The Utopian Promise of Private Law

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Abstract

This Essay uses Robert Nozick’s *Anarchy, State, and Utopia* as a springboard for examining the relationship between private law and the basic structure of society. Such an inquiry may seem odd, given that this book stands for a libertarian credo that questions the idea of such a normative structure in the first place. And yet, I hope to show that this is still a worthwhile pursuit because Nozick’s account of utopia as a framework for utopias captures a profound truth about private law.

His insight points to the normative underpinnings of private law, namely, to its irreducible role in upholding individual self-determination, and reveals its function in vindicating a robust conception of relational justice. These underpinnings are far removed from the libertarian foundations ascribed to private law not only by Nozick and other libertarians, but also by Kantians and many division-of-labor liberal egalitarians. Furthermore, they also require us to discard the conventional conceptions of property (as sole and despotic dominion) and of contract (as a means for delineating the boundaries of protected domains), which Nozick espouses. On the other hand, while these commitments have important distributive implications, they are also distinct from the considerations of justice in holdings that concern the institutions responsible for distributive justice.
THE UTOPIAN PROMISE OF PRIVATE LAW

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THE UTOPIAN PROMISE OF PRIVATE LAW

I. INTRODUCTION

Robert Nozick is no stranger to private law theory. *Anarchy, State, and Utopia,*\(^1\) the most celebrated libertarian manifesto of recent times, is naturally invoked or used for developing libertarian accounts of private law. Nozick’s entitlement theory, which underlies his account of justice in holdings, is rightly considered a prime example of a blueprint advocating a robust understanding of property along the lines of its Blackstonian rendition as sole and despotic dominion.\(^2\) Entitlement theory was also the foundation of the most outspoken libertarian account of contract law. In this account, the main function of contracts is to prescribe the transfer rules of law in line with the rightholders’ consent, in order to delineate the boundaries of protected domains.\(^3\)

Nozick’s position on justice in holdings, together with his insistence on the justness of the night-watchman state, have been the target of an intense and convincing critique that I will not repeat here.\(^4\) The aim of this Essay is to explore the potential contribution of Nozick’s somewhat neglected account of utopia as a framework for utopias on private law theory. Focusing on doctrines that regulate our interpersonal relations regarding holdings (as opposed to doctrines dealing with our bodily integrity), I argue that private law can, should, and to some extent already does, serve in such capacity. Moreover, as a framework for utopias, private law has a distinct role in securing justice. Finally, I contend that taking this promise of private law seriously implies a private law regime that is quite different from and much more robust than the conventional libertarian building blocks of a Blackstonian property and consent-based contract. Notwithstanding Nozick’s claim to the contrary, his exciting vision of utopia defies rather than supports libertarianism.

II. READING NOZICK BACKWARDS

*Anarchy, State, and Utopia* is well-known for the proposition that there are (only) three principles of “justice in holdings”: the principle of acquisition of holdings, the principle of transfer of holdings, and the principle of rectification of violations of the first two principles. For Nozick the libertarian, “the holdings of a person are just if he is entitled to

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them by the principles of justice in acquisition and transfer, or by the principle of rectification of injustice (as specified by the first two principles).” This means that “[i]f each person’s holdings are just, then the total set (distribution) of holdings is just,” so that any further use of the state’s coercive apparatus, however normatively attractive, is an illegitimate transgression against people’s rights.5

Anarchy, State, and Utopia also offers another and less familiar argument on behalf of the minimal state, which is at the focus of this Essay. In the last part of his book, entitled “Utopia,” Nozick develops an argument that “starts (and stands) independently of” his claims in support of these three principles, and arguably “converges to their result from another direction.”6 For Nozick the utopian, the virtue of a state that complies with the prescriptions of the entitlement theory—the minimal state—is that it is not only right but also inspiring.

Nozick’s most important insight on this front is that utopia must be conceptualized as “a framework for utopias, a place where people are at liberty to join together voluntarily to pursue and attempt to realize their own vision of the good life.” In treating us all “with respect by respecting our rights” and in allowing us, “individually or with whom we choose, to choose our life and to realize our ends and our conception of ourselves, insofar as we can, aided by the voluntary cooperation of other individuals possessing the same dignity,” this framework for utopias “best realizes the utopian aspirations of untold dreamers and visionaries.” To secure these happy effects, utopia’s law must reject the temptation of “planning in detail, in advance, one [utopian] community in which everyone is to live.” Instead, it should operate as a “libertarian and laissez-faire” framework, which facilitates “a diverse range of communities,” many (maybe most, or even all) of which would be neither libertarian nor laissez-faire, in order to enable “more persons . . . to come closer to how they wish to live, than if there is only one kind of community.” By facilitating “voluntary utopian experimentation” and “provid[ing] it with the background in which it can flower,” this utopian state invites “many persons’ particular visions,” enabling us “to get the best of all possible worlds.”7

This ideal of a framework for utopias is captivating. It takes differences between people seriously, insisting that all individuals deserve respectful treatment of their own autonomy. Unlike the conception of negative liberty (or independence) typically associated with libertarian authors,8 obviously including Nozick, this ideal builds on or at least acknowledges a richer understanding of autonomy as a form of self-authorship.

5 NOZICK, supra note 1, at 153.
6 Id., at 333.
7 Id., at 309, 312, 320, 332-34.
8 As well as with neo-Kantians. See ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY 14, 34, 45 (2009).
requiring diverse options. But is Nozick correct in asserting that the minimal state, and only the minimal state, can bring about this utopia? Should those readers who agree with Nozick that a (if not the) state’s major obligation is to facilitate people’s autonomous choices from amongst divergent conceptions of the good, subscribe to the libertarian credo? In order to address these critical questions (in the next Part), we need to read Nozick backwards and distill his understanding of private law’s building blocks from his account of the minimal state.

