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SOME PLURALISM ABOUT PLURALISM: A COMMENT ON HANOCH DAGAN’S “PLURALISM AND PERFECTIONISM IN PRIVATE LAW”

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*Response to: Hanoch Dagan, Pluralism and Perfectionism in Private Law, 112
Colum. L. Rev. 1409 (2012).*

Hanoch Dagan is among “those who think it advantageous to get as much ethics into the law as they can,” in the phrase of Oliver Wendell Holmes, Jr.¹ His pluralism is a perfectionism for polytheists: There are many human goods, and each has its domain, including some portion of the law of property.² Depending on where we stand on the property landscape at any time, we may be community-minded sharers, devoted romantics in marriage, or coolly rational market actors, and the local property law will smooth each of these paths for us. Property law is built on the design of the multifarious human heart, or, if you prefer, the many purposes we pursue in our projects and

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1. Oliver Wendell Holmes, Jr., *The Path of the Law and the Common Law* 8 (Kaplan Publ'g 2009) (1897).

2. On pluralism in values, see generally Isaiah Berlin, *The Pursuit of the Ideal* (1988), reprinted in *The Proper Study of Mankind: An Anthology of Essays* 1, 1–16 (Henry Hardy & Roger Hausheer eds., 1997); John Gray, *Two Faces of Liberalism* 34–68 (2000); Charles Taylor, *Sources of the Self: The Making of the Modern Identity* 495–521 (1989). Value pluralism has at least two lines of origin in modern thought. One line embodies the skepticism of figures as diverse as Michel de Montaigne and David Hume, who rejected the medieval Aristotelian view that all goods are reconcilable in one highest good, and instead posited a world in which human reason gave us no reason to believe in a unified and universally available account of moral reasoning. See generally David Hume, *Enquiries Concerning Human Understanding and Concerning the Principles of Morals* 169–75 (L.A. Selby-Bigge ed., 3d ed. 1975) (1777); Michel de Montaigne, *Apology for Raymond Sebond (1575–76, 1578–80)*, in *The Complete Essays of Montaigne* 318, 318–457 (Donald M. Frame trans., 1958) [hereinafter *Montaigne, Essays*]; Michel de Montaigne, *Of Cannibals (1578–80)*, in *Montaigne, Essays*, supra, at 150, 150–59. The other line embodies the romantic strand of thought associated with Johann Gottfried von Herder. He proposed that each human culture creates a unique vocabulary and grammar of cultural expression and of value, which give sense and meaning to the lives of those who inhabit that culture and which cannot be judged against any higher or independent standard. See Johann Gottfried von Herder, *How Philosophy Can Become More Universal and Useful for the Benefit of the People* (1765), reprinted in *Philosophical Writings* 3, 3–30 (Michael N. Forster ed. & trans., 2002).

relationships. Each of these implies a way of regarding others—as arm’s length collaborators, joint venturers, or other halves whose purposes we have joined to ours; property’s default rules anticipate and confirm these various attitudes.³

Dagan, of course, would not accept Holmes’s ironic assertion that he has managed to “get as much ethics into the law” as he can. He would say that it was already there, and that he brought it out. Surely this is plausible. In his short Essay, *Pluralism and Perfectionism in Private Law*,⁴ and his much more detailed study, *Property*, Dagan builds his argument from the structure of various areas of property law, which are more or less individualistic, more or less based on the model of exclusion, and more or less tilted toward sharing.⁵

This should not be surprising. The scope of property law is enormous: It defines and allocates claims on scarce and valued resources, the many good things of the world that we need to live, act, and pursue our projects.⁶ Without some share of these, we would be naked, unsheltered, and virtually powerless. Everything we do, including simple survival, therefore involves us in the web of property claims, and all our relationships with others, from a spot transaction to a marriage, are housed within those claims. It is hardly imaginable that just one model of property rules could serve all kinds of projects and relationships. It seems almost inevitable that the law’s architecture would somewhat reflect the diverse ways that people live within it. Sometimes form follows function.

