

This article uses Robert Nozick's account of utopia as a framework for utopias to examine the normative underpinnings of private law. Nozick's insight, I argue, points to private law's 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-labour liberal egalitarians. They 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. Private law's underlying normative commitments to both individual self-determination and relational justice also have important distributive implications. These implications, however, are distinct from the considerations of justice in holdings that concern the institutions responsible for distributive justice.

Keywords: private law theory, Robert Nozick, property, contracts, structural pluralism

1 Introduction

Robert Nozick is no stranger to private law theory. *Anarchy, State, and Utopia*, the most celebrated libertarian manifesto of recent times, is naturally invoked for developing libertarian accounts of private law.¹ Nozick's entitlement theory, which underlies his account of justice in holdings, is rightly considered a prime example of a blueprint that advocates 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

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1 Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974).

2 See Gregory S Alexander & Hanoch Dagan, *Properties of Property* (New York: Wolters Kluwer, 2012) at ch 3.

rules of law in line with the rights holders' 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 article is different. It studies Nozick's somewhat neglected account of utopia as a framework for utopias, exploring the potential contribution of this distinctly liberal understanding of utopia to 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 a capacity. Private law, at least at its best, establishes a variety of structures for respectful interaction between self-determining individuals, thus facilitating our ability to lead our chosen conception of life. Moreover, as a framework for utopias, private law has a distinct role in securing justice, namely casting these structures as interactions between free and equal individuals who respect one another as the persons they actually are, thus vindicating the demands of relational justice.

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, which Nozick espouses, suggest. 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 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

3 See Randy E Barnett, 'A Consent Theory of Contract' (1986) 86 Colum L Rev 269 at 270, 302. In torts, Nozick's position is often associated with strict liability. See e.g., Stephen R Perry, 'Libertarianism, Entitlement, and Responsibility' (1997) 26 Phil & Pub Aff 651.

4 For a poignant criticism by a particularly competent commentator, see Robert Nozick, *The Examined Life: Philosophical Meditations* (New York: Simon & Schuster, 1989) at 286.

(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

Nozick's principles of justice in holdings imply that the role of government, and of its legitimate power to tax, is limited to the protection of rights to person and property.⁶ They thus denounce the use of the state's coercive apparatus for either helping the underprivileged or even for supplying goods and services that arguably improve the quality of life for everyone.⁷ However, *Anarchy, State, and Utopia* also offers another and less familiar argument on behalf of the minimal state, which is the focus of this article. In the last part of his book, entitled 'Utopia,' Nozick develops an argument that 'starts (and stands) independently of' his claims in support of the above three principles and arguably 'converges to their result from another direction.'⁸ 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 a 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.'⁹

5 Nozick, *supra* note 1 at 153.

6 To be sure, Nozick does acknowledge that the principle of rectification could justify significant state redistribution given real world conditions. See *ibid* at 153 (asterisked note), 230–1.

7 See generally Jonathan Wolff, *Robert Nozick: Property, Justice and the Minimal State* (Stanford: Stanford University Press, 1991).

8 Nozick, *supra* note 1 at 333.

9 *Ibid* at 309, 312, 320, 332–4.

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,¹⁰ obviously including Nozick, this ideal builds on, or at least acknowledges, a richer understanding of autonomy as a form of self-authorship (or self-determination) requiring diverse options. However, 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 among divergent conceptions of the good subscribe to the libertarian credo? In order to address these critical questions, we need to read Nozick backwards and distil his understanding of private law's building blocks from his account of the minimal state.

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Since Nozick's three principles of justice 'have their equivalents in private law,'¹¹ such a task is not very demanding. Nozick's libertarian scheme builds, as I will argue, on familiar conceptions of property (as sole and despotic dominion) and of contract (as a means for delineating the boundaries of protected domains). Nozick's brief allusion to historical injustices further implies that his understanding of rectification piggybacks on these conceptions. When people violate the rules of property or contract law, they 'steal from others, or defraud them, or enslave them, seizing their product and preventing them from living as they choose.' Rectification is the obligation 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.'¹²

First consider property. '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 a determination.¹³ This conception of property, which clearly resonates with Blackstone's

10 As well as with neo-Kantians. See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA: Harvard University Press, 2009) at 14, 34, 45.