Perhaps because Nozick’s three principles of justice “have their equivalents in private law,” this is not a very demanding task. Nozick’s libertarian scheme builds, as I will argue, on familiar conceptions of property and contract. Nozick’s brief allusion to historical injustices further implies that his understanding of rectification piggybacks on these conceptions: because some people violate the rules of property and contract law—they “steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose”—rectification stands for the obligations of these “performers of injustice towards those whose position is worse than it would have been” had they not engaged in such impermissible “modes of transition from one situation to another.”

“The central core of the notion of a property right in X,” Nozick writes, “is the right to determine what shall be done with X” and “to reap the [emerging] benefits” of such determination. This conception of property, clearly resonating with Blackstone’s familiar (and recently reinvigorated) formula of “sole and despotic dominion,” is also vividly (albeit implicitly) present in Nozick’s famous Wilt Chamberlain fable. In trying to demonstrate that even egalitarians are bound to concede his claim that justice in distribution must be historical, Nozick allows his interlocutor to specify an initial distribution of holdings ($D_1$), arguing that once “people voluntarily moved from it to $D_2$” no one can challenge $D_2$ “on grounds of justice.” As critics noted, however, egalitarians are unlikely to specify the just initial distribution in terms of absolute property rights.

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10. NOZICK, supra note 1, at 152.

11. Id., at 171.


13. 2 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND *2 (Univ. of Chi. ed. 1979) (1765-69).

14. NOZICK, supra note 1, at 161.

Nozick’s fable, then, at least in its strong interpretation, works only if we assume that ownership must take the form of an unqualified and unconditional right.

Nozick’s discussion of transfers (transactions, gifts, and bequests) also has a familiar ring. The principle of justice in transfer requires, he claims, “general descriptions of voluntary exchange, and gift and (on the other hand) fraud, as well as reference to particular conventional details fixed upon in a given society.” Nozick does not specify these details but echoing in his favorite slogan—“From each as they choose, to each as they are chosen”—is the view that contract law, by and large, is or should be governed by one animating principle: to follow the parties’ mutual consent. As Randy Barnett argues in further developing Nozick’s conception of contract, contract law in this view is “that part of a system of entitlements that identifies those circumstances in which entitlements are validly transferred from person to person by their consent.” In order to “perform its allotted boundary-defining function,” thus clearly setting “the boundaries of protected domains,” contract law relies “on objectively ascertainable assertive conduct.”

Indeed, as Nozick argues in his clearly libertarian moments, the libertarian ideal of private law should focus on setting the boundary circumscribing the individual moral space. No wonder, then, that this ideal espouses these narrow conceptions of property and contract. These familiar, almost canonical, accounts are indeed best tailored for such an assignment. But can they possibly deliver on Nozick’s utopian promise?

III. NOZICK’S GAPS

I argue that this thin version of private law’s building blocks, which Nozick and many contemporary private law theorists subscribe to, cannot possibly live up to this challenge. To see why, we need to appreciate the robustness of the ideal of a framework for utopias, and realize its profound dependence on law or law-like conventions. While the former step can and should be read as a friendly extension of Nozick’s utopian vision, the latter

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16 In a weaker interpretation, the fable is not meant to analytically refute any other distributive principle, but rather to demonstrate that no “distributional patterned principle of justice can be continuously realized without continuous interference with people’s lives.” Id., at 163.

17 NOZICK, supra note 1, at 150.

18 Id., at 160.

19 For a similar and even more familiar version of contract theory, see CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981).


21 NOZICK, supra note 1, at 57, 71-73.
implies that this vision must rely on an unambiguously non-libertarian conception of private law.\textsuperscript{22}

Nozick envisages a diverse menu of comprehensive life-style options, in which “[d]ifferent communities, each with slightly different mix, […] provide a range from which each individual can choose that community which best approximates his balance among competing values.”\textsuperscript{23} But a viable framework for utopias offering people a diverse menu of options for interpersonal interaction from which to choose when pursuing their conception of the good, surely requires more than a variety of all-encompassing communities. To begin with, part of modernity’s promise, which Nozick undoubtedly embraces, is the option of multiple group affiliations allowing people to choose their associations in their various, and possibly incongruent or even conflicting, capacities.\textsuperscript{24} Moreover, self-determining individuals should be able to choose from not only a range of comprehensive options dealing with life-styles and conceptions of the good, but also from parallel sets of options for many other and more specific decisions they face in various spheres of life. These decisions may be less dramatic but they are still significant and, again, disconnected and potentially incompatible components of their life story. Self-authorship implies not only choosing between life in a “capitalist” community and a kibbutz,\textsuperscript{25} but also, and just as importantly, choosing whether we want to live in a fee simple absolute or a common interest community; to work as employees or as independent contractors; to do business in a partnership, a close corporation, or a publicly-held corporation, and to form an intimate bond of marriage or rather cohabitate.

Self-authorship, which is the underlying impetus for Nozick’s framework for utopias, requires a sufficiently diverse set of viable options for all these and many other discrete yet significant decisions regarding our interpersonal interactions, in addition to the more comprehensive options that Nozick emphasized. As Joseph Raz explains, autonomy requires not only appropriate mental abilities and independence, but also “an adequate range of options.” Therefore, 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, we require, other things being

\textsuperscript{22} On its face, the text overstates the conclusions of the discussion that follows because my argument refers to law or law-like conventions, which implies that the infrastructure required for a framework of utopias need not necessarily emanate from state law. But for these non-statist sources to function like law they do indeed have to be law-like, namely, normative coercive institutions. Cf. Hanoch Dagan, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY ch. 2 (2013).

\textsuperscript{23} Nozick, supra note 1, at 312.

\textsuperscript{24} See, e.g., George Simmel, CONFLICT AND THE WEB OF GROUP AFFILIATIONS 130, 150-54 (1955); Shai Stern, Taking Community Seriously: Toward a Reform in Takings Law *-* (unpublished manuscript).