To say that Dagan’s thesis is not surprising is not at all to deny that it is interesting, original, and admirable. On the contrary, it is all of these. Dagan’s close attention to property’s institutions turns his pluralism into a valuable interpretive map of the field. The ethics he draws out of the law really is there, but it is not explicit on the surface, and Dagan’s project requires the interpretive work of both a serious property scholar and an able normative theorist. Pluralism, in the register of Isaiah Berlin, can be vague and evocative, like riding a glass-bottomed boat over the colorful shoals of human values.⁷ Dagan’s pluralism is evocative, but also specific—a taxonomy of what is and what we do with it. In fact, it is a mark of his success that his argument can seem unsurprising. He shows, in detail, the connection of property’s structures to who we are and what we do.⁸

3. See Hanoch Dagan, *Property: Values and Institutions* 229–44 (2011) (setting out in detail arguments paraphrased here) [hereinafter Dagan, *Property*].

4. See Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 *Colum. L. Rev.* 1409 (2012) [hereinafter Dagan, *Pluralism and Perfectionism*].

5. See Dagan, *Property*, supra note 3, at 57–75 (reviewing property’s institutional and value pluralism); *id.* at 155–96 (describing institutional negotiation of communitarian and liberal values).

6. See Jedediah Purdy, *The Meaning of Property: Freedom, Community, and the Legal Imagination* 9–12 (2010) [hereinafter Purdy, *The Meaning of Property*] (giving this definition); *id.* at 100–09 (setting out and exploring some of the ways property mediates interdependence).

7. See Berlin, supra note 2, at 191–242 (reviewing political liberty and pluralism).

8. See, e.g., Dagan, *Property*, supra note 3, at 197–228 (exploring property law of marriage in these terms).

So, can a pluralist be pluralist about pluralism? That is, when might a pluralist have good, pluralist reasons to act like a monist? In this piece, I suggest two quite distinct ways that a monist approach can usefully contribute to the work of a thoughtful pluralist like Dagan. I call this proposal, taken together, *selective monism*, the decision of a pluralist to think as a monist for certain purposes. One example is an *interpretive* instance of what Dagan calls structural monism—that is, it proceeds on the thesis that property law is organized according to a single principle.⁹ The other is an instance of *reformist* monism, the idea that property law *should* promote a single value, despite its actual, present pluralism.¹⁰

I. THE INTERPRETIVE SELECTIVE MONIST

For the interpretive example, I would like to imagine a property theorist who has much in common with Thomas Merrill and Henry Smith, two of the “exclusion theorists” whom Dagan discusses.¹¹ Our theorist is a pluralist about value: As Dagan notes of Merrill and Smith, she believes that property institutions draw on many kinds of moral intuitions and make possible many different kinds of activity, and that our endorsement of property institutions reflects these multiple reasons.¹² Nonetheless, she wishes to make a selective commitment to the idea that property law is defined by granting certain individuals the power to exclude the rest of the world from certain things. She decides to act like an exclusion theorist.

Why? Why surrender the sensitive attention to the spectrum of form and purpose that property law presents? Why, as Dagan puts it, “set aside the rather capacious aspects of [property law] where inclusion or governance looms large?”¹³ My selective monist replies as follows:

I believe there is no understanding property law without appreciating that it is always a solution to a specific practical problem: how to enable many people, with diverse aims and situations, and with relatively little information, to coordinate their activity peacefully and productively with reference to the scarce and valued resources that they all need, but which they cannot all have. Assigning things to persons, via a limited number of standard rights, centrally the right to exclude others, is the paradigmatic way to make the world navigable for purposes of this sort of coordination.¹⁴ When we look at

9. See Dagan, *Pluralism and Perfectionism*, supra note 4, at 1419 (explaining first option of exclusion theorists is to define property as oriented by just one principle).

10. See *id.* at 1419–20 (setting out this alternative).

11. See *id.* at 1416–21 (discussing exclusion theorists); see generally Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 *Wm. & Mary L. Rev.* 1849 (2007) (arguing moral intuitions that support property rights coincide with exclusion model); Henry E. Smith, *Property as the Law of Things*, 125 *Harv. L. Rev.* 1691 (2012) (setting out and defending view of property centered on right to exclude rest of world from some specific thing).

12. I have made my selective monist a woman so that the pronoun will neatly distinguish her from each of the other characters in this piece.

