralism is distinctly acute with respect to private law – caution regarding legal decision-making is particularly required regarding private law – because the risk of blurring the coerciveness of law is uniquely high in this area, which tends to blend into our natural environment. 52 Beyond its intrinsic appeal, therefore, structural pluralism in private law can be read as a prudential response to these significant institutional concerns. 53

In some categories of private law, as implicitly noted, only one decision is called for, so lawmakers must make choices. Generally, only one set of rules can govern activities such as driving. Therefore, though some views may hold that value pluralism is relevant in transportation law, road accidents law cannot follow the prescription of structural pluralism at the core of this Essay. In a broad range of private law categories, however, this is not the case, as revealed by the crucial facilitative function of private law. Like other parts of law, private law plays a role in all legal functions: resolving disputes, channeling and coordinating people’s conduct, distributing entitlements and obligations, and expressing values. But the second function, and especially the facilitative role, is particularly significant in private law. Much of private law functions in our lives as a significant source of stable default frameworks of interpersonal interactions. Indeed, private law seems to be law’s main instrument for providing reliable facilities for

50 I use the word “channeling” as standing for something much stronger than (and different in kind from) “encouraging.” See infra Part III.

51 On its face, this effect may not always apply because increasing the repertoire of legal categories or private law institutions (each backed by such monopoly power) may at times limit the parties’ legal imagination, thus impairing their ability to contractually regulate their economic and interpersonal relations. But as I argue below (infra text accompanying notes 62 & 68-69), the claim that forcing parties to explicitly contract about their relationship is autonomy-enhancing is a dubious one. Moreover, even if (or to the extent that) it is true, this effect seems to be offset by the greater choice of options provided by institutions that would cease to exist were it not for the support of the law (such as relationships placing individuals in vulnerable positions), as well as by a greater choice-making capability within legally-facilitated institutions.


This emphasis on facilitation explains and justifies the relatively wide scope of freedom of contract in private law. Mutability obviously typifies much of contract law but is also broadly present in property matters, where even the traditionally immutable areas of marital property and servitudes shift from mandatory to default rules. Moreover, in these areas as well as in segments of tort law and of the law of restitution that prescribe (again, default) “rules of the game” for activities in which people can but need not engage, private law should also facilitate people’s autonomy by adding options, as it indeed does. Given the endemic difficulties of asymmetric information and collective action, facilitation is rarely exhausted by a hands-off policy and a corresponding hospitable attitude to freedom of contract. Rather, facilitation requires the law’s active provision of institutional arrangements, including reliable guarantees against opportunistic behavior. Private law should certainly beware of adding only valuable options and should thus also be ready to eliminate unworthy ones. In some contexts, it should also refrain from adding too many options. And yet, at least for this (again, rather significant) part of private law, the guidance of structural monism seems particularly inapt.

III. MODERATE PERFECTIONISM

Rejecting monism in private law is not an invitation to subscribe to neutrality. Rather, private law pluralism can, should, and does coexist with some degree of perfectionism.

54 See Joseph Raz, The Functions of Law, in The Authority of Law: Essays on Law and Morality 163, 169-70 (1979); Steven D. Smith, Reductionism in Legal Thought, 91 Colum. L. Rev. 68, 72-73 (1991). Cf. Scott J. Shapiro, Legality 171 (2011) (arguing that “legal institutions are institutions of social planning” whose “fundamental aim” is “to enable communities to overcome the complexity, contentiousness, and arbitrariness of social life”). The reason from law’s functions is not independent of the reason from autonomy discussed above. But it is still helpful to think about the autonomy-enhancing effect of private law’s pluralism as a manifestation of law’s facilitative function.

55 See American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations ch. 7 (2002); Restatement (Third) of Servitudes §§2.1, 2.4, 2.6, 3.2 (2000).


57 See infra text accompanying note 65 dealing with racially restrictive covenants.
Some of this perfectionism results from the difficulties inherent in the notion of private law neutrality, which render it either (almost) impossible or (quite) unintelligible. Other reasons, more important for my present purpose, derive from the fact that some measure of perfectionism is inherent in the very commitment to pluralism, especially insofar as it is perceived as autonomy-enhancing and when embedded in a justificatory practice such as law. In both cases, private law is driven to pursue a moderate measure of perfectionism. Although private law, loyal to its pluralism, is careful not to impose one-size-fits-all prescriptions, it is still a profoundly normative practice.