11 Alon Harel, 'Public and Private Law' in Markus Dubber & Tatjana Hörnle, eds, *Handbook on Criminal Law* (Oxford: Oxford University Press, 2014) 1040 at 1045.

12 Nozick, *supra* note 1 at 152.

13 *Ibid* at 171. Nozick's conception of property also includes, of course, an account of initial acquisition, which is a modification of the Lockean proviso. But his real innovation lies in the Wilt Chamberlin argument, which the text discusses (for the profound problems of Locke's theory, see text accompanying note 57 in this article).

familiar (and recently reinvigorated¹⁴) formula of ‘sole and despotic dominion,’ is also vividly (albeit implicitly) present in Nozick’s famous Wilt Chamberlain fable.¹⁵ 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 just 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.’¹⁶ As critics have noted, however, egalitarians are unlikely to specify the initial distribution that is just in terms of absolute property rights.¹⁷ 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.¹⁸

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.’¹⁹ Nozick does not specify these details, but echoing in his favourite slogan – ‘*From each as they choose, to each as they are chosen*’²⁰ – is the view that contract law, by and large, is, or should be, governed by one animating principle: to follow the parties’ mutual consent.²¹ 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

14 See e.g., JE Penner, *The Idea of Property in Law* (New York: Clarendon Press, 1997); Larissa Katz, ‘Exclusion and Exclusivity in Property Law’ (2008) 58 UTLJ 275; Thomas W Merrill & Henry E Smith, ‘The Morality of Property’ (2007) 48 Wm & Mary L Rev 1849.

15 William Blackstone, *Commentaries on the Laws of England* (Chicago: University of Chicago Press, 1979) vol 2. As an aside, recall that Blackstone never had a simple Blackstonian vision of ownership. See David B Schorr, ‘How Blackstone Became a Blackstonian’ (2009) 10 Theo Inq L 103.

16 Nozick, supra note 1 at 161.

17 See e.g., Will Kymlicka, *Contemporary Political Philosophy* (Oxford: Oxford University Press, 1990) at 102–3.

18 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.’ Nozick, supra note 1 at 163.

19 Ibid at 150.

20 Ibid at 160.

21 For a similar and even more familiar version of contract theory, see Charles Fried, *Contract as Promise: A Theory of Contractual Obligation* (Cambridge, MA: Harvard University Press, 1981).

‘the boundaries of protected domains,’ contract law relies ‘on objectively ascertainable assertive conduct.’²²

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.²³ 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 the challenge of Nozick’s utopia. 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 implies that this vision must rely on an unambiguously non-libertarian conception of private law.²⁴

Nozick envisages a diverse menu of comprehensive lifestyle options, in which ‘[d]ifferent communities, each with a slightly different mix, . . . provide a range from which each individual can choose that community which best approximates *his* balance among competing values.’²⁵ However, 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. This means that people should be able to choose their

²² Barnett, *supra* note 3 at 270, 302–3. Although other (notably neo-Kantian) transfer theorists of contracts tend to dissociate themselves from Nozick, their accounts are closely related to Barnett’s. See Hanoch Dagan & Michael A Heller, *The Choice Theory of Contract* (Cambridge, UK: Cambridge University Press, forthcoming 2017) ch 3.

²³ Nozick, *supra* note 1 at 57, 71–3.

²⁴ 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. However, 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* (New York: Oxford University Press, 2013) ch 2.

²⁵ Nozick, *supra* note 1 at 312 [emphasis in original].

associations in their various, and possibly incongruent or even conflicting, capacities.²⁶

Moreover, and more importantly for our purposes, self-determining individuals should be able to choose not only from a range of comprehensive options dealing with lifestyles 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*, as Nozick insists,²⁷ 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 an employee or an independent contractor; to do business in a partnership, a close corporation, or a publicly held corporation; and to form an intimate bond of marriage or, rather, cohabitante.

The liberal commitment to individual self-authorship, which makes Nozick's conception of utopia as a framework for utopias so appealing, requires a sufficiently diverse set of viable options for all of these, and the many other discrete yet significant, decisions regarding our interpersonal interactions, in addition to the more comprehensive options that Nozick has 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 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.'²⁸

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So far so good. Nozick, the libertarian, need not object to any of these observations. However, can all of these options at all of these levels indeed be instantiated in the minimal state? Does the freedom to initiate cooperative arrangements, which Nozick the libertarian relies upon,

²⁶ See e.g., George Simmel, *Conflict and the Web of Group Affiliations* (New York: Free Press, 1955) at 130, 150–4; Shai Stern, *Taking Community Seriously: Toward a Reform in Takings Law* [unpublished].

