The Public Dimension of Private Property

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INTRODUCTION

One of the most challenging questions in property theory is what makes private property private.¹ Is private property really private—that is, is it conceptually distinct from any public regulatory scheme? Or is private property merely a form of regulation, one that happens to delegate decision-making power to individuals (and corporations) in the service of the public good and to the extent of such service?

John Locke famously opted for the former alternative and even gave it a sharper edge, arguing that private property is in fact prior to law, indeed prior to any social contract on which the state and the law are founded. Property, in this view, cannot be understood as a product of the state’s regulatory power because it naturally prescribes and limits the scope of legitimate regulation.² Many years later, Bruce Ackerman presented a vivid example of the latter alternative, arguing that property law parcels out rights to use things ‘amongst a host of competing resource users’, where the ‘real question’ property’s ‘Scientific Policymaker’ faces is always ‘in whose bundle one or another right may best be put’ given a certain comprehensive view of the just society.³

Locke’s theory, insofar as it is aimed to establish the legitimacy of pre-political robust private property rights, is fraught with difficulties.⁴ Notable among them are the

¹ For the purposes of this article, I adopt Jeremy Waldron’s observation that rules of private property revolve ‘around the idea that contested resources are to be regarded as separate objects each assigned to the decisional authority of some particular individual (or family or firm)’. J Waldron, ‘Property Law’ in Dennis Patterson (ed), A Companion to Philosophy of Law and Legal Theory (Blackwell, 1996) 3, 6.
³ BA Ackerman, Private Property and the Constitution (Yale University Press, 1977) 26–27. For a survey of other such public conceptions of property, running from Pufendorf to Rawls, see D Attas, ‘Private Property’ in A Marmor (ed), Routledge Companion to the Philosophy of Law (Routledge, 2012) 277.
⁴ A more charitable, but inevitably much less ambitious, interpretation of the labour theory of property is along the lines of desert for productive labour. See S Buckle, Natural Law and the Theory of Property
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 remain, even if they suffer non-material harms; and the feeble contention that, by mixing one’s physical labour 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.\(^5\) By the same token, the idea underlying Ackerman’s claim that property is a ‘laundry list’ of rights with limitless permutations, a formless bundle of entitlements subject to policy-guided tinkering, has been convincingly critiqued. As the \textit{numerus clausus} principle demonstrates, at any given time property law offers only a limited number of standardised forms of property. Not only do ordinary people not buy into the idea of open-ended bundles of rights that policymakers reconfigure in order to make it ever more responsive to justice, but property law itself has never applied it either.\(^6\)

Rather than rehashing the arguments regarding these two polar positions, I hope to explain in this article in what sense property is indeed private and in what sense inevitably public. My starting point, and the subject matter of Part I, is the recent revival of Kant’s conception of private law in general and of property more specifically. This significant neo-Kantian enterprise avoids Locke’s most dubious claims and presents the most vigorous defence of the conceptual separation of private and public. Its critical analysis is also particularly valuable for the thesis of this article. Neo-Kantian theory helps to circumvent the difficulty posed by instrumental approaches such as Ackerman’s, which blur the distinction between private law adjudication and public law regulation.\(^7\) But neo-Kantians also make the much more ambitious claim of an airtight distinction between private and public law, and the exclusion of any collective or public value from our understanding of property or of its sister private law doctrines. This claim, I will argue, is both wrong and misleading. Though private property is not merely one of many regulatory technologies—and though private law, more generally, does have distinctive features—property and private law are significantly grounded in our social values.\(^8\)

Neo-Kantians are correct in emphasising the normative constraints entailed by the bipolar structure of private law. They helpfully highlight the prominent correlativity


\(^7\) The tendency to ignore the private nature of private law is particularly acute in some law and economics accounts of the common law. See eg RA Posner, \textit{Economic Analysis of Law} (Aspen Law & Business, 6th edn 2003) 383–5.

\(^8\) As the text implies, I use the terms ‘social values’; ‘collective values’ and ‘public value’ interchangeably.
characteristics of private law, involving considerable implications for our understanding of property. They are also correct when stating that brute instrumentalisation of private law may violate these constraints in a way that undermines its integrity and legitimacy. But preserving the integrity and legitimacy of private law adjudication neither requires nor substantiates the autonomy of private law or the irrelevance of our public values. Quite the contrary. As I argue in Part II and demonstrate in Part III, many so-called public values do, and in fact should, inform private law without undermining the normative significance of its bipolarity. Private law in general and property law more particularly rests on a moderately perfectionist and simultaneously pluralist view of society. True, the values underlying property and thus private law are by no means identical to those guiding public law. Furthermore, it is both descriptively and normatively wrong to assume that only one set of values necessarily underlies property law (let alone private law) in its entirety, or that these values are directly engaged by judges deciding specific cases. Nevertheless, private law, and thus property, is deeply involved in our social values, reflects them, and at times even participates in their formation.

I. A HEROIC FAILURE AND ITS VALUABLE LESSONS

A. Neo-Kantian Private Law Libertarianism

Neo-Kantians argue that a sharp distinction prevails between private and public law. For them no social purpose or social value, even if ostensibly desirable otherwise, can legitimately inform private law. Private law, in this view, is a realm with its own inner intelligibility, isolated from the social, economic, cultural, and political realms. This isolation derives from the bilateral logic of private law adjudication, understood as a unique forum for the vindication of infringed rights. As such, private law must comply with the injunction of correlativity, requiring both that the reasons underlying the plaintiff’s right be the same as the reasons that justify the defendant’s duty, and that these very reasons also explain the specific remedy inflicted on the defendant. The commands of correlativity, in this view, are so robust that they leave no space for any other (social) value.9

The claim that private law is not just a means for normative regulation, and hence the idea that intrinsic to private law are features that constrain the types of rules it can legitimately promulgate, is compelling. The reason is that private law (as law more generally) is a coercive mechanism, which means that it must also be a justificatory practice.10 For


10 On the dialectical relation between law’s coercion and its nature as a justificatory practice, see H Dagan, Reconstructing American Legal Realism & Rethinking Private Law Theory (Oxford University Press, 2013) 28–43.
private law, this implies that judges should be able to justify to defendants all aspects of their state-mandated power. Neo-Kantians helpfully emphasise the justificatory burden of private law adjudication as a bilateral interaction between a particular plaintiff and a particular defendant in which one party’s triumph is the other’s defeat. As they insist, private law should be able to justify to defendants both the identity of the beneficiary of any liability imposed on them and the exact type and degree (or magnitude) of that liability. The correlativity requirement answers exactly this concern insofar as it insists that the defendant’s liability and remedy correspond to the plaintiff’s entitlement.

Such correlativity indeed captures the distinction between private law and regulation, and thus seems an important feature of private law. But does correlativity mean that private law has, or should have, an inner intelligibility decipherable without recourse to social values? The canonical, if at times implicit, strategy for deriving this further thesis of private law autonomy from correlativity is to rely on the idea of property. Property, in this view, serves as a benchmark requiring no reference to our public values: while voluntary changes in the distribution of property obviously cannot generate any legitimate grievance, involuntary changes both justify owners’ complaints and specify the appropriate remedial response.11

Property is indeed a key, and perhaps even the key concept in private law. For property to serve as such a safe haven for private law autonomy, however, neo-Kantians—who surely realise that property is subject in law to competing interpretations and permutations—must defend a conception of property that is securely detached from social values. And indeed, this is precisely the approach that both Ernest Weinrib and Arthur Ripstein have recently advanced. Weinrib’s and Ripstein’s accounts of property, which I consider here jointly,12 call for a regime in which the state functions both as a guarantor of people’s pre-social—and thus necessarily 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’.13 Strong property rights and a viable welfare state, these authors claim, cluster as a matter of conceptual necessity.

