Sizing Up Private Law

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Abstract

Functional and interpretive theories of private law appear to differ greatly. For functionalists, an external theory should capture real-world results in terms of efficiency, distributive justice, or some other functional criterion, leaving the morally-infused concepts immanent in the law as an intermediate epiphenomenon. Functionalists tend to downplay the role of concepts and doctrines, especially those couched in the moral terms used by participants in the legal system – legislators, judges, and laypeople. By contrast, the interpretivist seeks first and foremost to be true to the moral self-understanding of the law, which necessarily includes the concepts and rules of private law as expressed by those inhabiting the law.

In this paper, we argue that the conflict between external and internal perspectives in private law is misunderstood – and is both exaggerated and underplayed. Both external and internal perspectives pay too little attention to how the "micro" level of individual, even bilateral, interaction relates to the "macro" level of society and the law as a whole. We will show that both perspectives overlook the resources they could employ to explain how the micro and macro are connected: in their different ways, external and internal perspectives do not draw out the connection between local simplicity and generalization. In a nutshell, both perspectives could converge on a picture of private law in which locally simple structures of bilateral rights and duties scale up to produce more complex structures at the level of society.

We suggest that functionalists should take seriously the moral norms that are immanent in private law – these norms are central to the functioning of private law as a system. Without these modular components, private law can be intractably complex. Accordingly, we propose an *inclusive functionalism*, one that takes these moral norms at face value. These moral norms perform a crucial function of managing the otherwise intractable complexity of the interactions between parties governed by private law. We also propose an *inclusive interpretivism*, which is more open to functional considerations involving simplicity. Private law must avoid intractable complexity if it is to function properly, and this calls for a simplicity criterion: interpretivists should look for moral norms that are both simple and generalizable.

Once theorists recognize this point of convergence – on norms that are simple and generalizable – it becomes clearer what is at stake in private law disputes. Resolving private law's conceptual structure at the middle level leaves open foundational questions. What grounds private law? Distributive justice, efficiency, or perhaps a mix of other values? Likewise, we can now better assess interactions between systemic, society-level goals and micro- or mid-level considerations. Should contract law be adjusted so that it has different distributive effects? Should property law be reformed so that it responds differently to fairness concerns, or to human flourishing? These and other questions can only be assessed properly once we have taken into account the way that private law operates as a system.

Introduction

Private law engenders disagreement. For some time, theorists have taken two apparently opposite and irreconcilable approaches to explaining and justifying private law, the law governing interactions between individuals in society. On one side, taking an external perspective, functionalists focus on the effects of legal structures and the consequences of legal decisions, leaving the law's moral language and non-consequentialist moral justifications as at most epiphenomena to what is really going on. Pitted against them are the interpretivists, who from an internal point of view, take on board what they see as the law's self-conception, which includes a moral component.[1] The structure of the law and the reasons given for decisions are seen as expressions of – or the embodiment of – some kind of morality, be it corrective justice, Kantian private right, or something else. Each side sees the other as failing to explain or to justify the law and regards the other approach's treatment of morality as a symptom – or even a cause – of the problem.

We argue that this conflict between external and internal perspectives in private law is both over and under blown. Both external and internal perspectives pay too little attention to how the "micro" level of individual, even bilateral, interaction relates to the "macro" level of society and the law as a whole. We will show that both perspectives overlook the resources they could employ to explain how the micro and macro are connected: in their different ways, external and internal perspectives do not draw out the connection between local simplicity and generalization. In a nutshell, both perspectives could converge on a picture of private law in which locally simple structures of bilateral rights and duties scale up to produce more complex structures at the level of society.

Relating the micro and the macro in private law could confirm broadly to one of three pictures. First, the world of private interactions could be irreducibly complex, in that no manner of management could mitigate the full burden of complexity. Various conflicts like a nuisance dispute between A and B could condition on relations between C and D, and so on. How one acts at the micro level and how the law influences actors' behavior would relate to macro results in an unpredictable way. Small changes in law would have large and surprising effects.[2] At the opposite extreme, the micro could relate to the macro in a trivial, noncomplex way. Everything actors do would have a simple additive

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[1] In making this claim, we will be referring to positive morality and not to critical morality. *Cf.* H.L.A. HART, THE CONCEPT OF LAW 169 (3d ed. 2012) ("We shall consider first the social phenomenon often referred to as '*the* morality' of a given society or the 'accepted' or 'conventional' morality of an actual social group. These phrases refer to standards of conduct which are widely shared in a particular society, and are to be contrasted with the moral principles or moral ideals which may govern an individual's life, but which he does not share with any considerable number of those with whom he lives.").

