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Inside Property

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INSIDE PROPERTY

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INSIDE PROPERTY
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Taking seriously the complexity and heterogeneity of property law, this Essay claims that a proper conception of property must account for both governance and inclusion. Neglecting governance obscures the significance of the internal life of property, which is often structured by sophisticated mechanisms aiming to facilitate various forms of interpersonal relationships in ways that no contractual arrangement can. Ignoring inclusion improperly marginalizes non-owners' rights to entry in categories of cases where inclusion is an indispensable feature of the property institution under examination.

Looking inside property in these two senses requires abandoning the conception of property as an exclusive right and substituting it with a pluralist conception. Property should be understood as an umbrella for a limited and standardized set of institutions, which serve as important default frameworks of interpersonal interaction regarding various types of resources. At its best, the plurality of property configurations—the different contents of owners' rights in these different property institutions—enables property law to vindicate differing balances among the different values that property can serve, according to the type of social relationship and the nature of the resource at stake. The pluralist conception of property, therefore, not only fits property law better; it is also the only understanding of property suitably attending to and facilitating the individuality-enhancing role of multiplicity, which is indispensable for meaningful autonomy.

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INSIDE PROPERTY

INTRODUCTION

Imagine a proposal for legal reform aiming to simplify and clarify property law, which recommends the adoption of two simple rules. The first rule prescribes that owners have an *in rem* right to exclude. The second empowers owners (if more than one) to contractually set up their own governance regime. This bill would obviously be radically incomplete, but is that all that is wrong with it? To say so, would mean agreeing with the increasingly popular proposition that “the core of property is the . . . 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.”¹ My claim, however, is that incompleteness does not even begin to capture the shortcomings of this bill.

My main proposition in this Lecture is that the deficiencies of this hypothetical proposal go much deeper. It overstates, and yet also understates, the role of both exclusion and freedom of contracts as important features of a liberal system of property. Even more significantly, this bill marginalizes, ignores, or possibly even undermines significant constitutive characteristics of property. The two most important features missing from my imaginary bill are governance and inclusion. The internal life of property law is structured by a wide range of sophisticated governance regimes aiming to facilitate various forms of interpersonal relationships. Moreover, examining the more precise scope of owners’ right to exclude shows that inclusion is sometimes inherent in property: non-owners’ rights to entry in these categories of cases are indispensable characteristics of the property institution under examination. The title of my Lecture—“Inside Property”—aims to capture these two main features, which distinguish my conception of property from the more conventional ones whereby “the differentiating

¹ See Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1857, 1891 (2007).

feature of a system of property [is] the right of the owner to act as the exclusive gatekeeper of the owned thing.”²

My aim in this Lecture is indeed to present this competing understanding of property and defend its normative desirability.³ I begin, not by chance, with a survey, albeit sketchy, of a series of doctrines dealing with governance and inclusion. Property theory, like legal theory more generally, seeks to illuminate our understanding of the conception of property “implicit in the law’s doctrinal and institutional arrangements.” Therefore, it must take these materials “as its starting point and enquire[] into [their] structure, [their] presuppositions, and the internal connections among [their] most pervasive features.”⁴ But as I hope to show, the need to account for the actual and rather complicated property law we have is not merely a constraint that legal theorists must face while other academics theorizing about property may, and indeed have, ignored. Taking the complexity of legal doctrine seriously helps to refine an understanding of property that is both more nuanced and more normatively appealing than the conventional conception of property as an exclusive right. One lesson of this Lecture, then, is that while the intellectual openness of legal theory to law’s neighboring disciplines is desirable and even imperative, law can provide significant theoretical lessons that could be potentially enriching to these disciplines as well.⁵

PROPERTY GOVERNANCE

A thick and rather sophisticated set of property rules deals with the internal life of property. In fact, a significant part of property law is not about vindicating the rights of

² Merrill & Smith, *id.*, at 1850. *See also, e.g.*, J.W. HARRIS, PROPERTY AND JUSTICE 29-30, 34, 65-66 (1996); J.E. PENNER, THE IDEA OF PROPERTY IN LAW 103 (1997); Larissa Katz, *Exclusion and Exclusivity in Property Law*, 58 U. TORONTO L. J. 275 (2008).

³ I defended this conception at length in my book, PROPERTY: VALUES AND INSTITUTIONS (2011).

⁴ Ernest J. Weinrib, *Private Law and Public Right*, 61 U. TORONTO L. J. 191, 193 (2011).

⁵ Cf. Christopher McCrudden, *Legal Research and the Social Sciences*, 122 L.Q. REV. 632, 648 (2006). *See generally* Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 CORNELL L. REV. 671 (2011).

autonomous excluders cloaked in Blackstonian armors of sole and despotic dominion,⁶ but rather about creating governance institutions that manage potential conflicts of interest among individuals who are all stakeholders in one resource or in a given set of resources. These dramas of property law occur, literally, within property; they deal with the internal life of property rather than with its foreign affairs.

