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PLURALISM AND PROPERTY

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INTRODUCTION

Welfarism is no longer the only game in the town of property theory.¹ In the last several years a number of property scholars have begun developing various versions of a general vision of property and ownership that, although consistent with welfarism in some respects, purports to provide an alternative to the still-dominant welfarist account. This alternative proceeds under different labels, including “virtue theory” and “progressive,” but for convenience purposes let us call them collectively “social obligation” theories. For what they have in common is a desire to correct the common but mistaken notion that ownership is solely about rights. These scholars emphasize the social obligations that are inherent in ownership, and they seek to develop a non-welfarist theory grounding those inherent social obligations.

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1. Not that it ever was. Welfarism, or, more simply, law and economics, has had at least two other competitors in American property theory. Personhood theory, most commonly associated with the well-known work of Margaret Jane Radin, *see, e.g.*, Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982), whose views I discuss in Part II.B.4, is an alternative to welfarism. However, for various reasons, not the least of which was the fact that, unlike welfarism, the personhood theory is not and does not purport to be a comprehensive theory of property, I do not consider the personhood theory to be a true competitor with welfarism or social obligation theories. Both at a positive and normative level, its force is limited. Its ambition is more limited than that of the social obligation theories I examine in this Article.

The second alternative to welfarism in modern American property theory is libertarianism. The most notable exemplar of a libertarian view of property is Richard Epstein, whose work I briefly discuss in Part III.B. As others have noted, however, Epstein’s libertarianism is leavened with a good measure of utilitarianism. Barbara Fried has recently argued that the same is true of Robert Nozick, who is also commonly identified as libertarian. *See* Barbara Fried, *Does Nozick Have a Theory of Property Rights?* (Stanford Pub. L. & Legal Theory Working Paper Series, Research Paper No. 1782031, 2011) *available at* <http://ssrn.com/abstract=1782031>.

These social obligation theories have attracted no shortage of critics.² No critic, however, has raised an ambiguity that characterizes most, if not all, of the work in this vein. Although social obligation theorists have been clear about their commitment to the idea that ownership imposes affirmative as well as negative duties to other members of their communities, they have not always been clear about the normative basis or bases of those duties. More specifically, they have not always indicated whether their theory is value monist or value pluralist; that is, whether it rests on a commitment to a single overriding moral value or multiple moral values. Of course, this is a fundamental question not only for social obligation theorists but also all property scholars engaged in projects of developing general normative theories of property, including welfare theorists.³ Whether they believe that a single value guides, and should guide, all of property law or that no single view of the good either can or should underlie all of property law's contextual and doctrinal diversity, property theorists must explicitly acknowledge and explain their position on this basic question.⁴

This Article has two objectives. The first is to clarify the positions on the monism-pluralism question among social obligation property theorists. Because so few theorists have explicitly confronted that question, I try to tease out their positions from their normative work, recognizing full well that this approach risks attributing views that the author does not hold at all. My second objective is normative. I argue, albeit briefly, in favor of value pluralism as the morally superior approach, one that is both analytically and normatively more defensible.

2. See, e.g., Eric Claeys, *Virtue and Rights in American Property Law*, 94 CORNELL L. REV. 889 (2009); Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009); Katrina M. Wyman, *Should Property Scholars Embrace Virtue Ethics? A Skeptical Comment*, 94 CORNELL L. REV. 991 (2009).

3. Given their express commitment to maximizing social welfare, welfare theorists would seem to be value monists. See Roger Crisp, *Well-Being*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (rev. Dec. 9, 2008), <http://plato.stanford.edu/archives/fall2011/entries/well-being/>. Although they may take cognizance of putative values, such as pleasure, friendship, health, and so on, they treat these as only instrumental values rather than ends themselves. Moreover, welfare theorists consider these instrumental values to be fully commensurable, indeed reducible to a common metric. As I discuss in Part I, these are characteristics of value monism.

4. Professor Hanoch Dagan has argued, correctly in my view, that property theorists must also be clear about their position regarding monism or pluralism in a structural sense; that is, whether property law facilitates diverse social and resource realms (say, à la Michael Walzer, the domestic realm, the commercial realm, the realm of intellectual property, the realm of residential rental property, and so on), each of which is governed by a different value or balance within a set of values, or on the other hand, whether all of property law is structured around a single core principle or right, such as the right to exclude. Although I agree entirely with Professor Dagan in rejecting structural monism, my focus in this Article is principally on *value* monism and pluralism. As Professor Dagan points out, structural pluralism can rely on a pluralist theory of value. See Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 10–11 (June 20, 2011) (unpublished manuscript), available at <http://ssrn.com/abstract=1868198>.

The discussion proceeds as follows. Part I provides a brief explanation of the terms monism and pluralism as they are used in modern value theory. Part II sets forth a taxonomy of various social obligation property theorists' views on the monist versus pluralist approach to values. Part III then takes a normative turn, arguing in support of value pluralism generally and how my social obligation theory specifically conforms to such an approach. It also discusses the problem of incommensurability that arises under value pluralism. I argue that the incommensurability of competing values does not warrant the conclusion that no rational choice between them is possible. Rational choice *is* possible, but this does not mean that only one rational solution is always possible. An unavoidable, and perhaps tragic, consequence of pluralism is that in cases in which two or more incommensurable values are involved, there will sometimes be situations in which more than one rational choice is available. There is not always a single correct answer. But that does not mean that no rational solution is possible. Such is the human condition.

The value monism versus value pluralism problem is not unique to property theory. This Article could have been written just as easily about contract or tort theory as well as other topics of legal theory. Property theory happens to be the domain that I know best. Scholars in other fields may find this Article useful for their own purposes. If so, they may wish to skip Part II, which deals specifically with property scholarship.

I. MONISM AND PLURALISM IN VALUE THEORY

Value monism and pluralism each come in several flavors, and, like chocolate and mocha, the differences between and among them are subtle and not always easy to discern. This makes the battle lines between monism and pluralism somewhat murky. In this part, I provide a rough sketch of the two positions and the main points of disagreement between them, fully acknowledging that I have glossed over some important details.

At bottom, the debate between value monism and value pluralism is about the structure of moral values. There are, of course, many moral values at work in moral theory, but how do these different values relate to each other? In ordinary conversation, we commonly speak of many values that matter to us in our lives—love, friendship, happiness, freedom, and so on—and we talk as though they are all different from each other. In value theory terms, the question is whether all of these values can really be reduced to one basic value or whether instead they in fact *are* distinct from each other.⁵ Monists hold that the former is correct, whereas pluralists take the latter view.⁶

The monist–pluralist dichotomy cuts across another set of distinctions that is familiar in moral theory, the three basic approaches to normative moral theory. These approaches are, of course, consequentialism,

5. See Elinor Mason, *Value Pluralism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 29, 2011), <http://plato.stanford.edu/archives/fall2011/entries/value-pluralism/>.

6. *Id.*

deontology, and virtue ethics.⁷ There is no necessary correlation between any of these approaches and either of the ways of thinking about values, so in theory a monist could be a consequentialist, deontologist, or virtue ethics proponent. Similarly, a pluralist could subscribe to any one of the three moral theories. No moral theory has its own unique or distinctive way of looking at values. There are differences, however, in the ways in which adherents of the three types of moral theory look at the nature of value itself. Consequentialists look at value in terms of goods, such as knowledge, beauty, health, and so on.⁸ They see value as residing in such goods. Consequentialists are not the only moral theorists to perceive values in these terms; virtue ethicists hold this understanding of values as well.⁹ Deontologists, however, do not. Rather than translating values into goods, their vocabulary is one of rules and principles.¹⁰ They ask about a plurality of principles, or a single overarching principle, rather than values or goods.

Regardless of their understanding of values, monists make the same basic claim. There is, they claim, only one fundamental value, whether that value is framed in terms of goods or principles. So, for example, Immanuel Kant was a deontologist, and he was also a monist, for he argued that all moral principles are based on a single, objective moral value, namely, humanity (or human dignity), which he describes as having “absolute” and “objective” worth as an end in itself.¹¹ Similarly, utilitarians are monists, although they take a consequentialist, rather than a deontological, meta-ethical position. Utilitarians usually insist that there is only one moral value, variously termed as pleasure, happiness, social utility, or welfare.¹² They recognize that other goods—such as friendship, honor, and knowledge—exist, but they argue that all such goods are merely instrumental goods insofar as they serve to achieve the same basic good.

Pluralists resist such reductionism. They hold that there may be multiple values that are equally valid and equally fundamental and that these values sometimes conflict with each other.¹³ Moreover, as we shall later see, pluralists often regard conflicting yet equally valid moral values to be incommensurable in the sense that there is no possible hierarchical ordering of them in terms of importance or weight.

Different forms, or levels, of pluralism must be distinguished from each other. At the bottom level, in the sense of being most singular, is

7. Rosalind Hursthouse, *Virtue Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 18, 2007), <http://plato.stanford.edu/archives/fall2011/entries/ethics-virtue/>.

8. See Walter Sinnott-Armstrong, *Consequentialism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Feb. 9, 2006), <http://plato.stanford.edu/archives/fall2011/entries/consequentialism/#WhaGooHedVsPluCon> (citing GEORGE EDWARD MOORE, *PRINCIPIA ETHICA* 83–85, 194 (1903)).

9. See Mason, *supra* note 5.

10. See Hursthouse, *supra* note 7.

11. IMMANUEL KANT, *Groundwork of the Metaphysic of Morals*, in THE CAMBRIDGE EDITION OF THE WORKS OF IMMANUEL KANT: PRACTICAL PHILOSOPHY 37, 78 [4:428–29] (Mary J. Gregor ed. & trans., 1996).

12. MOORE, *supra* note 8, at 107; see also Amartya Sen, *Capability and Well-Being*, in THE QUALITY OF LIFE 30, 32–33 (Martha Nussbaum & Amartya Sen eds., 1993).

13. See Mason, *supra* note 5.

foundational pluralism. This view holds that pluralism exists all the way down to the most basic level so that there is no single value by which we can judge the goodness of all other values.¹⁴ The best example of conflicting views regarding foundational pluralism comes from articles by G.E. Moore and Judith Jarvis Thomson. Moore argued that goodness is unanalyzable.¹⁵ He contends that when a person says that something is “good” the meaning is not purely descriptive, such as the thing contributes to happiness.¹⁶ There is no getting beneath good; it is intrinsically basic. Thomson replied that there is a basic plurality of ways of being good. If I say that the movie was good, there are a number of different senses or ways in which the movie could be good, and these different senses of the movie’s goodness are sufficiently distinct from each other that they cannot all be reduced to something that they all share in common.¹⁷

At the next level up is *normative pluralism*, sometimes called preference pluralism. This view rejects the claim that one moral value prevails over all others (e.g., autonomy over equality).¹⁸ The normative pluralist denies that there is any one unitary normative standpoint from which all possible different moral values, which one might think of as “good-transmitters,” might themselves be evaluated. There is a plurality of good-transmitters, or value-bearers, but only one foundational good that they all bear.¹⁹ Thus, one may think that aggregate well-being is the foundational intrinsic good but also believe that there are many bearers of well-being.

