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ARTICLE

"New Private Law Theory" as a Mosaic: What Can Hold (Most of) It Together?

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Abstract

Stefan Grundmann, Hans Micklitz, and Moritz Renner's *New Private Law Theory: A Pluralist Approach* is a wide-ranging, ambitious, and fascinating project. In this article I offer one way to read the NPLT as a mosaic, rather than a patchwork, by first taking seriously the idea of legal theory as the core of NPLT's methodological commitments, and second taking seriously its subject matter of private law as the source of its substantive underpinnings.

Legal theory, I argue (much in line with GMR's rich text), is distinctive from other discourses about law given its acute awareness to law's normative filter, which furthermore implies a synthetic commitment that these other discourses do not share. But legal theory should also, I claim, be attentive to the constitutive role law plays in constructing the building-blocks of many of our interpersonal interactions, and it should thus be particularly cautious from relying on philosophical or social scientific inquiries that take contingent configurations of property or of contract as a given. This lesson, in turn, is crucial for contemporary discussions of private law obligations that go beyond the libertarian duty of non-interference. Rather than reifying the libertarian conceptions of property and contract and resorting to exogenous justifications for our interpersonal obligations of non-discrimination and accommodation, private law theory can—and indeed should—rely on happier conceptions of these core legal institutions, which vindicate the free-standing significance of these obligations and thus also validate their transnational applicability.

Keywords: Legal theory; private law; autonomy; justice

A. Restating the Challenges

The *New Private Law Theory: A Pluralist Approach*[1] is a wide-ranging, ambitious, and fascinating project. Its breadth and depth are breathtaking; so reading this *tour de force* of perspectives and themes is literally thought-provoking. No single article, let alone a short article like this one, can do justice to the wealth of ideas discussed by Stefan Grundmann, Hans Micklitz, and Moritz Renner (GMR) in this inspiring volume.

Thus, I will focus on only one question our authors invited us to consider, namely: "Pluralism, Mosaic or Patchwork: What Holds 'New Private Law Theory' Together?" My hope is to offer one way to read *New Private Law Theory* (NPLT) as a mosaic, rather than a patchwork, by first taking

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[1]Stefan Grundmann, Hans-Wolfgang Micklitz, & Moritz Renner, New Private Law Theory: A Pluralist Approach (2021).

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seriously the idea of *legal theory* as the core of NPLT's methodological commitments, and second taking seriously its subject matter of *private law* as the source of its substantive underpinnings.

I am not claiming that this is the only way to read the book or even that it is the only way to read it as a mosaic. Nor do I pretend to offer a view from nowhere on these matters with which I am also engaged for quite some time. Indeed, in a way, what follows may be read as a plea to join forces. But now I'm getting ahead of myself. So let me begin with my understanding of the two main challenges—the methodological and the substantive—that GMR present to private law theory, and then turn to my main task of sketching a way of properly addressing both challenges without collapsing the project into a patchwork.

I. Methodological

The methodological challenge is presented at the very first page of this long book. The NPLT, we are told, must not "simply adopt the guiding paradigm of a single discipline," but rather "take into account the findings" of all the "neighboring disciplines" that can "meaningfully contribute" to private law.[2] This means that "genuine legal evaluation is always necessary in order to integrate the findings of [all these] disciplines and to use them appropriately in theory and practice."[3] This "disciplinary pluralism" implies, more specifically, that private law theory must be able to assess "how and with which significance to integrate the heterogeneous and rich input" as well as "translate and combine" the pertinent insights "into the language of the law."[4] Thus, GMR's reference to NPLT as "application-oriented" must not be interpreted as a mere application of these other disciplines' methodological toolkit to the data of law. In other words, "the added value of an application-oriented theory of private law"[5] is, on my understanding, *not*—at least not necessarily—in providing precise answers to all legal questions, but rather in offering more informed guidelines for addressing these questions.

While these methodological tasks of translation, synthesis, and integration may seem purely pragmatic, GMR helpfully clarify that the core demand and the most fundamental guiding principle for this enterprise is normative. To answer the question "how well can [any given] theory be reconstructed in the realm of law," we must interrogate "the assumptions made by the particular theory," and examine "how far those assumptions can also be accepted or used, albeit in a modified form, in the realm of law."[6] More specifically, as they write while comparing NPLT to economic theory, "[w]hat in economics was achieved under the auspices of the paradigm of efficiency, in legal scholarship must be achieved under the auspices of the ultimate foundations of legal legitimacy."[7] This is because "efficiency is neither the sole relevant value nor even the supreme value in the hierarchy of legal architecture(s). Democratic legitimacy, justice and respect for fundamental rights (and the rule of law) are legal values of supreme importance and rank."[8]

II. Substantive

Immediately after the last sentence just quoted comes the following one; "[i]n particular, the binding force which fundamental rights also have in private law constitutes a striking, irrefutable case, deeply rooted as they are both in societal beliefs about legitimacy and in the canon of legal sources."[9] This proposition—which I assume refers not only to the contingent (European) legal

[2] *Id.* at 1–3.
[3] *Id.* at 6.
[4] *Id.* at 10.
[5] *Id.* at 3.
[6] *Id.* at 16.
[7] *Id.* at 19.
[8] *Id.* at 16.
[9] *Id.* at 16.