Consider, as a starter, the traditional common law doctrine of waste. Formally, the law of waste accommodates the property interests of a holder of a present possessory interest, such as a life tenant, and the owner of the corresponding future interest, such as a remainderman. Substantively, waste law provides a default governance regime for the relationship between these stakeholders. This regime is required due to the inherent conflict between the parties' property rights. Specifically, while an optimal use would have maximized the value to both parties, the life tenant has an incentive to overuse the resource during his expected lifetime. "The law of waste forbids the tenant to reduce the value of the property as a whole by considering only his own interest in it."⁷

Waste law applies also in landlord-tenant law, because leaseholds are also typified by a temporal division of possession. But modern landlord-tenant law is interested in addressing not only the vulnerability of landlords to the possible opportunism of tenants but rather, and indeed mainly, the mirror image of this concern. Contemporary landlord-tenant law is preoccupied with the ability of landlords to affect the conditions of the premises. While traditional law had recognized a limited number of exceptions to the "no-landlord-duty rule,"⁸ many jurisdictions today recognize not only a broad covenant of quiet and beneficial enjoyment but also an implied warranty of habitability.⁹ One may applaud or criticize current landlord-tenant law, but no one can hope to provide a reasonable account of it without considering the governance doctrines that play such a

⁶ 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *2 (Univ. of Chi. ed. 1979) (1765-69).

⁷ Richard A. Posner, *Comment on Merrill on the Law of Waste*, 94 MARQ. L. REV. 1095 (2011).

⁸ See DUKEMINIER ET AL., PROPERTY 490 (7th ed., 2010).

⁹ See, e.g., respectively *Reste Realty Corp. v. Cooper*, 251 A.2d 268 (N.J. 1969); *Hilder v. St. Peter*, 478 A.2d 202 (Vt. 1984). For tenants, the main advantage of the latter doctrine over the former is that it allows them to stay in possession and withhold rent.

crucial role in shaping our contemporary understanding of this property institution. (One additional aspect of landlord-tenant law with an equivalent effect on the meaning of leaseholds in modern society is the restriction of landlords' right to select tenants, one manifestation of inclusion as a constitutive feature of property that is the topic of the next part of this Lecture.)

The law of waste has largely been superseded in the context of estate planning as well, this time not because of a dramatic change in the way we understand the relationship between stakeholders but rather due to the development of a highly sophisticated mechanism of governance: the trust. As Gregory Alexander explains, trust law includes a "coordinating norm" aimed at accommodating "conflicting investment goals among interest holders whose enjoyment rights are successive." Since this governance regime assigns to trustees considerable management powers over the assets of the trust beneficiaries, trust law also addresses the entailed risks of opportunism by imposing on trustees duties of care and loyalty.¹⁰ The trust, then, is typified by its governance regime, which is best understood by exploring how the specific shape of the trustee's managerial authority responds to the need to accommodate the potentially conflicting interests of the settlor, the trustee, and the beneficiaries.¹¹

Governance typifies not only property institutions whose beneficiaries have successive rights of enjoyment but also property institutions where the parties' interests are concurrent. These institutions regulate the relationship inside property among members of local communities, neighbors, co-owners, partners, and family members. While such property institutions cover a wide range, all are aimed at facilitating the possible economic and social gains of cooperation. Some of these institutions, such as a close corporation, are mostly about economic gains, including securing the efficiencies of economies of scale and risk-spreading, with social benefits merely a (sometimes pleasant) side-effect. Others, such as marriage, are more about the intrinsic good of being part of a plural subject, wherein the *raison d'être* of the property institution refers more to one's identity and interpersonal relationships while the attendant economic benefits are

¹⁰ Gregory S. Alexander, *Governance Property*, * U. PA. L. REV. * (2012).

¹¹ Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL. L. REV. 621 (2004).

perceived as helpful by-products rather than the primary motive for cooperation. Either way, the whole point of the elaborate governance structures these doctrines prescribe is to facilitate cooperative, rather than competitive, relationships. It is thus not surprising that the exclusion conception of property is particularly inapt for understanding these important property institutions.¹²

* * *

So let me focus for a few minutes on the large sections of property law where the name of the game is the “partial realignment” of the parties’ interests, which is a precondition to the creation of the economic and social gains of cooperation. The challenge of these property institutions is particularly acute in a liberal environment given the (justified) availability of exit, which exacerbates the parties’ mutual vulnerability and thus threatens the very possibility of trust and reciprocity.

To face this challenge, each of these property institutions contains a governance regime concerning decisions about consumption and investment, about management, and about allocation. These governance regimes are complex and multifaceted; as I show elsewhere, they include three types of techniques for partially realigning stakeholders’ interests: “internalizing externalities around individual use and investment decisions, democratizing a set of fundamental management decisions by shifting authority from individual to group control, and de-escalating tensions around entry and exit.”¹³ For my purposes, mentioning the core of this regime will suffice: a set of mechanisms for collective decision-making aimed at aligning individual and group goals by aggregating individual preferences or objectives. These conflict-transforming mechanisms range from democratic participatory institutions, such as simple majority rule, to representative or hierarchical apparatuses, such as a condo board in a common interest community or a board of directors in a close corporation.¹⁴

¹² See DAGAN, *supra* note 3, at Pt. III. The following paragraphs follow DAGAN, *id.*, at ch. 10.

¹³ *Id.*, at 234.

¹⁴ See, e.g., Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL STUD. 25 (1991).