[2] HERBERT A. SIMON, THE SCIENCES OF THE ARTIFICIAL 195 (2d ed. 1981); *see also* Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-95 (1978) (introducing the concept of polycentric tasks). For analysis of the different types of legal complexity, see Eric Kades, *The Laws of Complexity and the Complexity of Laws: The Implications of Computational Complexity Theory for the Law*, 49 RUTGERS L. REV. 403, 406-24 (1997).

effect on the aggregate of actions, and the macro would be the sum of the micro. Changes in law would have predictable effects, because no interactions beyond the one in question would be relevant to the law contribution to aggregate results.

The actual world fits neither of these pictures. Instead, the micro and the macro relate in a complex but not fully complex fashion.[3] Methods of managing the complexity through modularity allow the legal system to organize around clusters of interactions. Locally simple structures tracking moral norms are compatible with systemic complexity if the system is broken down into semi-autonomous components which interact across stylized interfaces. The very issue of complexity points to an important and often overlooked functional consideration: information costs. Complex systems often function better, in terms of ease of use, evolvability, and understandability, if they are modular.[4]

Across private law, a very localized kind of morality plays a key role in getting the system off the ground. In property, moral norms of possession relating to discrete things allow for coordination of plans and the avoidance of major types of conflict.[5] In tort, the basic injuries that the recognizes and the duties that it prescribes relate to how individuals should treat other individuals, as reflected in a range of tort theories from corrective justice to civil recourse.[6] Finally, contract law has a certain degree of localism built into it, if we take the two-party contract as a starting point, and even more so if the morality of promising or some other morally inflected aspect of bilateral relationships are in the picture.[7] In each of these areas, bilateral interaction and stylized situations that suppress some context are the bread and butter of private law because they represent manageable chunks of horizontal interactions among actors in society.

We will not be arguing that these local forms of morality explain all of private law. Nor do we claim that they are foundational or etched in stone. Indeed, as a society the results of law infused with local morality may not be adequate or attractive.Various

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[3] See Lee Alston & Bernardo Mueller, Towards a More Evolutionary Theory of Property Rights, 100 Iowa L. Rev. 2255 (2014); Henry E. Smith, Complexity and the Cathedral: Making Law and Economics More Calabresian (draft January 2018).

[4] CARLISS Y. BALDWIN & KIM B. CLARK, DESIGN RULES: THE POWER OF MODULARITY (2000); HERBERT A. SIMON, THE SCIENCES OF THE ARTIFICIAL (2d ed. 1981).

[5] LAW AND ECONOMICS OF POSSESSION 65 (Yun-Chien Chang ed., 2015); Morality of property Thomas W. Merrill & Henry E. Smith, *The Morality of Property*, 48 WM. & MARY L. REV. 1849, 1870-90 (2007).

[6] See, e.g., ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 2 (1995); John C.P. Goldberg & Benjamin J. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 FORDHAM L.REV. 1563 (2006).

[7] For promising and contract, see, e.g., CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION (1981); Seana Shiffrin, *The Divergence of Contract and Promise*, 120 HARV. L. REV. 708, 721 (2007). For corrective justice accounts of contract law, see, e.g., Peter Benson, *The Unity of Contract Law*, *in* THE THEORY OF CONTRACT LAW 118 (Peter Benson ed., 2001); Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55 (2003); Andrew S. Gold, *A Property Theory of Contract*, 103 Nw. U. L. Rev. 1 (2009).

schemes of taxation, regulation of polluting activities, and mandatory rules for consumer contracts are but a few of the interventions that override the law's theme of local morality. Instead of being the be-all or end-all of private law, local kinds of morality form the basis for relating the micro and the macro in a world of complex but not overwhelmingly complex interacting private actions and conflicts.