13. Dagan, *Pluralism and Perfectionism*, supra note 4, at 1419.

14. See Smith, supra note 11, at 1701–16 (reviewing use of modularity as flexible and

something—a car, a house, a stroller left on the corner beside a coffee shop—we know it belongs to someone, and we know roughly what “belongs” means.¹⁵ These legal and social facts are the standard blocks with which we can build castles and cities: Their simplicity and uniformity is what makes them the basis of highly complex responses to what I have just described as the basic practical problem of property.¹⁶

So far so good. One may notice something about my selective monist. She has built a rather thin and general monistic account of property atop a view of the basic problem that property addresses—coordinating activity around scarce and valued resources. In this, she resembles one of the most sophisticated and persuasive living legal positivists, Scott Shapiro, who defines law generally as a solution to the problem of peacefully planning activity among people with conflicting aims and interests.¹⁷ I mention this connection because it illuminates what my selective monist is doing that is in contrast with Dagan’s project. She is declining, in Holmes’s phrase, to get any ethics into the law of property besides the overarching goal of solving perennial moral problems: how to resolve competing claims to scarce and valued resources and coordinate the different goals we have for them and ways we value them. Shapiro’s “planning” view of law rests on the idea that, once we understand law’s planning function, we will appreciate that it serves its goal precisely because, in the classic positivist formulation, its content does not depend on any particular relation to substantive morality.¹⁸ It is, instead, a form of coordination that enables us to avoid reference to that substantive level of moral commitment in navigating our shared lives.¹⁹

My selective monist, then, is proceeding with reference to Dagan whereas Shapiro proceeds with reference to Ronald Dworkin, the defining proponent of an “interpretivist” view of law.²⁰ Dworkin, like Dagan, understands bodies of law as organized by implicit ideas of the moral claims people have on one another, and, ultimately, the moral character of the political community that claims the authority to enforce its law coercively.²¹ My monist does not deny that areas of property law are susceptible to, even invite, this kind of moral interpretation. Rather, her interest in property law is at a level that is neutral to these interpretive ventures.

simplifying architecture to enable various kinds of transactions).

15. See *id.* at 1706 (explaining modular knowledge of exclusion as core to in rem rights).

16. See *id.* at 1708 (describing potential for complex responses derived from simple set of rules).

17. See Scott J. Shapiro, *Legality* 154–92 (2011) (analyzing law as technique of planning that responds to universal and perennial human need for peaceful coordination).

18. *Id.* at 275.

19. *Id.*

20. See *id.* I am of course interpreting Shapiro’s project, but I note that he does not deny that the content of any area of law is shaped by moral decisions. Indeed, he embraces this point. His argument is that to identify the legal significance of this content we do not have to refer to the moral issues it resolves. Rather, we can understand its resolution of moral disputes as a set of social facts, created by sovereign decisions with the general aim of facilitating planning.

21. Ronald Dworkin, *Law’s Empire* 176–216 (1986).

What, then, does she make of the fact that, as Dagan points out, there are many rooms in the mansion of property, and that, on her own interpretation, some of them recede into the background? Let her answer again:

I don't deny that those areas of law are parts of property, but my way of understanding the problem implies a spectrum, or pair of spectrums, marking different types of solutions to the basic problem of property. One spectrum runs from exclusion to governance, where governance means the community makes a shared decision about how the resource is to be used. The other spectrum runs from exclusion to sharing, where sharing involves multiple, overlapping claims on the resource. Each of these "opposites" of exclusion, where it occurs, will draw our attention to some feature of the situation that makes the paradigmatic solution unappealing. Maybe the resource is logistically difficult to administer by exclusion, because, for instance, it is a school of fish, and moves around in ways that are hard to monitor. Maybe it is dedicated to a value that deeply involves sharing, like a family home or a community center. But I say what is interesting about property is, in the words of Henry E. Smith, its "LEGO-like" solution²² to the problem of coordination, and I see departures from this as precisely that—departures, which show something illuminating about the boundaries of the core situation, but do not show anything about its character.