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sources and to the *perceived* legitimacy (societal beliefs), but also, indeed mainly, to the *actual* legitimacy of private law—encapsulates NPLT's substantive challenge.

GMR are less explicit regarding this challenge than with respect to the methodological one. What seems clear, however, is twofold. First, at the core of GMR's fifth thesis in which "*New Private Law Theory reflects critical approach to private law*"[10] stands the familiar notion of "materialization of private freedom"—and thus of private law—"through statutory regulation" as well as—although this is "highly debatable"—"fundamental and human rights."[11] Private law, in other words, must be *re*conceptualized because it can no longer be—and is not—dominated by negative freedom and formal equality.

But while the pressure to depart from that old paradigm seems to come most conspicuously from domestic (or regional) constitutions and statutes, it seems equally clear—and this is my second point—that GMR aspire to instantiate it *trans*nationally: In NPLT, they proudly proclaim, "is neither state centred nor exclusively national."[12] Hence, NPLT's—implicit—substantive challenge emerges: Can materialization be endogenized *into* private law so that it is no longer dependent upon domestic legal instruments?

B. Legal Theory as Core

As my short restatement of both challenges implies, I believe that the key for addressing both methodological and substantive challenges is conceptual. Accordingly, my answer to the methodological challenge begins with a brief sketch of my understanding of legal theory; in turn, in Part C, I begin my proposed response to the substantive one with the way I understand the distinctive justice of private law.

This Part discusses the methodological challenge. Recall that GMR repudiate the autonomy of law, call for resorting to multiple methodological perspectives, and point to the need for a normative filter in selecting what is integrated into law and how. I share these convictions and hope to offer a jurisprudential foundation for GMR's appeal to legal theorists to make use of extra-legal insights and refine that filter. In order to do so, I begin by drawing a distinction between discourses about law and legal theory.

I. Discourses About Law and Legal Theory

Law, like economics, or science, for example, can be investigated both from internal and external perspectives. Studied from without, law serves as the source of data, which is the object of study by scholars who employ their own extra-legal theory or methodology. Studied from within, law comes with its own constitutive features, the characteristics that make it what it is. Admittedly, few if any accounts fully fit one polar perspective or the other. A professional historian who makes use of legal documents as sources, for example, needs to know something about the nature of law to identify "legal" or "binding" documents. Yet, these different perspectives—the perspective of a discourse about law or a discourse for which legal materials are sources of information about some wider phenomenon on the one hand, and that of legal theory on the other—present distinct types of work with different points of focus.

Legal theory, as Roy Kreitner and I analyze it elsewhere, denotes the various accounts that—in studying either the law as a phenomenon or any specific legal field—explicitly or implicitly engage with law's constitutive features.[13] Legal theory follows jurisprudence in interrogating the law as *a set of coercive, normative institutions*. Different legal theories offer differing accounts of the way law's power and its normativity align and of how this discursive cohabitation manifests itself institutionally. To be sure, disciplines like sociology, philosophy, political science, and economics also

[10] *Id.* at 4.
[11] *Id.* at 26–27.
[12] *Id.* at 3.
[13] *See* Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 Cornell L. Rev. 671 (2011).

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offer important insights on these three fronts—coerciveness, normativity, and institutions. But legal theory nonetheless has a distinctive signature, which lies at its simultaneous focus not only on what the law is but also on the standards by which law should be judged. Legal theory concentrates on the relationship between law's normativity and its coerciveness, and on the implications of law's institutional structures. For legal theorists, these three features of law and their complicated interactions imply answers on both descriptive and normative fronts.[14]

When law is used as raw material for the application of a non-legal disciplinary methodology or theory, these characteristics do not—and indeed *need not*—burden the analysis. Thus, for example, highly technical analyses of some legal questions that are handled by common law judges may yield valuable insights even when any attempt to translate them into legal prescriptions would be ill-advised given the institutional capacity of the pertinent legal actors. Legal theory, by contrast, must pay attention to this concern. Law is always institutionally embedded, and the capacities of—existing and potential—institutions can never be deemed irrelevant.

This article focuses not on legal theory's sensitivity to institutions, but rather on its attention to the idea that power and reason are both endemic to law. Law implicates power both because judgments prescribed by law recruit the state's force to back them, and due to the institutional and discursive features that tend to disguise or downplay the element of force.[15] Recognizing this apologetic tendency of internal juristic discourse, legal theory must establish at least a modicum of critical distance from practical jurists' proffered reasoning. At the same time, legal theory at its best resists reducing law merely to parochial interests or power politics. It recognizes that modes of legal reasoning—substantive and technical, abstract and contextual—often constrain the sense of choice available to legal decision-makers in directions that transcend their self and group interest. In the best case, legal reasoning must aspire to appeal beyond the parochial, and instances of argumentation exposed as a cover for this interest are treated as cases of abuse.