If local morality relates the micro and macro by managing complexity, it is easy to overlook this aspect of private law, for reasons we will explore in this paper. Basic everyday morality is easy to take for granted, and in its relationship to complexity it is as notable for what it rules out – promiscuous interdependencies – than for what it affirmatively accomplishes. As a result of its background role, it is easy to downplay or disparage. Since the days of Legal Realism it has been common to deemphasize the role of things in property, the role of duty in tort law and interpersonal promissory morality in contract.[8] At a further remove, concepts like title and the location of corporation, which serve to organize a variety of legal rules, have acquired a reputation as relics or superstitions.[9] And in a world of additive interactions they might well be. In our somewhat complex world, the question about their actual function is not a trivial one. We will argue that a locally simple morality is not fully appreciated in either functionalist or interpretive theories of private law.

As an example of where loosening the strictures on local complexity can lead to problematic macro effects, consider the financial crisis of 2007-08. The crisis had multiple origins and many effects, but at its center was a problem of unmanaged complexity. The instruments such as collateralized debt obligations or CDOs (and later credit default swaps used to insure CDOs), lie at the intersection of contract and property. Because they were designed to be traded frequently, they were treated in a decontextualized fashion but without being subject to standardization that is central to property doctrine – the *numerus clausus* principle.[10] Without the information cost containing features of property law, these instruments were characterized by high information costs, especially in their interactions.[11] As we will see, untamed complexity is the bane of private law, and much of private law is a response to this central problem.

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[8] See, among many others, GRANT GILMORE, THE DEATH OF CONTRACT (1974); Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Leon Green, *Tort Law Public Law in Disguise*, 38 TEXAS L. REV. 1 (1959).

[9] *See, e.g.*, Cohen, *supra* note 8.

[10] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000).

[11] *See* Kenneth Ayotte & Patrick Bolton, *Covenant Lite Lending, Liquidity, and Standardization of Financial Contracts*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 174 (Kenneth Ayotte & Henry E. Smith eds., 2011); Kathryn Judge, *Fragmentation Nodes: A Study in Financial Innovation, Complexity and Systemic Risk*, 64 STAN. L. REV. 657, 672 (2012); Note, *The Perils of Fragmentation and Reckless Innovation*, 125 HARV. L. REV. 1799 (2012).

There is an irony here. Each perspective – internal and external – does better where it does *not* aim. The functionalists believe in simple accounts that generate theories based on micro interactions, but their strength is that they capture generalities. Interpretive theories favor holistic approaches to law, but they are strongest on realism at the micro level, where the picture of what information people use is a relatively simple and transparent one. Functionalism pays attention to micro foundations but is best at generalization. Interpretivism regards law as a macro system, but is strongest on capturing the ground-level view of participants in the system.

Thus, the problem for internal and external theories is the same one looked at from different angles: how to connect the micro and the macro. And the solution to this problem is the same: locally simple structures, often based on moral norms, that generalize and scale up. Internal and external perspectives differ in which part of the solution to the micro-macro problem they already possess. Internal perspectives take seriously the parts of private law that are simple, generalizable, and scalable, but they ironically do not fully recognize these virtues. Conversely, external theories emphasize macro simplicity and generalization (and even methodological individualism) but usually do not draw the conclusion that considerations of information and complexity point to the importance of local simple structures that do indeed generalize and scale up.

In Part I, the Article will first show how functionalism can be broadened. Once one recognizes the need to explain how law works as a system on the micro and macro levels, it turns out that functionalist explanations can be given for the kinds of local private law structures emphasized by interpretivists. If this inclusive functionalism works, then the ability to explain and even justify these structures is not an argument for internal over external perspectives. Part II turns to interpretivist theories, and shows how without much acknowledgement they opt for local simplicity of a sort that generalizes and scales up. With this more inclusive interpretivism, the ability to provide a satisfying general theory is thus not the exclusive province of functionalists. Part III then turns to the implications of this convergence for private law theory. The convergence of the two kinds of perspectives suggests a reason for the sometimes surprising robustness of the structures of private law and their reliance on local forms of morality. Indeed, despite decades of Legal Realism and its progeny, the more systematic aspects of private law have not changed as much as the commentariat would have expected.[12] These structures derive their strength from the essential function of connecting the micro and the macro in private law.