²⁷ See Nozick, *supra* note 1 at 321.

²⁸ Joseph Raz, *The Morality of Freedom* (Oxford: Oxford University Press, 1986) at 372, 395, 398.

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.’²⁹ This is exactly what private law does and should do, according to the conventional accounts of property and contracts. As long as property is understood as ‘sole and despotic dominion’ and contract is 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?³⁰

To answer this question, we need to appreciate the indispensable roles – both material and expressive – of private law (or any parallel law-like convention, for that matter) in facilitating interpersonal arrangements.³¹ The economic analysis of private law, which investigates its incentive effects, forcefully demonstrates how many of our existing practices rely on legal devices that help overcome numerous types of transaction costs³² – information costs (symmetric and asymmetric), bilateral monopolies, cognitive biases, and heightened risks of opportunistic behaviour – which generate the participants’ endemic vulnerabilities in most cooperative interpersonal interactions.³³ Merely enforcing the parties’ expressed intentions would not be sufficient to overcome the inherent risks of such endeavours. If many (most?) of them are to become or remain viable alternatives, private law must provide the background reassurances tailored to the specific category of interaction at hand, which will serve to catalyze the trust that is so crucial for success. Even where

²⁹ Nozick, *supra* note 1 at 329. Nozick mentions a few other difficulties in implementing his ideal of utopia in the actual world. See *ibid* at 307.

³⁰ See Thomas W Merrill, ‘Property as Modularity’ (2012) 125 *Harv L Rev Forum* 151 at 157–8.

³¹ For more detailed analyses on which the remainder of this part of the article draws, see Hanoch Dagan, ‘Inside Property’ (2013) 63 *UTLJ* 1 at 3–10; Dagan & Heller, *supra* note 22, ch 7.

³² 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’ (2000) 110 *Harv L Rev* 387.

³³ See e.g., Ian Ayres & Robert Gertner, ‘Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules’ (1989) 99 *Yale LJ* 87; Russell B Korobkin & Thomas S Ulen, ‘Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics’ (2000) 88 *Cal L Rev* 1051.

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 establish trust in their routine, happier interactions.³⁴

Law's effects are not only material. Since private law tends to blend into our natural environment, its categories play a crucial role in structuring our daily interactions.³⁵ Thus, alongside these material effects, many of our conventions – including many social practices we take for granted as the options we currently have (think bailment, suretyship, or fiduciary) – become available to us only due to cultural conventions that often, especially in modern times, are legally constructed.³⁶ 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 face '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 that they participate in constructing.³⁷

Both the material and the expressive functions of private law imply that contractual freedom, though significant, cannot possibly replace active legal facilitation. The 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. However, these imperfections cannot be dismissed as contingent features that need not bother Nozick the utopian. While their significance may vary from one empirical context to another, these human features are

³⁴ Cf Hanoch Dagan & Michael A Heller, 'The Liberal Commons' (2001) 110 Yale LJ 549 at 578–9.

³⁵ See e.g., Robert W Gordon, 'Unfreezing Legal Reality: Critical Approaches to Law' (1987) 15 Fla St UL Rev 195 at 212–14.

³⁶ See Ian Ayres, 'Menus Matter' (2006) 73 U Chi L Rev 3 at 8 (arguing that even 'statutory menus that merely reiterate what the private parties could have done contractually by other means can have a big effect').

³⁷ See generally Hanoch Dagan, *Property: Values and Institutions* (Oxford: Oxford University Press, 2011) chs 1, 4. See also, e.g., Michael Klausner, 'Corporations, Corporate Law, and Networks of Contracts' (1995) 81 Va L Rev 757 at 766, 788 (discussing the accumulated outcome of the social learning effect and the network externalities phenomenon).

sufficiently ingrained to render irrelevant, if not self-defeating, any purportedly utopian theory that ignores them.³⁸

Thus, the state's obligation to enhance autonomy by fostering diversity and multiplicity, which is the impetus of Nozick's conception of utopia, cannot be properly fulfilled through the hands-off attitude represented by the conventional accounts of property and contracts that Nozick espouses. To be sure, in some contexts – notably in the commercial sphere – there are powerful economic forces catalyzing demand for options, so the task of private law can, and, by and large, should, be mostly reactive. However, in the other spheres of interpersonal interaction – think work, intimacy, or home – when the good that people seek moves away from strict maximization of economic surplus or where collective action problems or other (say, cognitive) difficulties inhibit the translation of people's preferences for new private law institutions into a market-based demand, market demand cannot delimit the state's obligation.