The final rung in the ladder of value pluralism is *decision proceduralism*. This view distinguishes between criteria of right action and decision procedures.²⁰ According to this view, which is held mainly by consequentialists, criteria of right action, like utility, are not intended to serve as decision procedures.²¹ Rather, they claim that utility or other such consequentialist end is only a standard of what is morally right. An agent need not be able to calculate in advance whether all of the conditions necessary for the right action have been met. One could be a value monist in every other way but with respect to decisional procedures, choosing whichever one is most advantageous. This is thus the least demanding form of pluralism.

Finally, it is important that we be clear about distinguishing between a term that applies to a group of values and a term meant to suggest only one unitary value. The former meaning is consistent with pluralism, whereas

14. *See id.* § 1.1.

15. *See* MOORE, *supra* note 8, at 6–16.

16. *Id.*

17. Judith Jarvis Thomson, *The Right and the Good*, 94 J. PHIL. 273, 275–76 (1997).

18. *See* Mason, *supra* note 5, § 1.1.

19. This does not preclude the possibility that goodness itself might be foundational, or a priori, meaning that a moral theorist could combine foundational pluralism with normative pluralism. Such was the case with G.E. Moore. Moore thought that although bearers of value possessed the same foundational value, they were plural with respect to the amount of that good. *See id.*

20. *See id.*

21. *See* R. Eugene Bales, *Act-Utilitarianism: Account of Right-Making Characteristics or Decision-Making Procedures?*, 8 AM. PHIL. Q. 257, 261–63 (1971).

the latter is consistent only with monism. This ambiguity is particularly relevant to property theorists today because welfarists have not been clear in which sense they use the term "welfare." Is welfare a term that covers a number of different values which in these theorists' view cannot be ordered (meaning that welfare theorists are pluralists)? Or do they regard welfare as a single unitary value, in which case they are monists?²² If the latter, then they are likely to face considerable difficulty when it comes to justifying their view that welfare is a unitary value. This is because most (perhaps all) modern welfare theorists are empiricists, for whom an account of any value, including welfare, must be empirical in the sense of referring to phenomena in the natural world.²³ So for them, an account of welfare that tries to establish welfare as a unitary value, as opposed to a group of values, must draw on phenomena in the natural world rather than relying on an *a priori* account of what it is. Because, as consequentialists, they understand values, including welfare, in terms of goods, they must provide evidence from the empirical world to establish that welfare is a singular good rather than an agglomeration of multiple goods. That may prove very difficult to do. It seems unlikely that there is just one experience, condition, or state of affairs that we call welfare. The term is just too broad to be captured by "one singular sensation," to borrow a phrase.²⁴ Upon closer inspection, welfare may well turn out to be a cover term for multiple values, in which case welfare theorists will turn out to be pluralists rather than the monists they are commonly supposed to be.

II. A TAXONOMY OF SOCIAL OBLIGATION THEORISTS

With this overview, we can now consider whether the various versions of social obligation property theory appear to adopt a monist or pluralist stance on the question of values and, if pluralist, what form or level of pluralism they take. This will be a representative sampling rather than an exhaustive survey of social obligation theorists. I cannot possibly claim to identify all property theorists who might reasonably be classified under the social obligation label, so I leave it to them to do so themselves.

A. *What Constitutes a Social Obligation Theorist?*

Professor M.C. Mirow has expressed the basic idea of the social obligation, or social function, norm in the following terms: "[P]roperty

22. One view is that welfarists are foundational monists and normative pluralists by virtue of their commitment to preference satisfaction. From this perspective, only one thing bestows value (that the agent prefers something) but many values (whatever the agent prefers). On another view, welfarists are foundational monists because there is only one irreducible good (welfare); all other goods are merely instrumental and therefore not really independently goods at all.

23. See, e.g., Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989).

24. EDWARD KLEBAN, *One, on A CHORUS LINE* (SONY MUSIC ENTMT 1975).

rights should have their share of social responsibility.”²⁵ The key point about social obligation property theory is that it is a theory (or a congeries of theories) regarding the nature of the concept of ownership. Thus, it does not include any and all theories that use the idea of “the social” to expand the realm of the objects of ownership, including theories like Charles A. Reich’s “New Property.”²⁶ Nor does it include every theory of ownership that recognizes that property rights are not absolute. Such a criterion would screen out practically no modern legal theory of ownership, including libertarian and welfarist theories.

One criterion that might be used concerns a theorist’s position on the right to exclude.²⁷ As Jane Baron has pointed out, “Exclusion is . . . currently perceived as the central fault line in property law and theory.”²⁸ Over the past several years, information-cost theorists, notably Thomas Merrill and Henry Smith, have argued that the right to exclude is at the core of ownership, perhaps even its *sine qua non*.²⁹ Social obligation theorists, although by no means denying the importance of the right to exclude, view ownership’s core as much more complex than the information-cost theorists acknowledge.³⁰ Indeed, they resist the entire imagery of core-and-periphery.

In large measure these opposing views about the right to exclude stem from more basic views regarding the obligations of ownership. Exclusionary theorists view the right to exclude capaciously because they regard the obligations of ownership so minimally. Property owners are rights-holders first and foremost; obligations are, with some few exceptions, assigned to non-owners. Social obligation theorists do not reverse this equation so much as they balance it. Of course property owners are rights-holders, but they are also duty-holders, and often more than minimally so.

Part and parcel with this emphasis on the obligations of ownership is another characteristic of social obligation theory. These theorists repeatedly stress social vision as the foundation of any property system.³¹ Specifically, they argue that a main function of property is to structure social relations and that a legal property system must therefore have a moral vision of what type of social relationships it seeks to foster. Normatively, they believe that a property system should seek to nurture social

25. M.C. Mirow, *The Social-Obligation Norm of Property: Duguit, Hayem, and Others*, 22 FLA. J. INT’L L. 191, 192 (2010) (quoting UGO MATTEI, BASIC PRINCIPLES OF PROPERTY LAW: A COMPARATIVE LEGAL AND ECONOMIC INTRODUCTION 31 (2000)).

26. See Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); see also Mirow, *supra* note 25, at 218.

27. See Jane B. Baron, *The Contested Commitments of Property*, 61 HASTINGS L.J. 917, 919 (2010).

28. *Id.* at 919.

29. See Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730, 737–39 (1998); Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV., 1849, 1857, 1861–62 (2007).

30. See Gregory S. Alexander, *The Complex Core of Property*, 94 CORNELL L. REV. 1063 (2009).

31. See Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745, 757 (2009).

relationships of equal respect and dignity, relationships of fairness and non-domination. For them, it is not enough that a property system is clear, formal, and well structured. Those are important characteristics, to be sure, but they are not enough in the eyes of social obligation theorists. To these theorists, the evaluation of a property system must include a moral dimension, and the morally optimal property system seeks more than formal rules that delineate well-defined and transparent boundaries between owners and non-owners. It cares about the character of the social relationships that those rules and other legal norms help structure and nurture.

B. Four Representative Social Obligation Theorists: Monist or Pluralist?

Taken together, the views of the four social obligation theorists I consider in this section cover all of the main points made in the social obligation literature. The choice of two of the four names—Joseph William Singer and Jedediah Purdy—will be relatively uncontroversial. Jane Baron included both of them in her study of progressive property theorists whose views she contrasted with those of information-cost theorists.³² The other two require a bit of explanation. I include Hanoach Dagan for several reasons. Not the least of these reasons is the fact that he considers himself a social obligation theorist. His work has consistently and explicitly stressed the social responsibility dimension of property, and his general property theory, although departing in some respects from some social obligation theorists, is still closely aligned with theirs. The final scholar in the group is Margaret Jane Radin. The selection of Radin is probably the most surprising among the four, but there are good reasons for counting her, at least in her earlier incarnation³³ as a social obligation theorist. Her personhood theory of property had strong implications for the social obligations of owners, and Radin herself developed some of these implications in influential articles.³⁴

In this part, I examine these four theorists' views, focusing on the question of whether they are value monists or value pluralists. In some cases their positions on that question are quite clear. In others, they are not, and I have done my best to distill from their work readings that are faithful to the scholars' views.

32. See Baron, *supra* note 27, at 924 n.12.

33. Since her well-known property work developing a personhood theory of property, Radin has moved away from property to concentrate on intellectual property and contracts.

34. See, e.g., Margaret Jane Radin, *Justice and the Market Domain*, in *MARKETS AND JUSTICE: NOMOS XXXI*, at 165 (John W. Chapman & J. Roland Pennock eds., 1989); Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667 (1988).

1. Hanoch Dagan

On the monism–pluralism question, Hanoch Dagan’s views are perhaps the clearest of the four. Without doubt, Dagan is a value pluralist.³⁵ He says so explicitly himself, and his reasons for saying so are well grounded. In a recent book³⁶ and several articles³⁷ he consistently and clearly argues that property law reflects commitments to more than one value and that these multiple values are irreducibly plural.

Consistent with his overall political commitment to liberalism, Dagan argues that value pluralism can and should serve a freedom-enhancing function. It can do so by “facilitat[ing], within limits, the coexistence of a variety of social spheres that embody different modes of valuation.”³⁸ Property law in fact does exactly that, he argues. In Dagan’s view, law’s response to this multiplicity mirrors social understandings, especially perceptions of what ownership involves. This observation leads Dagan to develop a version of what he calls “structural pluralism.”³⁹ He summarizes this theory in the following excerpt:

[P]roperty is an umbrella for a set of institutions [bearing a mutual family resemblance], serving a pluralistic set of liberal values: autonomy, utility, labor, personhood, community, and distributive justice. Property law, at least at its best, tailors different configurations of entitlements to different property institutions, with each such institution designed to match the specific balance between property values best suited to its characteristic social setting.⁴⁰

Structural pluralism has two dimensions, or axes. Dagan states that “there are dramatic differences between meanings of ownership in different social contexts and with respect to different resources.”⁴¹ Certain values can and should dominate certain areas of social activity and their attendant legal institutions. So, Dagan suggests, negative liberty should ordinarily be dominant with respect to those areas in which fee simple ownership of land is involved (commercial real estate transactions would be a good example).⁴² In the sphere of marital life, however, values of community

35. Dagan is not clear whether in endorsing value pluralism, he means moral pluralism or political pluralism. The term “value pluralism” is commonly used in connection with both, but it is important to distinguish between them. Political pluralism, which is associated with political liberalism, is concerned with the question of what sorts of restrictions the state may legitimately impose upon the individual’s freedom, given the fundamental differences among values that people reasonably hold. Perhaps the best known exemplar of political pluralism was Isaiah Berlin, whose defenses of political liberalism and a strong version of political pluralism were closely linked. See Mason, *supra* note 5, § 4.4. Political pluralism is not the concern addressed in this Article.

36. HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS* (2011).

37. E.g., Dagan, *supra* note 4; Hanoch Dagan, *Remedies, Rights, and Properties*, 4 J. TORT L., no. 1, 2011, at 1.

38. DAGAN, *supra* note 36, at 72 (footnote omitted).

39. See, e.g., Dagan, *supra* note 4, at 10.

40. *Id.* at 4.

41. DAGAN, *supra* note 36, at 72.

42. See Dagan, *supra* note 4, at 3.

and sharing, rather than personal liberty, should be paramount.⁴³ In yet other domains (Dagan gives the example of patents), utilitarian welfare maximization is and should be the dominant value.⁴⁴

The scheme of structural pluralism has a second axis, looking at the type of asset involved as well as the sphere of social activity.⁴⁵ So, although development of commercial real estate ordinarily should be governed by the linked values of autonomy and liberty, residential real estate may be a different matter. In common interest communities, for example, autonomy, which lies at the heart of the right to exclude, gives way, at least to some extent and for certain purposes, to values of cooperative behavior. In residential tenancies and with respect to highly personal assets, the impersonal values of the market should take a back seat to values of personal identity.

Part of Dagan's argument favoring pluralism as a normative concept is that pluralism enhances individual freedom.⁴⁶ His argument closely follows Joseph Raz's theory of value pluralism. In Raz's view, "[I]f autonomy is an ideal then we are committed to such a view of morality: valuing autonomy leads to the endorsement of moral pluralism."⁴⁷ Raz argues that we exercise autonomy by making choices and that we can make choices in a meaningful sense only if there are a variety of options from which to choose.⁴⁸ Further, for the choices to be meaningful, the available options must differ from each other, differ in ways that may affect rational choice. Moreover, the options must be morally acceptable. "There are, in other words," Raz says, "more valuable options than can be chosen, and they must be significantly different or else the requirements of variety which is a precondition of the adequacy of options will not be met."⁴⁹ In Raz's view then, autonomy presupposes the existence of multiple conflicting values and the necessity of choosing among them.⁵⁰ This is the understanding of autonomy that underlies Dagan's argument of value pluralism.⁵¹

Dagan only briefly discusses incommensurability of values and the question of rational choice among incommensurable values. He accepts the incommensurability of plural values, although it is not clear whether he considers incommensurability an inherent byproduct of plurality, and defines incommensurable values as "relevant goods [that] cannot be aligned along a single metric without doing violence to our considered

43. *See id.*

44. *See id.*

45. *See id.* at 26.

46. *See, e.g.,* DAGAN, *supra* note 36, at 72; Dagan, *supra* note 37, at 28.

47. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 399 (1986).

48. *See id.* at 398.

49. *Id.*

50. *See id.*

51. *See* Dagan, *supra* note 4, at 11–12. It appears, although it is not clear, that Dagan endorses normative rather than foundational pluralism, based on a commitment to individual autonomy. *See id.* at 12. As Dagan observes, however, the difference between the two versions of pluralism is not significant for his purposes because both versions impliedly commit the law to the coexistence of a variety of multiple different value options. *See id.*

judgments about how these goods are best characterized.”⁵² He follows Elizabeth Anderson’s view regarding the possibility of rational choice among incommensurable values, which we shall discuss in detail in Part III. Briefly, however, Anderson argues that although there is no available metric for making global overall comparative judgments of value, local comparisons of value can be and are rationally made. These comparative evaluations are what Anderson calls “goodness-of-a-kind” judgments.⁵³ Such judgments are impersonal choices made in the context of local practices and rely solely on “values internal to and constitutive of the practice,”⁵⁴ rather than external or global values. Anderson gives as examples judgments about the performances of athletes (e.g., the scoring system used in international gymnastics competition).⁵⁵ Such judgments are not expressions of mere preferences or the results of personal standards, nor do they consider values external to the object’s contribution to its contextual practice. So, judgments about acting take into account considerations such as subtlety of character portrayal but not how much the actor is a box office draw. Choices among incommensurable goods can be and are pragmatic and contextual, adapting to the conditions and standards of the local practices involved in the immediate setting.

It is important to emphasize that Dagan’s primary concern is with a certain form of pluralism—“structural pluralism”—in private law.⁵⁶ Certain values and their attendant legal norms should, and to some extent, Dagan believes, do dominate in certain realms of social life and those legal institutions that facilitate or regulate activity within each of those realms but not in others. Normatively, “law should facilitate (within limits) the co-existence of various social spheres embodying different modes of valuation.”⁵⁷ Moreover, lawgivers should be obliged to create and facilitate different—and sufficiently diverse—types of institutions, each incorporating a different value or different balance of values.⁵⁸ One might then call this form of pluralism applied pluralism, applying as it does different elements of moral theory to the legal norms and institutions of private law.

2. Joseph Singer

Although somewhat less explicit in his property scholarship about his stance on the issue than Hanoch Dagan, it seems clear that Joseph Singer, like Dagan, is a value pluralist.⁵⁹ To demonstrate the inevitable role of

52. *Id.* at 11 n.36 (quoting Cass Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 796 (1994)).

53. ELIZABETH ANDERSON, *VALUE IN ETHICS AND ECONOMICS* 49 (1993).

54. *Id.*

55. *Id.*

56. *See* Dagan, *supra* note 4, at 13.

57. *Id.*

58. *Id.*

59. In more recent general (i.e., not property-specific) writing, Singer, together with Martha Minow, has unambiguously endorsed value pluralism. *See* Martha Minow & Joseph

moral values in legal disputes and legal decision making, Singer has consistently emphasized that property disputes seldom, if ever, can be decided on the basis of legal concepts such as ownership alone.⁶⁰ Such concepts, he has forcefully argued, have no single clear meaning that can be used to settle disputes. Rather, underlying such concepts are internal tensions which allow competing disputants to use the concepts for opposing purposes.⁶¹

Singer stresses the social dimension of property rights and property norms. He states that "[j]udging whether a property right is justified requires us to consider the ways in which the recognition of legal rights in property structures social relations."⁶² This point is important for Singer's theory because Singer ultimately argues that in resolving value conflicts that property disputes implicate courts must have some underlying social vision. Courts must, that is, decide what type of society they wish to promote. In structuring property rights, Singer contends, courts must choose between alternative forms of social life.⁶³ These alternative types of society range from one in which factory owners are free to spew pollutants onto neighboring properties with impunity and a landowner is free to use his land as a pig farm that emits obnoxious odors that make his neighbors sick, to a society in which property owners owe obligations to non-owners requiring owners, for example, to share their wealth to enable others to become owners themselves.⁶⁴

Singer denies that property has any single, clear, fixed meaning. It has multiple meanings because it derives its meaning from certain underlying moral values. Singer states that property "is defined not by reference to a fixed conception but by reference to human values."⁶⁵ Moreover, like Dagan, he states that the values underlying property rights and property law are "various and incommensurable."⁶⁶ A non-exclusive list of the moral values that Singer associates with property includes the following: fairness, economic efficiency, social welfare, and social justice.⁶⁷ Moreover, throughout his discussion of property, he identifies individual autonomy—liberty, personal security, and human dignity as values that property rights implicate.⁶⁸

William Singer, *In Favor of Foxes: Pluralism as Fact and Aid to the Pursuit of Justice*, 90 B.U. L. REV. 903, 903 (2010).

60. See JOSEPH WILLIAM SINGER, ENTITLEMENT: THE PARADOXES OF PROPERTY 25–28 (2000).

61. See *id.* at 19–55.

62. *Id.* at 14.

63. See *id.* at 18.

64. See *id.* at 17–18.

65. *Id.* at 37. Singer has frequently quoted this line from the New Jersey Supreme Court's opinion in *State v. Shack*, 277 A.2d 369, 372 (N.J. 1971): "Property rights serve human values. They are recognized to that end, and are limited by it." See SINGER, *supra* note 60, at 37; JOSEPH WILLIAM SINGER, THE EDGES OF THE FIELD 1 (2000).

66. See SINGER, *supra* note 60, at 38.

67. See *id.* at 31.

68. See *id.* at 20, 31, 63, 68.

Like Dagan, Singer sees a kind of order to the role that these values play in property law. Unlike Dagan's order, though, the order that Singer identifies does not assign different values to different spheres of social life or to different assets. Moreover, Singer, unlike Dagan, attaches no special significance to property institutions as bearers of moral values. Rather, Singer sees property values in paradoxical relationships. He emphasizes what he calls the "[p]aradoxes of [p]roperty."⁶⁹ So, to cite an example that Singer uses,⁷⁰ suppose that X firm begins withdrawing water from natural aquifers that lay under its land and that of its neighbors. It sells the water to other firms which sell bottled water. As the demand for bottled water increases, X substantially increases the amount of water it withdraws. X's neighboring property owners begin to complain because they depend on the aquifer to support the surface of their land. They argue that if X keeps withdrawing so much water, their homes will eventually collapse into the earth. They contend that although it was generally legal for X to access underground water from its land, X cannot exercise its right in a manner that destroys its neighbors' property.⁷¹

Singer makes several points from this example. First, the conflict cannot be resolved on the basis of an abstract commitment to strong property rights or individual liberty, the moral value underlying strong legal rights in property.⁷² Credible arguments based on property rights (or liberty) alone can be made in support of both sides. X can plausibly argue, of course, that land owners should be free to use their land as they see fit and that this property right includes the right to freely exploit natural resources that they can access directly beneath their land. Their exercise of this right, they continue, in no way encroaches upon any property right of their neighbors, who are free to do the same. By the same token, the neighbors can argue that X has unduly interfered with their property rights, causing direct and serious physical injury to their land by removing the support for the land. In this situation, then, an abstract commitment to strong property rights supports both of two opposing values—freedom of use and security from harm.⁷³

Second, Singer uses this example to argue that property conflicts often cannot be resolved on the basis of fixed rules alone. Disputes such as the example can be decided only through "the exercise of judgment and the application of social norms."⁷⁴ Singer accepts that courts may develop general rules to adjudicate particular categories of cases. Even then, however, values underlie such rules, so value choices must be made.

The third point Singer wishes to establish from this example is that not only are values implicit in property concepts and norms, they are also

69. *See id.* at 19.

70. *See id.* at 19–39.

71. The example is drawn from *Friendswood Development Co. v. Smith-Southwest Industries*, 576 S.W.2d 21, 22–23 (Tex. 1978).

72. *See* SINGER, *supra* note 60, at 20–22.

73. *See id.* at 21.