The multiplicity of these mechanisms is neither chaotic nor unprincipled. Rather, the particular property configuration that serves as the default for the property institution at hand can be explained by reference to the divergent character of the underlying property institutions. Thus, predominantly economic property institutions are usually highly formal and hierarchical. Management decisions are addressed by *ex ante* rules that establish governing bodies, allocate powers among them, and prescribe procedures for their routinized operation.¹⁵ These rules are typically foreground rules: rules that stakeholders and legal players alike expect to be deployed in the daily life of that property institution (and not only at the end-game, which is inevitably legal).

By contrast, predominantly social property institutions are highly informal and participatory. Parties to neighborly relationships often find formalistic decision-making and resort to law to be the beginning of the end.¹⁶ So, if law is to facilitate such property institutions, it needs to act in softer ways by setting more participatory and looser procedures. Governance in these contexts is understood not only instrumentally but also as a means to intensify the parties' interpersonal relations. Hence, republican participatory governance substitutes the top-down governance of purely economic property institutions.¹⁷ Typically, law uses background instead of foreground rules, with a social norm of consensual decision-making governing the community's daily life, while formal majority rule providing a safety net against potential abuse by holdouts. Similarly, community governance rules can operate indirectly by recruiting third parties to protect community resources; for example, by voiding decisions reached by an insufficient majority or through inappropriate procedures.¹⁸

¹⁵ See, e.g., Frank H. Easterbrook & Daniel Fischel, *Close Corporations and Agency Costs*, 38 *Stan. L. Rev.* 271 (1986).

¹⁶ See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 60-64, 69, 76, 274 (1991).

¹⁷ See Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 43 *J. THEORETICAL POL.* 247, 258, 260-61 (1992).

¹⁸ See respectively DAGAN, *supra* note 3, at 168-70; *Id.*, at 21-23.

The law of common interest communities—the fastest growing property institution in America and by now a major form of land ownership—provides a rich example of a formal and hierarchical management regime in predominantly economic property institutions. A common interest community has the power to manage its common property and administer its servitude regime in a real-estate development or neighborhood.¹⁹ It can raise funds (by way of assessment of fees); manage, acquire, and improve common property; adopt rules governing use of property; and set procedures to encourage compliance and deter violations.²⁰ A common interest community is managed by an association that, in turn, is governed for most purposes by a representative government: a board elected by its members. The board is entitled “to exercise all powers of the community except those reserved to the members,” and members have

the right to vote in elections for the board of directors and on other matters properly presented to [them], to attend and participate in meetings of the members, and to stand for election to the board of directors. Except when the board properly meets in executive session, [members] are [also] entitled to attend meetings of the board of directors and to a reasonable opportunity to present their views to the board.²¹

Compare this formal and hierarchical management structure to the informal and participatory regime applicable in predominantly social property institutions. One example is the governance of commons property in the Continental tradition, where the law prescribes only a basic norm of majority rule accompanied by open-ended rules of disclosure, consultation, and fair hearing.²² Another example is the rules community property law prescribes for the governance of marital property.²³ Transactions in the marital estate require joinder if they involve substantial amounts of money (such as community real estate or a business) or resources that reflect the group-identity of the marital community and the personhood of its members (again, the marital residence, but

¹⁹ RESTATEMENT (THIRD) OF SERVITUDES §§ 6.4, 6.2(1) (2000).

²⁰ *Id.* §§ 6.5-6.8.

²¹ *Id.* §§ 6.2(3), 6.16, 6.18.

²² *See* DAGAN, *supra* note 3, at 193.

²³ A somewhat similar analysis applies in the majority of common law jurisdictions that recognize the tenancy by the entirety. *See id.*, at 16-17.

also its contents).²⁴ Joinder is desirable in these contexts to ensure that decisions do indeed aim to improve communal goods—to manage, in other words, the potential conflict between the interest of each individual spouse and the collective good. The joinder rule is a background rule. It neither prescribes any specific governance procedure nor does it require judicial intervention within a functioning marriage. Rather, in most cases where joinder is required, banks and other third parties are recruited to police conflicts of interest. Where such third parties realize that a transaction requires joinder to be binding, they are likely to require joinder before entering into that transaction with a single spouse. The joinder rule thus indirectly prevents self-serving violations by one spouse in a community.²⁵

* * *

I hope that, by now, I have established that governance is germane to a significant part of property doctrine, and that a conception of property focusing solely on exclusion cannot begin to account for these important aspects of the law. But what about the second rule in my imaginary bill? Perhaps the rules I have surveyed are merely convenient additions to the exclusionary core of property? Their absence, then, though admittedly uncomfortable, would not have changed the basic thrust of the idea of property given people's ability to set governance structures contractually.

The answer to the above question is negative. Among the more obvious reasons for it are the various forms of impediments to contract (transactions costs in the broad sense of the term), pervasive in many property institutions. Waste law, for example, is needed as between life tenants and remaindermen and contractual freedom is insufficient. Had they been required to negotiate so as to set up their relationship by contract the situation would have been “one of bilateral monopoly and transaction costs might [have been too] high,” even if we set aside the possibility that “the remaindermen might be children (born or even unborn).”²⁶ Similarly, understanding the various governance forms for property's

²⁴ *See id.*, at 16-17 & 20-26.