Therefore, the liberal commitment to personal autonomy as self-authorship requires the 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.³⁹ This prescription of structural pluralism implies that 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 a 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.

Indeed, a genuinely liberal theory of private law must take seriously law's commitment to our self-authorship. Therefore, it must adhere to the unique responsibility of private law to offer a repertoire of institutions for interpersonal relationships that responds to various forms of valuable human interaction and should thus be sufficiently distinct from

³⁸ I do not deny that a theoretical account of private law could start from an ideal world in which no such imperfections exist. But, at some point, these imperfections would have to be addressed, and a shift from an ideal to non-ideal theory of private law would be inevitable. Cf. John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971) at 245–6, 351–2 (distinguishing between an ideal and non-ideal theory of justice). Indeed, it is hard to imagine how a purely ideal theory of private law could have practical relevance for doctrinal areas in which human imperfections are not merely of peripheral concern but, rather, of a systematic difficulty. Ignoring this difficulty would be self-defeating if a theory of law aims to provide guidance for, or justification of, the actual legal doctrines that govern the terms of interaction among private individuals.

³⁹ Cf. Raz, *supra* note 28 at 133, 162, 265.

one another so as to offer people meaningful choice for any given sphere of social activity and interaction.⁴⁰

IV Structural pluralism as a framework for utopias

Unfortunately, the conventional conceptions of property and contract, discussed earlier, push private law in the opposite direction. They understand both property and contract in structurally monistic terms, assuming that each of these complex legal fields is governed by one sole animating principle, such as exclusion or consent. This structural monism seems appealing. 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. And yet if private law is to follow the autonomy-enhancing aspiration of Nozick's framework for utopias' ideal, this appeal of structural monism must be resisted. Private law theory must take the existing 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.

Indeed, although neither property nor contract fully complies with this structurally pluralistic injunction, both property law and contract law are far more amenable to it than their conventional conceptions suggest. Much of our private law already defies structural monism and instead follows the pluralist prescription. Private law – either common law or equity; judge-made law or statutory – is vastly heterogeneous.⁴¹ It tends to set up narrow categories, each covering only relatively few

⁴⁰ This prescription raises a host of important questions, which cannot be properly addressed here. What constitutes a normatively adequate range of existing property institutions and contract types within an important sphere of social activity and interaction? What if cognitive, behavioral, structural, or political economy concerns imply that a larger repertoire reduces freedom? And are there actual legal institutions sufficiently competent to implement the prescriptions of structural pluralism? For some answers, see Dagan & Heller, *supra* note 22, chs 10–12.

⁴¹ As the text implies, the distinction between private and public law (or regulation) cannot plausibly turn on the question of whether the legal doctrine at hand is judge

human situations, and each category is governed by a distinct set of rules expressing differing underlying normative commitments. The differences between various 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. Furthermore, in many spheres of interpersonal life, private law offers intra-sphere multiplicity, so that its property institutions and contract types can serve as substitutes, which facilitate choice and, thus, secure autonomy.

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Take again property.⁴² Contemporary champions of the Blackstonian conception of property imply that rejecting the notion of property as a monistic institution revolving 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.⁴³ This bundle conception of property has in it a grain of truth. As Wesley Hohfeld observes, property has no canonical composition. The reference to the concept of property, therefore, need not entail an inevitable package of incidents.⁴⁴ 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.⁴⁵ Not only do ordinary people not buy into the idea of open-ended bundles of rights, but property law also 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. On the other hand, 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

made or legislative (at least if we accept the European codes as respectable manifestations of private law).

⁴² See Dagan, *supra* note 37; Hanoch Dagan, 'Pluralism and Perfectionism in Private Law' (2012) 112 *Colum L Rev* 1409, on which the following paragraphs draw. For a parallel claim regarding contracts, see Dagan & Heller, *supra* note 22.

⁴³ See e.g., JE Penner, 'The "Bundle of Rights" Picture of Property' (1996) 43 *UCLA L Rev* 711; Penner, *supra* note 14.