74. *Id.* at 37.

diverse and incommensurable.⁷⁵ Singer asks, “How do we compare the value of freedom and the value of security, and choose one over the other?”⁷⁶ If such value choices seem impossible to make in the abstract, they often are no more easily made in a contextual fashion. In the context of disputes like that involving X firm’s claimed right to use underground water, freedom and security support both sides’ positions. The same can be said, Singer argues, from a welfarist perspective. Singer provides no solution to this dilemma but simply wishes to point out to us that the protection of property rights forces choices that are difficult, even painful.⁷⁷

3. Jedediah Purdy

The first question to ask about Jedediah Purdy is whether he is a social obligation theorist at all. I believe he is, although not nearly as obviously so as either Hanoch Dagan or Joseph Singer. As Jane Baron observes,⁷⁸ much of Purdy’s work reflects progressive themes, and at least one other social obligation theorist has identified him as a fellow progressive.⁷⁹ It is easy to misunderstand the normative message of Purdy’s property work because he labels his theory a “freedom-promoting approach.”⁸⁰ Moreover, his recent book, *The Meaning of Property*,⁸¹ explicitly draws its inspiration from Adam Smith, leading one reviewer to characterize the book’s argument as “a classic, liberal view of private property in which property arises out of and helps foster a society in which individuals can enjoy freedom and can flourish.”⁸² The reviewer goes on to describe the book as “situating [Purdy] in the category of those who largely endorse atomistic, contractarian social views and who see individual freedom as the ‘single master value.’”⁸³ I read Purdy differently in two respects. First, I do not read his work, including *The Meaning of Property*, to endorse an “atomistic, contractarian social view[.]” Second, although he does state that freedom is “a single master value,”⁸⁴ I interpret his approach to property as pluralistic rather than as a commitment by him to value monism.

Purdy is no atomist. To the contrary, he repeatedly emphasizes “the fact that we need one another [and] are mostly powerless without one

75. See *id.* at 38.

76. *Id.*

77. See *id.* at 39.

78. See Baron, *supra* note 27, at 924 n.12.

79. See Joseph William Singer, *Democratic Estates: Property Law in a Free and Democratic Society*, 94 CORNELL L. REV. 1009, 1047 (2009).

80. See Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237 (2005) [hereinafter Purdy, *A Freedom-Promoting Approach*]; Jedediah Purdy, *People as Resources: Recruitment and Reciprocity in the Freedom-Promoting Approach to Property*, 56 DUKE L.J. 1047 (2007) [hereinafter Purdy, *People as Resources*].

81. JEDEDIAH PURDY, *THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION* (2010).

82. Eric T. Freyfogle, *Book Review*, 29 LAW & HIST. REV. 327, 327 (2011) (reviewing PURDY, *supra* note 81).

83. *Id.*

84. PURDY, *supra* note 81, at 4.

another.”⁸⁵ While he embraces positive liberty as a value, at the same time he recognizes and endorses the negative version of liberty that is at the heart of classical liberalism. The problem for property and society more broadly, Purdy says, is how to somehow reconcile these two dimensions of freedom in a non-coercive polity. In the two great metaphors of property theory, the dilemma is how to reconcile the Aristotelian vision of humans as inherently interdependent and social with the Lockean vision of the individual as inherently self-sovereign.⁸⁶

Purdy reveals his commitment to pluralism as quickly as he embraces freedom as a value. In the introduction to his book he writes, “Freedom is itself a plural value, of course, and locating its plurality within property thought is a major part of my aim.”⁸⁷ Can this statement be reconciled with the statement immediately preceding it, in which he declares freedom a “single master value”? The latter statement, of course, appears to commit Purdy to value monism. But despite his confusing statement that freedom is a *single* master value, Purdy in fact treats it as plural. He analyzes freedom as multi-dimensional, with each dimension requiring normative pursuit of a separate value. These values are: reciprocity, responsibility, and self-realization.⁸⁸ In the economic sphere, Purdy’s immediate concern, reciprocity means that all participants have a range of alternatives, enabling them to bargain with each other on equal terms.⁸⁹ Responsibility, Purdy argues, requires that “the role of arbitrary fortune in producing inequality (which implies nonreciprocity) should be as small as possible.”⁹⁰ In this context Purdy means personal responsibility rather than social responsibility, although he by no means sees the two as mutually exclusive. Finally, self-realization requires full recognition of the human condition of interdependence.⁹¹ We need each other, Purdy observes, not merely to survive but to prosper and, beyond that, to realize ourselves.⁹²

Purdy is a normative pluralist, but not a foundational pluralist. As a foundational monist Purdy believes, or appears to believe, that there is one property of goodness—individual freedom. As a normative pluralist, however, he recognizes that there are multiple bearers of that value,⁹³ including the three that we just considered.

85. *Id.* at 111.

86. *Id.* at 111–12.

87. *Id.* at 4.

88. *See id.* at 112.

89. *See id.*

90. *Id.*

91. *See id.* at 113.

92. *See id.*

93. I use the term “bearer of value” broadly here to include, for instance, institutions (including legal institutions) and their effects on values like equality. The term also includes objects that agents may potentially choose in the future (where to attend law school) and situations over which agents have no control (a setting sun). Bearers of value such as these are valuable because of the abstract value(s) they realize or display. *See* Nien-hê Hsieh, *Incommensurable Values*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (July 23, 2007), <http://plato.stanford.edu/entries/value-incommensurable/>.

It is clear from Purdy's other writings that he recognizes other goods. Indeed, reading his book together with his other legal scholarship, it is not clear that he is a foundational monist at all. In a recent essay, for example, Purdy expresses a commitment to interpersonal equality as a value that is internal to ownership itself and that constrains the bounds of what owners are free to own.⁹⁴ The same value—interpersonal equality—also underlies constraints on the owner's right to exclude, Purdy argues. Discussing the famous case of *State v. Shack*, for example, Purdy suggests that "the most illuminating way to understand this case is as part of a broader obligation, instinct in ownership, to honor human equality."⁹⁵ Purdy makes it clear, though, that the conception of equality he has in mind is not one that involves, at least not as a matter of logical entailment, a commitment to distributive justice, but rather to access to markets.⁹⁶ In this respect, then, equality as a good is, in Purdy's treatment, another aspect of the basic good of individual freedom to which he committed himself in his book. Equality as access to markets is part of what Purdy means by "recruitment" and "reciprocity"—the processes through which individuals in market societies participate in the multiple practices that constitute an economy—employment, production, consumption, and so on. Within such a society, Purdy tells us, freedom just means that individuals are enabled to participate in these practices on roughly equal terms with all others. Systems of subordination and repression have been wiped away, and individuals participate in various market practices on equal footing—as free and autonomous moral agents.⁹⁷

Purdy does not discuss the problems of incommensurability or rational choice among incommensurable values. Of course, if he is indeed a foundational monist, there is no reason for him to do so. The multiple normative goods that he discusses—recruitment, reciprocity, self-realization, and equality—are all aspects of the same master good, individual freedom. So, there is no occasion for irreducible conflicts among competing values in Purdy's property theory, unlike the theories of both Dagan and Singer.

4. Margaret Jane Radin

Initially, it may seem odd to classify Margaret Jane Radin as a social obligation theorist at all. At first glance, her personhood theory does not seem resonant of a social obligation norm. To the contrary, as critics have noted, it seems individualistic,⁹⁸ at least as it was first set forth.⁹⁹ Its

94. See Jedediah Purdy, *A Few Questions About the Social-Obligation Norm*, 94 CORNELL L. REV. 949, 950 (2009); see also Purdy, *People as Resources*, *supra* note 80.

95. Purdy, *supra* note 94, at 951.

96. See *id.* at 952.

97. See Purdy, *A Freedom-Promoting Approach*, *supra* note 80, at 1297 (advocating his "freedom-promoting approach" to property, which "expand[s] people's set of viable choices and replace[s] relations of domination and subordination with reciprocity").

98. See generally Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347 (1993). Radin herself acknowledges that her personhood argument sometimes has an individualistic cast. See

concern is with the role that property plays in the proper development of the self rather than what obligations owners may owe to others by virtue of their ownership. On one reading, the theory does not seem relational, and in this respect it significantly departs from G.W.F. Hegel's personality theory, which provided the inspiration for Radin's approach. Like Radin, Hegel was concerned with the development of the personality, but unlike Radin, the development of personality is a decidedly communal matter for Hegel.

Radin's later work reveals, however, that her personhood theory in fact does have social obligation implications. Her theory recognizes that under some circumstances some owners owe obligations to persons with whom they have some special kind of relationship. In an article examining the normative justifiability of residential rent control from a personhood perspective, for example, Radin suggests that rent control may justifiably lower some tenants' rents at the landlords' expense.¹⁰⁰ In effect this amounts to recognition of an obligation that landlords owe to the tenants with whom they already have a landlord-tenant relationship. This obligation is based on what Radin calls "the intuitive appeal for preserving the tenant's [established] home."¹⁰¹ That "intuitive appeal" apparently is based on Radin's view that the resident tenant's interest is one that is "justifiably self-invested, so that [the tenant's] individuality and selfhood become intertwined with" her rental unit.¹⁰² The tenant's landlord, Radin implicitly suggests, owes the tenant an obligation to support this personhood interest, even at the expense of sacrificing profits that the landlord would otherwise gain by charging a market-clearing price.

Recognition of a social obligation of ownership can also be gleaned from Radin's discussion of land use restrictions. Radin points out that residential communities, either through zoning measures or restrictive covenants, often create their own social environments by excluding certain kinds of people.¹⁰³ She argues that although one cannot judge in the abstract whether such forms of community creation are good or bad, these restrictions are bad "if those in the main stream of American culture and economic life, who are not having difficulty living out their culture and beliefs, create monolithic exclusions that make it impossible for minorities and dissenters to form communities and live out their alternative visions."¹⁰⁴ "[T]here are moral limitations on servitudes," Radin states.¹⁰⁵ In effect, Radin recognizes that owners in these circumstances owe obligations to persons who would otherwise be excluded by their

Margaret Jane Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350 (1986), reprinted in MARGARET JANE RADIN, *REINTERPRETING PROPERTY* 72, 86 (1993).

99. See Radin, *supra* note 1.

100. RADIN, *supra* note 98, at 74-75.

101. *Id.* at 81.

102. *Id.*

103. See Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 757 (1986).

104. *Id.*

105. *Id.* at 758.

community-creating restrictions to avoid actions that would undermine the others' opportunities to flourish and to experience a well-lived life.

Radin's personhood theory appears to be monistic. It is true that she does not present the personhood theory as a complete theory of property and that she recognizes that other values, including efficiency and personal autonomy, may have a legitimate role to play in some areas of property. However, the same can be said for some welfare theorists, who state that there may be room for values other than welfare-maximization to play, but who do not employ them as part of their analysis. In one sense (a thin sense), these theorists are pluralists, but they, like Radin, either pay lip service to value pluralism or accept pluralism without facing the difficulties pluralism entails.¹⁰⁶

The question is whether Radin uses personhood in the sense of a single fundamental value or simply a name for a group of values, in which case Radin's theory would be pluralist in nature. Does she, in other words, regard personhood as simple and unitary with no parts? Radin's views on personhood have shifted over time. In her article *Market-Inalienability*, she identified three components of personhood: freedom, identity, and contextuality.¹⁰⁷ However, she subsequently criticized her earlier analysis as based too much on "past ideal theories about personhood."¹⁰⁸ In its place she advocated a pragmatic, non-ideal theory of personhood, one that is rooted in "the realities of needs, capacities and circumstances that shape personal development in practice, in the world."¹⁰⁹ Her exemplar of such a non-ideal theory is Martha Nussbaum's "Aristotelian essentialism."¹¹⁰ Nussbaum, both alone and in collaboration with Amartya Sen,¹¹¹ has developed a neo-Aristotelian theory of the good that is decidedly pluralist. I have elsewhere explained Nussbaum's and Sen's capabilities approaches to human flourishing,¹¹² but suffice it to say that both approaches reject the monist view that there exists a singular unitary fundamental moral value. Nussbaum analyzes human flourishing in terms of a list of specific capabilities that she argues are necessary for a person to live a life characterized by human dignity.¹¹³ Moreover, her list of capabilities is provisional and open-ended, adding to its pluralist character. In her later

106. It is true that Radin characterizes her view of property alternatively as "evolutionary pluralism" and "pragmatic pluralism." See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1904 n.208 (1987). However, there is nothing pluralistic about the personhood theory itself. That theory focuses on only one moral value—personhood, or self-constitution. Thus, what is perhaps her most famous and influential piece, *Property and Personhood*, consistently and exclusively focuses on personhood. For this reason, I treat her as a monist.