²⁵ *See, e.g.*, JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 218 (1998).

²⁶ Posner, *supra* note 7, at 1096.

more cooperative institutions as merely convenient substitutes for what parties would do absent such doctrines undermines the role that property law plays in these contexts. To be sure, 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. But in a host of other contexts, a hands-off policy and a hospitable attitude to freedom of contract can hardly suffice to overcome the endemic difficulties of asymmetric information and collective action. At least in a liberal environment—where exit is always legally available—participants in cooperative interpersonal relationships are particularly vulnerable to one another.²⁷ Property law's active empowerment in providing institutional arrangements, including reliable guarantees against opportunistic behavior, is therefore likely to be the *sine qua non* of the viability of these challenging though still promising types of interpersonal relationships.

But the significance of these governance doctrines for property goes even deeper. To see why, consider the *numerus clausus* principle, a typical and some say defining feature of property in most modern legal systems.²⁸ The *numerus clausus* prescribes that, at any given time, property law offers only a limited number of identifiable and standardized forms (property institutions as I call them). My previous comments on the ways the internal governance regimes of these various property institutions reflect—and thus also shape—these institutions' character are the key to an understanding of why the *numerus clausus* principle is indeed an important characteristic of property.²⁹ Limiting property to some set of identifiable and standardized forms is a means of facilitating stable (and thus necessarily limited in number) categories of human interaction. More

²⁷ See DAGAN, *supra* note 3, at 166-68, 170-71.

²⁸ Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 Yale L.J. 1, 59 (2000).

²⁹ Thomas Merrill and Henry Smith famously argue for another justification. For them, the standardization of property is justified by the communication costs of third parties who need to determine the attributes of these rights. See Merrill & Smith, *Id.* But as Henry Hansmann and Reinier Kraakman convincingly claim, the relevant concern of third parties is verification, and it is hard to see how this concern can justify the onerous *numerus clausus* principle. See Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. 373 (2002).

precisely, the institutions of property consolidate people's expectations so that they know what they are getting into when entering, for example, a joint tenancy, a common interest community, or, for that matter, a marriage. Furthermore, the institutions of property may also affect people's ideals and therefore their preferences with respect to these categories of relationships. In this latter role, property institutions perform a significant expressive and cultural function. Both roles—consolidating expectations and expressing ideal forms of relationships—require some measure of stability. To form effective frameworks of social interaction and cooperation, property law can recognize a necessarily limited number of categories of relationships and resources. This prescription of standardization is particularly acute with regard to the expressive role, which mandates limiting the number of property institutions because law can effectively express only so many ideal categories of interpersonal relationships.³⁰

Thus, while a broad scope for freedom of contract prevails (as it should) regarding property matters,³¹ a legal system that would eliminate the important—albeit largely default—property governance regimes would end up with something very different from property law as we know it. Contractual freedom, significant as it is, cannot replace property in the consolidation of expectations and the expression of normative ideals regarding core categories of interpersonal relationships.

PROPERTY AND INCLUSION

Governance is the major characteristic of property, one that the exclusionist understanding obscures given its total disregard of property's internal life. Even insofar as property's external life is concerned, however, the notion that the core of property is the owner's power to exclude from the resource is an exaggerated and rather damaging notion because it tends to improperly bolster the cultural power of libertarian claims. To

³⁰ See DAGAN, *supra* note 3, at 31-35.

³¹ See Hanoch Dagan, *Pluralism and Perfectionism in Private Law* * (unpublished Manuscript). Interestingly, the commitment to freedom of contract is one of the conspicuous differences between my conception of property and Merrill and Smith's account of property as exclusion. See Hanoch Dagan, *Judges and Property*, in *INTELLECTUAL PROPERTY AND THE COMMON LAW* * (Shyam Balganes ed. 2012).

be sure, as Felix Cohen demonstrated, every property right 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 always 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.”³² Indeed, 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. In certain circumstances, the right of non-owners to be included and exercise a right of entry is even typical of the property institution at hand.³³ Consider these three examples.³⁴

“[F]rom time immemorial” the premises of the common innkeeper “have been subjected to special rules” prescribing a duty “to receive and provide lodging in his inn for *all* comers who are travelers.”³⁵ Since that time this core norm, which defines public accommodations law, has been codified. And although in some jurisdictions the applicable statutory materials do not cover the entire array of either public accommodations or insidious discrimination, Joseph Singer seems persuasive when arguing that “most people, including many lawyers and law professors” believe that “businesses open to the public [do] have a duty to serve the public without unjust discrimination.”³⁶

³² Felix S. Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 362, 370-74, 379 (1954).

³³ See generally DAGAN, *supra* note 3, at ch. 2 on which this section heavily relies.

³⁴ Other manifestations of the right to entry include, for example, the right to public access to beaches, including privately-owned dry-sand portions of beachfront property; the right to roam over privately-owned wilderness or similar sorts of undeveloped land; and compulsory licensing of patents. See respectively Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 801-10 (2009); John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 NEB. L. REV. 301 (2011); Martin J. Adelman, *Property Rights Theory and Patent-Antitrust: The Role of Compulsory Licensing*, 52 N.Y.U. L. REV. 77 (1977).