⁴⁴ See Wesley Newcomb Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26 *Yale LJ* 710 at 747.

⁴⁵ See Thomas W Merrill & Henry E Smith, 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 *Yale LJ* 1 at 9–24.

armour 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 is a great exaggeration. Property law includes, side by side, doctrines that by and large comply with a commitment to independence (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 products (as with patents) as well as the many other doctrines vindicating various types of balance among these and other property values.

That property can be understood as an exclusive right, and exclusion can exhaust the meaning of property and thus be described as its core, is possible 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, neighbours, co-owners, partners, and family members, including rights regarding the governance of these property institutions, cannot be analyzed fairly through the terms of exclusion. While exclusion is silent about 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 in, for example, the law of public accommodations, the copyright doctrine of fair use, and the law of fair housing, notably in the contexts of common-interest communities law and landlord-tenant law.⁴⁶ These rights of entry of non-owners are not an embarrassing aberration. Inclusion is indeed less characteristic of property than exclusion, and in the limiting case of inclusion – universal equal access – there is no owner.⁴⁷ However, its manifestations are just as

⁴⁶ See Dagan, *supra* note 37 at 37–56.

⁴⁷ 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

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 grounded in the very reasons – the very same property values – that justify the support of our legal system for the pertinent property institution.

Indeed, the renewed orthodoxy of property as exclusion fails to properly account for property because it marginalizes governance and inclusion, which are both constitutive characteristics of property. 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. Instead, it 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 independence. Liberal societies justifiably facilitate such property institutions, which serve both as a source of personal well-being and as a domain of individual freedom.⁴⁸ In other property institutions, a more communitarian view of property may dominate, with property as a locus of sharing. In yet 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.

* * *

solutions.' Felix S Cohen, 'Dialogue on Private Property' (1954) 9 Rutgers L Rev 357 at 370–4, 379.

⁴⁸ See John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 298.

Indeed, the divergence of property law from its conventional monistic conception is stark and multi-faceted. What matters for our purposes is that the variety of property institutions is rich not only between spheres of life but also within such spheres. Property law provides intra-sphere multiplicity, offering 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 content is thus not only misleading but also potentially damaging, 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 alternative 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 is implicit in Nozick's resistance to a monistic utopian prescription, because it would undermine the autonomy-enhancing function of property's structural pluralism. Only a sufficiently heterogeneous property law, alongside 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 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, eliminated the option of retreat into one's own safe haven. However, as long as this property institution remains a viable alternative, the availability of several different, but equally valuable and obtainable, proprietary structures of interpersonal interaction makes autonomy more, rather than less, meaningful.⁴⁹

Similar observations apply to contract.⁵⁰ Notwithstanding the great unifying force of the so-called classical contract theory, contract law is

⁴⁹ See Hanoch Dagan, 'Liberalism and the Private Law of Property' (2014) 1 Crit Analysis L 268.

⁵⁰ Structural pluralism also applies to those segments of tort law and of the law of restitution that prescribe (again, default) 'rules of the game' for activities in which people

not the shapeless, ‘general’ law taught to generations of first-year students. Diverse family, work, home, and consumer contract types are at least as central to our shared contracting experience as are widget sales. Furthermore, it should be no surprise that the values plausibly animating marriage, employment, and consumer transactions differ from each other and from those driving commercial transactions. Moreover – and again more importantly for our purposes – the contract types within each of these contractual spheres offer individuals choices among divergent values. Indeed, contract’s core role in a liberal polity is to serve autonomy. A contract enhances our ability to be the authors of our own lives by enabling people to enlist others legitimately in advancing their own projects, goals, and purposes. However, in order to properly comply with this important mission, contract law must follow, as it by and large does, the structurally pluralist prescription and ensure the availability of distinct, normatively attractive types within each contractual sphere.⁵¹

Proactively facilitating the multiplicity of private law through structural pluralism does not undermine law’s normativity, but it nonetheless curbs law’s power.⁵² A structurally pluralistic private law is profoundly normative in a way that libertarians may find objectionable, because 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. And, yet, in line with its utopian underpinnings, structural pluralism curbs law’s power by opening up alternatives, rather than channelling everyone to the one option privileged by law. When private law complies with the prescriptions of structural pluralism, individuals can navigate their own course, bypassing certain legal prescriptions and avoiding their implications as well as the power of those who have issued them.

can but need not engage, or for social roles they can, but do not have to undertake. See Dagan, *supra* note 24 at 177.