Again, other disciplines' inquiries of law often ignore law's normativity (or its element of force). This disposition is, at times, quite beneficial, as attested by numerous sociological accounts that expose legal abuses and pathologies. But it is legal theory that tells us that cases in which law is reduced to brute power or interest are indeed pathologies—as H.L.A. Hart's distinction between the power of the law and that of the gunman famously highlights.[16] Law is often unjustified; like other social practices it can, and often does, fail in complying with its task. But this task is nonetheless informative because it defines what counts as success and what counts as failure. In other words, the proposition that the requirement of justifiability is constitutive of law is not a relic of a romantic conception of the law. Quite the contrary: It is at least implicit in any approach that engages in—or seeks to comprehend—evaluation of the law or its critique.[17]

II. Justification as Filter

Indeed, unlike other discourses about law, legal theory must consider the law as purporting to claim legitimate authority. This means that legal prescriptions must appeal to normatively acceptable and openly accessible reasons.[18] At least in a liberal polity, these justifications are premised on

[14]*See also* Hanoch Dagan, Roy Kreitner & Tamar Kricheli-Katz, *Legal Theory for Legal Empiricists*, 43 L. & Soc. Inq. 292 (2018) (describing the potential implications for empirical scholarship, especially on the level of research design).

[15]Here I refer notably to the institutional division of labor between "interpretation specialists" and the actual executors of their judgments, and to our tendency as lawyers and even as citizens to "thingify" legal constructs and accord them an aura of naturalness and acceptability.

[16]*See* H.L.A. Hart, The Concept of Law 82–85 (1961).

[17]*See, e.g.*, K. N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 Yale L. J. 1355, 1385 (1940); Julie Dickson, *Is Bad Law Still Law? Is Bad Law Really Law?, in* Law as Institutional Normative Order 161, 169–70 (Maksymilian Del Mar & Zenon Bankowski eds., 2009); *id.* at 174.

[18]*See, e.g.*, Joseph Raz, Between Authority and Interpretation: On the Theory of Law and Practical Reason 1, 177–78, 180 (2009).

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John Rawls' proposition that people—that is, all people—are entitled to act on their capacity "to have, to revise, and rationally to pursue a conception of the good."[19]

The substance of this injunction will be directly addressed in Part C. For my current purposes what matters is jurisprudential. Law's ongoing quest for justification explains why GMR's insistence on a filter that *selects* the insights of law's neighboring disciplines that can be admitted to legal discourse is not a matter of disciplinary pride. To be sure, as William Ford and Elizabeth Mertz rightly note, law—just like any other linguistic practice—has its own "unspoken assumptions," "deeply felt attitudes," and "underlying worldview," which are all connected to its "core mission."[20] But as they quickly add, law's "underlying goals and ethics [] diverge sharply from those underlying most (if not all) of the social sciences," since law is one of the "very distinctive, normatively charged set of linguistic practices."[21]

This means that legal theory, especially in its prescriptive, application-oriented sides, *must* apply a *normatively-charged* filter. Legal actors may fail, of course, in their choice of normative filter, or in the way they apply it; and they might even act in an irrational manner.[22] But Robert Cover's famous critique of liberal law as an exercise of a "jurispathic power"[23] is—maybe paradoxically—the key for law's legitimacy: Max Weber's account of "the interplay of private rule-making" followed by "the judicial 'selection'" of "the rules that 'are to survive as law'," is not only "a highly realistic picture of rule-making in private law."[24] This critical scrutiny is also a necessary element of private law's legitimacy.

This proposition implies that Jürgen Habermas must be right in his debate with Niklas Luhmann, which GMR discuss in chapter four. The question of "the legitimacy conditions of the legal system" must not be left open, because "social communication is always and necessarily based on a set of normative presuppositions."[25] To be sure, there may well be— indeed there are —"functional systems of society [which] are effectively immune;"[26] and economic globalization may indeed have contributed, as Habermas acknowledged, to this predicament.[27] But this "sober analysis of society" does *not*, in and of itself, justifies placing these systems "on the same footing with" law, as Luhmann argues.[28]

I do not deny, of course, that the commercial activity, on which Luhmann focuses, may generate expectations with no involvement of nation state institutions; social practices surely exist, and at times can even flourish, without formal law. This means that studying these practices and the social norms on which they rely, as well as their interaction with practices that are law-based, is often beneficial. But keeping the conceptual distinction between law and these other categories of norms and practices is nonetheless essential since other systems of norms are not necessarily bound by the same justificatory requirement with which law *qua* law must comply.

Blurring the distinction between law and social norms is troublesome because it might valorize expectations and sanction practices that cannot be justified. The justificatory filter of legal theory addresses this risk by insisting that in order for the expectations from commercial activity—to return to Luhmann's example—to be justified, they must rely on a valid—not necessarily statist—conception of contract. Identifying such a conception necessarily requires, as I will argue

[19]JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 19 (Erin I. Kelly ed. 2001).

[20]William K. Ford & Elizabeth Mertz, *Introduction: Translating Law and Social Science, in* TRANSLATING THE SOCIAL WORLD FOR LAW: LINGUISTIC TOOLS FOR THE NEW LEGAL REALISM 1, 9 (Elizabeth Mertz et al eds., 2016).

[21]*Id.*, at 19.

[22]GRUNDMANN, MICKLITZ, & RENNER, *supra* note 1, at 65.

[23]*Id.*

[24]*Id.* at 64–65.