\textsuperscript{25} See Nozick, supra note 1, at 321.
equal, “more valuable options than can be chosen, and they must be significantly different,” so that choices involve “trade-offs, which require relinquishing one good for the sake of another.”

So far so good. Nozick the libertarian need not object to any of these observations. But can indeed all these options at all these levels be instantiated in the minimal state? Does the freedom to initiate cooperative frameworks, which Nozick the libertarian relies upon, suffice for the task of securing the diversity of the menu, which Nozick the utopian considers crucial? Nozick seems to believe that this is indeed the case. Although conceding that his system “does not require” people “to innovate” and that they may “stagnate if they wish,” Nozick is not alarmed by this problem as long as his framework provides the “liberty to experimentation of varied sorts.” And on its face, this is exactly what we do according to the conventional accounts of property and contracts or, at least, this is what many private law theorists who also subscribe to them believe we do. As long as property is understood as “sole and despotic dominion” and contract conceptualized around people’s consent, so the argument goes, free individuals can use these fundamental building blocks of private law and tailor their interpersonal arrangements so that they best serve their own utilitarian, communitarian, or other purposes. We might think of convenient additions, but is there anything fundamentally necessary that is still missing?

To answer this question, we need to appreciate both the material and the expressive functions of private law (or any parallel law-like convention, for that matter). Economic analysis of private law, which investigates its incentive effects, forcefully demonstrates how many of our existing practices rely on legal devices serving to overcome numerous types of transaction costs—information costs (symmetric and asymmetric), bilateral monopolies, cognitive biases, and heightened risks of opportunistic behavior—that generate the participants’ endemic vulnerabilities in most cooperative interpersonal interactions. Merely enforcing the parties’ expressed intentions would not be sufficient.


27 NOZICK, supra note 1, at 329. Nozick mentions a few other difficulties in implementing his ideal of utopia in the actual world. See Id., at 307.


29 For more detailed analyses on which the remainder of this Part draws, see Hanoch Dagan, Inside Property, 63 U. TORONTO L.J. 1, 3-10 (2013); Dagan & Heller, supra note 20, at Pt. III.A.

30 On top of these transaction costs, there are certain features of cooperative endeavors—notably affirmative asset partitioning—that are (almost literally) impossible to achieve without legal intervention. See Henry Hansmann & Reinier Kraakman, The Essential Role of Organizational Law, 110 HARV. L. REV. 387 (2000).

to overcome the inherent risks of such endeavors. If many (most?) of them are to become or remain viable alternatives, law must provide the background reassurances tailored to the specific category of interaction at hand, which will serve to catalyze the trust so crucial for success. Even where parties are guided by their own social norms, law often plays an important role in providing them background safeguards, a safety net for a rainy day that can help to establish trust in their routine, happier interactions.  

But law’s effects are not only material. Because our private law tends to blend into our natural environment, its categories play a crucial role in structuring our daily interactions. Thus, alongside these material effects, many of our conventions—including many social practices we take for granted (think bailment, suretyship, or fiduciary)—become available to us only due to cultural conventions that often, especially in modern times, are legally constructed. Thus, even before we consider the transaction costs of constructing these arrangements from scratch, people in a society where these notions have not been legally coined would have faced “obstacles of the imagination” that might have precluded these options. Indeed, our private law institutions play an important cultural role; like other social conventions, they serve a crucial function in consolidating people’s expectations and in expressing normative ideals regarding the core categories of interpersonal relationships they participate in constructing.

Both the material and the expressive functions of private law imply that contractual freedom, though significant, cannot possibly replace active legal facilitation. Lack of legal support is often tantamount to undermining—maybe even obliterating—many cooperative types of interpersonal relationships, and thus people’s ability to seek their conception of the good. This gap between the libertarian conceptions of property and contract and the utopian promise of private law admittedly relies on people’s fallibility, notably their cognitive failures and the way they tend to prefer their self-interest to the interests of others. But these imperfections cannot be dismissed as contingent features that need not bother Nozick the utopian. While their significance may vary from one

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34 See Ian Ayres, Menus Matter, 73 U. CHI. L. REV. 3, 8 (2006) (arguing that even “statutory menus that merely reiterate what the private parties could have done contractually by other means can have a big effect”).
empirical context to another, these human features are sufficiently ingrained to render a purportedly utopian theory that ignores them irrelevant if not self-defeating.\(^{36}\)

Thus, the state’s obligation to enhance autonomy by fostering diversity and multiplicity cannot be properly fulfilled through the hands-off attitude represented by the conventional accounts of property and contracts that Nozick espouses. A commitment to personal autonomy as self-authorship requires the liberal state, through its laws, to enable individuals to pursue their own conceptions of the good by proactively providing a multiplicity of options for interpersonal interaction.\(^{37}\) For each major category of human activity, private law must include a sufficiently diverse repertoire of property institutions and contract types, each governed by a distinct animating principle, meaning a different value or different balance of values. Private law must also keep open the boundaries between these institutions to enable people to freely choose their goals, principles, forms of life, and associations.

### IV. STRUCTURAL PLURALISM AS A FRAMEWORK FOR UTOPIAS

Neither property nor contract fully complies with this pluralistic injunction, yet both property law and contract law are far more amenable to it than their conventional conceptions suggest. Structurally, these conceptions perceive property and contract in monistic terms and assume that each of these complex legal fields is governed by one sole animating principle, such as exclusion or consent. And yet, if law is to follow the autonomy-enhancing aspiration of a framework for utopias ideal, the appeal of structural monism must be resisted.\(^{38}\) Private law theory must take the existing structural pluralism of private law seriously and highlight, rather than suppress (as variations on a common theme) or marginalize (as peripheral exceptions to a robust core), the multiple forms typical of private law. Rather than rely on the conventional monistic conceptions of property and contract, private law must adopt and be guided by a structurally pluralistic understanding of its building blocks.