The notion of private law neutrality in the sense of a refusal to embrace any controversial moral claim is problematic, at least from a teleological perspective, because every position that private law may take implies the promotion of one substantive moral view, occasionally at the expense of others. Every choice of a set of legal rules governing a particular type of interpersonal relationship facilitates and entrenches one ideal vision of the good in that particular institution. Because private law must allocate rights and entitlements on the basis of some ideal vision of the relationship at hand, no substantively neutral way of allocating them is possible. Even when contract law or any other part of private law adopts majoritarian default rules explicitly aimed at replicating the preferences of most contracting parties, it must take notice of possible systemic problems of asymmetric information and of the parties’ bounded rationality, and in any event it may entrench the choices its rules reflect. Furthermore, even such a majoritarian scheme is inevitably premised on certain normative foundations such as the commitment to personal autonomy or the maximization of aggregate social welfare and, therefore, must by definition be guided by these ideals of contract.

Finally, consider the most extreme instrument the law may use in order to remain neutral: a regime that would allow parties to engage in an activity or enterprise only if they actively choose their own terms. Even such a scheme, which forces parties to

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58 See, e.g., DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 151 (1989); Sunstein, supra note 36, at 818-19.

59 See respectively, e.g., Ian Ayres & Robert Gertner, Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules, 99 YALE L.J. 87 (1989); Russell B. Korobkin & Thomas S. Ulen, Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics, 88 CALIF. L. REV. 1051 (2000). Needless to say, such majoritarian schemes should also make sure they do not validate practices that systemically externalize costs.


explicitly contract about their relationship, would hardly be neutral. Such a forced contracting system would be quite burdensome, rendering certain types of interpersonal relationships but not others too costly to enter into, at least for some. It would also, at least in many contexts, still miss the “authentic” substantively neutral position, because all contracting schemes ratify whatever background expectations and power imbalances presently exist between the parties.\(^6\)

And yet, private law perfectionism is not only the inevitable consequence of the failure of private law neutrality but is actually compatible with, indeed closely related to, structural pluralism. Pluralism and perfectionism can happily coexist for three reasons. First and most obviously, value pluralism, even of the foundational stripe, is different from the philosophically suspect meta-ethical positions of value relativism, skepticism, or nihilism, which undermine any possibility of moral justification, evaluation, or for that matter criticism, thus undermining the idea of law itself.\(^6\) Rather, alongside the laudable recognition of a broad menu of incommensurable human alternatives, value pluralism 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.”\(^6\) Thus, value pluralism not only allows but also requires that interpersonal practices such as the racially restrictive covenants discussed in *Shelley v. Kraemer*,\(^6\) which threaten to undermine this core by infringing the most fundamental humanistic prescriptions,\(^6\) be invalidated.

Moreover, when pluralism is autonomy-based as in Raz’s view, perfectionism does not merely signal the limits of pluralism but also explains its grounding and guides the state in its implementation. Raz’s pluralistic state is emphatically not blind to the truth or falsity of moral ideals; rather, its “goal” is “to enable individuals to pursue valid


\(^6\) Shelley v. Kraemer, 344 U.S. 1 (1948). *Shelley* held that judicial enforcement of racially restrictive covenants is an exercise of state action that violates the Fourteenth Amendment. As I argue elsewhere, the best justifications for *Shelley*’s rule – and for the Fair Housing Act, 42 U.S.C. 3601 – come from within, rather than without, private law. See Dagan, *supra* note 7, at 52-54.

\(^6\) Identifying the specific content of this minimal core is obviously a significant task that cannot be undertaken here. Tentatively, I would perhaps argue that this core must be located around the maxim of treating every person as a human being whose dignity – or normative agency – fundamentally matters. See respectively Dworkin, supra note 38, at 315, 225; Griffin, *supra* note 40, at 32-33, 44-48.
conceptions of the good and to discourage evil or empty ones.” The liberal state should therefore provide “a multiplicity of valuable options,” a mission Raz insists is bound to be frustrated by a hands-off attitude of the law that “would undermine the chances of survival of many cherished aspects of our culture.”

Furthermore, if the role of private law is to offer a rich repertoire of forms of human interaction, law need not just worry about preserving the valuable existing forms but also may, and at times should, provide innovative alternatives.