³⁵ Kevin Gray & Susan Francis Gray, *Civil Rights, Civil Wrongs and Quasi-Public Space*, 1 EUR. HUM. RIGHTS L. REV. 46, 83-84 (1999).

³⁶ Joseph W. Singer, *No Right to Exclude: Public Accommodations and Private Property*, 90 NW. U.L. REV. 1283, 1290-91 (1996).

Just as the right of patrons to enter a restaurant, a theatre, or a shopping mall is constitutive of the character of the property institution of public accommodations, certain rights of the public to access music, literature and the like are emblematic of copyright. And indeed, like the public accommodations law, fair use—a veteran doctrine dating back to the 1840s³⁷—explicitly limits the owner’s exclusive rights, allowing users to figuratively enter the owners’ domain and legitimately bypass their consent.³⁸ In its now codified form, this doctrine prescribes that “the fair use of a copyrighted work, including such use by reproduction in copies ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”³⁹

My third (and final) example returns to land ownership. Since the landmark case of *Shelley v. Kraemer* held that judicial enforcement of racially restrictive covenants is an exercise of state action that violates the Fourteenth Amendment,⁴⁰ some rights to entry in defiance of the property owners’ will have become part of the meaning of a significant segment of housing law in America. As with public accommodations, the next episode of the fair housing law was legislative: the enactment of the Fair Housing Act,⁴¹ which now prohibits discrimination in the sale or rental of residential dwellings on the basis of race, color, religion, sex, familial status, national origin, or handicap. Given its constitutional origin, the right of entry to fair housing is usually analyzed as an external qualification of

³⁷ See *Folsom v. Marsh*, 9 F. Cas. 342, 344-45 (C.C.D. Mass. 1841).

³⁸ The title of 17 USCS §107 is “Limitations on exclusive rights: Fair use.”

³⁹ *Id.* A determination of fair use in this context requires the consideration of these factors: “(1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.” *Id.*

⁴⁰ *Shelley v. Kraemer*, 344 U.S. 1 (1948).

⁴¹ Fair Housing Act, 42 U.S.C. 3601. See also Civil Rights Act of 1866, 42 USC §1982, which prescribes that “all citizens of the United States shall have the same right, in every state and territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.” *Jones v. Alfred Mayer Co.*, 392 U.S. 409 (1968) held that this prescription applies not only to public discrimination, but also to private discrimination.

the owner's exclusionary prerogative,⁴² rather than as an internal entailment of the meaning of the right to property in common interest communities (or of landlords' property right). But this seems to be wrong, or at least incomplete, because, as Carol Rose insisted, *Shelley* poses "a state action enigma": both prior and later decisions show that the bare potential of judicial enforcement of private arrangements and preferences does not transform them into state action. While Rose's specific solution to this puzzle seems to me unsatisfactory,⁴³ her more general claim that *Shelley* presents "some of the best instincts of property law" is right on target.⁴⁴

* * *

Indeed, if the fact that inclusion (rather than only exclusion) is germane to certain property institutions is to make a difference in our understanding of property, I need to persuade you that inclusion need not rely on values external to property. To be sure, I do not deny the potential effect of external, typically public law, considerations (though their effect in the horizontal contexts of private law may be different from their effect in the vertical context of public law). But I think it is important to see that—at least regarding the examples just mentioned—the right to entry need not be interpreted along these lines. These non-owners' rights of entry are intrinsic to property because they are grounded in the very reasons—the very same property values—that justify the support of our legal system for the pertinent property institution. This is why I insist that, although inclusion is less characteristic of property than exclusion—in the limiting case of inclusion,

⁴² Cf. Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U.L. REV. 273, 281 (1997); Richard A. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 918-19 (1988).

⁴³ Rose suggested that this puzzle can be solved by reference to the welfarist commitment of property law to minimize negative externalities on third parties, who may not share the preferences of the existing transactors. But, as Rose herself admits, making the protection of third parties from the idiosyncratic preferences of current transactors the core of property, raises difficult questions for cases such as *Shelley*, where third parties are likely to share these current preferences.

⁴⁴ Carol Rose, *Shelley v. Kraemer*, in PROPERTY STORIES 169 (Gerald Korngold & Andrew P. Morriss eds., 2004).

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.

I have explored this point at some length elsewhere.⁴⁵ For my purposes here, outlining why the most important right to entry I mentioned—the right to fair housing—is internal to property, should suffice. That is, I need to show why *Shelley* is correct notwithstanding the state action enigma, and why the basic entry rule set by the Fair Housing Act should likewise be treated as a statutory specification of the meaning of property (like the parallel enactment of the common law doctrines of public accommodations and fair use)—rather than as a public law intervention.⁴⁶

Many property institutions are often justified—and rightly so—as *loci* of individual autonomy, as important means for securing people's ability to be authors of their life. But limiting the opportunities of some individuals to buy or lease housing in specific geographical areas undermines this role of property in facilitating people's self-determination. Exclusionary practices that unreasonably limit the mobility of the excluded persons—a mobility crucial to their forming, revising, and pursuing their own ends—must thus be invalidated. To be sure, in some settings, concern for the autonomy of entrants is defeated by the autonomy and personhood concerns of property owners: the Fair Housing Act vigorously protects the right to exclude in intimate settings, where the personhood value of the owner (potential landlord) trumps any possible interest of potential tenants.⁴⁷ Yet, the Act reverses this rule and recognizes a rather capacious right to entry where the lessor is a commercial entity. Because negative liberty is not an ultimate value but a

⁴⁵ See DAGAN, *supra* note 3, at ch.2.