Much of our private law already defies structural monism and follows instead the pluralist prescription. Private law is vastly heterogeneous. It tends to set up narrow

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\(^{36}\) Cf. JOHN RAWLS, A THEORY OF JUSTICE 138 (1993) (insisting that a credible conception of justice must comply with “the laws of moral psychology” and “the principles of moral learning.”).

\(^{37}\) Cf. RAZ, supra note 26, at 133, 162, 265.

\(^{38}\) By conceptualizing an entire legal field as revolving around one idea, monist theories tend to be parsimonious and elegant, thereby satisfying an important demand of the practice of theorizing. They also avoid the seemingly intractable difficulties faced by pluralist theories when addressing contextual conflicts of values or contextual applications of values. Finally, the broad coherence they celebrate means that law talks to people in one voice and thus deserves their obedience.
categories, each covering only relatively few human situations, and each governed by a
distinct set of rules expressing differing underlying normative commitments. The
differences between property institutions or contract types do not simply reflect the
obvious injunction that abstract principles, to be properly applied, need to be carefully
adjusted to their context, but rather that they are best explained by reference to their
distinct animating principles.

Take, for example, property. Contemporaneous champions of the Blackstonian
conception of property imply that rejecting the notion of property as a monistic institution
revolting around the core idea of sole despotic dominion necessarily leads to an
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 Wesley
Hohfeld observed, property has no canonical composition. The reference to the concept
of property, therefore, need 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 and place.
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.

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 significantly, as citizens experience it in everyday life, but neither does the
conception of property as a monistic institution revolving around an owner’s exclusive
right. Some parts of the property drama do consist of governing the productive struggle
between autonomous excluders, each cloaked in the armor of sole and despotic dominion,
and can thus be reasonably accounted for within the Blackstonian paradigm. And yet, the
notion that property as an idea is about the owner’s power to exclude (or of exclusivity) is
a great exaggeration. Property law includes, side by side, doctrines that by and large
comply with a commitment to negative liberty (think fee simple absolute), alongside
doctrines where ownership is mostly a locus of sharing (as in marital property), or the
maximization and just distribution of the social pie of scientific knowledge and its

39 See Dagan, supra note 35; Hanoch Dagan, Pluralism and Perfectionism in Private Law, 112
COLUM. L. REV. 1409 (2012) on which this Part draws. For a parallel claim regarding contracts,
see Dagan & Heller, supra note 20.

40 See, e.g., J. E. Penner, The “Bundle of Rights” Picture of Property, 43 UCLA L. REV. 711
(1996); Penner, supra note 13.

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

42 See Thomas W. Merrill & Henry E. Smith, Optimal Standardization in the Law of Property:
products (as with patents), as well as many other doctrines vindicating various types of balance among these and other property values.

Property can be understood as an exclusive right and exclusion or exclusivity can exhaust the meaning of property and thus be described as its core only if we set aside large parts of what constitutes property law, at least according to the conventional understanding of the case law, the Restatements, and the academic scholarship. 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 necessary structures for cooperative relationships rather than competitive or hierarchical ones. In shaping the contours of these property institutions, concerns about insiders’ governance are often as, or even more, informative than concerns about outsiders’ exclusion.

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 to entry is even typical of property as, for example, in 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. These rights of entry of non-owners are not an embarrassing aberration. Inclusion is less characteristic of property than exclusion and in the limiting case of inclusion—universal equal access—there is no owner. Its manifestations, however, are just as intrinsic to property and should not be perceived as external limitations or impositions. 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

43 See Dagan, supra note 35, at 37-56. 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).

44 Indeed, as Felix Cohen argued, every property right involves some power to exclude others from doing something. But as he 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, problems too infinitely intricate for simple panacea solutions.” Felix S. Cohen, Dialogue on Private Property, 9 Rutgers L. Rev. 357, 370–74, 379 (1954).
grounded in the very reasons—the very same property values—that justify the support of our legal system for the pertinent property institution.

Rather than a uniform bulwark of exclusion or a formless bundle of rights, then, 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 but instead is, or at least should be, determined by its character, that is, by the unique balance of property values characterizing the institution at issue. The ongoing process of reshaping property institutions is oftentimes rule-based (or else relies on informative as opposed to open-ended standards) and usually addressed with an appropriate degree of caution. And yet, the possibility of repackaging, which Hohfeld highlights, makes it (at least potentially) an exercise in legal optimism, with lawyers and judges attempting to explicate and develop existing property forms by accentuating their normative desirability while remaining attuned to their social context.

Some property institutions are structured along the lines of the Blackstonian view of property as sole despotic dominion. These institutions are atomistic and competitive and vindicate people’s negative liberty. Liberal societies justifiably facilitate such property institutions, which serve both as a source of personal well-being and as a domain of individual freedom and independence. In other property institutions, a more communitarian view of property may dominate, with property as a locus of sharing. In yet many others, 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.

Given the profound heterogeneity of property law, searching for property’s core is potentially misleading, at least if this core is supposed to be robust enough to have a meaningful role in the development of property law. The diversity of property institutions enables diverse forms of association and thus diverse forms of the good to flourish. Trying to impose a uniform understanding of property on them would be unfortunate, as implicit in Nozick’s resistance to a monistic utopian prescription, because it could undermine the autonomy-enhancing function of pluralism and the individuality-enhancing role of multiplicity. Only a sufficiently heterogeneous property law, beside an attendant commitment to a broad realm of freedom of contract regarding property rules, complies with the utopian injunction to facilitate the coexistence of a sufficiently diverse

45 See JOHN RAWLS, POLITICAL LIBERALISM 298 (1993).
set of social institutions crucial for our autonomy. A conception of property fittingly steered by this injunction should celebrate the existing multiplicity of property law, guiding its expansion to include a manifold repertoire of sufficiently distinct institutions in all relevant spheres of human activity.