Now, both my selective monist and Dagan have perfectly intelligible ways of thinking about property. They are simply looking at it from different points of view. But why would my selective monist, who is, after all, a pluralist, be looking at things this way in the first place? She might be convinced by H.L.A. Hart's important concession, toward the end of *The Concept of Law*, that we select our definitions, and therefore our inquiries, for pragmatic and substantive reasons: We care what kinds of conversations we start when we define our topic in one way or another.²³ She might, moreover, accept a goal that Hart believed his positivist definition of law served: to avert certain moral conflicts that can arise once one undertakes to discern the moral content of law.²⁴ These conflicts can arise in either of two ways. On the one hand, once we have identified an area of law with a specific moral goal or commitment, we may make the mistake of assuming that whatever that moral idea implies must also be the content of law in this area—and, conversely, that when the law departs from this ideal, it loses legitimacy, or at least becomes suspect.²⁵ On the other hand, we may make the opposite, symmetrical mistake of imagining that whatever the law establishes in this area shows us something about the content of the moral value we have aligned with it.²⁶ The first mistake shows too little respect for law, and encourages ignoring it when it conflicts with moral judgments. The second gives law respect it has not earned

22. Smith, *supra* note 11, at 1708.

23. See H.L.A. Hart, *The Concept of Law* 204–05 (1961). Hart, like my selective monist, chose a minimal and formal definition of his topic—in that case, law itself: the union of what he called primary and secondary rules of behavior, all of them determined in their content by social facts. See *id.* at 96.

24. See *id.* at 205–07.

25. See *id.*

26. See *id.*

by assuming it is not just lawful, but morally right. Both get in the way of thinking clearly about law. They impede our appreciating that we must be free to criticize law morally, on the one hand, but, on the other, it has its own criteria of validity, which we may have good reason to respect even when it conflicts with our moral judgments.

This is the classic reason to think of law separately from its internal moral commitments. It expresses itself in the positivism of Thomas Hobbes, who worried mainly that people would take contestable moral objections to law too seriously, and Jeremy Bentham, who had the opposite worry, that people would respect law too much, dulling the edge of criticism.²⁷ Either argument distracts from law's core function as provider of necessary solutions to a set of coordination problems—solutions, says my selective monist, such as property's exclusion device.

Do these antimoralizing considerations obtain in property law? Maybe. My selective monist might have been struck, for instance, by a recent exchange between the pluralist Gregory Alexander and one of Dagan's monists, Henry Smith. Arguing that ownership implies social obligation, Alexander contended that the presence in some property doctrines of rules that depart from Blackstone's "sole and despotic dominion"²⁸ in favor of duties to others indicates something about the moral character of property law generally: that it contemplates owners' owing something to the rest of society, in both refraining from using their own property harmfully and contributing affirmatively when called on to do so.²⁹ Smith's reply aimed mainly at defusing the moral interpretation of property doctrine.³⁰ He argued that a doctrine's means, such as protecting exclusion or lifting it in favor of some non-ownership interest, does not indicate its end, or purpose: Strict exclusion rules can serve social goals such as prosperity and opportunity, while injecting distributive and social-obligation considerations directly into the definition or adjudication of property rights can erode the functionality of property law's core solution to the problem of coordination.³¹

Suppose my pluralist would like to avoid inviting disputes such as this one. She agrees with Dagan that property law promotes various ends, some of them through the kinds of diverse doctrines that Dagan uses as his interpretive basis, but she also agrees with Smith that it is often counterproductive to try to reason normatively about property from the shape of specific doctrines. On the whole, she thinks a focus on the special "LEGO-like" functionality of the exclusion core keeps attention on property law's distinctive achievement.

27. See Thomas Hobbes, *The Leviathan* 149 (Richard Tuck ed., 1991) (1651) ("[I]t is an easy thing, for men to be deceived, by the specious name of Libertie; and for want of Judgement to distinguish, mistake that for their Private Inheritance, and Birth right, which is the right of the Publique only."); see Shapiro, *supra* note 17, at 388–89 (describing Bentham's positivism as demystifying doctrine).

28. 2 William Blackstone, *Commentaries* *2.

29. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 *Cornell L. Rev.* 745, 769 (2009).