The starting point of this analysis is Kant’s conception of the right to personal independence, which differs from other, more robust conceptions of autonomy, understood

11 See Weinrib, ‘Restitutionary Damages as Corrective Justice’ (n 9) 6–7, 12, 24.
12 Because the main purpose of this article is to use the neo-Kantian position in order to develop my observations regarding the public dimension of property, I do not pretend to offer a full description and assessment of this complex position on its own terms. Specifically, I leave out the sequential nature of the Kantian position and its insistence that property can only be characterised formally. Nor do I deal with certain key critiques of some aspects of the theory, notably its claim that independence necessarily requires absolute property rights, and its recourse to a welfare state as (again) the only possible solution to the problem of dependence, never considering the possibility that leaving enough public property (eg public land) may be a better though not ideal alternative. For this last line of critique, see JE Penner, ‘The State Duty to Support the Poor in Kant’s Doctrine of Right’ (2010) 12 British Journal of Political and International Relations 88.
as the ability to be the author of one’s life, choosing among worthwhile life plans, and
being able to pursue one’s choices. Kantian independence is inherently relational, and
is exhausted by the requirement that no one gets to tell anyone else what purposes to
pursue. ‘Autonomy can be compromised by natural or self-inflicted factors no less than
by the deeds of others; Kantian independence can only be compromised by the deeds
of others.’ This means that Kantian independence ‘is not a good to be promoted; it is a
constraint on the conduct of others, imposed by the fact that each person is entitled to be
his or her own master.’ Furthermore, because independence only requires that ‘nobody
else gets to tell you what purposes to pursue’, it ‘is not compromised if others decline to
accommodate you.’

This understanding of the right to independence is crucial because it explains why,
in this account, even when rights relate to issues beyond the physical organism of the self
they must be absolute. If people are to be allowed ‘to exercise their freedom by controlling
external objects of choice’, as they should, these objects must be under the sole discretion of
the choosing subject, so that all others must be bound by virtue of the power of the proprie-
tor’s unilateral will.15 As an ‘expression of [one person’s] purposiveness in relation to the
purposiveness of others’, the right to property must ‘limit the conduct of others in relation
to particular things’. ‘Your property constrains others because it comprises the external
means that you use in setting and pursuing purposes; if someone interferes with your
property, they thereby interfere with your purposiveness.’

But allowing ‘one person coercively to restrict another’s freedom through unilateral
acts that establish proprietary rights to exclude’ is problematic, because it allows the
proprietor ‘to subordinate others to his or her purposes’, and is thus ‘inconsistent with
innate equality of all.’ This difficulty is profound, as it threatens to undermine the very
independence for which property rights are introduced. A full-blown regime of such
rights of private property confines people’s ‘rightful possibilities … to what might be
left over from others’ efforts at accumulation’. This may make their ability to satisfy their
basic needs or even their survival ‘dependent on the goodwill or sufferance of others’,
or force them to subordinate themselves, ‘making [themselves] into a means for [these
owners’] ends’.

The introduction of property rights thus creates a ‘conceptual tension’ since these
rights are required by the right to independence, but they also threaten this inde-
pendence. This impasse can only be broken by a transition to ‘the civil condition of
law-governed society’, which fulfils the (public!) duty to support the poor. In other
words, pace Locke, ‘a purely unilateral act of acquisition can only restrict the choice of all
other persons against the background of an omnilateral authorization, which is possible

14 A Ripstein, Force and Freedom: Kant’s Legal and Political Philosophy (Harvard University Press, 2009) 14, 34,
45.
15 See Weinrib (n 13) 275.
16 See Ripstein (n 14) 91, 93.
17 See Weinrib (n 13) 276–7, 283.
only in a condition of public right’.18 ‘The sovereign’s assumption of the duty to support the poor makes up for the possible inaccessibility of the means of sustenance’ and thus eliminates ‘the danger of being reduced to a means for others’. Furthermore, because the duty to support the poor is aimed at resolving the ‘systemic difficulty that property poses’, it is a ‘collective duty imposed on the people’, so that ‘no one’s subsistence is dependent on the actions of others’. In this way, although the poor are only ‘beneficiaries of a duty’ (they cannot have a right to subsistence since they cannot coerce the state, which is the ultimate repository of legitimate coercive power), the operation of this duty re-establishes people’s non-dependence.19 Indeed, ‘the only way that property rights can be made [legitimately] enforceable is if the system that makes them so contains a provision for protecting against private dependence’.20

This ‘civil condition is formed through a social contract … that unites the will of all’. To be sure, this social contract ‘is not a historical event’. Rather, it is ‘an idea of reason in terms of which the legitimacy of the state can be conceived’. Indeed, it is this ‘notional union of all wills’ that ‘transforms the external acquisition of unowned things from a merely unilateral act on the part of the acquirer to an omnilateral act, to which everyone as possible owners of property implicitly consents and whose rights-creating significance everyone acknowledges’.21 No valid social contract can be formed if some people ‘are completely beholden to the choice of another’, as is the case with no public duty to support the poor, because ‘the person who can only occupy space with the permission of others has no capacity to set and pursue his or her own purposes’.22 But while the legitimacy of private property requires that the state, through the legislature, indeed take upon itself the duty to support the poor, it is not dependent upon the details of this tax legislation. As long as that legislation ‘is not an instance of one person unilaterally choosing for another’ but rather of ‘the public purpose of creating and sustaining a rightful condition’, the result is legitimate. More specifically, as long as ‘everyone acts in his or her official capacity, the result is … not arbitrary from the standpoint of freedom’ even if it is not ‘the one that is most advantageous to you, or even to everyone’. Once ‘the legislature acts within its powers, the result is not merely unilateral’, and the ‘details of legislation’ are ‘accidental from the standpoint of right’.23

B. Mission Impossible

The neo-Kantian account of property offers the most sophisticated version of an attractive strategy for reconciling the two most fundamental liberal values of liberty and

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18 See Ripstein (n 14) 90. For a view in which this is also Locke’s position, see J Waldron, ‘Nozick and Locke: Filling the Space of Rights’ (2005) 22 Social Philosophy and Policy 81.
19 Weinrib (n 13) 284–5, 288.
20 Ripstein (n 14) 278.
21 Weinrib (n 13) 278, 280.
22 Ripstein (n 14) 279–80.
23 Ibid 192, 197-98.
equality, notwithstanding their inherent tension. The basic idea is a division of labour between public law and private law. The concern for the well-being or, for neo-Kantians, the independence of other people, is solely the responsibility of the government, through its tax and redistribution mechanisms. By contrast, individuals are not required to treat others with care or concern in utilising their private property. On the contrary, insofar as they do not harm anyone, they are entitled to a self-interested attitude.

Such a division of labour between public and private law seems appealing. Some say that it is the only way of preserving personal liberty, leaving the agent’s moral private space free of claims from others while remaining loyal to the egalitarianism entailed by the fundamental liberal maxim of equal concern and respect. Others argue that it is preferable on welfarist grounds, because tax-and-transfer mechanisms are always, or at least typically, the most efficient way of redistributing welfare. It has been convincingly demonstrated elsewhere, however, that both lines of argument against incorporating distributive concerns into our private law are in fact context-dependent. Is the neo-Kantian school of private law libertarianism more viable?

I will argue that it is not. To see why, consider two significant and related ambiguities of our neo-Kantian accounts. The first concerns the threat that robust, indeed absolute, property rights pose to propertyless people. On the one hand, our Kantians seem to recognise that ownership is a source of economic and therefore social, political and cultural rights and powers, the correlative of which are other people’s duties and liabilities. Thus, they broadly define this threat as one of potential dependence that may apply, for example, as they themselves seem to acknowledge, to the numerous cases of propertyless workers who only rent living space or even live on the employer’s land without renting. This broad understanding of the threat posed by absolute property rights explains why neo-Kantians reject, and rightly so, Locke’s claim that unilateral...