[25]*Id.* at 102.

[26]*Id.* at 102–103.

[27]*Id.* at 103.

[28]*Id.* at 102–04.

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below, to face challenges of legitimacy and justifiability. Therefore, it must not be simply assumed away.

III. Justification and Synthesis

Legal theory invokes a normative filter every time it is faced with an insight from a neighboring discipline. But recall that part of GMR's methodological thesis is also that NPLT takes a *multi*-dimensional view; namely, that private law theorists should seek to resort to *many* such insights from *multiple* disciplines. The conception of legal theory offered above can explain why.

Legal theory's focus on law's constitutive features of coerciveness, normativity, and institutions implies that any one-dimensional account of law—or of any specific legal doctrine or practice—is, by definition, partial and deficient. In other words, to perform its tasks—either explanatory, justificatory, or reformist—legal theory often *needs* to resort to insights from the other discourses about law. This means that the synthetic spirit of NPLT's disciplinary pluralism is not just a matter of methodological inclination; rather, the appreciation of the nature of law as a set of coercive normative institutions justifies—or even mandates—it.[29]

Thus, applying legal history and sociology as well as to comparative law—a traditional tool of academic lawyers—can offer contextual accounts that help explain the sources and the evolution of the legal terrain. There neighboring disciplines are also instrumental in opening the legal imagination by undermining the status quo's implicit claim of necessity and revealing the contingency of the present. At times, they can help unearth competing legal possibilities and provide hints as to the possible ramifications of their adoption. In turn, social scientific methods—from economics, psychology, sociology, anthropology, and political science—both empirical and theoretical, are surely helpful in figuring out the real life ramifications of current law.

Therefore, legal theory should take a principled anti-purist position. Legal theory combines lessons from interfacing disciplines of the social sciences and the humanities. But legal theory is *not*, as I've emphasized, reduced it to any of them. By the same token, legal theory has no aspiration of closure. Rather than seeking to establish law as an autonomous academic discipline, it celebrates its own embeddedness in the social sciences and the humanities.

This position is further strengthened for legal theorists of the evaluative—justificatory or reformist—type. Assessing the normative desirability of law requires a critical perspective on law's goals. Thus, it typically resorts to guidance from the evaluative neighboring disciplines—notably ethics and political philosophy. And where legal theorists aim at reconstruction—at designing alternatives and comparing their expected performances—they again often use both social scientific tools and normative ones. The responsibility in potentially affecting people's lives forces upon lawyers a duty to doubt as well as a duty to decide, and one cannot discharge these obligations from any single perspective on law. NPLT's call for an application-oriented academic engagement in law—with its distinctive emphasis on justification—makes legal theory's synthetic commitment particularly urgent.

IV. Taking Legal Theory Seriously

Thus far, I've tried to refine two distinctive features of NPLT vis-à-vis more familiar genres of "Law and . . ." scholarship that typify a significant subset of the legal academic dossier in recent decades: Its synthetic commitment and its acute awareness to law's normative filter.[30] I now want to suggest that NPLT should add to these two another feature, or at least a critical cautionary note.

[29]*See* Dagan & Kreitner, *Legal Theory*, *supra* note 14, at 685–88, on which this section draws.

[30]These distinctions can refine the difference between those economic accounts that should be integrated into legal analysis and those that should remain part of what I've called earlier "discourses about law." *See* Hanoch Dagan & Roy Kreitner, *Economic Analysis* in *Law*, 38 YALE J. ON REG. 566 (2021).

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Focusing on private law and especially its core function as the law of the market—as the NPLT does—calls for a special caution for the process of consulting other disciplines. The reason for this is that when these disciplines reflect upon the market's building blocks—property and contract—they all too often *presuppose* contingent, and many times normatively dubious, conceptions of these concepts, which are, to a significant degree, *legally constructed*.

One familiar example comes from Robert Nozick's famous Wilt Chamberlain fable, which he uses in order to analytically undermine the validity of any competing theory of distributive justice.[31] As Will Kymlicka shows, this exercise only works if we *assume* that ownership must take the form of an unqualified and unconditional right.[32] But as property lawyers know, this assumption is descriptively wrong; and—as I argue at some length elsewhere—it is also both conceptually misguided and normatively bankrupt.[33] Yet, the very same conception of property underlies numerous discussions of philosophers as well as social scientists when addressing, respectively, property's justification and its consequences and desirable architecture, and thus also their accounts of the market and the state.

Whereas political philosophers investigate property's justifications and social scientists focus on its architecture, architecture and justification are deeply and necessarily intertwined. The reason for this is that, as one of society's major power-conferring institutions, property's architecture is prescribed by law, which means that its features are—or at least can and should be—aligned to its normative underpinnings. This means that in order to critically interrogate property's legitimacy, whether to celebrate it or to condemn it, philosophers need to appreciate the richness and variability to be yielded from property's legal underpinnings. The inverse conclusions are just as important: Property's design must not be reduced to a pragmatic task of functional optimization of its operation; it should always be responsive, and indeed answerable, to property's justificatory challenge.[34]

Because law is the venue where architecture and justification interact, legal theorists' applications of external critical perspectives on law become tricky. The risk is that looking for insights from social scientific inquiries that oftentimes presuppose the meaning of a legally constructed conception like property might paradoxically end up *further reifying and entrenching* the *status quo*. There is, however, a happy flip side of this professional hazard of NPLT: Private law theory is not—and should not be—only a beneficiary of law's neighboring disciplines. One of its important contributions is to identify the blind-spots of both political philosophers and social scientists. Needless to say, private law theorists must make sure that these blind spots are not replicated in law.