30. See Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 *Cornell L. Rev.* 959, 971–74 (2009).

31. See *id.* at 963–71.

Although a pluralist, she will often find it productive to approach property law as an interpretive monist, deliberately classifying the doctrines that Alexander and Dagan find most interesting as departures from property's core.

II. THE REFORMIST SELECTIVE MONIST

Now to my second example: the reformist selective monist. In this example, my pluralist wakes up in a very different mood. Today she is animated, even agitated, by some reservations that she feels about the political limitations of Dagan's pluralism. She doubts whether this pluralism has room for a productive relationship with a tradition of the left that is deeply skeptical of property. This tradition, like Dagan's project, is oriented to autonomy, personhood, utility, labor, community, and distribution.³² The difference is that it sees property rights, not as integrating these values in diverse ways, but as standing in the way of our realizing them. The perception at the heart of this tradition is that property rights have marked a limit on a core aim of modernity: to provide for material needs while at the same time releasing the force of free human activity, including creativity and association with other persons.³³

Some scholars in the classical-liberal property school of thought identified private property, mostly in its exclusion-focused version, as bringing these aspirations into perfect mutuality: protecting freedom by the requirement of consent and promoting material welfare by directing free activity to economically productive ends.³⁴ Dagan's pluralism might be thought of as studying the patterns made by the shards of this classical-liberal synthesis: Allowing that property law, like the rest of legal order, involves tragic tradeoffs among values, what constellations do those values form in the various legal-institutional domains of life—commerce, housing, marriage, etc.?

My pluralist's question in this example is what Dagan's liberal pluralism, which I suppose that she generally shares with him, can make of the argument that property's relation to these values is not, as Facebook would have it, in a relationship, but "It's complicated." According to this argument, property and these liberal values might not be friends at all, or frenemies at best.

Let me state in quick, polemical form, the lines of argument that my pluralist now wants Dagan to take seriously:

(1) The distribution of wealth is a much deeper problem than we admit when we treat most of the present property system as presumptively legitimate: By ensuring leisure to a relatively small number and requiring the rest to work for survival, it systematically excludes many people from free, creative

32. See Roberto Mangabeira Unger, *Politics, False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* 575–81 (2001) (explaining conception of empowerment that motivates his legal theory).

33. See *id.* at 371 (describing "absolute" right of private property as basis of system of private power that limits human capacity for self-emancipation).

34. See Purdy, *The Meaning of Property*, *supra* note 6, at 19–28 (reviewing competing conceptions of property's purposes and Scottish Enlightenment ideal of their integration via liberal property).

activity, and even from the satisfaction of basic needs.³⁵

(2) The distribution of wealth, combined with the regime of market incentives that liberal property sets in motion, is relentlessly innovative, but in only a certain direction: that of more satisfaction of the wants of those who have, to the neglect of those who have not. Resources, but also creativity, collaboration, the whole suite of human powers, go more to sell stuff to the rich than to address the situation of the poor, or to foster creative activity or cooperation in ways not linked to profit.³⁶

(3) The commodifying tendency of a system that rewards what can be marketed means that, even though some of the surplus goes to social efforts, from the Gates Foundation to Kiva, the larger tendency is to put everything up for sale—from privatizing public institutions to selling things we might once have given away or shared or done out of duty or somehow managed in non-market ways.³⁷

(4) Abstract financial property, exemplified by capital markets and derivatives, follows its own logic and becomes a kind of alien power—a jealous god that rewards its followers, punishes those who ignore its dictates, and periodically rains down storms on the obedient and impious alike.³⁸ Until a few years ago, addressed to American legal scholars, this would have sounded like weird German metaphysics. Now, it just sounds like the housing crisis story, which has been told over and over since Michael Lewis hurried out *The Big Short*.³⁹

One approach to answering these challenges has been to find a productive irony in the activity of property law—that conventional innovation produces some very unconventional results, such as the sharing and dispersed production that Yochai Benkler explores, or the indispensable role of the public domain or commons, which James Boyle discusses.⁴⁰ This is dialectics in a minor key: Private property produces, not its own abolition, but its constant adjustment, qualification, and partial displacement, often serving some arguably higher, or at least quirkier, value, which gives the lie (at least a little lie) to the claim that private property directs human energy in a monotonic way.