As long as the boundaries between these multiple property institutions are open and as long as non-abusive navigation within this variety is a matter of individual choice, commitment to personal autonomy does not necessitate the hegemony of the fee simple absolute. Nor does this commitment undermine the value of other, more communitarian or utilitarian property institutions. The eradication or marginalization of the fee simple absolute could indeed have entailed an excessive restriction of liberty, because it would have erased the option of private sovereignty and thus eliminate the option of retreat into one’s own safe haven. But as long as this property institution remains a viable alternative, the availability of several different but equally valuable and obtainable proprietary frameworks of interpersonal interaction makes autonomy more, rather than less, meaningful.46

Proactively facilitating the multiplicity of private law through structural pluralism curbs law’s power without neglecting or undermining its normativity.47 In line with its utopian underpinnings, structural pluralism opens up alternatives rather than channeling everyone to the one option privileged by law. Individuals can then navigate their own course, bypassing certain legal prescriptions and avoiding their implications as well as the power of those who have issued them. And yet, a structurally pluralistic private law is profoundly normative, in a way that libertarians will undoubtedly find objectionable. Each one of its categories encompasses a set of precise rules and informative standards shaped by a distinct animating principle. Although many of these rules and standards function as defaults, as they should in an autonomy-based private law regime, the forms of social interaction and cooperation that private law facilitates are necessarily limited in number and their contents relatively standardized. These features enable the institutions of private law to consolidate people’s expectations regarding core types of human relationships. Moreover, these features also imply that these institutions express the normative ideals of law for these types of social interaction.


47 It should come as no surprise that structural pluralism accommodates law’s power and normativity, given its reliance on the legal realist conception of law as a dynamic set of institutions that embodies three sets of constitutive tensions: between power and reason, science and craft, and tradition and progress. See DAGAN, supra note 22, at chs. 1, 8, 9.
V. FROM UTOPIA TO JUSTICE

I have so far argued that, if we agree with Nozick that the liberal state as a framework for utopias is an inspiring notion, we need to discard the libertarian credo of the minimal state and the conventional conceptions of private law’s building blocks resonating in it. Nothing short of the robust legal edifice of structural pluralism will do if private law is to be guided by this autonomy-enhancing utopian promise. Indeed, one lesson of my account is that autonomy, as self-authorship, may be threatened not only by having too much law. The absence of law, the failure of private law to support a sufficiently diverse range of institutions within a given sphere of interpersonal activity, may undermine autonomy just as much.\(^\text{48}\)

But what about justice that, after all, is Nozick’s main concern? Does not a thick legal regime committed to the facilitation of people’s self-determination violate justice’s injunctions? Is not a system of private law that complies with structural pluralism—our private law—unjust, even if inspiring? Three possible complaints from justice are worth exploring. Although none of them is convincing, as I argue below, their analysis helps to refine the promise of a structural pluralistic private law and the distinct role of private law in securing justice.

The first straightforward complaint is most powerfully formulated in the very first lines of Anarchy, State, and Utopia. Because the rights of individuals are both “strong and far reaching,” Nozick writes, there are many things “no person or group may [legitimately] do to them,” thus raising “the question of what, if anything, the state and its officials may do.”\(^\text{49}\) The striking divergence of my thick conception of private law from Nozick’s thin understanding may suggest that my conception violates this prescription. This suspicion might be strengthened when we remember that my account relies on the telos of private law that, I argue, is the enhancement of our autonomy, thus departing from the understanding of private law as a set of duties aimed at vindicating our pre-political rights. Can such a teleological account be just and legitimate?\(^\text{50}\)

I believe it can, given the nature of the private law areas addressing interpersonal relations concerning our holdings, to which this Essay is limited. My claim is that in these areas private law (or any parallel law-like convention) cannot plausibly be understood, despite the many attempts to do so, to be safeguarding our pre-political rights. Rather, law (or again, any parallel set of social norms) plays a power-conferring role; it eases and

\(^{48}\) For a preliminary discussion of this lesson, see Dagan & Heller, supra note 20, at Part IV.C. Cf. ROBIN WEST, NORMATIVE JURISPRUDENCE: AN INTRODUCTION 201-03 (2011).

\(^{49}\) NOZICK, supra note 1, at ix.

at times even enables and shapes interpersonal practices. Therefore, I contend, the proper configuration of our private law of holdings must rely on its telos.

To see why private law cannot be understood in duty-imposing terms (that is, as vindicating pre-political rights) insofar as our holdings are concerned, recall first the irreparable flaws of John Locke’s attempt to establish that robust private property rights precede law or any social contract on which the state and its law are founded.\(^51\) As many critics have shown, Locke’s theory is fraught with problems. Notable among them are the tortuous path from the no-spoilage proviso to an endorsement of full-blown money economy; the doubtful (implicit) claim that non-owners have no right to complain about appropriations as long as enough and as good means of subsistence remains, even if they suffer non-material harms, and the feeble contention that, by mixing one’s physical labor with an object that belongs to everyone in common, one is able to obliterate others’ rights in that object and establish absolute ownership of it.\(^52\)

Locke’s failure is not conclusive, but is nonetheless telling. Acknowledging that property rights cannot plausibly be understood as pre-political\(^53\) implies that, whereas tort law doctrines that protect our bodily integrity may reasonably be said to affirm our innate rights and accordingly analyzed as duty-imposing, private law rules dealing with our holdings are different. Rather than vindicating existing rights, they are at their core power-conferring. As power-conferring bodies of law, both property and contract, as well as those tort rules dealing with rectifying violations of the rules of property and contract law, attach “legal consequences to certain acts” in order “to enable people to affect norms and their application in such a way if they desire to do so for this purpose.”\(^54\) This feature captures the empowering role of private law that structural pluralism highlights. To be sure, duties not to interfere with people’s rights are relevant to our private law of holdings as well. But these piggy-backing (duty-imposing) rules would be meaningless in the absence of the power-conferring institutions of the private law of holdings because their role is to protect our ability to apply the powers enabled by property and contract. They rely on, and should thus be circumscribed by, the normative commitments that explain


\(^{52}\) For a quick survey of some of the pertinent literature, see Alexander & Dagan, supra note 2, at 9-12. The best treatments of Locke’s theory of property are Jeremy Waldron, The Right to Private Property 137-252 (1988); Gopal Sreenivasan, The Limits of Lockeian Right in Property (1995).