Similar lessons apply to contract—society's other major power-conferring institution—and may call to question the "justice of consensus," or the "justificatory functions" of freedom of contract as discussed in chapter eleven. Following Ludwig Raiser, GMR's picture of contract and of party autonomy in contract offers two options for "the legitimacy of consent": One requires that "both parties formed their will in a decently well-informed and free manner, having the realistic chance of understanding in essence the rationale and the consequences of that to which they consent"; the other "is reached where only one party can be assumed to consent, but in society, there might be a broad consensus that the solution chosen is acceptable and even to be preferred to alternative solutions."[35] The latter alternative, we read, requires "a trade-off between community and individual needs," which is "highly political" and thus needs to be "decided democratically."[36]

[31]*See* Robert Nozick, Anarchy, State, and Utopia 161 (1974).
[32]Will Kymlicka, Contemporary Political Philosophy 102–103 (1990).
[33]*See* Hanoch Dagan, A Liberal Theory of Property (2021).
[34]*See Id.* at 15–16.
[35]Grundmann, Micklitz, & Renner, *supra* note 1, at 207.
[36]*Id.* at 213.

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But the former, we learn—at least by implication—is straightforwardly just, at least in the absence of such a democratic decision.[37]

This last proposition, which reflects familiar accounts of contract as a consensual transfer of entitlements,[38] may seem a truism. But it is not. It presupposes that contract *as such* is and should be—conceptually and normatively—blind to the contracting parties' predicaments. This assumption, at least insofar as modern contract law is concerned, is again descriptively wrong. Thus, in structuring the parties' *bargaining process*, contract law does not hesitate to require parties to consider each other's predicament: Modern rules of duress and unconscionability imply that not all informed consents are valid.[39] Likewise, consented arrangements are still subject—as part of the modern understanding of contract *per se*, rather than due to its recruitment to "community needs"—to a rather robust set of rules during the life of a contract, epitomized by the duty of good faith and fair dealing, which solidify a conception of contract as a cooperative venture.[40]

All these doctrines and rules suggest, at the very least, that—again, even before we get to the public good—consent, including informed consent, does not exhaust the conceptual core of contract. Further analysis may explain why the conception of contract as a consensual transfer, which relies on a view of private law as a bastion of interpersonal independence, is not only contested—rather than essential—but is also normatively indefensible.[41]

Contract theorists, who are well aware of the crucial role law plays in constructing contract and in differentiating valid from invalid consent, can again play a key role in questioning the obviousness of the view of contract as consensual transfer, and thus of the "justice of consensus." In this way, private law theory can again contribute to, rather than being merely informed by, law's neighboring disciplines, which regularly resort to contract and contractarianism, and often—but not always: Recall the subtler idea of "social contract"—uncritically equate these notions with informed consensual transfer.

This lesson as to law's essential role in constructing private law's building blocks of property and contract is, I next argue, key to NPLT's substantive challenge of endogenizing into private law the materialization of private freedom and smoothly introducing fundamental and human rights into its framework.[42]

C. Justifying Private Law

I. Private Law's Autonomy-Enhancing Telos[43]

Private law theory is the theory of the law that structures a (subset of) the horizontal interactions of people in their personal capacity, as opposed to their capacity as subjects of the state or as co-citizens. Private law also affects, of course, public concerns, such as distributive justice, democratic equality, or aggregate welfare and thus should always be attentive to these implications of its doctrines. But private law's distinctive role—its core responsibility—is in structuring our social, as opposed to our public, life; its doctrines address the ways in which we live and interact in the

[37]*Id.* at 215–16.

[38]*See, e.g.,* PETER BENSON, JUSTICE IN TRANSACTIONS: A THEORY OF CONTRACT LAW (2019).

[39]*See* Hanoch Dagan & Avihay Dorfman, *Precontractual Justice*, 28 LEGAL THEORY (forthcoming 2022).

[40]*See* Hanoch Dagan & Avihay Dorfman, *Justice in Contracts*, 67 AM. J. JURISP. (forthcoming 2022).

[41]*See* Hanoch Dagan, *Two Visions of Contract*, 119 MICH. L. REV. 1247 (2021); Hanoch Dagan & Michael Heller, *Autonomy for Contract, Refined,* 40 L. & PHIL. 213 (2021); Hanoch Dagan, *The Liberal Promise of Contract, in* PRIVATE LAW AND PRACTICAL REASON: ESSAYS ON JOHN GARDNER'S PRIVATE LAW THEORY (Haris Psarras & Sandy Steel eds., forthcoming 2022).