107. *Id.* at 1904.

108. Margaret Jane Radin, *Reconsidering Personhood*, 74 OR. L. REV. 423, 425 (1995).

109. *Id.*

110. See Martha C. Nussbaum, *Human Functioning and Social Justice: In Defense of Aristotelian Essentialism*, 20 POL. THEORY 202 (1992).

111. See, e.g., THE QUALITY OF LIFE, *supra* note 12.

112. See Alexander, *supra* note 31, at 762–68.

113. See Nussbaum, *supra* note 110, at 222.

work Radin expressly endorses this list,¹¹⁴ thereby implying that her understanding of human flourishing, like Nussbaum's, is pluralist.¹¹⁵ She characterizes her theory of the good as "complex and detailed."¹¹⁶ Further, she states that it is, again like Nussbaum's, open-ended and provisional.¹¹⁷ Finally, although non-relative, the theory of the good is culturally situated.

Radin states that Nussbaum's "theory of the good implies a commitment to [value-]incommensurability."¹¹⁸ Radin herself unambiguously denies that all values are commensurable and further states that this denial is central to human personhood.¹¹⁹ The question of incommensurability is, she states, directly linked with the issue of commodification: "Commodification . . . implies a strong form of value commensurability."¹²⁰ She has little to say about how to deal with the problem of value incommensurability and apparently considers the greater problem to be the refusal to acknowledge that values may sometimes be incommensurable. As to the latter, she states that "by and large . . . philosophical argument, such as it is, cannot force those who are committed to commensurability to change their minds."¹²¹ She continues, "There aren't any knock-down logical arguments that compel people to recognize incommensurability."¹²² She does not seem much interested in the question and so does not pursue the matter.

III. PLURALISM, INCOMMENSURABILITY, AND RATIONAL CHOICE

A. Weaknesses of Value Monism: Rational Preference Theory as an Example

A main, perhaps *the* main, objection to value monism is that it is implausibly reductive. Monists attempt to reduce all moral goods to some single irreducible evaluative standpoint, such as pleasure or desire. This attempt simply does not square with our everyday experiences. As Elizabeth Anderson states, "Our evaluative experiences, and the judgments based on them, are deeply pluralistic."¹²³

How do we respond to situations in which we are faced with multiple, competing goods, like equality and autonomy? Utilitarians and welfarists

114. See Radin, *supra* note 108, at 437.

115. It further implies that her approach has shifted from one inspired by Hegel, as she claimed in *Property and Personhood*, to one that is neo-Aristotelian, but she does not clarify this shift.

116. Radin, *supra* note 108, at 437.

117. *Id.* at 438–39.

118. *Id.* at 445.

119. MARGARET JANE RADIN, *CONTESTED COMMODITIES* 9 (1996).

120. *Id.*

121. *Id.* (footnote omitted).

122. *Id.* This—whether there are "knock-down logical arguments that compel people to recognize" the validity of one's claim—is an odd standard by which to determine whether a philosophical issue is worth engaging at all. It is a standard that seems incompatible with Radin's commitment to philosophical pragmatism, which rejects demands for all foundational tests for validity.

123. ANDERSON, *supra* note 53, at 1.

respond by weighing the competing goods against each other. In doing so, they assume that the nature of the difference between the competing goods is simply quantitative and that, this being so, the rational solution to such dilemmas is to subject them to weighing by a common scale or metric, which, they assume, is readily available. This is a strategy of monism, and it is deeply flawed.

Many defenses of moral pluralism have been offered, most of them basically arguing that there is an irreducible heterogeneity of goods (e.g., knowledge, love, integrity, personal autonomy, etc.). I find particularly attractive Elizabeth Anderson's argument, which points out that there exists what I will call a pluralism of pluralisms,¹²⁴ and I shall rely substantially on her theory, along with Charles Taylor's.

The common denominator of all versions of value pluralism is their claim that apparently different moral values really are different from each other and irreducibly so. But values can differ from each other in more than one respect. What is attractive about Anderson's defense of pluralism is that it takes seriously everyday experiences, specifically, attitudes along with practices that reflect values. By examining such attitudes and practices we can recognize the multiplicity of differences among differences in moral values. Much in the way that ordinary language philosophy successfully draws conceptual insights from everyday expressive practices, ordinary attitudes and practices regarding moral values are a useful and reliable source of knowledge concerning moral questions.¹²⁵

Looking to the evaluative attitudes and practices of everyday life, we can see how the differentiation of goods proceeds along multiple vectors. One vector concerns the modes of valuation.¹²⁶ Anderson points out that we employ distinctive evaluative attitudes toward different goods.¹²⁷ This is saying more than that different kinds of goods are different in different ways. It is saying that in our everyday practices we use different kinds of standards to evaluate different kinds of goods. When I say, "Nelson Mandela is a good man," I don't mean "good" in the same sense as when I say, "This cake is good." The standards I use in valuing Nelson Mandela and cake are quite distinct and resist reduction to any single or unitary standard. We have, in other words, a plurality of evaluative attitudes and standards in addition to a plurality of goods.

But in valuing something—persons, objects, whatever—that is, judging it to be good, we do not always employ standards. Sometimes we value people or things intrinsically, that is, simply for who or what they are.¹²⁸

124. *See id.* at 14.

125. This approach, relying as it does on everyday attitudes and practices, is not an intuitive approach. It differs from an intuitive approach in at least two respects: first, an intuitive approach does not identify the source of our intuitions; second, this method is more social than the intuitional method insofar as it concerns societal rather than individual attitudes and practices.

126. *See* ANDERSON, *supra* note 53, at 8–11.

127. *See id.* at 8–16.

128. Goods may be valued either intrinsically, i.e., for who or what they are, or instrumentally, i.e., for what they can obtain or lead to.

Most parents value their children this way. This is partly what it means to say that we love our children unconditionally. But at other times we value things or persons because they meet a certain preexisting standard that we have. I value my favorite bakery's cake because it meets a certain standard of taste that I use in judging cakes, not because I value cakes intrinsically.

These two different ways of valuing things leads Anderson to observe that there are two conceptions of good. Although these two conceptions overlap with each other, they do not coincide perfectly. The broader sense is captured when we say that something is good simply when it is appropriately valued.¹²⁹ The second, narrower conception of good means that a person or thing is good because it merits being valued by virtue of meeting certain preexisting standards of value that we have.¹³⁰

As Anderson explains, these two different conceptions of good lead to two different conceptions of a plurality of goods. One conception is the idea that we value goods in different ways, ways that are irreducibly different.¹³¹ The second form of pluralism concerns evaluative standards.¹³² There exists an irreducible plurality of evaluative standards according to which we judge whether something is good or not. The standard(s) I use in judging whether or not a cake is good are irreducibly different than the evaluative norms that lead me to declare a Mahler symphony good.

Another vector of differentiation concerns the social dimension of valuation.¹³³ As Anderson notes, "[I]ndividuals are not self-sufficient in their capacity to value things in different ways."¹³⁴ The different ways in which we value things emerge from social settings which sustain the different modes of valuation. Anderson states, "To care about something in a distinctive way, one must participate in a social practice of valuation governed by norms for its sensible expression."¹³⁵ For example, the appropriate mode of expressing valuation of symphonic music in the United States is applause, i.e., clapping one's hands together, and this distinct mode is learned in a social setting. The appropriate mode of expressing valuation of an oral presentation of a scholarly paper at a university setting in Germany is rapping one's fingers or knuckles on the table, a different mode that is also learned in a social setting.

A final vector of differentiation of goods involves the relationship between goods and self-image.¹³⁶ Our self-perceptions, of what kind of persons we are and what we would like to be, inform our perceptions of values. My desire to be an excellent scholar implicitly means that I value certain goods, goods which I strive to attain—to be clear, insightful, careful,

129. See ANDERSON, *supra* note 53, at 2.

130. See *id.* at 4.

131. See *id.* at 4–5.

132. See *id.*

133. See *id.* at 11–16.

134. *Id.* at 11–12.

135. *Id.* at 12.

136. See *id.* at 5–8.

and honest in my work. It means, moreover, that I have become acculturated in the norms of a particular community that has educated me about what goods are valued in the relevant social group of scholars of which I am a member.

Monism attempts to bypass these several levels of differences among goods by reducing them all to one fundamental value. This attempt ignores the evaluative attitudes and practices of everyday life, which inform us that we use multiple and fundamentally diverse standards when coming to value the variety of goods that we encounter in the diverse realms of our lives. It also denies the dependency of our evaluative standards on the particularity and diversity of social settings in which we deploy those standards. It implausibly supposes that one unitary fundamental value cuts across all social and cultural contexts.

As Anderson suggests, one way to test monist theories against pluralist theories is through ordinary experience.¹³⁷ Can the monist theory in question satisfactorily account for the entire range of ordinary evaluative experience? This means whether the theory can account for the variety of standards we ordinarily deploy when valuing people, things, and so on, in different spheres of social life. Can it account for all of the many goods, and the many kinds of goods, as we experience them, that we value in ordinary life? Elaborating on this last point, do those things that are valued as good by the theory match up with just those things that our experience gives us good reasons to value?

The version of monist value theory that is most common in property scholarship (and perhaps most common generally) is rational desire (or preference) theory, which lies at the heart of modern welfarism. Rational desire theory asserts that what is good for a person, what that person values, is what she or he rationally prefers.¹³⁸ Welfare economics, which posits a cruder version of this theory,¹³⁹ consider such preferences to be the actual preferences a person has as they are revealed through actual behavior. Let us compare the more sophisticated rational desire understanding of the good with the pluralist theory just described.

Although the pluralist theory and rational desire theory agree in identifying the good with the subject of a person's positive evaluations in everyday life, they part company from that point on. The first point of difference concerns rational desire theory's identification of the good with preferences. Rational desire theory does not account for all goods. It is not so much wrong as it is incomplete.¹⁴⁰ Objects of desire are aims that we wish to bring about or to obtain. Not everything that people value is

137. See *id.* at 118–19.

138. See generally RICHARD BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* (1979).

139. See generally LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* (2002). Whether objectionable actual preferences, say, racist preferences, should be ignored or cleansed in the welfare calculus is a controversial topic among welfarists. Compare, e.g., JON ELSTER, *SOUR GRAPES* 20–24 (1983) (advocating elimination of improper preferences from welfare calculation), with KAPLOW & SHAVELL, *supra*, at 422 (arguing that purging any preferences conflicts with individuals' basic autonomy and freedom).