35. See Robert L. Hale, *Freedom Through Law: Public Control of Private Governing Power* 15–17 (1952) (setting out account of property rights as establishing baseline of regime of reciprocal, and generally unequal, coercive power).

36. See Purdy, *The Meaning of Property*, *supra* note 6, at 115–16 (stating property regimes create markets by initial allocation, rather than simply following markets); Amartya Sen, *The Moral Standing of the Market*, *in* *Ethics and Economics* 1, 13 (Ellen Frankel Paul et al. eds., 1985) (same).

37. See Michael J. Sandel, *What Money Can't Buy: The Moral Limits of Markets* 93–130 (2012) (noting tendency of markets to overtake other forms of social organization).

38. See Jedediah Purdy, *Being America: Liberty, Commerce, and Violence in an American World 194–99* (2003) (making this argument, with reference to 1999–2000 Indonesian financial crisis).

39. See Michael Lewis, *The Big Short: Inside the Doomsday Machine* (2010).

40. See Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* 35–58 (2006) (reviewing economics of dispersed production); *id.* at 133–272 (discussing promotion of freedom through new technological forms that enable new property arrangements); James Boyle, *The Public Domain: Enclosing the Commons of the Mind* 17–41 (2010) (noting importance of public domain to working regime of innovation).

It strikes my pluralist, in her radical mood, that Dagan takes a particularly sober version of this approach. His discussion of liberal commons arrangements, for example, speaks to it: We use the impersonal and chilly devices of the market to contract for community, commodifying what people were once born into. But, what we get, properly designed, can be genuinely a community—and one that, to boot, overcomes the parochialism and coercion of many traditional communities.⁴¹ The general idea here is that the closer one gets to the actual institutional workings of a legal regime, the more its multifariousness comes into view, and the less plausible it is to think of it in terms as blocky as Property = Capitalism = Commodification, etc., as if each of those words named just one thing, with one logic and meaning. Structural pluralism is an intellectual discipline directed against exactly this kind of rapid abstraction. My pluralist would see this as the Facebook position: Property and radical aspirations toward human emancipation are in a relationship, and “It’s complicated.”

But still she hopes there can be another way for property law and scholarship to approach these radical challenges. A great deal of the conventional rationale for private ownership of resources is a set of collective action problems, the commons tragedy being the arch-paradigm, that serve as bleak meditations on human nature: lazy and destructive (though we learn to say instead, rational) when not motivated by greed or fear.⁴² Property, in the law school conversation, may have taken the crown that James Madison assigned to government: the greatest of all reflections on human nature.⁴³ One question that motivates the Left critics—whom my pluralist is channeling today—is whether Property does not contribute to producing the “nature” its parables describe, helping to ensure that “realism” and modest pessimism about human motivation continue to be two terms for the same thing.

Contrast property for a moment with another touchstone institution of liberal modernity: democracy. Democracy, too, arose in the light of pessimism such as Madison’s, but its growth has been informed by radical ideas of equal freedom and shared self-determination.⁴⁴ The last 235 years, since the appearance in 1776 of both the Declaration of Independence and Adam Smith’s *Wealth of Nations*, have seen in the institutions of political order a practical “reflection on human nature” that has proved people capable of much more freedom and equality than Madison’s generation thought possible.⁴⁵

So, concludes my pluralist, we liberal pluralists—she, Dagan, and the rest, including a character named Purdy—tend to be too quiescent about property’s lack of a utopian dimension. If democratic government is a reflection on human nature, it is one that, by its internal logic, produces constant pressure—

41. See Dagan, Property, *supra* note 3, at 229–44 (making this argument).

42. See, e.g., Robert C. Ellickson, Property in Land, 102 Yale L.J. 1315, 1327–28 (1993) (describing private property as solution to subset of collective action problems); Garret Hardin, The Tragedy of the Commons, 162 Sci. 1243, 1243 (1968) (setting out canonical collective action problem rationale for property).

43. See The Federalist No. 51 (James Madison).

44. See Jedediah Purdy, A Tolerable Anarchy: Rebels, Reactionaries, and the Making of American Freedom 154–60 (2009) (forwarding this argument, regarding democracy).