[42]Another possible implication that may be pertinent to the NPLT relates to GMR's treatment of Albert Hirschman's celebrated conceptualizations of exit and voice. While GMR discuss these concepts (in Chapter 21) in economic terms, exit and voice are also, I argue elsewhere, core features of a liberal private law properly conceptualized. *See* DAGAN, *supra* note 33, at 36, 43, 54, 59, 85-86, 97, 206-07.

[43]*See* Hanoch Dagan, *Autonomy and Pluralism in Private Law, in* THE OXFORD HANDBOOK OF NEW PRIVATE LAW 177 (Andrew Gold et al. eds., 2020).

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world as people rather than as citizens. This role of private law preceded the idea of the modern state; it is clearly manifested in the transnational interactions that increasingly typify our lives; and it is no less apparent within states—in the market, the workplace, and the neighborhood (to mention just a few obvious loci).

At times, other people pose threats—actual or potential—to our natural rights, which means that part of the task of the law of inter-personal relationships is strictly defensive. But oftentimes—and this is not a particularly modern feature—private law goes beyond the duty-imposing core of protecting people's natural rights. Property and contract—the institutions of private law on which NPLT, and thus this article, focus—are essentially power-conferring.[44]

Private law's power-conferring institutions are important—perhaps crucial—because they enable us meaningfully to act and interact in the world; to make plans and pursue goals; to self-determine. The normative powers instantiated by property law and by contract law allow people to have private authority over resources and to reliably benefit from others' promises. They thus facilitate a temporally extended horizon of action, which is conducive to people's ability to plan. Moreover, contract and alienable property are also key for people's mobility, which is a prerequisite for self-determination; and both expand the options available to individuals to function as the authors of their own lives.

The fact that both property and contract are essentially power-conferring institutions highlights the distinct legitimacy challenge of both property law and contract law because the powers they instantiate—unlike our right to bodily integrity—do not enjoy the uncontroversial status of pre-conventional rights. By constituting property, law proactively empowers owners; and by designating a subset of the promises we make contracts, it likewise enables people to do things that were impossible before. The empowering potential of both property and contact is relational; it comes from the fact that both property law and contact law vest certain people with certain normative powers over others.

Indeed, it is the law which proactively renders these others—non-owners and promisors—vulnerable to such powers. Therefore, law must be answerable to the subjects of the powers it creates. It must be able to explain why non-owners should be subject to the authority it vests in owners. It should likewise account for its willingness to back up promisees' insistence on promisors' performance of promises they have not yet relied upon.

Private law can offer good answers to these acute legitimacy challenges. Law justifiably confers these normative powers on owners and on promisees because such powers are crucial to their self-determination. This means that although both property and contract are conventional, they are particularly valuable conventions—indeed, they are conventions that any humanist polity must enact. Law is also justified in subjecting non-owners and promisors to these powers because *as such*—that is, as core features of autonomy-enhancing conventions—these powers deserve respect from our fellow human beings due to our pre-conventional right of reciprocal respect for self-determination.

Appreciating these foundational roles of private law's autonomy-enhancing *telos* and of the maxim of reciprocal respect for self-determination is critical to the design of private law. It constrains the range of possible configurations of private law, because a private law that undermines its own *telos* and justificatory premise may become illegitimate. Moreover, autonomy's status as the linchpin of the legitimacy of both property and contract implies that its role must not be limited to gatekeeping. Rather, autonomy must also play a major, albeit not an exclusive, role in assessing the performance of existing doctrine as well as guiding its future development.

[44]To be sure, property and contracts obviously also include duties, such as a duty not to interfere with others' rights. But their piggy-backing duty-imposing rules would be meaningless in the absence of the power-conferring institutions of property and contract because their role is to protect our ability to apply the powers enabled by these bodies of law. These duties are important—in fact, they are intelligible—because they support the legal powers that are characteristic of property and contract in the first place.

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This is surely not the place to elaborate on this maxim. For our purposes it is enough to highlight two specific injunctions that emerge from private law's autonomy-enhancing *telos*; that is: From the requirement to ultimately ground its justifications on this commitment to everyone's equal right to self-determination.

The first injunction refers to the intra-personal, inter-temporal dimension of the workings of private law. Because self-authorship requires the ability to both write and rewrite our life stories, autonomy puts a high value on people's ability to "reinvent themselves." Therefore, private law typically ensures people's right to exit their existing property arrangements; this is also the reason for the limits on the range, and at times the types, of enforceable commitments people can undertake.

Alongside this prescription of regard for future self, private law's autonomy-enhancing *telos* prescribes a floor of legitimacy that attends to law's inter-personal implications. Because private law's legitimacy, as just noted, is premised on the maxim of reciprocal respect for self-determination—since this maxim is what justifies the private authority of both owners and promisees—private law must be careful to support interpersonal interactions only if they comply with this very same maxim. But respecting people's self-determination is hollow without *some* attention to who they actually are as well as to their predicament. Therefore, an autonomy-enhancing private law cannot be content with a formal conception of equality that abstracts away the particular features distinguishing one person from another. It must comply with relational justice, namely: Reciprocal respect for self-determination and substantive equality.