24 On this tension, see eg I Berlin, Introduction to Four Essays on Liberty (Oxford University Press, 1969).
29 This truism is one of the most important contributions of legal realists to property theory. See MR Cohen, ‘Property and Sovereignty’ (1927) 13 Cornell Law Quarterly 8, 11–14; RL Hale, ‘Coercion and Distribution in a Supposedly Non-Coercive State’ (1923) 38 Political Science Quarterly 470, 470–9. Neo-Kantians sidestep the claim that expanding one person’s range of choices by allowing property rights in external object potentiality limits another’s. See Ripstein (n 14) 61–63. This move has been effectively criticised elsewhere. See Waldron (n 5) 115–17, 423, 425–7, 430–9, 444–5. But see JE Penner, The Idea of Property in Law (Oxford University Press, 1997) 206–7. Be that as it may, neo-Kantians concede that the legitimacy of these rights, as noted, ultimately depends on showing that universal non-domination can nonetheless be secured. The plausibility of success at this task, which they recognise as essential, is the target of my critique.
acquisitions entailing no *material* disadvantage are easily justified. As they explain, in order to justify placing others ‘under a perfectly general obligation to refrain from using an object’, we need to satisfactorily ‘engage the issue of freedom’.  

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

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

If the only problem that needs to be addressed is survival or access to means of sustenance rather than the independence of the propertyless in a world where property relations significantly affect interpersonal power, or if the only requirement we can pose to a putative solution is one of form rather than substance, the justificatory challenge faced by private law libertarianism is easily met. But if omnilateral authorisation is not

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30 See Ripstein (n 14) 98.
to be reduced to an ideological device of legitimation, the broad, even if hypothetical, consent it stands for must be plausible. This means that survival and the satisfaction of basic needs cannot be our only concern, and procedural adequacy cannot exhaust the justificatory burden at stake.33 Given the threat of dependence posed by property rights, and the far from optimal response of contemporary legislatures and governments to poverty, private law libertarians can justify a private law regime of absolute property rights only if they can plausibly demonstrate that the public law of tax and redistribution can substantively meet the problem of dependence, broadly defined. In other words, they need to demonstrate that public law is likely to supplement private law with rules that would adequately remedy the injustices of a libertarian private law, at least in terms of interpersonal dependence if not in terms of distribution, so that omnilateral consent can be plausibly assumed.

This burden of persuasion is insurmountable for three reasons. The first is quite straightforward. The realities of interest group politics in the promulgation of tax legislation in liberal democracies make egalitarian tax regimes, such as one based on Rawls’s difference principle, a matter of political theory and not of empirical reality. Rather than being a contingent failure, this unfortunate result is built into the idea of democracy. Democratic legislatures are expected to reflect the ‘grammar of democratic politics’ which is ‘a hybrid of preferences and reasons’.34 Thus, there is a critical difference between justice and democracy: while ‘justice conceptually can count preferences as relevant reasons’, democracy ‘must always take (some) account of people’s preferences’.35 As long as these preferences diverge from what justice demands, their translation into legislative pronouncements is likely to fall short of what a just scheme of tax and redistribution requires.

Whereas the first reason is not unique to a regime of private law libertarianism, the second reason for doubting the viability of this strategy is. Not only does private law libertarianism reflect the noted usual disparity between our distributive ideals and the real-life consequences of redistribution through public law, but it is also likely to exacerbate them due to the pivotal role of our understanding of property in defining mutual legitimate claims and expectations in our daily interactions. I address these cultural effects of property (and their limits) in some detail elsewhere.36 For my current purpose, it is enough to claim that if our understandings of the responsibilities of owners and the limits of what we perceive to be the legitimate interests of owners are influenced to some

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33 In other words, a plausible social contract cannot rely on formal equality given the severe threat of significant substantive inequalities.
35 RE Goodin, ‘Democracy, Justice and Impartiality’ in K Dowding, RE Goodin and C Pateman (eds), Justice and Democracy (Cambridge University Press, 2004) 97, 104. Obviously, this proposition does not imply the collapse of democratic politics into the logic of the market. Rather, it implies that democratic politics is situated ‘between the realm of the market (that focuses on preferences) and that of the law (that must always strive for public-regarding justification)’. See Dagan (n 34) 356.
36 See Dagan (n 28) ch 6.
extent by the conception of ownership applied by our private law, the self-regarding attitude generated by extreme private law libertarianism may undermine the hope for endorsing policies that would appropriately target the requirements of distributive justice when we come to shape our public law.

I am not disputing the significant advantages that the impersonal and general tax and redistribution mechanisms typically enjoy when addressing the challenge of distributive justice. Nor do I deny that people can and often do apply different, and at times even opposite, standards in different normative spheres. Yet our stance in one sphere may sometimes affect our stance in another, and in such cases we should take such external consequences into account. The possibility that an extreme libertarian private law regime might undermine social solidarity and dilute people’s responsiveness to claims from distributive justice is, I believe, a case in point. People who are not required to pay any attention to others’ fate in every action affected by private law, that is, in their numerous inter-personal interactions, are likely to doubt or belittle the legitimacy of others’ claims to significant fragments of their resources when the tax collector asks his due.37 Exact correspondence between these underlying values of private law and of the public law of tax and redistribution is, as noted, not required and even undesirable, as shown in section II.B, but complete divergence in this context is probably impossible. While acknowledging the important benefits of general and anonymous public law beneficence, private law should beware of entrenching attitudes that might hinder a just public order.38

Finally, even if a sufficiently redistributive tax scheme miraculously emerged, it seems unlikely that it could sufficiently erase the distortions of a private law libertarian system in terms of unjustified interpersonal dependence, namely, in terms of freedom. Quite the contrary, treating the propertyless as passive recipients of welfare, mere beneficiaries of the public duty to support the poor, entrenches their dependent, subservient status rather than their dignity and independence. Even if government largesse is recognised as an entitlement, dependency does not evaporate but shifts instead from the context of private law to that of one’s relationship with the state via the welfare bureaucracy. (I am not arguing that the welfare state should be dissolved. Indeed, its difficulties notwithstanding, a welfare state is superior to a society in which poverty is ameliorated solely through charity.39 My point is that, by pushing the entire burden of social responsibility

37 See H Dagan, Unjust Enrichment: A Study of Private Law and Public Values (Cambridge Studies in International and Comparative Law, 1997) 39. For the way in which our ideas of justice are affected by our perception of the relationship generally prevailing in the set of people within which the distribution is going to occur, see David Miller, ‘Distributive Justice: What the People Think’ (1992) 102 Ethics 555, 590.
and distributive justice to the welfare state, neo-Kantians do not avoid the problem of dependence.\(^{40}\)

The neo-Kantian response to this concern is that ‘dependence involves a relationship with someone who, without breaching a duty, can withhold a benefit necessary for one’s survival’, and that because the state is under a duty to support the poor and ‘has no motivation to withhold support’, the receipt of state support ‘does not make the needy subservient to the will of others’.\(^{41}\) This response is tellingly articulated without mentioning the bureaucrats who run the welfare system and premised on a rather surprising analogy to the parent-child relationship,\(^{42}\) but is clearly far removed from everything we know about the workings of modern welfare states.\(^{43}\) In order to make it somewhat more reliable, neo-Kantians should have at least advocated a radical reform of the welfare system to, for instance, one providing universal rather than means-tested entitlements, so as to avoid marking anyone as dependent. But even this reform would not have necessarily eliminated dependency given the features and dynamics of governmental bureaucracies.\(^{44}\) The notion of a welfare state without dependence is so detached from real life and from almost any imaginable welfare system run by real people as to become sheer window-dressing for an arrangement that would most likely generate widespread human dependence.

II. PRIVATE PROPERTY WITH SOLID PUBLIC FOUNDATIONS

While endorsing the position that private law should not be collapsed into just another form of regulation, I have tried to show that private law cannot, and indeed should not, have its own inner intelligibility. I now attempt to demonstrate that private law can take correlativity seriously while acknowledging, indeed celebrating, the crucial role that our social values play in its constitution. More specifically, I contend that property law responds both to the correlativity requirement typical of private law and to the social values appropriate to the pertinent category of human interaction, which define both the plaintiff’s entitlement and the defendant’s (correlative) liability.