⁴⁶ *Cf. Noble v. Alley* [1951] S.C.R. 64, invalidating racially based restrictive covenants because they referred to the identity of users/owners rather than to any actual use of the pertinent land. Not only that this reasoning is from within property, but it also implicitly relies on the *raison d'être* of the property institution of covenants as a form of governance aimed at facilitating landowners' ability to commonly enjoy the benefits of private land use controls. Understanding covenants in these terms indeed makes the reference to the identity of users and owners on its face suspicious.

⁴⁷ See the Act's exceptions for intimate associations: single families (§3603(b)(1)) and small owner-occupied multiple unit dwellings (§3603(b)(2)).

means for self-determination, a claim by one who wishes to establish her life in a certain locus must override that of someone who perceives that property as a fungible asset.

Thinking about common-interests communities as a property institution aimed at fostering the community value of property leads to similar conclusions. This perspective sanctions exclusionary practices of residential communities only in limited circumstances. In particular, it implies that law should not authorize such practices insofar as they are used against, rather than by, cultural minority groups. It also requires that the law should make sure that the limits on entry applied by “thin” common interest communities are indeed necessary in order to ensure that “bad cooperators” likely to jeopardize the success of the commons property are excluded. This means that courts need to supervise both the admissions criteria of such communities and the way they are practiced on the ground. One implication of this prescription is that rejections of applicants for admissions must be reasoned, and that the reasons must be sufficiently detailed so that both their evaluative and factual components can be properly scrutinized.

WHAT IS PROPERTY?

Implicit in my discussion of both governance and inclusion is an understanding of property that is both strikingly different from and more loyal to the practice of property than the conventional understanding of property as exclusion. It is now time to flesh out the skeleton of this conception of property and to try to persuade you that, normatively, it is more attractive than the dominant exclusionary approach.

This conception, which I defended at length in my book, *Property: Values and Institution*,⁴⁸ takes the heterogeneity of our existing property doctrines seriously. It thus understands property as an umbrella for a limited and standardized set of property institutions, which serve as important default frameworks of interpersonal interaction. All these institutions mediate the relationship between owners and non-owners regarding a resource, and in all property institutions owners have some rights to exclude others. This common denominator derives from the role of property in vindicating people's

⁴⁸ See DAGAN, *supra* note 3.

independence. Alongside this important property value, however, other values also play crucial roles in shaping property institutions. Property also can and does serve our commitments to personhood, desert, aggregate welfare, social responsibility, and distributive justice. Different property institutions offer differing configurations 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. At least at its best, this plurality allows property law to vindicate differing balances among these property values according to their characteristic social settings, namely, the type of social relationship in which they are situated and the nature of the resource at stake. Thus, alongside exclusion and independence, property is also a proud home for inclusion and for community. Although the cohabitation of different property values and divergent property institutions within property is always contentious, property law—again, at its best—offers principled and rule-based ways of accommodating this happy plurality.

This understanding of property is inherently dynamic: while existing property institutions are and should be the starting point of any analysis of property questions, they are never frozen. Rather, as institutions structuring and channeling people's relationships, they are subject to ongoing—albeit properly cautious—normative and contextual re-evaluation and possible reconfiguration. The conservative baseline of this approach derives not only from the pragmatic reality that existing rules cannot be abandoned completely but also from the recognition that existing law represents an accumulated judicial and legislative experience worthy of respect. The forward-looking perspective of this endeavor, in turn, is premised on an understanding of law as a dynamic enterprise whose content is made and remade as it unfolds. Thus, this approach is both backward-looking and forward-looking, constantly challenging the desirability of the normative underpinnings of property institutions, their responsiveness to their social context, and their effectiveness in promoting their contextually examined normative goals. Indeed, as is true regarding its substance, this conception of property follows the law regarding its dynamic form as well; more specifically, it follows the common law method described by Karl Llewellyn as “a functioning harmonization of vision with tradition, of continuity

with growth, of machinery with purpose, of measure with need,” mediating between “the seeming commands of the authorities and the felt demands of justice.”⁴⁹

At times, this process helps to fill gaps in the law by prescribing new rules that bolster and vindicate these goals further. At other times, it points out “blemishes” in the existing doctrine: rules that undermine the most illuminating and defensible account of such a property institution, which should be reformed so that an institution lives up to its own ideals.⁵⁰ This reformist potential may yield—indeed, has yielded throughout the history of property—different types of legal reforms. In some cases, the reform is relatively radical: the abolition of a property form (as was the case, for all practical purposes, with the fee tail form⁵¹) or an overall reconstruction of its content (as with leaseholds⁵²). Sometimes more moderate options are in order, such as restating the doctrine pertaining to a property form in a way that brings its rules closer to its underlying commitments, removing in the process indefensible rules (the best example here is probably the recent Restatement of Servitudes⁵³).