Implementing these abstract prescriptions is obviously complicated and it requires local adjustments based on the pertinent doctrinal landscape and the broader social, cultural, and economic circumstances, as well as democratic choices. But what is critical for my current purposes is only that both prescriptions spring immediately from private law's own indigenous normative DNA. This means that any attempt to recruit private law in defiance of these prescriptions must be treated as *ultra vires*: It is an abuse of the idea of property or of contract, that is, use of private law for a purpose that contravenes its *telos*.

II. Inside and Outside of Private Law

It is, I hope, clear by now how this reconceptualization of private law with a proper appreciation of the law's crucial role in constructing private law's building blocks of property and contract helps addressing NPLT's substantive challenge. It may nonetheless be helpful if I further refine the challenge and my—hopefully constructive—intervention.

GMR follow here the dominant interpretation of the path of European—specifically German—private law. This "process of 'materialization'," which GMR discuss mostly in Chapters eight, ten, and eighteen, was first described by Franz Wieacker and then famously theorized by Habermas. Recounting briefly Habermas' account elucidates the challenge at hand. "Premised on the separation of state and society," the narrative goes, "doctrinal refinement proceeded on the assumption that private law, by organizing a depoliticized economic society withdrawn from state intrusion, guaranteed the negative freedom of legal subjects and therewith the principle of legal freedom."[45] But this starting point proved indefensible once it was recognized that this principle "must be realized in different ways as the social context changes."[46] Hence, the need "to 'materialize' existing rights and create new types of rights."[47] As Habermas clarifies, the commitment to "the negative status of legal subjects," which underlies private law, "did not change at all."[48]

[45]Jürgen Habermas, Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy 391 (1996).

[46]*Id.* at 396.

[47]*Id.* at 397.

[48]*Id.* at 400.

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What did change is the understanding that its universal application must follow a "more abstract reading" of private law's "normative premises," and thus "implies a universal right of equality, that is, the right to equal treatment according to norms that guarantee substantive legal equality."[49]

Materialization requires, Habermas explains, "to introduce a new category of basic rights grounding claims to a more just distribution of social wealth (and a more effective protection from socially produced dangers)."[50] But these basic rights also have a "radiating" or "third-party effect"—they prompt changes "in the classical areas of property law and contract law."[51] Thus, materialization represents a "paradigm shift" from a facilitative "framework for private activity," which is "limited only by the contingencies of the quasi-natural social situation" to "the paternalistic provisions of a superior political will that, attempting to influence and shape these social contingencies, intervenes with the intention of enhancing the opportunities for an equal use of legal freedoms."[52]

Habermas is justifiably alarmed by "the risk" that once "the *whole* of private law" is recruited to the task of "the realization of social justice," it "runs the risk of impairing individual autonomy, precisely the autonomy it is supposed to promote by providing the factual preconditions for the equal opportunity to exercise negative freedoms."[53] The "only solution" to this predicament, he claims, is a proceduralist understanding of law, which ensures that law's subjects "can at the same time understand themselves as [its] authors"[54]—"the more [private] law is enlisted as a means of political steering and social planning, the greater is the burden of legitimation that must be borne by the democratic genesis of law."[55]

But is democracy indeed the "only solution"? Moreover, is it a sufficient one? GMR's discussion of the scope of the non-discrimination principle for private actors highlights the remaining difficulty. The fierce controversy on this front is, as they note, "the culmination of an ongoing debate about the growing importance of 'material justice' in private law."[56] The debate is not over, they add, since the "conceptual problem" has not been resolved—how can law call to account private actors, who should be able to freely choose their private law relations? The problem does not go away once the defender of anti-discrimination rules points out to their democratic genesis, since it goes to the very roots of private law as the law of our interpersonal relationships whose language "is unable to address the social consequences of individual decisions."[57]

In other words, since private law "transfer[s] a social problem to the level of individual responsibility,"[58] applying anti-discrimination rules in private law settings—let alone the broader net of *affirmative* interpersonal obligations instantiated by private law post-materialization—faces head on, even if democratically prescribed, the justificatory query of private law;[59] "Why me?", asks the private actor whose negative liberty is now constrained; Why should *I* be the agent of social justice?[60] The familiar answers are not always adequate since the pertinent private responsibility often goes beyond the general Rawlsian—civic—responsibility we all have as citizens to support

[49] *Id.* at 402.
[50] *Id.*
[51] *Id.* at 403.
[52] *Id.* at 405–406.
[53] *Id.* at 398.
[54] Id. at 407–409.
[55] *Id.* at 426–428.
[56] *Id.* at 263–264.
[57] *Id.* at 268.
[58] *Id.* at 270.
[59] The text should not be interpreted as degrading democratic prescriptions. Quite the contrary: it follows a happy conception of democracy, which takes seriously people's right to justification and thus refines its specific content in the pertinent—private law—context. For the right to justification, see RAINER FORST, THE RIGHT TO JUSTIFICATION: ELEMENTS OF A CONSTRUCTIVIST THEORY OF JUSTICE 188–228 (Jeffrey Flynn trans., 2011).
[60] *See* Hugh Collins, *The Challenge Presented by Fundamental Rights to Private Law, in* PRIVATE LAW IN THE 21ST CENTURY 213, 223, 234–235 (Kit Barker et al. eds., 2017).

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just institutions;[61] and—setting aside some corner cases—the duty-ower is not a public official, and in many cases does not enjoy a disproportional market power or provide some essential good.