⁵¹ See Dagan & Heller, *supra* note 22, chs 7, 9.

⁵² 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 24, chs 1, 8, 9.

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 – namely a sufficiently varied inventory of property institutions and contract types for each sphere of social life – 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. Rather, the absence of law – the failure of private law to proactively support a sufficiently diverse range of institutions within a given sphere of interpersonal activity – may also undermine autonomy just as much.⁵³

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

* * *

The first complaint is that the proper role of private law (or law at large) must be to safeguard our rights rather than to promote our autonomy. Nozick powerfully formulates this concern in the very first lines of *Anarchy, State, and Utopia*. Since the rights of individuals are both 'strong and far reaching,' he 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.'⁵⁴ Similar objections are likely to be raised by division-of-labour liberals, who take the polity's responsibility to our self-determination seriously but who insist that it is purely vertical in direction; that it does not – and should not – govern people's horizontal relationships; and that so long as we respect one another's independence we bear no responsibility for one another's autonomy. Since private law, in this conventional understanding, is a set of duties

⁵³ For a preliminary discussion of this lesson, see Dagan & Heller, *supra* note 22, ch 11. Cf Robin West, *Normative Jurisprudence: An Introduction* (New York: Cambridge University Press, 2011) at 201–3.

⁵⁴ Nozick, *supra* note 1 at ix.

aimed at vindicating our right to independence, an account that relies on the autonomy-enhancing *telos* of private law cannot possibly be just.⁵⁵

Tort law doctrines that protect our bodily integrity may reasonably be said to affirm our innate rights and, accordingly, are analyzed as fundamentally duty imposing along these lines. However, the private law areas addressing interpersonal relations concerning our holdings, to which this article is limited, work differently. In these areas, private law (or any parallel law-like convention) cannot plausibly be understood, despite the many attempts to do so, to be vindicating existing rights. Rather, law (or again, any parallel set of social norms) plays here a power-conferring role – it eases and 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 insofar as our holdings are concerned, it is helpful to (briefly) consider 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.⁵⁶ 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 a full-blown money economy; the doubtful (implicit) claim that non-owners have no right to complain about appropriations as long as enough, and a good means of, subsistence remains, 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 this object and establish absolute ownership of it.⁵⁷

Locke's failure to set up a baseline of entitlements in holdings on which a duty-imposing private law can be founded is not conclusive, but it is nonetheless telling. Acknowledging that property rights cannot plausibly be understood as pre-political implies that private law rules dealing with

⁵⁵ Cf Peter Benson, 'Abstract Right and the Possibility of a Nondistributive Conception of Contract: Hegel and Contemporary Contract Theory' (1989) 10 *Cardozo L Rev* 1077 at 1111.

⁵⁶ See John Locke, *Two Treatises of Government*, ed by Peter Laslett (Cambridge, UK: Cambridge University Press, 1960) at 303–20.

⁵⁷ 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* (New York: Oxford University Press, 1988) at 137–252; Gopal Sreenivasan, *The Limits of Lockean Right in Property* (New York: Oxford University Press, 1995).

our holdings are at their core power conferring.⁵⁸ 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.’⁵⁹ 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 and justify law’s support for allowing people to become owners or to self-impose obligations in the first place.⁶⁰

In prescribing the specific content, scope, and implications of the powers conferred by the various property institutions 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, rather, on the ways that law should enhance people’s autonomy. This perspective necessarily implies 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 *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. 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

⁵⁸ For a critique of another – this time, neo-Hegelian – attempt to argue otherwise, see Dagan, *supra* note 49 (criticizing Alan Brudner, *The Unity of the Common Law*, 2d ed (Oxford: Oxford University Press, 2013)).

⁵⁹ Joseph Raz, *Practical Reason and Norms* (London: Hutchinson, 1975) at 102.