A. Social Values and Correlativity

The failure of the neo-Kantian endeavour to provide context-independent, secure starting points for the bipolarity constraint of private law to rely upon does not mean

\(^{40}\) *Ibid* 212–21, 236–7. There is, of course, no contradiction between the claim that the welfare state does not solve the problem of dependence and the proposition that it is still overall desirable. Rather, this tension only highlights the implausibility of the position that independence can, indeed must, be the sole normative premise of our civil society and its laws.

\(^{41}\) See Weinrib (n 13) 288.

\(^{42}\) See Ripstein (n 14) 194.


\(^{44}\) This is particularly true in the neo-Kantian utopia where the poor have no enforceable rights.
that such starting points are unavailable. Quite the contrary. I argue that our social values legitimately and indeed properly determine the initial entitlements of private law, from which correlativity is measured.\(^45\) This role of our social values is, however, limited to the task of prescribing private law rules (for our purposes: justifying property law entitlements). Thus, my claim should not be confused with the discredited contention that in evaluating individual cases judges should make ad hoc judgments based on these values.\(^46\)

The correlativity injunction precludes assertions that the plaintiff’s right is simply the ‘analytic reflex’ of the defendant’s duty (or vice versa).\(^47\) It thus commends that it is not enough for a plaintiff to demonstrate the desirability of the state of affairs that would result if the type of complaint she raises were to generate the remedy sought. Rather, a private law plaintiff has an additional justificatory burden: to give reasons why people in her predicament should be entitled to extract from people in the defendant’s category the kind of remedy she now requires. This additional hurdle is obviously crossed in some cases, as in the paradigmatic case of an injured plaintiff seeking a remedy from a defendant who negligently caused her harm. But some cases are more challenging, as, for instance, when the defendant can plausibly ask ‘why me?’ (why should she be forced to be the agent of remedying the plaintiff’s unjustified harsh predicament?), or ‘why you?’ (why should the plaintiff be allowed to invoke the state’s machinery to remove an unjust privilege that the defendant currently holds?). Moreover, even if the plaintiff has good answers to both questions, she still needs to justify her entitlement to the specific measure of recovery she seeks to impose on the defendant.

Insofar as our social values inform our ideals regarding the relationship between the plaintiff and defendant categories (as, for example, spouses, neighbours, co-owners, members of the same community, transactors, competitors or drivers and pedestrians), they can and indeed should also inform the answers to this set of questions. Social values that are credibly relevant to these normative inquiries—‘internal’ social values—define the ex ante entitlements of the litigating parties and hence their bilateral legitimate expectations. They serve as the foundation of the parties’ bilateral relationships. Therefore, they are significantly different from other, ‘external’ values or public policies whose guidance is more problematic to private law, since they impose on the parties goals alien to their bipolar relationship.

Admittedly, internal social values are at times premised on socially contingent facts: the understandings that people, here and now, attach to types of interpersonal arrangements or to their holding certain types of resources. But the fact that these values may be local rather than universal does not necessarily dilute their normative significance, or imply that a legal regime that relies on such values unreflectively entrenches our contingent reality. Many social practices that are absent from or insignificant in other social

\(^{45}\) This section follows Dagan (n 10) chs 5 and 7.II.B.

\(^{46}\) I discuss this last point at some length elsewhere. See Dagan (n 10) 201–11.

\(^{47}\) See Weinrib, The Idea of Private Law (n 9) 124.
environments, other places, and other eras may well provide us with invaluable channels of self-expression or with means that expand our options and allow us to achieve objectives that would otherwise be unattainable. Because these practices are justifiably valuable, private law is justifiably deferential to these socially contingent facts.

Yet, by no means does it follow that we must blindly accept the contingent content of our social world. Quite the contrary: although private law often relies on contingent social practices and persuasions, it can and should lead us to constantly reexamine their value. Making private law’s reliance on our social values explicit helps us realise that in order to validate our current practices we need to justify these conventional values. The requirement of justification is always potentially challenging to some of our social practices since it requires a respectable universalistic façade at the very least, an idealised picture that can be, and often is, a fertile source of social criticism because it sets standards that our current practices do not necessarily live up to. The idealism of our social world, even if hypocritical, is the best source of any critical engagement. Indeed, thus used, private law’s reliance on social values not only avoids the risk of reifying contingent choices, but can also actively participate in reforming our non-ideal social reality by helping us see the gaps between existing doctrinal rules and their justificatory premises, thus forcing us to rethink those cases in which the law does not live up to its latent ideals.

Neo-Kantians reject the notion that correlativity is situated within—or, more precisely, founded upon—a thick layer of social values. Thus, Weinrib argues that the reasons for the parties’ entitlements—and not only the entitlements themselves—should be correlative, namely: that these reasons themselves must be entirely internal to the parties’ relationship. But this additional requirement of relational reasons is excessively demanding and unwarranted. The bipolar form of private law is only one (important) object of the justificatory burden prompted by each application of state coercion.

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52 Even Weinrib recently acknowledged that ‘[i]n adjudication, a court combines these two dimensions by projecting its own omnilateral authority onto the parties’ bilateral relationship … thereby extend[ing] the significance of its decision beyond the specific dispute, making it a norm for all members of the state’. EJ Weinrib, ‘Private Law and Public Right’ (2011) 61 University of Toronto Law Journal 191, 196. The implications of the omnilateral dimension for adjudication, however, are exhausted, in Weinrib’s view, by the requirements of ‘publicness’, namely: ’exhibiting justifications for liability that are accessible to public reason’, and ‘systematicity’, that is: ‘acting within its competence as an adjudicative body’ and making ‘[t]he principle of the decision … cohere with the entire ensemble of similarly binding decisions’ (196–8). Limiting the implications of the practice of precedent in this fashion is puzzling, given the significance of these forward-looking effects of adjudication. Do judges have no substantive duty to justify their decisions to those who will be subject to them, even if they are not participating in the judicial drama at hand?
Therefore, although cases in which the reasons for the parties’ entitlements are correlative are indeed easier cases insofar as the integrity of private law is concerned, this does and should not imply that they are the only cases, or that we should a priori assume that even if the reasons are not correlative, their implications with respect to the parties’ entitlements will not be sufficiently convergent. In other words, private law’s bipolar form should not be entitled to exclusivity in determining the types of normative considerations we must take into account; it should not be allowed to overwhelm our justificatory inquiry. Hence, no fast and easy way is available for determining the limits of private law. Each type of case requires a careful account of the reasons for and against recognising the plaintiff’s entitlement vis-à-vis the defendant. These very reasons, it is important to add, are of the kind neo-Kantians try to exclude from private law, namely: whether law’s endorsement of such claims supports or distorts the ideal construction of the type of relationship under consideration and whether using private law in this way is both necessary and overall conducive to the public purpose at hand.

The practical implications of this additional inquiry are limited, but they are by no means trivial. Indeed, because I take seriously the requirement that the plaintiff give reasons why someone in her predicament should be entitled to extract from someone like the defendant the kind of remedy she now requires, my position does not collapse into blunt instrumentalism. Thus, the conclusion in some cases is that allowing a private law claim of the sort required would be unjust, even when likely to bring about a desirable state of affairs. And yet, a complaint in private law may still, at times, justifiably involve the interests of numerous other potential plaintiffs, so that the actual plaintiff serves as a so-called private attorney general. Likewise, it may justifiably target many or all members of a group who have profited from a risky activity in which the plaintiff was injured. Neither feature should necessarily prevent the complaint from proceeding if (but only if) the justificatory burden of showing the desirability of allowing it in its private law form is, on balance, properly met.