* * *

This conception of property as institutions is surely antithetical to its understanding as a uniform bulwark of exclusion. But property as institutions does not conceptualize property as a “laundry list” of substantive rights that are “strikingly independent” (to use Wesley Hohfeld’s term)⁵⁴ and have a limitless number of permutations. Property is not simply a bundle of rights. The institutions of property are unifying normative ideals for core categories of interpersonal relationships. Therefore, as I have already emphasized, they must be limited in number and standardized. Each such property institution entails a

⁴⁹ KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 37-38 (1960).

⁵⁰ See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 118-23 (1977).

⁵¹ See, *DUKEMINIER ET AL.*, *supra* note 8, at 200-01.

⁵² See generally Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 *CORNELL L. REV.* 517 (1984).

⁵³ See *RESTATEMENT (THIRD) OF SERVITUDES* (2000).

⁵⁴ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710, 747 (1917).

specific composition of rather precise 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.

Henry Smith has recently contested the claim that the conception of property as institutions is distinct from the bundle understanding of property. The only alternative, in his view, to the exclusion school of property is “to invoke a plethora of general principles to be balanced as specific situations present themselves.” He therefore concludes that nothing separates my account of property from the understanding of property as “an ad hoc, unstructured bundle.”⁵⁵ This is a serious critique. The conception of property as a formless bundle of sticks open to ad-hoc judicial adjustments bears no resemblance to the law of property as lawyers know it or as citizens experience it in everyday life. Furthermore, if indeed property as institutions necessarily collapses into nominalism, it could jeopardize the significant benefits of “the rule of rules” in the authoritative settling of disputes, which secures the moral benefits of coordination, expertise, and efficiency.⁵⁶ Because rules “are designed to translate the implications of normative values into concrete prescriptions,” they must be followed by those applying them “without first resolving the very normative questions [they] are designed to settle” or “considering whether the local outcome of the rule conforms to the values [they are] supposed to advance.”⁵⁷

Fortunately, Smith's critique is misguided.⁵⁸ The conception of property as institutions can (and indeed should) distance itself from the dubious nominalistic approach of case by case adjudication. Properly understood, property as institutions does not require—and indeed should not imply—focusing on the equities of the particular case or the particular parties. By the same token, property as institutions should not imply the

⁵⁵ See Henry E. Smith, *Property is Not Just a Bundle of Rights*, 8(3) *ECON. J. WATCH* 279, 287 (2011); *Id.*, *Property as The Law of Things*, * *HARV. L. REV.* * (2012).

⁵⁶ See LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES* 12-15 (2001).

⁵⁷ Emily Sherwin, *Rule-Oriented Realism*, 103 *MICH. L. REV.* 1578, 1589, 1590, 1591 (2005).

⁵⁸ As this section and the next one clarify, Smith's other critique of my conception of property—that it pays little attention “toward specialization of the parts [of the system] in achieving the goals of the whole” (*supra* note 55, *id.*)—is also wrong.

problematic approach of rule-sensitive particularism allowing judges to depart from rules whenever the outcome of the particular case at hand so requires, while taking into account both substantive values and the value of preserving the rule's integrity.⁵⁹ Rather than substituting clear rules with vague standards, property as institutions insists that reasoning about property rules should involve reasoning about the character of the property institution at hand given its social context or the nature of the resource at hand, and not about property writ large. In other words, the property values of autonomy, personhood, utility, labor, community, and distributive justice are not—and should not be—invoked as reasons for particular outcomes of specific cases but rather as reasons for rules. Recognizing these values as the normative infrastructure of property law should advise *some* legal actors—notably, judges of appellate courts—to *occasionally* use new cases as triggers for an ongoing refinement of rules, as opportunities to revisit the normative viability of existing rules *qua* rules, and to re-examine the adequacy of the legal categorization that organizes these rules.⁶⁰ In fact, much of *Property: Values and Institutions* is similarly devoted to the identification of property *rules* that best promote the property values underlying the property institutions to which they belong.

Indeed, given that the number of property institutions is limited and that the role of property values is confined to a small number of deliberative moments, we have no reason to assume that property as institutions cannot be rule-based. But would not allowing property doctrines to rest on these property values without a predetermined formula for measuring and balancing them entail unbridled judicial discretion, an invitation to apply subjective preferences, and thus an even deeper affront to the rule of law? I do not think so, even when disregarding that classic legal formalism, the main alternative to normative legal reasoning, is hopelessly malleable and thus indeterminate. Different types of human interactions and, consequently, different categories of property doctrines call for different balances of the (limited number, to be sure) values relevant to

⁵⁹ See Sherwin, *supra* note 57, at 1591-94.