⁶⁰ This paragraph and the one that follows draw on Dagan & Heller, *supra* note 22, ch 3.

an omnilateral authorization.⁶¹ 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 fulfil 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.⁶²

Alas, even this heroic attempt ultimately fails because such a strict division of labour 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 interest group politics in the promulgation of tax legislation render egalitarian tax regimes, such as the one based on John Rawls' difference principle, a matter of political theory rather than of empirical reality. This reality is intrinsic to the concept of democracy, which respects people's preferences and not only their principles. Second, given that our understanding 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 fostering 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.⁶³

Therefore, a strictly Blackstonian property regime premised on owners' libertarian claims 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

61 Ripstein, *supra* note 10 at 90. For a view in which this is also Locke's position, see Jeremy Waldron, 'Nozick and Locke: Filling the Space of Rights' (2005) 22 *Soc Phil & Pol'y* 81.

62 Ripstein, *supra* note 10, chs 4, 9; Ernest J Weinrib, 'Poverty and Property in Kant's System of Rights' in Ernest J Weinrib, *Corrective Justice* (Oxford: Oxford University Press, 2012) 263.

63 See Dagan, *supra* note 37 at 63–6.

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) artefacts to people's (natural?) right to self-authorship.

* * *

However, is such an autonomy-enhancing private law 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.'⁶⁴

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').⁶⁵ Given that private law cannot plausibly give equal support to all of the possible arrangements people may want to make,⁶⁶ private law's structural pluralism seems to score quite high on the former, concrete front. Since 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 favours certain types of arrangements to others. Furthermore, even regarding each specific institution or type, private law cannot be neutral since every choice of a set of legal rules governing a particular kind of interpersonal relationship facilitates and entrenches one ideal vision of the good in that particular context. Finally, and most significantly, an obligation to provide a diverse menu of property institutions and contract types (accompanied by a commitment to freedom for further consensual tailoring) is less imposing than its alternative – the one-type-fits-all notion of traditional property or contract theories with their global, overarching principles.⁶⁷

⁶⁴ See Martijn W Hesselink, 'Private Law Principles, Pluralism and Perfectionism' in Ulf Bernitz & Xavier Groussot, eds, *General Principles of EU Law and European Private Law* (Alphen an de Rijn, Netherlands: Kluwer Law International, 2013) 21.

⁶⁵ See generally Peter De Marneffe, 'Liberalism, Liberty, and Neutrality' (1990) 19 *Phil & Pub Aff* 253.

⁶⁶ 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* (New York: Harper Collins Publishers, 2005).

⁶⁷ This paragraph draws on Dagan & Heller, *supra* note 22, ch 8.

The justification I have 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 that I endorse), or the sustainability of the alternative position – political liberalism – advocated by the critics, surely exceeds the scope of the present inquiry.⁶⁸ For my purposes, suffice it 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.⁶⁹ 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 pursuit of 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.⁷⁰ Respecting all persons equally requires enabling each individual person to choose, or at least to discover, his or her own life plan.⁷¹

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 in two important ways (hinted above). First, to preserve its legitimacy, private law’s supply of multiple property institutions and

68 For a devastating critique of political liberalism, see David Enoch, ‘Against Public Reason’ (2015) 1 *Oxford Stud Pol Phil* 112.

69 See Jonathan Quong, *Liberalism without Perfection* (Oxford: Oxford University Press, 2011) at 85–96.

70 It may not be a coincidence that critics of perfectionist liberalism sanction (in passing) legal practices that combat practices of (women’s) subordination to ensure people’s ability ‘to leave one view and opt for another,’ thus eventually subscribing to the (modest) perfectionist position they purportedly condemn. Martha C Nussbaum, ‘Perfectionist Liberalism and Political Liberalism’ (2011) 39 *Phil & Pub Aff* 3 at 29, 36.

71 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?’, online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2193674>.

contract types should be guided not only by demand. Although significant demand for certain institutions (and types) generally justifies their legal facilitation, private law should also respond favourably 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.⁷² Second, state neutrality implies that people should not be limited to choosing among the options provided by the state. This means that alongside this rich menu of state-sponsored institutions, private law must offer a residual category that allows individuals to decide for themselves how to mould their interpersonal relationships. Contract law largely complies with this prescription by allowing contracting outside of all available contract types.⁷³ However, 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.⁷⁴

* * *

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 is, thus, unlikely to be supplemented by a just system of tax and redistribution?

⁷² 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"' (2013) 113 Colum L Rev Sidebar 9. For further, more cultural responses to these (important) concerns, see Hanoch Dagan, 'Property Theory, Essential Resources, and the Global Land Rush' in Olivier De Schutter & Katharina Pistor, eds, *Governing Access to Essential Resources* (New York: Columbia University Press, 2015) 81.