To conclude: private law in general and thus property law more particularly are structured as a drama between plaintiff and defendant. Therefore, if it is to retain its nature as a justificatory practice, this private feature of property law requires correlative between the defendant’s liability and the plaintiff’s entitlement. This concession, however, does not entail the dissociation of property law from our public values. Quite the contrary: the pivotal role of property law in defining our mutual legitimate claims and expectations in our daily interactions undermines the legitimacy of a property law regime that ignores these values. For this reason, the parties’ ex ante entitlements, from

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54 As in cases seeking market-share liability, see Sindell v Abbott Labs, 607 P 2d 924, 935–8 (1980).

which this correlativity must be measured, are best analysed by reference to our social values.56

B. Property as Institutions

Property law as we know it adequately reflects these conclusions. Rather than a uniform bulwark of independence, as portrayed by the neo-Kantians, property manifests itself in law in a much more nuanced, contextualised and multifaceted fashion. In what follows I sketch a conception of property which takes the heterogeneity of our existing property doctrines seriously. This conception, which I defended at length in my book, Property: Values and Institution,57 understands property as an umbrella for a limited and standardised set of property institutions, which serve as important default frameworks of interpersonal interaction. All these property 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 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 content of an owner’s rights vis-à-vis others, or a certain type of others, with respect to a given resource.

The particular configuration of these entitlements is by no means arbitrary or random. Rather, it is (at least at its best) determined by the character of the property institution at issue, namely: by the unique balance of property values characterising it.58 These values both construct and reflect the ideal ways in which people interact in a given category of social contexts, such as market, community, family and with respect to a given category of resources, such as land, chattels, copyright, patents. The ongoing process of reshaping property as institutions is typically rule-based and usually addressed with an appropriate degree of caution. And yet, the possibility of repackaging, highlighted by Hohfeld,59 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.


57 See Dagan (n 28).

58 Some may worry that relying on such plural values may still generate normative indeterminacy which opens the door to decision-makers’ subjective preferences. I address this concern in Dagan (n 10) 211–22.

Some property institutions are structured along the lines of the Blackstonian (and Kantian) 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, such as marital property, to be discussed below, a more communitarian view of property may dominate, with property as a locus of sharing. In yet many others along the strangers-spouses spectrum, shades and hues will be found. In these various categories of cooperative property institutions, both liberty and community are of the essence, and the applicable property configuration includes rights as well as responsibilities.

Thus, property law supports a wide range of institutions that facilitate the economic and social gains possible from cooperation. Some of these institutions, such as a close corporation, are mostly about economic gains, including securing efficiencies of economies of scale and risk-spreading, with social benefits merely a (sometimes pleasant) side-effect. Other institutions, such as marriage, are more about the intrinsic good of being part of a plural subject, where the raison d’être of the property institution refers more to one’s identity and interpersonal relationships, while the attendant economic benefits are perceived as helpful by-products rather than the primary motive for cooperation. The underlying characters of the divergent relationships prove to be the key to explaining the particular property configuration that serves as the default for the property institution at hand.60

Thus, property law appropriately facilitates the ‘sphere of freedom from personal ties and obligations’61 constituted by the impersonal norms of the more market-oriented property institutions. It does not, however, allow these norms to override those of the other spheres of society. Property relations mediate some of our most cooperative human interactions as spouses, partners, members of local communities, and so forth. On its face, these types of interactions can be facilitated by contractual arrangements between despotic owners. But at least in a liberal environment where exit is always legally available, these more cooperative types of interpersonal relationships involve vulnerability. In other words, imposing the impersonal norms of the market governing the fee simple absolute on these divergent spheres might have effectively erased or marginalised these spheres of human interaction and human flourishing. Indeed, in order to remain viable alternatives for human interaction and flourishing, these property institutions rely on law’s supply of robust default mechanisms (particularly anti-opportunistic devices).62

Property institutions vary not only according to the social context but also according to the nature of the resource at stake. The resource is significant because its physical

60 See Dagan (n 28) ch 10.
62 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 in order to overcome these obstacles. But in many other categories of cases, law’s active support is likely to be a sine qua non. See generally Dagan (n 28) chs 2, 8–10; H Dagan, ‘Inside Property’ (2013) 63 University of Toronto Law Journal 1, 8–10.
characteristics crucially affect its productive use. Thus, for example, the fact that information consumption is generally non-rivalrous implies that, when the resource at hand is information, use may not always necessitate exclusion. The nature of the resource is also significant in that society approaches different resources as variously constitutive of their possessors’ identity. Accordingly, resources are subject to different property configurations: whereas the law vigorously vindicates people’s control of their constitutive resources, the more fungible an interest, the less emphasis property law will need to place on its owner’s control.

Indeed, unlike the neo-Kantian conception of property, the understanding of property as institution implies an acknowledgement of the significance of social values to property. As just noted, each one of our property institutions targets a specific set of values to be promoted by its constitutive rules in one subset of social life. Both the existing categories and their underlying regulative principles are always subject to debate and reform, so that some institutions may fade away while new ones emerge and yet others change their character or split. (This dynamic feature of property and private law more generally assures that understanding property as encapsulating ideals of interpersonal interaction is a source of critical engagement and reform.) But at any given moment each such institution consolidates people’s expectations regarding a core type of human relationship so that they can anticipate developments when entering, for instance, a common interest community or marriage or invading other people’s rights in a specific form of intellectual property. Thus, a set of fairly precise rules and informative standards governs each of these types of property institutions, enabling people to predict the consequences of future contingencies and to plan and structure their lives accordingly. Furthermore, our property institutions also serve as means for expressing normative ideals of law for these types of human interaction. Both roles—consolidating expectations and expressing law’s ideals—require some measure of stability: to form effective frameworks of social interaction and cooperation, law can recognise a necessarily limited and relatively stable number of categories, whose content must be relatively standardised. The standardisation prescription is particularly stringent regarding the expressive role, which mandates limiting the number of legal categories because law can effectively express only a given number of ideal types of interpersonal relationships. Indeed, the standardisation of property noted at the outset is justified because of the role our property institutions play as default frameworks of interpersonal interaction which serve to consolidate expectations as well as to express the law’s normative ideals for core types of human relationships.

Property’s perfectionism is by no means an antithesis to individual autonomy. In fact, property as institutions is premised on a robust conception of autonomy, understood as people’s ability to be the authors of their life, choosing among worthwhile life

63 See text at n 6.
64 See generally Dagan (n 28) ch 1.
plans and being able to pursue one’s choice. As Joseph Raz explains, autonomy requires not only appropriate mental abilities and independence but also ‘an adequate range of options’. While a wide range of valuable sets of social forms is available to societies pursuing the ideal of autonomy, autonomy ‘cannot be obtained within societies which support social forms which do not leave enough room for individual choice’. For choice to be effective, for autonomy to be meaningful, there must be (other things being equal) ‘more valuable options than can be chosen, and they must be significantly different’, so that choices involve ‘tradeoffs, which require relinquishing one good for the sake of another’. Thus, because autonomy admits and indeed emphasises ‘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

Given the diversity of acceptable human goods from which autonomous people should be able to choose and their distinct constitutive values, the state must recognise a sufficiently diverse set of robust frameworks for people to organise their lives. And because many of these plural values cannot be realistically actualised without active support of viable legal institutions,66 law should facilitate (within limits) a structurally pluralist private law. Property as institutions—the conception of property which best accounts for the property law we actually have—follows this prescription by including different and sufficiently diverse types of institutions, each incorporating a different value or different balance of values. 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.