We then turn to the issues that remain. One type of disagreement, which cuts across external and internal perspectives, is the extent to which local morally inflected legal norms actually do scale up and how public morality "scales down." Libertarians will regard the scaling up as relatively unproblematic, while progressives will see the need for greater distributional and other constraints and interventions in light of patterns

[12] For a dicussion of how the more "architectural" aspects of property law have been the most resistent to Realist and post-Realist inspired change, see Henry E. Smith, *The Persistence of System in Property Law*, 163 U. PA. L. REV. 2055 (2015).

that emerge on the macro level. In contrast, a second set of remaining issues gets at the heart of external versus internal divide. What is the ultimate normative foundation of private law? We aim in this paper to show that much of what commentators and participants in the legal system present as controversies over fundamentals are an artifact of an underdeveloped sense of system in private law. This does not, however, make foundational issues disappear. It does mean that these controversies over foundations will mostly not be decided at the level of principles, doctrines, and institutional features that are the focus of current discussion. In that sense debates in private law are both less and more genuine than they appear. The article concludes with some thoughts on how our argument about the convergence of perspectives on private law fits into past and present currents of thought in private law.

I. Inclusive Functionalism

In the American legal academy, functionalist theories of law in general and private law in particular hold considerable sway. Starting at least with Legal Realism, scholars have been on a quest to explain the law in terms of something else, whether it be efficiency, fairness, autonomy, virtue ethics, or specific social policies. Among these approaches, we focus particularly on law and economics as an exemplar, because it is especially explicit about its functionalism. Explicit, but not unique. The dismissal of the problems of complexity and the related inability to relate the micro and the macro is also characteristic of other functionalist theorizing as it is currently practiced in the United States. Not coincidentally, it is also common to all these approaches that they downplay or disregard the structures of the law itself. These overlooked structures play a role in solving the problem of complexity and thereby linking the micro to the macro in private law. In other words, functionalist theories generally suffer from a gap in explaining how to deal with the complexity involved in connecting the micro and macro. Inclusive functionalism seeks to bridge that gap.

A. The Middle Ground between Micro and Macro

Current external accounts of the law are generally unable to relate the micro and the macro. Sometimes they deny that there is a problem. Law and economics, for example, appears to have a clear answer on how to ground generalizations at the macro scale in micro foundations. Like economics, it rests on methodological individualism.[13] The properties of the system emerge from the interaction of individuals in a straightforward way. Predictions about aggregate behavior of groups are the sum of the predictions of individual, or average, or marginal, individual behavior, as the case may be. To assess overall societal welfare, one can either sum up the welfare implied in one- or two-party models, or one can multiply the welfare associated with averages by the number of actors or instances. In the classic formulation, all that is assumed about individuals is bare rationality.

[13] For a skeptical exploration, see Kenneth J. Arrow, *Methodological Individualism and Social Knowledge*, 84 AM. ECON. REV. 1 (1994); *see also* Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537, 539 (1998).

This approach is as straightforward as it is inadequate in dealing with complexity. Typically, the amount of computation required is not taken seriously.[14] Even in behavioral approaches, there is little emphasis on how rules should not be taken in isolation and how they might work synergistically to give rise to system effects.[15]

It might be thought that the problem of connecting the micro and the macro is unique to law and economics. While appealing at first sight as a solution to the problem, non law and economics functionalist theories similarly fail to address the macro-micro connection head on. Consider theories of private law founded on autonomy. These theories are often quite centered on two-party interactions and assume that the virtues of legal rules unproblematically scale up. Libertarians and some classical liberals are especially likely to see the public as a scaled up version of the private.[16] The focus is on the individual and the individual's autonomy. Considerations that would override this focus simply don't come into play in such theories. For those for whom considerations of fairness and distributive justice do matter, this will not seem very satisfactory. The scaling up of the private also elides the issues of complexity that will be our concern.