⁷³ As the text implies, it is unclear whether what is currently termed 'general' contract law is sufficiently tailored for the task. A residual law of free-standing contracting should be shaped around the obligation to take idiosyncrasy seriously, rather than piggybacking on the arm's length commercial contract that the Willistonian project imagined as the default. See Dagan & Heller, *supra* note 22, ch 8.

⁷⁴ For a preliminary analysis of this proposition, see Hanoch Dagan, 'The Challenges of Private Law,' in Kit Barker et al, eds, *Private Law in the Twenty-First Century* (Oxford: Hart Publishing, forthcoming 2016).

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. However, certain distinctive features of structural pluralism discussed below make it much friendlier to distributive justice and point out 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 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. In this account, private law’s recognition of our normative powers – notably the powers constituted by the practices of ownership and contract – is justified, as noted earlier, 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.⁷⁵ 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.⁷⁶

This is an onerous burden of justification. In certain contexts, as noted, it implies that some limitations or qualifications of owners’ right to exclude are internal to property.⁷⁷ These limitations do not defy private law’s underlying normative commitments; quite the contrary, they follow the injunction of reciprocal respect to self-determination.⁷⁸ Furthermore, conceptualizing the right of self-authorship as the ultimate value of private law 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, which means that this justification cannot be used to sanction only the variety of options

⁷⁵ See Joseph William Singer, ‘The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld’ (1982) 1982 Wisc L Rev 975; Andrei Marmor, ‘On the Limits of Rights’ (1996) 16 Law & Phil 1.

⁷⁶ In other words, the duties and liabilities of non-owners – and thus their vulnerabilities – emerge (and, in fact, become intelligible) only given our decision to endorse the power-conferring institution(s) of property. See Hanoch Dagan & Avihay Dorfman, ‘The Human Right to Private Property’ (2017) 18 Theo Inq L (forthcoming).

⁷⁷ See text accompanying notes 46–7 in this article.

⁷⁸ See Hanoch Dagan & Avihay Dorfman, ‘Just Relationships’ (2017) 117 Colum L Rev (forthcoming).

that the state currently affords the ‘haves.’ Given that autonomy as self-authorship is a general right-based justification,⁷⁹ it implies that every human being is entitled to such choices and that a sufficiently diverse set of options must be available to all.⁸⁰

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, and people with disabilities must be properly accommodated in the workplace.⁸¹ 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.⁸² It thereby also helps to dispel the notion of property absolutism that is the nemesis of distributive justice.⁸³

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 relational justice.⁸⁴ Only a structurally pluralistic private law enables the thick institutions that allow for the many respectful interpersonal relationships that are 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

79 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.

80 *Cf* Waldron, *supra* note 57 at 115–17, 423, 425–7, 430–9, 444–5.

81 *Cf* Sophia Moreau, ‘What Is Discrimination’ (2010) 38 *Phil & Pub Aff* 143.

82 *Cf* Jeremy Waldron, ‘Homelessness and the Issue of Freedom’ (1991) 39 *UCLA L Rev* 295.

83 See Dagan, *supra* note 37 at 73–4.

84 For more on this conception and its implications, see Hanoch Dagan & Avihay Dorfman, ‘Justice in Private,’ online: Social Science Research Network <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2463537>; Dagan & Dorfman, *supra* note 78.

is sufficiently valuable to gain independent significance behind the veil of ignorance.

VI *Concluding remarks*

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,⁸⁵ but they are never sufficient.⁸⁶ If justice requires, as I believe it does, respect for 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 all of us with a diverse inventory of credible institutions of just interpersonal relationships intrinsically valuable for our self-authorship.⁸⁷

⁸⁵ Needless to say that these mechanisms are required in order to secure other – that is, self-regarding forms of self-authorship.

⁸⁶ See Elizabeth Anderson, 'What Is the Point of Equality' (1999) 109 *Ethics* 287; Samuel Scheffler, *Equality and Tradition: Questions of Value in Moral and Political Theory* (Oxford: Oxford University Press, 2010) at 191, 199–200, 203–6, 225–35.

⁸⁷ This statement leaves open difficult questions regarding the potential tension, or even conflict, between the respective demands of relational and distributive justice. See Dagan & Dorfman, *supra* note 78.