This point seems particularly valid insofar as private law’s more cooperative frameworks are concerned, in a spectrum running from one-shot arm’s length transactions up to long-term intimate relationships. The reason is that, at least in a liberal environment where exit is always legally available, the more cooperative an interpersonal relationship, the more vulnerable its participants to one another. Thus, private law institutions, which are relatively cooperative, are particularly dependent upon law’s supply of anti-opportunistic devices in order to remain viable alternatives for human interaction and flourishing. In certain contexts and for some parties, social norms and other extra-legal reasons for action or the possibility of ex ante explicit contracting may be sufficient in order to overcome these obstacles. But in many other categories of cases, law’s active support by way of creating robust default institutions is likely to be the sine qua non of the viability of these challenging though still promising types of interpersonal relationships.

Law’s support of multiple forms also tends to be perfectionist due to the inherent features of law. The institutions that law supports are often not inventions but typically grounded in social reality and corresponding to the social sense of the good of the institution. In supporting such institutions, however, law does not simply duplicate

67 Raz, supra note 41, at 133, 161, 265.

68 On its face, this proposition also means that the state is obliged to support this rich repertoire so as to ensure equal opportunity in the realization of each and every such form, but this conclusion is both overly demanding and democratically questionable.

It is too demanding because pluralism implies that society has an obligation to help provide only “a fairly rich array of options,” so that if a person cannot realize one conception of a worthwhile life – and every conception “has its own degree of difficulty of realization” both generally and regarding each of us individually – there are others “that one can also value and that can become fully worthwhile lives for one to live.” Griffin, supra note 40, at 162-63.

The state’s obligation must be limited to a minimum level of facilitation rather than to a standard of equal support, also because a requirement of equality would mean that society cannot rank different forms. Such an outcome would sharply contradict the ideal of perfectionist pluralism, unduly limiting the ability of society’s members, this time as a collectivity, to be authors of their particular (and potentially unique) collective lives.

69 See generally Dagan, supra note 7, at chs. 2, 8-10.

70 The justification for resorting to these social meanings is twofold. One is epistemic or pragmatic, meaning that the ideals underlying the practices we have worked out over time are
prevailing social perceptions. At least at its best, it does not blindly accept the contingent content of our social world. Legal discourse is an exercise in reason giving. And reason giving – for our purposes: the type of arguments that inform the development of our private law institutions – is always potentially challenging to our social practices. It requires, at the very least, a respectable universalistic façade, an idealized picture that may be hypocritical but can be, and often is, a fertile source of critical engagement because it sets standards that our current practices do not necessarily live up to. Thus, while the pluralist account of private law relies on existing law, it also provides important critical resources.

This feature of private law discourse is surely compatible with autonomy-based pluralism insofar as the ideals embedded in our social institutions indeed serve its meta-commitment to autonomy. But reliance on such ideals is also amenable to Anderson’s claim that one of pluralism’s main means for overcoming the difficulty of addressing conflicts of values is by judgments that are internal and constitutive of our diverse practices.

The moderate perfectionism of private law follows these guidelines of structural pluralism. Each of its categories (or sub-categories) targets a specific set of human values to be promoted by its constitutive rules in one subset of social life. Both the existing categories and their underlying values are always subject to debate and reform, so that some institutions may fade away while new ones emerge and yet others change their often helpful starting points to guide us to the right values. The other is democratic, meaning that at least some part of law’s authority, especially the authority of common law, derives from its evolution as a story that articulates in doctrine the values implicit in the practices developed in a community facing normative challenges emerging out of real-life encounters. Furthermore, the contingency of these social meanings should not be too troublesome because many social practices absent or insignificant in other social environments, other places, and other eras, may provide invaluable channels of self-expression or means that expand our options and allow us to achieve objectives that would otherwise be unattainable. See generally JOSEPH RAZ, The Value of Practice, in ENGAGING REASON: ON THE THEORY OF VALUE AND ACTION 202 (1999).

Either way, the onus of justifying recourse to any given normative foundation for any given institution is far less burdensome for structural pluralism than for structural monism, for two reasons. The first is that what counts in structural pluralism is the big picture of multiple legal institutions rather than any given one, and that picture is founded on autonomy-based or freestanding pluralism. The second, related reason is that structural pluralism is not only not hostile but is indeed committed to offer, in appropriate contexts, also new institutions that may rely either on minority views or on utopian theories.