In terms of connecting the micro and the macro, other functionalist approaches fare, if anything, even worse. Some private law theories proudly announce themselves as pluralist.[17] Thoroughgoing pluralists see private law as not only grounded in multiple values, but see the structures of the law as reflecting a kaleidoscope of balanced considerations. While loudly claiming not to be ad hoc,[18] such theorists celebrate complexity without giving the slightest clue how it is supposed to be managed.[19] Denying the problem doesn't make it go away. Similar problems face private law theories that take "human flourishing" as the criterion for explaining and, more importantly, justifying private law.

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[14] One approach is to treat economic models "as if" they described the decision making process without claiming that they do, and instead focusing on prediction. *See* Milton Friedman, *The Methodology of Positive Economics*, *IN* ESSAYS IN POSITIVE ECONOMICS 3 (1966) [1953]. Another is to enrich the model of human decision making, which ultimately leads to behavioral appraches. *See* Herbert A. Simon, *A Behavioral Model of Rational Choice*, 69 Q.J. ECON. 99, 99 (1955).

[15] BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000); OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS (2012); *see also* BEHAVIORAL ECONOMICS AND ITS APPLICATIONS (Peter Diamond & Hannu Vartiainen eds., 2007); COLIN F. CAMERER, BEHAVIORAL GAME THEORY (2003).

[16] For a sophisticated libertarian account showing awareness of this feature, see David Friedman, *A Positive Account of Property Rights*, 11(2) SOC. PHIL. & POL'Y 1 (1994). *See also infra* at 141-142 and accompanying text.

[17] Gregory S. Alexander, *Pluralism and Property*, 80 FORDHAM L. REV. 1017 (2011); Hanoch Dagan, *Pluralism and Perfectionism in Private Law*, 112 COLUM. L. REV. 1409 (2012).

[18] *Id.* at 1443 n.140.

[19] *Id.* at 1409.

While we are all for human flourishing, the notion of human flourishing also elides the question of how to manage complexity.

Evaluating detached rules of property from the point of human flourishing is a massive exercise in the fallacy of division.[20] Granted that we should hope that the law promotes human flourishing and should worry if it doesn't, the idea that it informs which exceptions are to be made to trespass or who should be compensated for takings simply ignores how these questions interlock with others in the overall system of law. So we get bizarre statements such as public libraries always being worthy[21] – even when as a gold-plated amenity they can be used as a tool for exclusionary zoning.[22] The same goes for the hotly contested area these days of open space.[23] Open space promotes human flourishing except when it doesn't. If it keeps poor people from having decent housing, it promotes some (elite) groups' flourishing at the expense of others'. But there is no way to know this without paying attention to how things scale up.

Sometimes this micro-macro problem involves a confusion of different kinds of justice. For example, Bruce Ackerman argued for minimum housing standards based on landlords' ongoing relationship with tenants, even if this meant that landlords would shoulder the burden rather than those in society generally.[24] This might be regarded as a distributive justice argument in corrective justice clothing: a maldistribution of wealth is the responsibility of those personally furnishing services to those lacking in wealth. How this kind of intervention generalizes turns out to be a tricky question.[25] As one of us has argued, there are good arguments that can be mustered for minimum housing standards,[26] but the assumption that distributive arguments scale down in the naïve way isn't one of them.

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[20] Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009). For discussion of this fallacy, see *infra* at note 42 and accompanying text.

[21] *Id.* at 781-82.

[22] Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel, 336 A.2d 713, 722 (N.J. 1975) (reciting gold plated required amenities that contributed to exclusionary zoning scheme, including "very large sums of money for educational facilities, a cultural center and the township library").

[23] Stephen Schmidt & Kurt Paulsen, *Is Open-Space Preservation a Form of Exclusionary Zoning? The Evolution of Municipal Open-Space Policies in New Jersey*, 45 URBAN AFF. REV. 92 (2009).

[24] *See* Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 YALE L.J. 1093, 1170-72 (1971).

[25] *See* Richard Craswell, *Passing on the Costs of Legal Rules: Efficiency and Distribution in Buyer–Seller Relationships*, 43 STAN. L. REV. 361, 378-95 (1991); Henry E. Smith, *Ambiguous Quality Changes from Taxes and Legal Rules*, 67 U. CHI. L. REV. 647, 712-15 (2000).