⁶⁰ Indeed, the important legal realist insight regarding doctrinal indeterminacy implies that new cases *can* serve as opportunities to rethink; but it does not rule out the position that, in their daily work, judges should limit their role to applying the existing understandings of property doctrine (within the relevant legal community) to the cases before them.

property law. Here, as elsewhere, the requirement to explicitly apply judgment, which needs to be normatively and contextually justified, is a real constraint.⁶¹ Admittedly, in some categories of cases, this contextual normative inquiry might indeed lead to a standoff, with reason unable to adjudicate between two or more competing prescriptions. But the relevant question is not whether such cases are possible, and the sheer existence of hard cases scarcely undermines the determinacy or the integrity of the law. Rather, the question is whether these cases are prevalent enough so that they threaten a property theory premised on these guidelines. In many cases, a sufficiently robust contextual normative account can have quite sharp doctrinal teeth, as I attempted to briefly demonstrate in the examples mentioned above. Although some of my analyses may obviously be controversial, they can hardly be challenged by the sheer difficulty of measuring or balancing the property values I employ, or by the possibility that there are other pertinent values. To challenge my approach, a detailed demonstration of the superiority of a competing account is needed, rather than a blanket claim that a better account will always be available.⁶²

PROPERTY AND UTOPIA

My time is almost up, but there is one last and rather crucial step in my presentation today. Thus far I have tried to argue that, in law, property is an umbrella for a set of institutions, serving a pluralistic set of liberal values: liberty, utility, labor, personhood, community, and distributive justice. I have also claimed that, at its best, property law 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. In other words, I have tried to show that what from a monist viewpoint seeking to pigeonhole property law in its entirety under the rule of one regulative principle (such as exclusion) looks like a random mess, turns out to be a rich mosaic once a perspective of structural pluralism (as I will call it in this section) is

⁶¹ See MICHAEL MARTIN, *LEGAL REALISM: AMERICAN AND SCANDINAVIAN* 39-40, 76 (1997); Joseph William Singer, *Normative Methods for Lawyers*, 56 *UCLA L. REV.* 899 (2009).

⁶² Cf. RONALD DWORKIN, *LAW'S EMPIRE* 76-86 (1986).

utilized. The last step of my argument is even more ambitious: I contend that this mosaic is valuable for people's autonomy. While the fee simple absolute—the property institution which seems to be core for exclusion theorists—facilitates people's independence (and is thus indeed indispensable for liberal societies), law's support for other property institutions is crucial for autonomy. This is exactly why the conception of property as institutions resists the way exclusion theory privileges one property institution—the fee simple absolute—thus suppressing the others as variations on a common theme or marginalizing them as peripheral exceptions to a robust core.⁶³

Consider the ideal of personal autonomy stating that people should, to some 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.”⁶⁴ 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.”⁶⁵

⁶³ This part relies heavily on Dagan, *Pluralism and Perfectionism*, *supra* note 31.

⁶⁴ 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* ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 14, 34, 45 (2009). By contrast, with Raz, this Essay discusses autonomy within teleological morality. *See also, e.g.*, JAMES GRIFFIN, *ON HUMAN RIGHTS* 68-69, 149-58, 326-27 (2008).

⁶⁵ *See* JOSEPH RAZ, *THE MORALITY OF FREEDOM* 372, 381, 395, 395, 398-99 (1986). *Cf.* ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 309-12 (1974).

Indeed, given the diversity of acceptable human goods from which autonomous people should be able to choose and their distinct constitutive values, the state must recognize a sufficiently diverse set of robust frameworks for people to organize their life. And because, as I have argued above, 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. So, despite the appeal of the global coherence of monistic conceptions of the building blocks of private law (for our purposes: of property), it is reasonable and even desirable for law to adopt more than one set of principles and, therefore, more than one set of coherent doctrines.⁶⁶

The commitment to facilitate a plurality of reasonable but conflicting ideals and conceptions of the good provides lawgivers some latitude for making choices, where such choices are necessary, amongst morally acceptable possibilities. It also imposes on them a distinct obligation: to make these choices for people *only* when necessary and thus to create and facilitate a structurally pluralist legal regime.

A structurally pluralist property 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 property 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 necessarily foreclose it insofar as these institutions add valuable options of

⁶⁶ 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).

human flourishing that significantly broaden people's choices. Only in this way can law recognize and promote the individuality-enhancing role of multiplicity.⁶⁷

Because only the conception of property as institutions follows these prescriptions, it is the only truly autonomy-enhancing conception of property. Indeed, as long as the boundaries between the multiple property institutions are open, the liberal commitment to autonomy—which lies at the root of the exclusionist conception of property—neither necessitates the hegemony of the fee simple absolute, nor undermines the value of other, more communitarian or utilitarian property institutions. On the contrary, the availability of several different but equally valuable and obtainable frameworks of interpersonal interaction makes autonomy more meaningful by facilitating people's ability to choose and revise their forms of interaction with other individuals respecting diverse types of resources.

Sheer multiplicity is obviously not sufficient. The legal conventions encapsulated in property law, the property institutions as I call them, do not merely supply an assortment of disconnected choices. Rather, 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 these gaps only mean that, rather than searching for unifying normative accounts 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 reform, if needed, that would force these property institutions to live up to their own implicit promises. In other words, the practical payoff of discarding the conception of property as exclusion—or indeed any other monist conception of property—in favor of the understanding of property as institutions lies in the fact that the latter approach situates the normative inquiries regarding property law at the correct level (inside property). 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.

⁶⁷ Cf. RAZ, *supra* note 65, at 417-18, 425.