140. See ANDERSON, *supra* note 53, at 129–30.

something that we wish to bring about. Indeed, some of the most valuable goods to a person are not aims at all. A person values them intrinsically rather than desiring them in some motivational sense. Think of one's children, for example. A theory of the good that defines the good exclusively in terms of preferences or rational desires cannot capture most people's experience of valuing their children. Some additional value besides preference-satisfaction, a value not reducible to preference-satisfaction, must be at work to explain people's positive evaluations of their children.

The second respect in which value pluralism and rational desire theory differ is the inverse of the first point of difference. The category of desired or preferred objects is over-inclusive in the sense that not all preferences are goods. This is so because of the logic of preference theory, which is maximization of preference-satisfaction. If maximization of preference-satisfaction is to serve as the sole basis of the good, then we must be able to represent preferences in a "single, complete, transitive preference ordering."¹⁴¹ If a person's preferences can be represented, at least at times, only by multiple conflicting preference orderings, then some value other than preference satisfaction must be at work to determine which preferences indicate value.¹⁴² In fact, preferences often do conflict. This occurs partly because preferences arise from multiple and diverse sources, ranging from rational evaluation to whim to habits and even compulsion. One possible response to the problem of conflicting preferences is to identify the strongest preference as the authoritative one, measuring strength on the basis of either experienced intensity or motivational effectiveness.¹⁴³ But this solution will not work. The problem with relying on felt intensity as the benchmark of strength is that it is very misleading. Often the desires that a person feels most intensely are compulsions or obsessions. If we define rational desire on the basis of what states of affairs on reflection we seek to secure for ourselves, then intensely felt desires will sometimes fail to meet the test of a rational desire.

If we use motivational effectiveness as the yardstick by which to measure intensity of desire, we encounter other problems. The motivational effectiveness measure endorses whatever desire actually leads a person to action, but such desires sometimes are the result of weakness of will. By this standard, people who are addicted to nicotine and who are trying unsuccessfully to quit have stronger preferences for cigarettes than they do for good health. But surely that is a misleading conclusion to draw regarding which preference is that person's authoritative preference. When preferences conflict, no intrinsic attribute of preference can tell us which preference is the authoritative index of value. We must look to some source outside of preference to determine that index.

141. *Id.* at 132.

142. *See id.*

143. *See id.* at 136.

B. The Inadequacies of Value Monism of Property Theory

Value monism can be found in various forms throughout modern property theory. Probably the best example is, as I have already indicated, welfarism, the value theory that is the foundation of law and economics. Because I have already discussed some of the problems that confront welfarism and its theory of value, preference satisfaction, I will briefly examine two other monist property theories in this section: libertarianism and the neo-Hegelian personhood theory. Two problems appear in monist property theories. First, they do not maintain their monist character. That is, they both tend to slide into pluralism insofar as they introduce other values. Second, the preferred value of monist property theories does not account for all of property law but only for selected parts.

Consider first libertarianism. Perhaps the best known spokesperson celebrating individual liberty as the single foundational value grounding all of property law is Richard Epstein, and among his vast body of property writings, the best exemplar of his libertarian view is his famous book *Takings*.¹⁴⁴ Epstein's book has attracted more than its share of critics, and one of the common threads of criticism is that Epstein does not consistently hew to his rights-based libertarian line. He blends libertarianism with more than a few doses of welfarist consequentialism. Epstein claims, for example, that his theory strictly protects property as a classically liberal natural right. But in explaining the foundation of this natural right, Epstein rejects the divine origin theory of Locke and Kant's pure reason theory in favor of utility maximization.¹⁴⁵ This move—attempting to marry individual liberty as the fundamental value with utilitarian or welfarist constraints—is characteristic of much of Epstein's property scholarship.¹⁴⁶

Epstein is not the only libertarian who fails to maintain a consistent commitment to individual liberty as the sole foundational value that does or ought to undergird all of property law. Barbara Fried has recently argued that the same problem besets Robert Nozick's theory of property.¹⁴⁷ Fried contends that in *Anarchy, State and Utopia*, Nozick actually has three theories, which she considers mutually exclusive—Lockean libertarian, utilitarian, and “anything goes, provided that citizens have some unspecified level of choice among legal regimes.”¹⁴⁸ To the extent that any one of them predominates, Fried suggests, it is utilitarianism.¹⁴⁹ Indeed, Fried goes on to suggest that most deontologists have not been able to provide detailed solutions to everyday moral problems on the basis of their

144. RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

145. See Thomas C. Grey, *The Malthusian Constitution*, 41 U. MIAMI L. REV. 21, 36 (1986); see also Margaret Jane Radin, *The Consequences of Conceptualism*, 41 U. MIAMI L. REV. 239, 242 (1986).

146. See, e.g., Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723 (1986); Radin, *supra* note 103.

147. See generally Fried, *supra* note 1.

148. *Id.* at 4.

149. *Id.*

deontological premises alone; rather, they have usually relied on assistance from welfarism.¹⁵⁰

Not only do monist property theories tend to fail in their commitment to a single, unitary value as the foundation of property law, they also fail as comprehensive theories of property. That is, they account only for limited parts of property law, conceding (usually implicitly) that the remainder of property law rests on other values. Radin's personhood theory illustrates this problem. This limitation of Radin's personhood theory is indicated by the very fact that Radin herself concedes that her neo-Hegelian theory is not a general theory of property.¹⁵¹ It applies only to those assets and those forms of social life that are (or should be) beyond the reach of the market. Even if we significantly reduce the market's realm, removing from it a number of assets or interests that may legally be the subject of market exchanges under current law, we would still be left with an enormous area of social life and an enormous part of property law about which Radin's personhood theory has nothing to say.

Both Epstein's and Radin's efforts tell us something important about the moral foundation of property law. It is too heterogeneous to be reduced to a single, all-encompassing moral value. Property law's heterogeneity has at least two dimensions. Radin's dichotomy between "personal" property and "fungible" property points to one dimension—the heterogeneity among types of assets (especially viewed in context).¹⁵² As Radin wonderfully shows, although people experience many assets as market commodities, viewing them for their capacity to create wealth, they experience other types of assets in a fundamentally different way, reflecting a different valuation. It is different not in the sense of being higher or lower but in the sense of being an altogether different form or dimension of valuation. They value these "personal" assets for their contribution to and relationship with the construction of the owner's identity.

A second dimension of heterogeneity is social context. Here, I have in mind less the discrete realms of social activity (e.g., the family, the workplace, politics, etc.) that Walzer famously described¹⁵³ than I do the myriad forms and means of social interaction. Epstein's inability to maintain a single-minded commitment to individual liberty illustrates, for example, how the passage of time not only affects the relations between past and present possessors of land but also implicates other goods—including wealth-maximization, the self-identity that accompanies long-term possession, and so on—beyond individual liberty in disputes between those possessors.¹⁵⁴ More broadly, recent judicial applications of the public trust doctrine to contexts in which recreation is the use in question illustrates how courts have recognized the importance of goods other than

150. *Id.* at 27–28.

151. See Radin, *supra* note 1, at 958, 991, 1013.

152. See *id.* at 960.

153. See generally MICHAEL WALZER, *SPHERES OF JUSTICE* (1983).

154. See Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667 (1986).

those expressed by the right to exclude.¹⁵⁵ These goods notably include friendship, sociality, and tolerance.¹⁵⁶ Goods such as these cannot be reduced to mere preferences. They are not simply objects of desire, the conditions of which can be specified in strictly non-evaluative terms, something we either have or do not have ("I just do.").¹⁵⁷ Rather, as we experience such goods, we recognize that in identifying them as valuable to us, we must employ standards that are evaluative, even emotional in nature. The need to use evaluative or emotional standards in identifying goods is one basis for distinguishing mere preferences from pluralist goods.

Hanoch Dagan has pointed out that in property theory monism takes a structural form as well as a value form.¹⁵⁸ By structural pluralism he means the multiplicity of realms of social activity and corresponding legal doctrines and institutions with attending value foundations. Thus, with respect to the family home, in relations between the owner and outsiders the right to exclude is indeed paramount and appropriately so. In this realm, the law values individual autonomy and personal security. But in the context of marriage and marital property, a very different set of values prevails. Here, sharing, community, and cooperation are the values that are normative guideposts for the law. Individual autonomy and security are inappropriate as normative foundations for an intimate social relationship like marriage. This institutional multiplicity can be seen in further detail as we look at social organizations ranging from common interest communities to partnerships.

What needs emphasis is the fact that beneath the structural multiplicity lies value pluralism that is both foundational and normative.¹⁵⁹ The existence of multiple social spheres each with attendant legal institutions and doctrines expresses the pluralism of moral values. The various legal institutions and norms embody the basic moral values that are at work in the social spheres that the legal institutions regulate. That the law creates such multiple and diverse institutions and norms is itself *prima facie* evidence that the underlying values are genuinely diverse and plural. Moreover, even within the same social sphere and same attendant legal institution or set of institutions, there may well be multiple and diverse fundamental values that conflict with each other or at least are potentially in tension with each other. Some property institutions may express both individual autonomy and cooperation or sharing, for example. In such situations we will need to determine whether the fundamental values are incommensurable and if so, whether a rational choice between them is possible. These questions are the topics of the next two subsections.

155. See *Glass v. Goeckel*, 703 N.W.2d 58 (Mich. 2005); *Raleigh Ave. Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112 (N.J. 2005).

156. See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 779–80 (1986).

157. See ANDERSON, *supra* note 53, at 129.

158. See Dagan, *supra* note 4, at 3–4.

159. See *id.* at 10–13.

C. Incommensurability–Incomparability

Value pluralism is often associated with the problem of incommensurability.¹⁶⁰ Some theorists suppose that if values are plural they must be incommensurate.¹⁶¹ But we need to be clear about just what we mean by incommensurate, for there is disagreement about its meaning.¹⁶² One meaning is that incommensurable objects cannot be measured by a single common scalar metric. In this sense it does appear that plural values involve incommensurability. But others use the term “incommensurable” (or “incommensurate”) as being synonymous with *incomparable*.¹⁶³ Strictly speaking, the two are not identical.¹⁶⁴ Incommensurables can be comparable. The side and diagonal of a square are incommensurable but comparable.¹⁶⁵ However, even if plurality does not entail incomparability, the plural (and incommensurate) moral values at conflict in a given situation may still be regarded as incomparable, raising the problem of whether rational choice between (or among) them is possible.¹⁶⁶ This is the problem that critics of pluralism commonly raise, and it is the one I wish to address. Hence, I will, following Joseph Raz,¹⁶⁷ treat incommensurability as synonymous with incomparability, which I think is the more serious problem.