In other words, the inspirational role of our private law doctrines serves as a bridge between the descriptive and the normative aspects of the pluralist account of private law.

See text following note 36.
character or split. But at any given moment, each such category consolidates people’s expectations regarding core types of human relationships so that they can anticipate developments when entering, for instance, a common interest community, or indeed invading other people’s rights. Thus, a set of fairly precise rules governs each of these types of legal categories, enabling people to predict the consequences of future contingencies and to plan and structure their lives accordingly. Furthermore, and more significantly, the categories of private law also serve as means for expressing normative ideals of law for these types of human interaction. Both roles – consolidating expectations and expressing law’s ideals – require some measure of stability: to form effective frameworks of social interaction and cooperation, law can recognize a necessarily limited and relatively stable number of categories, whose content must be relatively standardized. The standardization prescription is particularly stringent regarding the expressive role, which mandates limiting the number of legal categories because law can effectively express only a given number of ideal types of interpersonal relationships.75

Sheer multiplicity of private law institutions would certainly not have served pluralism, or at least not a pluralism founded on autonomy or sufficiently respectful of people’s autonomy, had individuals been unable to choose the institution they wish to be part of when forming the relevant interpersonal relationship. Therefore, private law’s scheme of thoroughly normative institutions keeps open the boundaries between them, making navigation within this diversity a matter of individual choice. In many contexts, this choice suffices to preserve autonomy, notwithstanding the perfectionism of private law.76 Private law, then, should indeed strive to open up alternative legal schemes for closely related types of activities. One prominent example are the important differences among the various types of potentially profit-making institutions, such as co-ownerships, partnerships, close corporations, and publicly held corporations.77 Another is the conception of cohabitation as a regime that is different from regular contracts as well as from marriage and offers an intermediate level of commitment, thus discharging “society’s responsibility to provide a diversity of spousal institutions.”78

75 In addition to the reasons discussed in the text, law may justifiably resist adding another legally-facilitated institution when such an addition is likely to undermine the good of an existing valuable one by, for example, diluting people’s participation in it via a process of adverse selection.

76 In other words, as long as there is sufficient competition among the various private law institutions, even immutable institutions would do. Cf. Randy Barnett, The Sounds of Silence: Default Rules and Contractual Consent, 78 VA. L. REV. 821, 902-05 (1992).

77 See generally DAGAN, supra note 7, at ch. 10.

This last example, however, also shows the limits of such an external type of choice (choice among institutions) because the unique symbolic status of marriage in society and the various tax and other benefits unique to marriage make a couple’s choice between marriage and non-marriage not a neutral one.\(^7^9\) No wonder, then, that the facilitating segments of private law allow individuals to choose not only among its various institutions but also within each one of them. Subject to the limits of private law’s pluralism and to other provisos noted briefly above, as well as to opt-outs that run counter to the core social meaning of a given institution (such as a prenuptial agreement providing that a given marriage would last for a week or a month),\(^8^0\) private law neither should nor does set immutable rules but only defaults. In certain contexts, law may legitimately regulate and at times even strictly scrutinize such opt-outs in order to guarantee procedural and substantive fairness.\(^8^1\) Nonetheless, even when there are good reasons for making its prescriptions somewhat “sticky,” private law uses defaults. To allow for meaningful social pluralism, parties should be allowed, within the constraints mentioned, to enter into private agreements that alter the rules of the pertinent institution if they so choose, tailoring their arrangements in accordance with how they prefer to cast their interpersonal relationships. (Such diversity within existing categories may at times trigger a bifurcation of one legal category into two – or more – once a sufficiently frequent atypical use calls for an independent status.\(^8^2\))

Allowing people to opt out does not usually undermine law’s functions of consolidating expectations and expressing ideals for core types of human interaction. People may legitimately wish to accommodate arrangements to their particular needs and circumstances. Since the goods of these institutions can and often are realized in various forms, law should accordingly affirm this plurality.\(^8^3\) Moreover, choice is often a precondition for the meaningful realization of the more associational or communitarian

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\(^{80}\) Implicitly, the pluralist account offered here also sets limits on opt-ins, an issue that raises important questions as to the core meaning of the legal institutions at hand. Thus, while the case for allowing same-sex couples to participate in the institution of marriage seems to me obvious, the cases of polygamy and of other types of intimate relations (say: between adult siblings) are more complicated.