\(^{53}\) For a critique of another, this time neo-Hegelian, attempt to argue otherwise, see Dagan, supra note 47 (criticizing Alan Brudner, The Unity of the Common Law (2013)).

\(^{54}\) Joseph Raz, Practical Reason and Norms 102 (1975).
and justify law’s support for allowing people to become owners or to self-impose obligations in the first place.\textsuperscript{55}

In prescribing the specific content, scope, and implications of the powers conferred by the various property rights and contract types it promulgates, law (or a law-like social convention) shapes the interpersonal practices of property and contract rather than merely reflecting them. In designing these areas of private law, therefore, we necessarily make choices that affect the parties’ bilateral relationships. The relevant question to autonomy-based property and contract laws does not touch on the legitimate constraints to people’s autonomy (as it does for many aspects of tort law), but on the ways that law should \textit{enhance} people’s autonomy. That is necessarily an ex-ante discussion, about how law can facilitate forms of holdings and of interpersonal interactions concerning holdings that are conducive to its autonomy-enhancing \textit{telos}. This inquiry is qualitative rather than quantitative. It is not focused on maximizing the extent of autonomy in the world but is still teleological, seeking the system that generates the most autonomy-friendly consequences.

The recent revival of Kant’s conception of property may be read as offering a way to resist this conclusion while implicitly admitting the power-conferring nature of the private law of holdings.\textsuperscript{56} It avoids Locke’s most dubious claims by conceding that “a purely unilateral act of acquisition can only restrict the choice of all other persons against the background of an omnilateral authorization.”\textsuperscript{57} It aims to isolate this authorization from teleological concerns by advancing a regime in which the state functions both as a guarantor of people’s robust property rights against one another, and as the authority responsible for levying taxes in order to fulfill a public duty to support the poor so as to secure everyone’s independence. Strong property rights and a viable welfare state, so the argument goes, cluster as a matter of conceptual necessity.\textsuperscript{58}

Alas, even this heroic attempt ultimately fails because such a strict division of labor between a libertarian private law and a robust welfare state, wherein the threat of dependence is universally alleviated, is quite implausible. As I show elsewhere, the public law of tax and redistribution is unlikely, for three reasons, to supplement private law with rules capable of remedying the injustices of a libertarian private law, if not in terms of distribution at least in terms of interpersonal dependence. First, the realities of

\textsuperscript{55} This paragraph and the one that follows draw on Dagan & Heller, \textit{supra} note 20, at Part I.C.1.

\textsuperscript{56} For an explicit claim that Kant’s view of property is best thought of in power-conferring terms, see Joachim Hruschka, \textit{The Permissive Law of Practical Reason in Kant’s Metaphysics of Morals}, 23 LAW & PHIL. 45 (2004).

\textsuperscript{57} RIPSTEIN, \textit{supra} note 8, at 90. For a view in which this is also Locke’s position, see Jeremy Waldron, \textit{Nozick and Locke: Filling the Space of Rights}, 2005 SOC. PHIL. & POL’Y 81.

\textsuperscript{58} RIPSTEIN, \textit{supra} note 8, at chs. 4 & 9; ERNEST J. WEINRIB, \textit{Poverty and Property in Kant’s System of Rights}, in CORRECTIVE JUSTICE 263 (2012).
interest group politics in the promulgation of tax legislation render egalitarian tax regimes, such as one based on Rawls’ difference principle, a matter of political theory rather than of empirical reality. This difficulty is intrinsic to the concept of democracy, which respects people’s preferences and not only their principles. Second, given that our understandings of the responsibilities of owners and the limits of what we perceive to be their legitimate interests are influenced by our legal conception of ownership, an extreme libertarian private law regime might undermine social solidarity and lessen people’s responsiveness to claims from distributive justice. Third, treating non-owners as passive recipients of welfare and mere beneficiaries of the public duty to support the poor entrenches their dependent, subservient status rather than their dignity and independence. Shifting dependence from the context of private law to that of the individual’s relationship with the state via the welfare bureaucracy does not solve the problem and might actually exacerbate it.59

Indeed, a strictly Blackstonian property regime premised on owners’ libertarian claim to independence cannot plausibly gain omnilateral authorization. By contrast, a property system (or, more generally, a private law regime) premised on the autonomy-enhancing effects of a wide range of property institutions and contract types—a private law regime inspired by the utopian promise of private law articulated above—is a far more plausible candidate. Conferring on individuals the power to participate in the various practices constituted by the differing property institutions and contract types, in line with the prescriptions of structural pluralism, has a much better chance of gaining support due to the contribution of these legal (or law-like) artifacts to people’s (natural?) right to self-authorship.