Let us define two incommensurate goods as two goods about which no positive value relation between them holds. A positive value relation means that we can say that *x* is *better than y*, or *x* is *less than y*, or *x* is *equal to y*. If we can say none of those things about the relation between *x* and *y*, then they are incommensurate.¹⁶⁸ One can commensurate two or more values only in relation to what Ruth Chang calls a “covering value,” i.e., some valuable respect or consideration that they share in common.¹⁶⁹ So, two intrinsically valuable goods such as Bach’s musical genius and Mother Theresa’s kindness are incommensurate because they are valuable in fundamentally different respects. There is no covering value that enables any statement of a positive value relation between them to be made. Where

160. For an argument that value pluralism does not necessarily involve incomparability *qua* incommensurability, see Ruth Chang, *Introduction* to INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 14–16 (Ruth Chang ed., 1997).

161. See Michael Stocker, *Abstract and Concrete Value: Plurality, Conflict, and Maximization*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 160, at 196, 203.

162. See Chang, *supra* note 160, at 1.

163. See, e.g., RAZ, *supra* note 47, at 322.

164. Comparison does not require any single scalar metric of measurement. One alternative can be better than another in a relevant sense (e.g., moral) without being a certain number of units better. Items that are comparable can be *ordinally* ranked, i.e., ranked on a list, but need not be *cardinally* ranked, i.e., precisely ranked on the basis of a certain number of units of some scalar metric. See Chang, *supra* note 160, at 2.

165. Stocker, *supra* note 161, at 203.

166. *Id.*

167. See *supra* note 163 and accompanying text.

168. See Elizabeth Anderson, *Practical Reason and Incommensurable Goods*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 160, at 90, 90.

169. Chang, *supra* note 160, at 34.

there is a covering value, Elizabeth Anderson has developed a three-part test for incommensurability. Sharing a covering value, multiple goods are still incommensurable, she suggests, if (1) they both meet the standards measured by some scale but do so in very different ways; (2) there are no great differences in the extent to which each good meets the standards in its own way; and (3) meeting the standards in one way is not categorically superior to the other way.¹⁷⁰ Consider genius. There are multiple ways of meeting the standard of genius, but none of them is categorically superior to the other. Bach's musical genius is beyond question, but it is not categorically superior to Shakespeare's literary genius. Each exhibited genius in the way appropriate to his own genre, which were quite different from each other. Neither displayed greater genius than the other, nor can we say that they were roughly the same in genius. But suppose that Shakespeare had developed the novel as well as written plays and sonnets. This imagined Shakespeare would be better than the real one, but would we say that he exhibited greater genius than Bach? This would make no sense. The situation exhibits what Raz calls intransitivity: Bach does not possess more genius than does Shakespeare, nor does the opposite hold true.¹⁷¹ But there is a third option—the imagined Shakespeare—and this option is better than one but not the other. Intransitivity is the mark, Raz says, of incommensurability.¹⁷²

Just how common is the phenomenon of incommensurability of values? It depends. Values are guides for decisions or reasons for action. In this respect, values implicate the question of human agency.¹⁷³ There are, broadly speaking, two schools of thought about human agency. The crucial differences between the two are: first, the rationalist considers the agent's preferences as a reason for decision or action, whereas the classical school regards preference as an independent factor rather than a reason; second, the rationalist holds that incommensurabilities are relatively rare anomalies, whereas classicists consider value incommensurabilities far more common.¹⁷⁴

The rationalist's move of regarding preferences as reasons is highly problematic. Preferences are motivations, but they are not, at least not necessarily, reasons. Reasons require both information and reflection, qualities that preferences may or may not exhibit. My preference for vanilla ice cream over chocolate is not the result of information (at least not much) or reflection but instinctive reaction to taste. By considering preferences as reasons, rationalists cover the universe of motivations, thereby rendering the category of non-choice among incommensurate goods an empty category. A nifty move, but unconvincing. Unconvincing and unnecessary. There is another way to approach the problem of rational

170. ANDERSON, *supra* note 53, at 55.

171. See RAZ, *supra* note 47, at 325–26.

172. See *id.*

173. See Joseph Raz, *Incommensurability and Agency*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON, *supra* note 160, at 110, 111.

174. *Id.*

choice among incommensurate goods that does not require treating preferences as reasons. I turn to that approach in the next section.

One more point about preferences needs to be added. Welfarists and other consequentialists sometimes try to avoid the problem of incommensurable goods by arguing that all preferences are complete, and that being the case, any two available options to someone who faces a choice between them are commensurable. The preferences are complete, the argument goes, because in a given situation the chooser may always be forced to choose, hence revealing her preference.¹⁷⁵ This argument succeeds by reducing preferences to choices, but that is surely a mistake. Choices are sometimes forced in situations in which it would be absurd to call the chosen option a "preference."¹⁷⁶ Sometimes choices reflect preferences, but at other times, choices are just choices. They certainly tell us nothing about values. The fact that a person's choices are complete is no reliable indicator of the person's value rankings. Hence, the preference-maximizer cannot sidestep the problem of incommensurability.

D. Rational Choice Among Incommensurate Goods

Are we left, then, with no alternative but to conclude that values are indeed irreducibly plural and thus that it is not (or at least may not be) possible to make a rational choice between two moral values? Can we make non-arbitrary (though contestable) decisions in such situations in the absence of an available metric?

I think there is an alternative, and it is one that resonates with suggestions that a number of other moral theorists have raised. To introduce it, let me quote a passage from Aristotle's *Nicomachean Ethics* in which he discusses *epieikeia*, or equity:

[A]ll law is universal [generally], but there are some things about which it is not possible to speak correctly in universal terms. Now, in [those] situations where it is necessary to speak in universal terms but impossible to do so correctly, the law takes the majority of cases, fully realizing in what respect it misses the mark. The law itself is none the less correct. For the mistake lies neither in the law nor in the lawgiver, but in the nature of the case. For such is the material of which actions are made. So in a situation in which the law speaks universally, but the case at issue happens to fall outside the universal formula, it is correct to rectify the shortcoming, in other words, the omission and mistake of the lawgiver due to the generality of his statement. . . . There are some things about which it is impossible to enact a law, so that a special decree is required. For where a thing is indefinite, the rule by which it is measured is also indefinite, as is, for example, the leaden rule used in Lesbian construction

175. See ANDERSON, *supra* note 53, at 58.

176. The choice posed in the novel by William Styron, *SOPHIE'S CHOICE* (1979), is a particularly vivid fictive example.

work. Just as this rule is not rigid but shifts with the contour of the stone, so a decree is adapted to a given situation.¹⁷⁷

As usual, Aristotle is highly instructive, not only about the problem of rules and standards but more generally about making practical decisions and the nature of the practical.¹⁷⁸ In this passage, of course, Aristotle is discussing practical reason, and practical reason is not solely concerned with means but with ends as well.¹⁷⁹ Aristotle reminds us that in living their lives individuals are able to deliberate about seemingly intractable choices and to evaluate what ends are important to them and why. They do not do so merely by relying on their personal preferences, which they treat as some sort of unexamined black box. Rather, they look inside the box and closely examine its contents. Nor do they do so by engaging in some sort of maximizing calculation but by reflecting, oft times in a kind of semi-conscious way, on what really matters in their lives, where "what matters" pertains to considerations such as how they find personal fulfillment or what provides meaning for their lives.

In referring to "what really matters," I mean those actions, modes of behavior, personal characteristics, virtues, ways of life that deeply and honestly express and embody the kind of life that the individual regards as satisfying, worthwhile, and fulfilling—in short, good.¹⁸⁰ What may really matter to some people is kindness to others, best experienced by easing their suffering or discomfort. For others, what really matters may be something quite different—the esteem of one's peers, perhaps, or unshakeable courage, and so on. If those who consider kindness to be the most important good in life, or at least among the most important goods, reflect on what accounts for their valuation of kindness, they will come to a deeper level of understanding of their moral constitution. They will realize that the view they hold regarding kindness as fundamental to the good life relates closely to certain background understandings they have, such as basic views of the relationship between the individual and society, the nature of humanity, and so on.¹⁸¹ In deliberating about the seemingly intractable choices between two or more irreducible but incommensurable

177. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V., ch. 10, at 1137b–1138a (Martin Ostwald trans., 1962). The reference to Lesbian construction work is to its molding, which had an undulating curve. The Lesbian rule was "a flexible piece of lead which was first accommodated to the irregular surface of a stone already laid in position, and then applied to other stones with the view of selecting one of them with irregularities which would fit most closely into those of the stone already laid." 1 J.A. STEWART, *NOTES ON THE NICOMACHEAN ETHICS OF ARISTOTLE* 531 (1973).

178. The following discussion draws inspiration from essays by Charles Taylor and David Wiggins. See Charles Taylor, *Leading a Life*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON*, *supra* note 160, at 170; David Wiggins, *Incommensurability: Four Proposals*, in *INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON*, *supra* note 160, at 52.

179. See David Wiggins, *Deliberation and Practical Reason*, in *ESSAYS ON ARISTOTLE'S ETHICS* 221 (Amélie Oksenberg Rorty ed., 1980).

180. Charles Taylor refers to such actions, ways of being, and so on, as "life goods." See CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 93 (1989).

181. Taylor refers to these basic understandings as "constitutive good[s]." *Id.* at 92. They are constitutive insofar as they constitute the life goods themselves. See *id.* at 92–95.

options, individuals move, often (probably usually) unconsciously, between these different levels of reflection about what really matters. In doing so, they begin to break down what really matters, whatever it may be for them individually, into more finely-grained essentials, elements, threads, and dispositions.

What emerges from this process, although usually not in any clearly articulated form, are evaluative criteria through which individuals are able to avoid impasses in their reflections about what really is worthwhile in life. They develop these criteria contextually, not in the abstract, in an all-things-considered method where all the things that they consider are the concrete elements immediately at hand. The criteria, then, may lack sufficient generality to permit a general ordinal ranking, let alone a cardinal ranking, yet the criteria are sufficiently definite and substantive to enable choices to be made among available options. As the excerpt from Aristotle quoted above indicates, this is what it means to be “practical” and to engage in practical reasoning. It cannot be distilled into any process that we can remotely characterize as maximization, for what really matters is *not* a unitary super-value in the end. What really matters *is* complex, irreducibly so, and part of the point of the process of reflecting on it is to come to grips with its irreducible complexity.