\(^{81}\) See, e.g., AMERICAN LAW INSTITUTE, *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* Ch.7, at 945-1032 (2000) [“ALI PRINCIPLES”].

\(^{82}\) The gradual legal recognition of the home as a category which is distinct from land may be a case in point.

values promoted by certain private law institutions.\textsuperscript{84} The goods of these institutions as, for instance, marriage as a locus of intimacy, care, commitment, and self-identification, are dependent on choice and thus cannot be legally coerced.\textsuperscript{85} Finally, and most crucially from a pluralist point of view in both of its renditions, citizens in a liberal society should be free to reject messages sent by the law and to repudiate the values recommended by the state for (almost?) any legal institution. Thus, it is not only inevitable but also desirable that law’s lessons are not inescapable commands.

IV. PROPERTY AS INSTITUTIONS

The idea that our private law is pluralistic is not at all 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 parties and the courts.”\textsuperscript{86} As this Section demonstrates, the situation is not that different in regard to property law. And yet, while Kreitner has recently observed that “[p]luralism is on the agenda of contract theory,”\textsuperscript{87} property theory has recently veered in the opposite direction, as shown in Part I. In the last part of this Essay, therefore, I return to property

\textsuperscript{84} See Kenneth L. Karst, \textit{The Freedom of Intimate Association}, 89 YALE L.J. 624, 637 (1980).
\textsuperscript{87} 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 \textit{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, \textit{On the New Pluralism in Contract Theory}, * SUFFOLK. L. REV. * (2011).
in order to demonstrate the viability, indeed the desirability, of a pluralist turn in property theory.

The conception of property as exclusion, which is the most conspicuous genre of structural monist accounts in recent property theory, implies that rejecting the notion that property is a monistic institution revolving around this 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. This 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. But property is not, as the bundle metaphor might suggest, a mere laundry list of rights with limitless permutations. Instead, as the *numerus clausus* principle prescribes, property law offers only a limited number of standardized forms of property at any given time. 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 (or maybe because) 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 offer a structurally pluralist and moderately perfectionist understanding of property, in which property is an umbrella for a set of institutions. 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 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 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.

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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.\(^{90}\) 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. This variety is rich, both between and within contexts: it provides more than one option for people who want, for example, to become homeowners, engage in business, or enter into intimate relationships.\(^{91}\)

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, including securing efficiencies of economies of scale and risk-spreading, with social benefits 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 by-products 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.\(^{92}\)

Thus, property law appropriately facilitates the “sphere of freedom from personalities and obligations”\(^{93}\) constituted by the impersonal norms of the more market-oriented property institutions. It does not, however, 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 so forth. On its face, these types of interactions can be facilitated by contractual arrangements between despotic owners but given that, as noted, these more cooperative types of interpersonal relationships involve vulnerability, lack of legal support might have undermined them.\(^{94}\) In other words, imposing the impersonal norms of the market governing the fee simple

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\(^{92}\) See id., at ch. 10.

\(^{93}\) See Anderson, *supra* note 37, at 145.

\(^{94}\) See supra text accompanying note 69.
absolute on these divergent spheres might have effectively erased or marginalized these spheres of human interaction and human flourishing.

Property institutions vary not only according to the social context but also according to the nature of the resource at stake. The resource is significant because its physical characteristics crucially affect its productive use.\textsuperscript{95} Thus, for example, the fact that information consumption is generally non-rivalrous implies that, when the resource at hand is information, use may not always necessitate exclusion.\textsuperscript{96} The nature of the resource is also significant in that society approaches different resources as variously constitutive of their possessors’ identity.\textsuperscript{97} Accordingly, resources are subject to different property configurations: whereas the law vigorously vindicates people’s control of their constitutive resources, the more fungible an interest, the less emphasis property law will need to place on its owner’s control.\textsuperscript{98} (One may ostensibly wonder whether any real choice is provided in this dimension given that only one form applies to any given resource. But because the social meaning of resources is conventional, multiplicity here provides people with choices to be owners of more or less constitutive resources, where ownership of constitutive resources has different implications than ownership of fungible ones.)