But is such an autonomy-enhancing private law indeed worthy of omnilateral support? Two legitimate concerns may be grounds for hesitation, hence the two remaining objections from justice I need to address. One worry comes from neutrality. In endorsing self-authorship as private law’s ultimate value, and in privileging a limited (albeit not insignificant) number of private law institutions and shaping them as ideal forms of interpersonal interaction, so the argument goes, an autonomy-enhancing structural pluralism violates “the precept of state neutrality.”60

This critique can be read as referring to either concrete neutrality (“neutrality as a first-order principle of justice”) or neutrality of grounds (“neutrality as a second-order principle of justification”).61 Given that private law cannot plausibly give equal support to

all the possible arrangements people may want to make, private law’s structural pluralism seems to score quite high on the former, concrete front. Because law’s support makes a difference—very few private law institutions would look as they do and work as well as they do without the active support of law—private law necessarily favors certain types of arrangements to others. Furthermore, even regarding each specific form, private law cannot be neutral since 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 context. Finally, and most significantly, the obligation to provide a diverse menu of forms (accompanied, of course, by the commitment to broad freedom for further consensual tailoring) is less imposing than its alternative—the one-type-fits-all of traditional property or contract theories with their global, overarching principles.

The justification I offered for the structural pluralism of private law should also be broadly acceptable, hence my response to the critique from neutrality of grounds. To be sure, I recognize neutrality concerns regarding the use of self-authorship as the polity’s ultimate value. Exploring these critiques of perfectionist liberalism (or rather the thin version of it I endorse), or the sustainability of the alternative position—political liberalism—advocated by the critics, surely exceeds the scope of the present inquiry. For my purposes, suffice to note that the most significant critique of perfectionist liberalism as a form of disrespectful paternalism arises when state action does not seem necessary for the promotion of autonomy-enhancing conditions. My analysis of the gaps in Nozick’s utopia implies that private law’s structural pluralism involves no such paternalism; that the role of law, or a parallel law-like convention, is critical for securing the menu of viable options from which autonomous people should be able to choose. Furthermore, at least in the context of a power-conferring body of law that people can but need not invoke or use in pursuing their objectives, it is hard to envisage a plausible meaning of equal respect that downgrades people’s right to choose their path or authorizes their systemic subordination. Respecting all persons equally requires enabling each individual person to choose, or at least discover, his or her life plan.

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62 Moreover, private law should not even try to offer such support: as cognitive psychologists have shown, too many options may at times curtail people’s effective choice. See generally BARRY SCHWARTZ, THE PARADOX OF CHOICE: WHY MORE IS LESS (2004).

63 Consensual tailoring should be read in this context to include the category of “residual contracting,” namely, contracting outside of all available contract types. (The significance of a sufficiently salient and vibrant residual category of private arrangement may imply that the property doctrine of numerus clausus can be justified if, but only if, it includes a similarly residual category. Exploring this proposition is beyond the scope of this Essay.)

64 This paragraph draws on Dagan & Heller, supra note 20, at Part IV.A.

65 See JONATHAN QUONG, LIBERALISM WITHOUT PERFECTION 85-96 (2011).

66 It may not be a coincidence that critics of perfectionist liberalism sanction (in passing) legal practices that combat practices of (women) subordination and ensure people’s ability “to leave
These responses imply that the challenge from neutrality does not render private law’s structural pluralism unjust or illegitimate. They may, however, helpfully refine the noted obligation of private law to support a sufficiently diverse range of institutions within any given sphere of interpersonal activity. To preserve its legitimacy, private law’s supply of these multiple institutions should be guided not only by demand. Significant demand for certain institutions generally justifies their legal facilitation, but private law should respond favorably to innovations even absent significant demand. Of particular importance is private law’s support of innovations based on minority views and utopian theories, insofar as these outliers have the potential to add valuable options for human flourishing that significantly broaden people’s choices.⁶⁸

Even then, how can a structurally pluralist private law that is guided by a commitment to self-authorship rather than to distributive justice be legitimate, given the burdens it imposes on the have nots? Does it not end up, like its neo-Kantian rival, with the same unsatisfying scheme of a private law that pays too little attention to people’s mutual responsibilities and thus unlikely to be supplemented by a just system of tax and redistribution? This challenge—the last complaint from justice I address—may well be the most serious one, since I acknowledge that, like its neo-Kantian counterpart, a structurally pluralist private law is not directly motivated by distributive concerns. But certain distinctive features of structural pluralism discussed below make it much friendlier to distributive justice and point out to the specific conception of justice—distinct from both distributive justice and corrective justice—to which private law can and should apply. Furthermore, a just distribution of holdings cannot plausibly be the


⁶⁷ As Leslie Green claims, the position that grounds freedom in self-authorship and the view that the value of freedom is founded on authenticity “are not completely distinct,” because the former must recognize the significance of the “unchosen features of life” that “friends of authenticity” emphasize as “means to, or constituent parts of, various life plans,” whereas the latter must recognize the significance of choice associated with “friends of autonomy,” if not “in order to choose one’s path in life, then in order to discover it.” Leslie Green, *What is Freedom For?*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193674.

⁶⁸ This injunction is particularly important given the risk that the constructive perspective on our current practices that I espouse may end up as an apologetic exercise, co-opting the hegemonic way of thinking about collective action problems as if they inevitably need to be addressed with “modest pessimism about human motivation,” thus possibly exacerbating our blindness to more utopian alternatives. See Jedediah Purdy, *Some Pluralism About Pluralism: A Comment on Hanoch Dagan’s “Pluralism and Perfectionism in Private Law”*, 113 COLUM. L. REV. SIDEBAR 9 (2013). For further, more cultural responses to these (important) concerns, see Hanoch Dagan, *Property Theory, Essential Resources, and the Global Land Rush*, in GOVERNING ACCESS TO ESSENTIAL RESOURCES (Olivier De Schutter & Katharina Pistor eds., forthcoming 2014), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2302709.
only concern behind the veil of ignorance, and if structural pluralism indeed stands for the promise of utopia articulated above, it may even justify some “cost” in terms of just distribution.