As Aristotle emphasizes, the nature of practical reasoning is such that no blanket general (or “universal,” to use the Aristotelian term) rule will be of use in the kind of cases we are discussing. “There are some things about which it is impossible to enact a law,” he urges us to acknowledge.¹⁸² Our decisions, our choices between multiple incommensurable goods, are intensely and inevitably fact dependent. We ourselves don’t rely on general rules that abstractly rank-order our values when confronted with such dilemmas, for such rules would fail us in these cases. They would fail us for exactly the reason Aristotle identifies—because “there are some things about which it is not possible to speak in universal terms.”¹⁸³ In such cases we cannot use a “rule [that] is . . . rigid but [rather one that] shifts with the contour of the stone.”¹⁸⁴

To continue Aristotle’s metaphor, the stone is what really matters, and the contour of that stone is not always clear. The process of reflecting on what really matters may reveal that it is not morally unambiguous, and in fact it is not even a single value when viewed in a particular context. Suppose that Jill is a graduate botany student doing fieldwork on local flora in Africa. She accidentally discovers that an indigenous flower, previously known only to the indigenous tribe, has properties that allow it to be developed into an anti-HIV vaccine. A significant portion of the local tribe is infected with HIV or suffers from full-blown AIDS. She also learns that the local tribe considers the flower to be sacred and uses it in one of its most important religious rituals. Jill faces a dilemma. On the one hand, she

182. See Aristotle, *supra* note 177, at 1137b–1138a.

183. *Id.*

184. *Id.*

could disclose (possibly for consideration, which she then might donate or at least share with the local tribe) the existence of the flower to a pharmaceutical firm already engaged in manufacturing anti-HIV vaccines, or she could keep the flower's existence a secret, thereby protecting the sacred ritual of the indigenous tribe. Jill consults the elders of the tribe, presenting them with the facts of her situation and asking for advice. What course of action would be in the tribe's best interest, she asks? The elders conduct an informal plebiscite among the members of the tribe, who vote in favor of negotiating with a pharmaceutical firm. But the elders reject the results of the plebiscite and tell Jill that she should keep the flower's existence a secret. Jill worries about the fact that the elders have rejected the apparent wishes of the tribe. She is also troubled by the possibility that the elders, none of whom has AIDS or is infected with the HIV virus, have not fully taken into account the interests of those who are suffering from AIDS or are HIV-positive.

What should she do? Reflecting on her choice, Jill realizes that what she values most highly in her life is being kind to others. Jill does not consider herself to be any sort of saint, but she does share Aristotle's view that humans are social animals. Further, she believes that interdependency is an inevitable aspect of the human condition. A little further reflection about what exactly kindness to others means leads Jill to realize that what kindness to others requires is not clear in this situation. She sees that it implicates at least two quite different goods, both of which matter a great deal to her. The first is respect for the tribe's autonomy and their dignity, as individuals and as a group. An important aspect of this good is non-domination—doing what she can to protect the tribe from being exposed to forms of outside encroachment on their autonomy that risk domination and loss of their way of life. At the same time, Jill is in a position to help the tribe, to reduce their suffering, by giving the pharmaceutical firm access to the flower so that it can produce the anti-HIV vaccine, which can then be made available to members of the indigenous tribe, per Jill's demand, either free or heavily subsidized by Jill and the firm. Both options involve acts of kindness to the tribe but in very different ways. Two different goods are at stake here, and they are very hard, if not impossible, to compare. If asked to rank-order them according to their importance to her in the abstract, she could not possibly do so. How can she possibly choose in this situation?

Charles Taylor's discussion of such situations is especially insightful.¹⁸⁵ Taylor suggests that the crucial aspect of Jill's reasoning will not be her weighting of the different goods but will instead be what Taylor calls "*complementarity*."¹⁸⁶ Rather than balancing the different goods—dignity-non-domination and improvement in health care—in the sense of weighing them against each other, Jill will consider how both goods fit together as pieces of a whole life that she is creating.¹⁸⁷ We are always in the process of becoming a certain kind of human being, and we must

185. See Taylor, *supra* note 178, at 178–82.

186. See *id.* at 181.

187. *Id.* at 179.

evaluate each choice that confronts us as a part of that ongoing process rather than as an isolated decision. Precisely because our lives are an ongoing process that is inconstant, unpredictable, and surprising, we would perhaps not fit the same pieces together the same way at different points in our lives. But at any given point in our lives, a point when we face the need to choose between two fundamentally different goods, we do have some sense of our lives, where we are leading our lives, and what kind of persons we aim to become. It is that sense that enables us to see how the pieces fit together and then to decide.

Complementarity reasoning in Jill's case is agent-relative in nature. That is, it moves away from asking what is the right choice in terms of the competing values in general or in the abstract to asking what is the right choice for the person making it (in this case, Jill). At the same time, however, complementarity reasoning does not necessarily ignore the interests that others may have in the agent's choice. The agent's own vision of how she wishes her life to unfold and what kind of person she sees herself as becoming may well lead her to take the interests of at least some others into account. This is especially likely if she is responsible (and sees herself as such) for the well-being of certain others, ranging from close family members to individuals who are members of various communities or groups that nurture her own well-being in some clear way. The range of persons whose interests the agent takes into account may be broad or narrow, depending upon a wide variety of factors. The important point is that the agent-relative character of complementarity reasoning need not lead to total exclusion of others' interests.

There is no reason to suppose that when someone in Jill's position is able to make a rational choice between incommensurable values through complementarity reasoning she implicitly relies upon some sort of super-value that allows ranking of otherwise incommensurable values. That is not the character of Jill's reasoning when she considers how the multiple values fit together. She does not view the values in binary, or zero sum terms, a situation in which she chooses one and discards the other that has been trumped. Rather, they constitute pieces of the ongoing jigsaw puzzle that is her life—her self—and she values both pieces but must imagine how they can fit with the rest of the puzzle. There is no rejection of values, no trumping. There is instead fitting and refitting until a sense of complementarity—an understanding of the relative contributions the various values make in creating the kind of person she wishes to become—is achieved. Jill evaluates the contributions of each value by looking at them in their relationships with the others, not in a sense of weighing them against each other or ranking them (ordinally or cardinally), but in the sense of investigating how each value fits with the others.

E. Complementarity Analysis Applied to Judicial Reasoning

Jill's story is an example of practical reasoning in the context of personal morality, but does it have any relevance to political morality and to legal decision making? I think it does, and the key is Aristotle's discussion of

equity and its relationship to legal rules that I quoted earlier.¹⁸⁸ In that passage Aristotle intends to describe the equitable judge, but he also intends to describe the lawful judge, the judge who realizes that legality means supporting the legal framework as a whole. Acting equitably, Aristotle tells us, is not acting outside of or against the law. Much to the contrary, equity actually promotes the law by making it operate better. As a noted Aristotelian scholar, paraphrasing Aristotle, puts it, "The legal system works best when legislators know that defects in their products will not necessarily result in injustice, because equitable [judges] will be on hand to recognize the exceptions that were overlooked when the laws were adopted."¹⁸⁹ This is not a matter of rules versus standards or ad hoc decision making, for Aristotle favors "universal law," i.e., rules. Aristotle recognizes, however, that rules, precisely because of their generality, will be deficient because they are too general. Lawmakers cannot possibly anticipate every conceivable circumstance, and even if they could, the rules that would emerge would be needlessly complex. Hence, there are gaps, some intended, some not. The role of equity, Aristotle argues, is to enable legal decision makers to correct these deficiencies in legal rules, not as a matter of refusing to enforce the law in order to do justice as they personally see fit but as a matter of attempting to sustain the lawmakers' overall vision of justice, according to the decision maker's best interpretation of that vision.

The judge's role is to examine the vision animating the relevant legal rule, identifying all of the moral values underlying the rule. When multiple and incommensurate values are involved, the judge must engage in the kind of practical reasoning I described earlier, what I called complementarity analysis. But there is an important difference between complementarity analysis in Jill's case and as it is deployed in judicial analysis. I said earlier that in Jill's case complementarity analysis is agent-relative. Jill asks, among the competing values, what is the right choice for her, in terms of her personal vision of the kind of person she wishes to become, rather than what is the right choice in the abstract. A judge has a different responsibility than an individual like Jill. As Aristotle stresses, even when doing equity, a judge must remain faithful to the law. Specifically, the judge is obligated to develop the best interpretation of the lawmakers' vision of justice animating the rule in question, to identify the vision of what really matters from the lawmakers' point of view, and then to see how the competing and incommensurate moral values best fit together to advance that vision. The reasoning is still agent-relative insofar as the analyst is not asking what the right choice is in the abstract but with respect to some agent. The relevant agent, however, is no longer the analyst. Rather, it is a collective agent whose collective vision of what really matters the judge must do her best to identify. The judge strives to develop an objective understanding of the lawmakers' vision, but the reasoning process

188. See *supra* note 177 and accompanying text.

189. RICHARD KRAUT, ARISTOTLE: POLITICAL PHILOSOPHY 110 (2002).

is inevitably interpretive and contestable. In Aristotle's metaphor, the contour of the stone sometimes is not clear, and reasonable people may reasonably discern its shape differently.

CONCLUSION

Connecting this rather abstract discussion back to property law and theory, it is easy to see the attraction of monist theories such as utilitarianism for property scholars (and judges). They hold out the promise of providing a single correct solution to cases in which seemingly difficult choices must be made by drawing upon the fundamental value at work in their theory. But the promise is illusory. In property disputes, as elsewhere in the law, the apparent value conflicts are real. As I have argued in this Article, no fundamental value is available to mediate these conflicts. The plurality of values that inhere in our legal property system—and other areas of the law—is irreducible.

Where does this leave property theory, then? What implications does value pluralism pose for property theorists? It requires them, first, to be clear about whether they *are* pluralist. Too many analysts have left their position on this important question murky. Second, those property theorists who are pluralist need to attend to the vexing problem of whether rational choices between incommensurable values is possible and, if so, exactly by what reasoning process. Too often we property scholars—and legal scholars generally—when confronted with the familiar dilemma of competing values facilely state that a solution can be found only through a balancing process. Analytically, however, what exactly does this balancing process involve? Does it mean, for example, that we face a zero sum situation in which we must choose one value and discard the other? I have argued that this need not—and should not—be the case.

There is a final implication for property scholars who are pluralist. The moral pluralist accepts the possibility that there are multiple ways to choose well between or among competing incommensurable moral values. In the context of both personal morality and law there are situations where more than one right option is available, and it is rational to choose among these options. This view puts pluralists at odds with monists, who consider it a failure of pluralists that they cannot unequivocally endorse one uniquely correct course of action.¹⁹⁰ But this is not a weakness of pluralism. Buridan's ass¹⁹¹ *can* rationally choose one pile of oats over the other. The

190. Louis Kaplow, for example, makes this criticism of Amartya Sen's capabilities theory. See Louis Kaplow, *Primary Goods, Capabilities, . . . or Well-Being?*, 116 PHIL. REV. 603 (2007).

191. The allegory of Buridan's ass illustrates the dilemma of the moral choice between two apparently identical items. It was first developed by the French philosopher Jean Buridan (1300–58), who actually discussed a dog rather than an ass in his commentary of Aristotle's *De caelo*. See NICHOLAS RESCHER, SCHOLASTIC MEDITATIONS 18–19 (2005) (discussing Buridan's unpublished *Expositio textus* of the *De caelo*). Buridan discusses the method by which a dog must choose between two equal amounts of food (of the same kind) placed before it. See *id.* Given a symmetry of information and symmetry of preference, Buridan concludes, the dog must choose randomly.

ass is not really choosing one pile over the other but rather choosing one of them over starvation.