45. See *id.*

practical and ideological—to test the limits of our ability to reconcile individual freedom, political equality, and collective self-determination. My pluralist’s complaint about liberal pluralism in property law is that it does not create this internal pressure to be asking, constantly, why we can’t *all* have our needs met and the opportunity to engage in free, productive activity.

In other words, we ask about liberal democracy why it is not anarchy—in the good, utopian sense of order without coercion—and so we press toward draining unnecessary coercion out of it. But we don’t ask about liberal property why it is not communism—a strange question, maybe, certainly a deliberately provocative one, but one that might also help press toward draining avoidable inequality and coercion out of it. This would be, in an ironic way, no more than taking seriously the old claims of classical-liberal property theorists, that property should perfectly reconcile competing human goods, and ask whether we can’t use that asymptotically, not claiming to be able to reach it, but always measuring ourselves by how far we are from it.

And how would my pluralist pursue this aim? By becoming a selective monist of the reformist kind, putting pressure on property law by insisting that it be always held to the standard of whether it is producing human freedom, in the double sense of freedom from coercion, on the one hand, and the enjoyment of a rich set of alternatives from which one may freely choose, on the other.⁴⁶ Dagan points out in his Essay that structural pluralism can serve the ends of a value-monist who prizes freedom, because it supports a diversity of possible life-courses, and so promotes the second as well as the first dimension of freedom.⁴⁷ My reformist selective monist, though, wants to go further, pressing on the property regime at every point where it might do more to realize its own utopian promise, of reconciling the satisfaction of our material needs with the liberation of our creative and collaborative activity. In her view, pluralism, for all its benefits, tends to small-c conservatism because it takes its cues from the internal structure of property institutions. These have at least two major limitations. First, operating within existing distributions of property, they tend to be blind to distributive considerations. Second, being constituted by well-established social practices, they tend toward familiar values and balances of value, not radical innovations.

Now, my reformist selective monist might regard her radical approach merely as a kind of thought experiment, and even in this modest respect it could be productive. Even if she ultimately decides against the approach I have sketched, she might understand her reasons better by virtue of having genuinely pursued a kind of monism. She might conclude, pessimistically, that property is much more deeply constrained than democracy. While political liberty, from democratic suffrage to the constitutional protection of intimacy, describes an area where human freedom really has emerged in a dynamic way, she might conclude the tragic features of human nature to which Property responds, from scarcity to selfishness, are permanent and intractable, and we should not cross them. More pragmatically, she might judge that she doesn’t

46. See Purdy, *The Meaning of Property*, supra note 6, at 111–13, 135–37 (arguing for this sort of integrated conception of freedom in property system).

47. See Dagan, *Property*, supra note 3, at 1423–24.

know what I have just said to be true, but that, prudentially, we should act as if it were true, because the historical legacy of those who have assumed otherwise is too violent to tarry with these questions again.

Or she might come to a middle ground. She might judge, not that we should avoid these questions wholesale, but that the answer to them will always be incremental, not categorical, and emerge from exactly the kinds of reformist and reconstructive explorations that property pluralism celebrates. But, she might conclude, returning fully to Dagan's fold, there is nothing further gained by doing this under the sign of utopian reconciliation. Far better to do so under the more modest rubric of pluralist tradeoffs, where one is always trying to lessen the loss.

Or she might decide to embrace the utopian imperative in property. She might genuinely become a selective monist, a pluralist who nonetheless believes that we serve our interests in property best if we always begin and end our inquiries by asking how far our property regime moves us toward the world that both the libertarian ancestors of the right and the utopian ancestors of the left sought.

III. PLURALISM ABOUT PLURALISM

My second example of selective monism wants to get, perhaps, even more ethics into property than Dagan does. My first agreed with those who see reasons to get ethics out. They both, though, give instances of the need for pluralism about pluralism. Pluralism is only one of the stances one might take toward property law, depending which issues one deems important and what one hopes to accomplish. There is a significant gap between pluralism as a general view and the working assumptions one brings to any particular problem. In the latter case, a selective monism may seem more clarifying or productive, precisely because it organizes the field, interpretively or in a spirit of reform, more polemically and selectively than a thoroughgoing pluralism does.

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