This difficulty is exacerbated, as I've noted at the outset, in the transnational context, which, as GMR note, poses "the much-discussed question" of "whether transnational legal regimes can and should be 'constitutionalized'."[62] Alluding, I assume, to the notion of materialization, GMR state that such constitutionalization can only be achieved by "transcending the boundaries between domestic and international, between private and public law."[63] But at least to this reader, it remains unclear how this process can overcome the main challenge of materialization, which is—as they concede—justificatory.

The prescriptions of private law's autonomy-based *telos* discussed above dissolve these difficulties.[64] Thus, limits on the jurisdiction of people's present selves to encumber the autonomy of their future selves are not, we now realize, exercises in paternalism, which, as such, threaten individual autonomy. Rather, they are *endogenous* limitations of private law's facilitative sections on which the NPLT focuses.[65]

Similarly, non-discrimination rules and the host of other affirmative duties that typify these sections of modern private law, on which NPLT focuses, can now be seen as what they are. These are not external impositions on, or interventions in, private law, as they are *mis*-represented by ordo-liberal theorists, such as Franz Böhm, who misleadingly use the term "private law society"[66] for what is in essence a libertarian conception of private law. Rather, all these affirmative duties are manifestations of the obligation of reasonable accommodation *integral* to the terms of interaction between owners and promisees—e.g. employers—and nonowners and promisors—the employees—simply as *private* individuals.[67] While the specific content of this obligation depends on the background regime surrounding the parties' interaction, its normative underpinning is freestanding, rather than derivative of that of the welfare state as it is portrayed by Habermas.[68] Because duty-owers do not act as delegates of the state, their interpersonal responsibility does not recede where the parties are not part of the same political community.[69]

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[61]*See* JOHN RAWLS, A THEORY OF JUSTICE 293–294 (1971).

[62]GRUNDMANN, MICKLITZ, & RENNER, *supra* note 1, at 483.

[63]*Id.*

[64]To reiterate and maybe clarify: I do not deny that we are properly bound by civic obligations that go beyond what private law intrinsically requires. But as noted above, the moral importance of the division of humanity into separate individuals implies that the recruitment of citizens to serve justified public goals can be legitimate if and only if it is reasonable and proportional. I discuss the distinction between these two categories of interpersonal obligations in Hanoch Dagan, *Between Regulatory and Autonomy-Based Private Law*, 22 EUROPEAN L.J. 644 (2016).

[65]*See* Hanoch Dagan & Ohad Somech, *When Contract's Basic Assumptions Fail*, 34 CANADIAN J.L. & JURIS. 297 (2021); Hanoch Dagan & Michael Heller, *Freedom and Commitment in Contract Law: Specific Performance Decoded*, 98 NOTRE DAME L. REV. (forthcoming 2023).

[66]GRUNDMANN, MICKLITZ, & RENNER, *supra* note 1, at 136.

[67]*See* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016); Hanoch Dagan & Avihay Dorfman, *The Domain of Private Law*, 71 U. TORONTO L. J. 207 (2021); Hanoch Dagan & Michael Heller, *Can Contract Emancipate? Contract Theory and The Law of Work*, 23 THEORETICAL INQ. L. (forthcoming 2022); Hanoch Dagan & Avihay Dorfman, Poverty and Private Law: Beyond Distributive Justice (Nov. 3 2021), https://ssrn.com/abstract=3637034.

[68]*See* Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 L. & PHIL. 171 (2018). The text may also offer an explanation for Wieacker's caution in qualifying the view of materialization as the remaking of private law a vehicle of "social utilitarianism," where private law is pushed to "serve social purposes outside itself." This view, Wieacker insisted, "is not the whole truth," since this process also reflects the "substantive ethics in contracts, as accepted by the Law of Reason." FRANZ WIEACKER, A HISTORY OF PRIVATE LAW IN EUROPE: WITH PARTICULAR REFERENCE TO GERMANY 428 (Tony Weir Trans., 1995).

[69]*See* Hanoch Dagan & Avihay Dorfman, *Interpersonal Human Rights*, 51 CORNELL INT'L L. J. 361 (2018).

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D. Concluding Remarks

The *New Private Law Theory* offers an exciting opportunity to reconsider the task and the practice of legal theory, and to delve into the normative underpinnings of private law. Legal theory, I've argued—much in line with GMR's rich text—is distinctive from other discourses about law given its acute awareness to law's normative filter, which furthermore implies a synthetic commitment that these other discourses do not share. But legal theory should also, I've added, be attentive to the constitutive role law plays in constructing the building-blocks of many of our interpersonal interactions, and it should thus be particularly cautious from relying on philosophical or social scientific inquiries that take contingent configurations of property or of contract as a given. This lesson, in turn, is crucial for contemporary discussions of private law obligations that go beyond the libertarian duty of non-interference. Rather than reifying the libertarian conceptions of property and contract and resorting to exogenous justifications for our interpersonal obligations of non-discrimination and accommodation, private law theory can—and indeed should—rely on happier conceptions of these core legal institutions, which vindicate the freestanding significance of these obligations and thus also validate their transnational applicability.

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