Given that the meaning of property is not homogeneous but varies instead with its social settings and with the categories of resources subject to property rights, searching for property’s core is futile and misleading, 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, as Part II claims, it would undermine the autonomy-enhancing pluralism and the individuality-enhancing multiplicity so crucial to our ideal of justice. Furthermore, Penner’s presupposition that a uniform Blackstonian conception of property reflects the lay understanding of property is not only condescending but also probably mistaken. 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

\textsuperscript{95} See Richard A. Epstein, On the Optimal Mix of Private and Common Property, in PROPERTY RIGHTS 17 (Ellen F. Paul et al. eds., 1994).


\textsuperscript{97} See Margaret J. Radin, Property and Personhood, 34 STAN. L. REV. 957, 992, 1013 (1982).

Thus, we have no reason for thinking that these differences are not widely known as well as easily understood and internalized. In fact, as I argued in Part III, the law is justified in limiting the number of these property institutions and standardizing their incidents by 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 that guides property law, but 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 prescriptions of the previous parts of this Essay in promoting rather than undermining, as does property monism, the autonomy-enhancing function of pluralism and the individuality-enhancing role of multiplicity. Private law in general and property law more particularly should facilitate, within limits, the coexistence of a variety of social institutions embodying different underlying reasonable (albeit at times conflicting) modes of valuation. As long


100 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 the constitutive power of law 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).

101 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 (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 respect the stability and predictability of property. Cf. Gregory S. Alexander, The Complex Core of Property, 94 CORNELL L. REV. 1063, 1063-68 (2009).
as the boundaries between the multiple property institutions are open and navigation within this variety is a matter of individual choice, the commitment to personal autonomy that drives Penner and probably most other 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{102} The eradication or marginalization of the fee simple absolute could indeed 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, rather than less, meaningful. This is especially the case given that the conception of property as institutions not only facilitates choice among the various property institutions but also, for the reasons mentioned in Part III, is also particularly hospitable to the internal type of choice, namely, the choice within each one of these institutions. Understanding the institutions of property as unifying normative ideals for core categories of interpersonal relationships comfortably coexists with a rather broad realm of freedom of contract re property rules. Therefore, the pluralist conception of property propounded in this Essay endorses the recent shift in property law, most significantly manifest in the traditionally immutable areas of marital property and of servitudes, away from mandatory rules and toward default rules.\textsuperscript{103}

In and of itself, choice among multiple property institutions does not yet satisfy the prescriptions of the kind of structurally pluralist and moderately perfectionist private law celebrated in this Essay. Indeed, as described, the various property institutions constituted by law do not supply a mere assortment of disconnected choices but offer instead 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 these gaps, as noted in Part III, 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. In other words, the practical payoff of discardin

\textsuperscript{102} The same conclusion applies regarding the utilitarian case for property as exclusion. See Dagan, supra note 7, at 44, 47.

\textsuperscript{103} See ALI PRINCIPLES, supra note 81; RESTATEMENT (THIRD) OF SERVITUDES §§2.1, 2.4, 2.6, 3.2 (2000). Interestingly, this is one of the conspicuous differences between my conception of property and one of the most prominent conceptions of property advanced by exclusion theorists: Merrill and Smith’s account, which is premised on communication costs. See Hanoch Dagan, Judges and Property, in INTELLECTUAL PROPERTY AND THE COMMON LAW* (Shyam Balganesh ed. 2012).
monism in favor of structural 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 purportedly-conceptual presumptions, and on the other, it structures these normative inquiries so that they properly address both the social context and the nature of the resource.

CONCLUDING REMARKS

Private law in general and property law more particularly play a significant though at times implicit role in the drama of modern liberal societies. They form diverse sets of institutions, allowing people to be the authors of their lives’ narratives by making choices to engage in various types of interpersonal relationships in a variety of social spheres that embody different modes of valuation. This facilitative role of our private law neither renders it neutral nor does it imply the exclusion of ideals from this broad and diverse domain. Rather, this fundamental feature of liberal private law relies on a subtle combination of pluralism and perfectionism, which “asserts the existence of a multitude of incompatible but morally valuable forms of life … coupled with an advocacy of autonomy.”104 Because this profound characteristic eludes the broad strokes of monist theories of private law, these theories do not elucidate properly the existing legal terrain nor do they address some of the most promising ways in which private law theory can contribute to the evaluation, interpretation, and development of private law. The appeal of private law monism is obvious. But for private law theory to better account for the law it seeks to illuminate and to participate in its unfolding development, it should resist this temptation, transcend monism, and follow the spirit of our private law by embracing both its complexity and its multiplicity.

104 RAZ, supra note 41, at 133.