The boundaries between the various property institutions are open, enabling people to freely choose their own ends, principles, forms of life and associations by navigating their way among them. And—subject to the legitimate verification interest of third parties67 (and to other garden-variety limitations of freedom of contract)—most of their constitutive rules are defaults,68 and are thus subject to a relatively wide scope of contractual freedom.69 These further features, of choice among various property institutions and the choice within each one of these institutions, enables property law to

66 See n 62 and accompanying text.
68 Even the traditionally immutable areas of marital property and servitudes are recently shifting from mandatory to default rules. See American Law Institute, Principles of the Law of Family Dissolution: Analysis and Recommendations (2002) ch 7 (‘ALI Principles’); Restatement (Third) of Servitudes §§2.1, 2.4, 2.6, 3.2 (2000).
69 Freedom of contract enables people to use property institutions for types of interpersonal relationships very different from those anticipated by their constitutive default rules, at least within limits. Thus, although the law may not facilitate using marital property for what is ex ante defined as a short-term interaction, it does recognise, for example, a relatively broad range of uses for the two most dominant forms of land-holding: the fee simple absolute and the common interest community.
adequately recognise and promote the autonomy-enhancing function of pluralism and
the individuality-enhancing role of multiplicity.70

While this conception of autonomy is importantly distinct from the Kantian notion
of independence,71 a commitment to human independence should not find such mul-
tiplicity objectionable; quite the contrary. Pace Weinrib and Ripstein, independence
neither necessitates the hegemony of the fee simple absolute, the property institution
that best vindicates independence, nor undermines the value of other, more communi-
tarian or utilitarian property institutions. To be sure, the eradication or marginalisation
of the fee simple absolute could well have threatened liberal ideals about property.
Insofar as this property institution remains a viable alternative, however, the availabil-
ity of several different but equally valuable and obtainable proprietary frameworks of
interpersonal interaction makes autonomy more meaningful instead of undermining
it. Indeed, because free people have diverse ends and because diverse forms of property
are necessary to realise those ends, a liberal law must reject the property monism advoc-
cated by neo-Kantians in which the goods pursued by alternative forms of interpersonal
interaction may be crimped. Because only property as institutions takes seriously law’s
obligation to facilitate multiple forms of interpersonal interaction, it is the only truly
autonomy-enhancing conception of property.

Admittedly, property as institutions falls short of the degree of redistribution
demanded by justice (in line with my acceptance of some differentiation between pri-
ivate and public law, property as institutions is not guided by a comprehensive view of
justice à la Ackerman). The bulk of the burden of promoting distributive justice is, as it
should be, borne by the mechanisms of tax-and-redistribution law, which are distinctly
designed for this purpose. And yet, property as institutions still makes some, even if lim-
ited, contribution to distributive justice. By devising attractive property institutions that
facilitate cooperation among free individuals and serve as the infrastructure of meaning-
ful, constitutive liberal communities, property as institutions—which merely presents
our own property law in its best light—can help support the cultural alliance of prop-
erty with social responsibility and solidarity.72 Property as institutions also helps dispel
from public consciousness the notion of property absolutism that, notwithstanding the
heroic efforts of Weinrib and Ripstein, is the arch-enemy of distributive justice.73 Finally,
because property as institutions insists that the specific configuration of entitlements
typical to owners of property rights is always prescribed by the regulative principle of
the property institution at hand, it makes the value or balance of values that justify
law’s support of such institution always determinative in our property discourse. But

70 See Dagan (n 10) ch 8.
71 See text at n 14.
72 Even Robert Nozick, the most eloquent spokesperson of libertarianism, recognised the legitimacy of using
law as a means for giving public expression to our bonds of concern and solidarity with others. See R
73 See text at nn 34–44.
as Jeremy Waldron demonstrated, many of these values—notably autonomy and personhood—entail significant distributive implications: to the extent that we justify law’s enforcement of the rights of those who have property by reference to these general right-based justifications of property,74 we must simultaneously guarantee necessary—as well as constitutive—resources to those who do not.75 (I return to this point in section III.B below.)

III. TWO CASE STUDIES

With these theoretical observations at hand, I turn now to two examples I intend to use as case studies which demonstrate the public dimension of private property—namely: its reliance on social values—as well as the limited, but important, sense in which it is distinctly private, distinguishable from regulation, as captured by the injunction of correlativity. I have chosen these specific examples because they help to demonstrate features of the public dimension of private property that are particularly important for this article. The first focuses on the distinction between internal and external social values; the second further refines this distinction, insisting that values that at times seem public through and through are in fact constitutive of a given property institution, and are thus properly part of its private law elaboration.76

A. Marital Property77

The starting point for any modern discussion of marital property law (at least in liberal democracies) must be the rule of equal division upon divorce. Although this is a relatively late rule in marital property law, we can now hardly think of marital property law without equal division, which is probably the feature least contested by courts, commentators and lay people alike, at least on theoretical grounds.78 It is therefore surprising that the underlying justification for equality is far from settled.

74 General, right-based arguments for private property such as autonomy and personhood are distinct from two other types of arguments. As right-based arguments, they rely on an individual interest as opposed to a collective one; as general arguments, they rely on the importance of an individual interest as such rather than on a specific event, as do special right-based arguments.
75 See Waldron (n 5) 115–17, 423, 425–7, 430–9, 444–5.
76 My case studies also cover a great deal of doctrinal domain: marital property, common interests communities, leaseholds and public accommodations. And elsewhere I have demonstrated the parallel role of our social values in constructing the regulative principles of numerous other property (and intellectual property) institutions. See generally Dagan (n 28); Dagan (n 62). If successful, these accounts preclude the possibility of marginalising the understanding of property as institutions to property’s periphery and insisting that property’s core complies with a monistic logic. See also Dagan (n 10) ch 8.
77 For a more comprehensive account, on which this part relies, see Dagan (n 28), ch 9.
The main justification offered for this rule fits a conception of property which does not refer to, let alone rely on, any social vision of the ideal marriage. Rather, it rests on an understanding of property as a realm of interaction between autonomous individuals holding absolute property rights, and it invokes the contribution theory that, in the Lockean tradition, stands for pre-legal notions of justice. Equal division, in this view, simply reflects an accurate valuation of both spouses’ contribution, taking into account non-market work and interpersonal support.

But this seemingly appealing explanation is factually implausible. The non-market contribution and the interpersonal skills of the spouse with less market power would not, ordinarily, equalise the significant differences in market power unfortunately pervading social life. To be sure, the intuition to equalise marital contributions taps into a deep truth of marriage: it would be inappropriate for one spouse to think of the other as an unequal partner, as a free-rider in the collective enterprise. But this truism is not based on a meaningful objective calculation. In other words, while both spouses are certainly expected to contribute to the marital community, desert is not the foundation of equal division. Indeed, equal division stands against any sort of investigation into the interior functioning of the marital community to determine individual desert. Fifty per cent is the number that best demonstrates that no party is more entitled to the marital assets than the other.

This more plausible understanding of equal division, the most fundamental and indisputable rule of marital property law, relies on an ideal conception for the institution of marriage. I maintain that equal division can be readily justified as a manifestation of the ideal of marriage as an egalitarian liberal community. In this perfectionist vision, a commitment to marital community wherein spouses share without reference to individual desert combines with a concern for non-subordination and the protection of individual autonomy through, primarily, free exit.

More precisely, the ideal of marriage as an egalitarian liberal community perceives marriage as reflecting a plural subject that generates the potential for intimacy, caring and commitment, and meaningful self-identification. The projects of marriage, including the common management of resources, facilitate these virtues by providing opportunities for an intensive, long-term fusion of the couple. This (partial) fusion, so crucial for the success of marriage, forms the basis for the sharing principle. Sharing both the advantages and difficulties of a joint life, infusing costs and benefits with an inter-subjective character and rejecting any strict accounting based on individual merit, is the linchpin of the marital community. But although the marital ideal is inherently

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79 See n 5.
81 This is also why another proposed explanation, relying on the spouse’s hypothetical consent, is dubious. See Dagan (n 28) 212.
communal, it is also bounded by a commitment to autonomy as free exit and to equality as non-subordination. No-fault divorce, the legal manifestation of spouses’ right to exit, is an important feature of the ideal marriage because it clearly distinguishes between marital communities as good for spouses and marital communities as exercises in self-denial. The legal right to free exit is a prerequisite of a self-directed life, a precondition of the ability to form, revise and pursue our own ends. This right is particularly important in marriage because, in the liberal conception, the communal goods of marriage are all part of the good life for individuals, not a legal duty they must bear regardless of its continuing appeal. Furthermore, the legal right to free exit is an important means for the continuing reaffirmation of the spouses’ plural identity. Finally, like autonomy, equality is also a constraint and a core feature of the ideal of marriage. It is a constraint because disparity in the control and possession of the goods of marriage, the most pervasive human engagement, leads to subordination, which systematically and pervasively denies the importance of one spouse and threatens his or her basic personhood. It is a core feature of the ideal of marriage because subordination is a threat to the communal nature of marriage itself; hierarchy, exploitation and oppression subvert intimacy, caring and commitment and meaningful self-identification.