The requirement to justify the distributive implications of our private law of holdings is deeply ingrained into the fabric of its account as a power-conferring body of doctrine. Recall that, in this account, private law’s recognition of our normative powers—notably the powers constituted by the practices of ownership and contract—is justified due to their contribution to our autonomy as self-authorship. But because these powers have a flip-side—other people’s liability—their facilitation can be legitimate only if, or more precisely only to the extent that, it can be justified to those who will be subject to them.69 This requirement seems particularly significant regarding ownership, because ownership’s normative powers are amenable to translation into power as influence, which may in turn generate autonomy-reducing effects.70

This is an onerous burden of justification. In certain contexts, as noted, it implies that some limitations or qualifications of owners’ rights are internal to property.71 Conceptualizing the right of self-authorship as the ultimate value of private law, however, entails even more direct distributive consequences. The law’s support for certain interpersonal interactions is justified by reference to their role in providing people with choices, yet this justification cannot be used to sanction only the variety of options the state currently affords the haves. Given that autonomy-as-self-authorship is a general, rights-based justification,72 it implies that every human being is entitled to such choices and that a sufficiently diverse set of options must be available to all.73 This injunction proscribes discriminatory limits on participation in private law practices. For example, the option of marriage must be available to people irrespective of their sexual orientation,


70 In other words: the duties and liabilities of nonowners—and thus their vulnerabilities—emerge (and in fact become intelligible) only given our decision to endorse the power-conferring institution(s) of property. See Morris R. Cohen, Property and Sovereignty, 13 CORNELL L.Q. 8, 11-14 (1927); Avihay Dorfman, Private Ownership and the Standing to Say So, 64 U. TORONTO L.J. (2014). For an attempt I find suspiciously apologetic to keep ownership’s associated powers separate from the power to acquire property, see Christopher Essert, Legal Powers and Ownership (unpublished Manuscript).

71 See text accompanying notes 43-44.

72 General, right-based justifications are distinct from two other types of justifications. As right-based justifications, they rely on an individual as opposed to a collective interest; as general justifications, they rely on the importance of an individual interest as such rather than on a specific event, as do special right-based justifications.

and people with disabilities must be properly accommodated in the workplace.\textsuperscript{74} Moreover, this injunction implies that law can legitimately enforce the rights of those who have property only if it simultaneously guarantees necessary or constitutive resources to those who do not.\textsuperscript{75} It thereby also helps to dispel the notion of property absolutism that is the nemesis of distributive justice.\textsuperscript{76}

These arrangements may still fall short of the degree of redistribution demanded by distributive justice. The burden of securing justice in holdings is still borne mainly by the mechanisms of tax-and-redistribution law, not only because these mechanisms are distinctly designed for this purpose but also because private law, at least in its structurally pluralistic rendition, delivers a distinct ideal of justice. This ideal is not about the fair distribution of holdings even though, at least to some extent, it may depend on it. Yet, it is not about safeguarding people’s independence and formal equality either, as in its neo-Kantian counterpart. Rather, a structurally pluralistic private law helps to establish our interpersonal relationships as free and equal persons committed to respect each other’s right to self-authorship, and thus entails a robust understanding of \textit{relational justice}.\textsuperscript{77}

Only a structurally pluralistic private law enables the thick institutions allowing for the many respectful interpersonal relationships conducive to everyone’s autonomy and indispensable to the ability of all individuals to be, at least to some extent, the authors of their own lives. This promise of private law as a framework for utopias is sufficiently valuable to gain independent significance behind the veil of ignorance.

\section*{VI. THE BASIC STRUCTURES OF SOCIETY}

The theme of our conference states that society’s “major social and political institutions,” which form the “basic structure of society,” are “subject to the requirements of justice, while what falls outside of the basic structure also falls outside the scope of justice.” It thus asks us to consider “the foundational question of whether or not private law… should be understood as ‘basic structure.’” But if my claims in this Essay are convincing, this conventional way of presenting the relationship between private law and social

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\item \textsuperscript{74} Cf. Sophia Moreau, \textit{What is Discrimination}, 38 PHIL. & PUB. AFF. 143 (2010).
\item \textsuperscript{76} See DAGAN, supra note 35, at 73-74.
\item \textsuperscript{77} For an elaborate statement of this conception of private law and its sharp distinction from the dominant liberal-egalitarian and corrective-justice-based accounts, see Hanoch Dagan & Avihay Dorfman, Just Relationships (unpublished manuscript); Hanoch Dagan & Avihay Dorfman, The Value of Private Law (unpublished manuscript).
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justice must be wrong, because it obscures the specific conception of justice to which private law can and should aspire.\textsuperscript{78}

Private law deals with interpersonal relationships. At its best, private law can facilitate mutually respectful relationships that are conducive to autonomy. The public schemes of resource allocation and reallocation, as well as of regulation, are often also needed to secure this task,\textsuperscript{79} but they are never sufficient.\textsuperscript{80} If justice requires, as I believe it does, to respect our individual right to self-authorship, and if this right requires law, as I insist it does, to set and support a sufficiently diverse set of valuable options for shaping interpersonal relationships, then private law has a unique task in the scheme of justice. Whereas private law partly relies on, and is also partly required to assist in achieving justice in holdings, the core irreducible mission of private law is to provide \textit{all of us} a diverse inventory of credible institutions of just interpersonal relationships intrinsically valuable for our self-authorship.\textsuperscript{81}

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79 Needless to say that these mechanisms are required in order to secure other, that is: self-regarding, forms of self-authorship.

80 \textit{See} Elizabeth Anderson, \textit{What is the Point of Equality}, 109 \textsc{Ethics} 287 (1999); \textsc{Scheffler, supra} note 78, at 191, 199-200, 203-206, 225-235.

81 This statement leaves open difficult questions regarding the potential tension, or even conflict, between the respective demands of relational and distributive justice. \textit{See} Dagan & Dorfman, \textit{Just Relationships}, \textit{supra} note 77.