An important challenge to a marital property law that seeks to follow this ideal of marriage is to provide institutional guarantees of gender equality to support the community of marriage in a liberal context of free exit. Equal division is one important means for this aim although, in an environment of pervasive gender inequality, it is certainly not sufficient. Equal division treats each party identically and thus erases, for the duration of marriage, men’s greater power to gather resources in the market. Moreover, equal division of existing marital assets most clearly sends a message of ownership: the award is not a social welfare handout, but an entitlement. Finally, not only does equal division vindicate equality and thus also equal exit, but is also uniquely appropriate for the marital community as a locus of plural identity. Equal division spreads the benefits and the risks of sharing behaviour equally between the parties, thus transforming personal pursuits into joint endeavours.

To understand spouses’ claims for 50 per cent of the marital estate as expressing the ideal view of marriage as an egalitarian liberal community along the lines of the preceding paragraphs is to recognise the decisive place of social values in shaping this important doctrine of property law. And yet, it would be both wrong and misleading to use this example to justify Ackermanian instrumentalism or evoke concern among guardians of the integrity of property law.

To see why, compare our case with Augustus’s use of matrimonial law for population policy, an example rightfully deemed obnoxious. (As Nils Jansen and Ralf Michaels report, this use occurred ‘only shortly before … a principle of public utility eroded all

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individual liberty … and became the guiding measure of all law under the absolutistic, personal domination of the late [Roman] emperors.\textsuperscript{83} The reason it so obviously represents an abuse of private law is that the promotion of a population policy cannot plausibly inform the entitlements of husband and wife against one another. This is not a logical but rather a normative claim about the legitimacy of even considering the issue of population policy when constructing the legal framework governing the spouses’ relationship. Why should a spouse who infringes a governmental population policy be accountable to the other? In fact, such a liability would easily make the parties’ relationship appear less attractive. By contrast, the ideal of marriage as an egalitarian liberal community does not impose external goals on the parties’ bipolar relationship, meaning goals that are alien or even potentially subversive to their relationship. The ideal of marriage as an egalitarian liberal community is what defines, or should define,\textsuperscript{84} the spouses’ \textit{ex ante} entitlements and hence their bilateral legitimate expectations. This ideal entails a property configuration very different from the monistic Blackstonian model that neo-Kantians celebrate. Once translated into legal doctrine, however, the ideal of marriage as an egalitarian liberal community is simply the foundation of the bilateral relationships within the marital community rather than an intrusive public policy.

The ideal of marriage can serve as an instance of an ‘internal social value’, and population policy as one of an ‘external social value’ that threatens to have an illegitimate impact from outside on the spouses’ relationship. There are also hard cases, however, of social values that fail to fit clearly on one or another side of the divide. Consider the question of whether divorce law should address the issue of gender discrimination. On its face, the challenge of gender imbalances is a clear example of a social purpose external to the marital community and thus worth addressing only in an instrumentalist understanding of private law. Yet, gender inequality is not a problem merely for women individually but also for the institution of marriage, since serious disparities between the post-divorce financial status of men and women\textsuperscript{85} give men greater bargaining power within the marriage, raising the spectre of subordination.\textsuperscript{86}

If men and women entered and left marriage equally able to earn an income in the market, the rule of equal property division would be perfectly consistent with the vision of egalitarian marriage. But although equal division sends a message of equal entitlement and partially neutralises men’s greater market power \textit{vis-à-vis} the resources of the

\textsuperscript{83} Ibid.

\textsuperscript{84} As the text implies, understanding marital property law as grounded in the ideal of marriage as an egalitarian liberal community yields suggestions for reform, both regarding the scope of the marital estate and regarding its governance during an intact marriage. See Dagan (n 28) 214–16, 223–7 (endorsing a broad definition of the marital estate that encompasses any changes effected during the tenure of marriage in the spouses’ earning capacity, and a recognition of both spouses’ interests in the marital estate as present and vested during the marriage rather than as mere expectancies that are only meaningful upon divorce).


\textsuperscript{86} See S Moller Okin, \textit{Justice, Gender, and the Family} (Basic Books, 1989) 147.
marital community, it falls short of adequately addressing this challenge.\textsuperscript{87} This predicament implies that a non-instrumental marital property law, guided by the ideal of marriage as an egalitarian liberal community, should offer an inevitably imprecise remedial response mitigating the devastating consequences of gender inequality for marriage without imposing its entire burden on spouses (read: men).

This is the role of the recent practice of rehabilitative alimony.\textsuperscript{88} Rehabilitative alimony does not require former husbands to equalise their wives’ financial situations for the remainder of their lives. This would impose a prohibitive exit tax on men, undermining not only the autonomy of spouses but also the community as a whole, constituted as it is of voluntary attachments. Rather, rehabilitative alimony is expressly aimed toward self-sufficiency, giving women the tools to overcome their market disadvantages. Its purpose is merely to cover the education or training of spouses with a smaller income to enable them to support themselves better after divorce.\textsuperscript{89} These awards are inherently time-limited, so that their impact on exit is restricted. To be sure, rehabilitative alimony does place some of the burdens of gender discrimination on the alimony-paying spouse, but this is hardly unfair because he too benefits from the arrangement. To the extent that he desires the unique goods arising from communal marriage, he benefits from lessening the threat that gender inequality poses to genuine community. A limited alimony obligation enables him to participate in and benefit from a good marriage without unduly compromising his autonomy.

**B. A Right to Entry**

My second example involves limits on the right of individual or group property owners to exclude, either by refusing to sell or lease or by insisting that non-owners do not physically enter their land. These rules are usually discussed in terms of the legitimacy or desirability of allowing external public law concerns to infiltrate property law.\textsuperscript{90} This is an admittedly important question, but one which I wish to suspend.\textsuperscript{91} Instead, I address below the limits of exclusion from the perspective of private law given the (public) values that participate in the regulative principles of the pertinent property institutions, and


\textsuperscript{88} For a critique of other attempts to explain rehabilitative alimony, see Dagan (n 28) 220–1.


\textsuperscript{91} Because I do not find the distinction between private and public law necessarily hermetic, I tend to be sympathetic to the idea that public law values can at times inform private law doctrines. The circumstances in which such influence, as well as its manner and degree, would be viewed as legitimate, cannot be determined \textit{a priori} but should rather be prescribed according to whatever seems appropriate for the category at hand.
inquire how these social values converge to support some rights of non-owners to entry. Although my discussion here is fairly general, it is informed by three types of cases in which existing land law limits exclusionary practices and recognises non-owners’ right to entry: common-interest communities law, landlord-tenant law and the law of public accommodations.92

In one, quite obvious sense, the prevailing framework for analysing these cases as involving the impact of public law challenges the autonomy of property law. In another sense, however, it fits the understanding of property as isolated from public values, since both opponents and proponents of the approach that allows such impact (implicitly) assume that the right to entry is anathema to property per se. But, as noted, this absolutist conception of property is unable to do the work ascribed to it because the entitlements configuration of each property institution from which correlativity is measured is always determined by that institution’s regulative principle, which is shaped according to our social values. Therefore, in order to determine whether a right to entry exists at all and, if so, what is its scope, we need to reflect on the prescriptions of the pertinent social values and their possible accommodation within the correlativity constraint of property law. This exercise shows that an a priori dismissal of the right to entry is by no means entailed by the relevant values. Quite the contrary: at least some of these values—some of the foundations of the regulative principles of the property institutions at hand—in fact point to substantial, albeit well-circumscribed, limits on owners’ right to exclude, as well as to important reasons for allowing entry to non-owners. The convergence of these normative conclusions explains why, in some cases, the right to entry can, and indeed should, be recognised as a necessary outgrowth of property rather than as an embarrassing aberration. (I use the term ‘convergence of normative reasons’ advisedly. As we will see, these reasons are not relational, so that they would not qualify under Weinrib’s more demanding account of correlativity. Nevertheless, as I hope to show, their convergence is thick enough to justify the responsiveness of the [correlative] entitlements of property owners and potential entrants.)

Despite the diversity of the property institutions at stake, all implicate three important values: autonomy, personhood and community. None of these values sanctions an absolute right to exclude; furthermore, to varying degrees, they even positively require curbing such a right and recognising the right to entry of non-owners.93

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92 For a more comprehensive account, on which this part relies, see Dagan (n 28) ch 2. 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; fair use of copyrighted materials; and compulsory licensing of patents. See respectively GS Alexander, ‘The Social-obligation norm in American Property Law’ (2009) 94 Cornell Law Review 745, 801–10; JA Lovett, ‘Progressive Property in Action: the Land reform (Scotland) Act 2003’ (2011) 89 Nebraska Law Review 301; Dagan (n 28) ch 2; MJ Adelman, ‘Property Rights Theory and Patent-Antitrust: The Role of Compulsory Licensing’ (1977) 52 New York University Law Review 77.

93 Other contexts where the property value of welfare (or utility) is prominent are also likely to be amenable to a similar conclusion. See Dagan (n 28) 47. In such cases, the correlativity constraint applies quite
Although autonomy appears to be the most obvious property value supporting a rigid right to exclude, in fact it does not. As a general right-based justification of property, the idea that personal autonomy requires individual property rights implies that every human being is entitled to some property or, more precisely, entitled to the property needed to sustain human dignity.94 Furthermore, even if we focus on property’s role in protecting people’s negative rather than positive liberty, no absolute right to exclude necessarily follows. Indeed, private property protects people’s independence and security because it tends to decentralise (spread) decision-making power. Its protective effect, then, is not universally significant but rather particularly important to those who are either part of the non-organised public or part of a marginal group with minor political clout. The combination of these positive and negative aspects (the special significance of providing non-owners access to property on the one hand, and the inverse relation between an owner’s wealth and power and the importance of safeguarding her right to exclude on the other hand) points to categories of cases in which the non-owners’ claim to entry rather than the owners’ claim to exclude derives from our commitment to autonomy.95

Similar and possibly more pointed conclusions emerge from the analysis of the personhood value of property. Whereas ownership of a fungible property plays a purely instrumental role in an owner’s life, holders of constitutive resources are personally attached to their properties since and insofar as they reflect their identity, because such resources are external projections of their personality.96 Hence, the same property value that is particularly strict about curtailing a non-owner’s demand to enter (purchase, lease, use or physically enter) a constitutive resource, may be almost indifferent regarding a fungible resource. In some cases, the position of the personhood value of property is virtually reversed: when a resource is fungible for its owner but constitutive for another (say: its long-term lessee), the personhood value of property is particularly suspicious of the owner’s claim to exclude that particular other.97

Finally, consider the property value of community. Property institutions can, and often do, create an institutional infrastructure that facilitates the long-term cooperation nec-

96 For a synthesis of the philosophical and social-scientific literature on the subject, see Dagan (n 37) 38–42.
sary for successful communities fostering human flourishing. Community, by definition, requires some demarcation from the broader society, and thus some measure of practical and symbolic exclusion. But not every type of exclusion is sanctioned. The ways property serves community cover a wide spectrum, ranging from close-knit cultural communities to much thinner ones, where co-ownership is itself a significant medium for creating shared community values. Both types of situations prescribe only specific types of reasons legitimising exclusion. One end of the spectrum authorises exclusion if, and only if, exclusion is required to preserve the community’s *ex ante* distinction from the surrounding society (as when segregation is practised by a minority group to preserve its distinctive culture and way of life), and is indeed necessary to sustain a prosperous proprietary community. At the other end of the spectrum, involving a community partly constituted by the property structure, limitations on entry are even more restricted and justified only insofar as they either prevent inclusion of ‘bad cooperators’ likely to jeopardise the success of the commons property, or enhance shared cooperative values that are a necessary condition of such success. The community value of property is not only reluctant to sanction broad exclusionary practices but, in some cases, even positively requires entry. Our entire citizen body is also an important human community, so that preserving open boundaries between sub-communities, at least to some extent, also serves the property value of community.

Without pretending to offer a comprehensive account of any one of the doctrines at stake, the current state of the law can be shown to be roughly in accord with these theoretical observations. The law of common-interest communities, for instance, justifiably polices exclusionary practices of residential communities insofar as they are used against, rather than by, cultural minority groups, and when exclusionary practices unreasonably limit the mobility of the excluded persons and thus their autonomy. Similarly, landlord-tenant law 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. Yet, it reverses this rule and recognises a rather capacious right to entry where the lessor is a commercial entity, in particular where the refusal to rent is contemptuous, namely, related to conspicuous features of the potential lessee’s identity. Finally, public accom-

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98 See generally Dagan (n 28) ch 8.
102 See Dagan (n 28) 47.
105 See Gillette (n 99) 1437–9.
106 See generally the Fair Housing Act (2006) USC.
modations law also reflects the proper adjustment of the content of ownership concerning a place that is mostly instrumental for its owner but functions as a locus of opportunities for personal development and significant socialisation for other members of the public. In other words, this persistent doctrine prescribes a right to entry that is determined by a fine-tuned balance between the owner’s reduced personhood interest and key autonomy and community interests of potential entrants.

In all three bodies of law—respecting all three property institutions—non-owners who fall within categories of cases in which the law recognises a right to entry can typically justify the imposition of this burden on defendants vulnerable to such claims. Such potential plaintiffs can surely face the question of why they should be entitled to a remedy, and why the said remedy should enforce their entry. But they can also face the additional justificatory burden of private law, and explain why the defendants at hand—common-interest associations, lessors and owners of public places such as hotels, restaurants or shopping malls—should be the ones who carry the burden. At times, the reason is straightforward, as when potential defendants enjoy a local monopoly in the relevant area. But the scope of legitimate entitlements to force entry is not limited to these extreme instances and also includes cases that do not involve a monopoly but, due to the convergence of local owners’ attitudes in a certain area, make a non-owner’s right to entry virtually meaningless without the power to curtail these owners’ exclusionary practices.

CONCLUDING REMARKS

Private property is the cornerstone of our private law. Property law accordingly observes the correlativity characteristic of private law. This is not a negligible justificatory burden, but it is not the only one, because in order for the correlativity inquiry to start off—in order for it to be intelligible—we need to determine what exactly is the content of the parties’ rights, a determination that necessarily invokes our public values. Not every such value can, however, qualify for the task: by and large only values that participate in the regulative principle that underlies the property institution at issue—that is: only values that inform our ideal vision of the interpersonal relationship at hand regarding the pertinent resource—can be legitimately taken into account. The diversity of these regulative principles in property and their reliance on our public values need not be confusing and should not be considered demeaning to the private nature of property. Quite the contrary. Properly understood, this diversity is the precondition for property’s crucial role in supporting diverse forms of interpersonal interaction and thus diverse forms of human flourishing. Thus, this public

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107 See Gray (n 103) 173–4.
109 For the history of this doctrine, see Gray and Gray (n 90) 80–100; Singer (n 108).
dimension of private property is, at the end of the day, what enables property law to ade-
quately recognise and promote the autonomy-enhancing function of pluralism and the individuality-enhancing role of multiplicity.