[26] Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773 (2001).

Before turning to complexity, consider other external or functionalist theories based on fairness or distributive justice. Do they face the complexity problem in connecting the micro and the macro? Most of Legal Realism and its legacy in mainstream legal thought simply ignores the scaling problem and asserts its solution.[27] Most or all forms of Realism and Post-Realism analyze law as a collection of rules, despite policy-makers having societal goals in mind. Or it focuses on two-party interactions, such as company-consumer, landlord-tenant, and employer-employee. It does not consider the possibility of rules working in tandem. The Realist stream of thought tends to look at the benefits of possible reforms without considering system effects.[28] This is particularly true in property, where because rights are often in rem, the two-party model is especially inapt. Thus, land records and the good faith purchaser, the law of trespass, and the like are not as amenable to the A v. B style of analysis, even if cases in these areas wind up being between a plaintiff versus a defendant. Analyzing the recording acts only in terms of two-party litigation distorts the picture of the system as a whole.[29] Thus, even if fairness or distribution, like efficiency, is a society-wide or global criterion for a good legal system, it is not applied in a way that accounts for how these properties emerge.

Nor is the tendency to assume away the micro-macro problem confined to post-Realists of the public law, interventionist sort. Even a classical liberal consequentialist like Richard Epstein sees the public as a scaled up version of the private.[30] For example, he argues for compensation for increases in the scope of the navigation servitude on the grounds that the government should be inherently limited to what a collection of neighboring landowners would be entitled to.[31] This assumes that there cannot be structures that respond to qualitatively different public values.[3233] For example, Carol Rose's cate-

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[27] One way in which scaling up problems are overlooked shows up in the reductive way legal realists have often viewed legal concepts. For helpful discussion of functional difficulties that result, see Jeremy Waldron, *"Transcendental Nonsense" and System in the Law*, 100 COLUM. L. REV. 16 (2000).

[28] Smith, *supra* note 12.

[29] For a recognition of this problem in an economic framework, see Benito Arruñada & Giorgio Zanarone & Nuno Garoupa, The Economics of Sequential Exchange (draft on file with authors).

[30] Richard A. Epstein, *Rediscovering The Classical Liberal Constitution: A Reply To Professor Hovenkamp*, 101 IOWA L. REV. 55 (2015).

[31] He is quite explicit on this point:

> The moment public law is untethered from private law, it becomes a wild card in the hands of the judges that wipes aside everything that stands in its path, which is how the Supreme Court behaved when it insisted that the "paramount" navigation servitude under the Commerce Clause swept everything aside.

Id. at 88. *See also* Richard A. Epstein, *Playing by Different Rules? Property Rights in Land and Water*, *in* PROPERTY IN LAND AND OTHER RESOURCES 317, 345-47 (Daniel H. Cole & Elinor Ostrom eds., 2012).

[32] Henry E. Smith, *Commentary*, *in* PROPERTY IN LAND AND OTHER RESOURCES 356, 359 (Daniel H. Cole & Elinor Ostrom eds., 2012) ("It is true that in some sense, the public is the composite of individuals, but to argue that public rights should share the qualities of private rights is to commit the fallacy of composition. More empirically, the types of network effects associated with some types of public property, including the navigation servitude discussed in Epstein's chapter, may call for devices that are not simply the sum of private easements"); *id.* at 364 ("[S]ome problems are so inherently public that the hypothetical aggregation of private rights and duties does not fully explain or justify the public aspect of property law. The public is not just quantitatively but sometimes also qualitatively different from the private.").

gory of inherently public property reflects benefits that we would these days call network effects: through a wide range, navigation and recreation involve commerce and sociability where benefits are greater the larger the network.[34] The benefits are not the additive effect of individual benefits and costs. Moreover, public effects may involve emergent properties that cannot be tied one-to-one with private effects.[35]

Even the perennial debate over whether redistribution is best done through private law or the tax system does not fully incorporate the insights of complexity theory and does not fully face up to the need to connect the micro and the macro. Louis Kaplow and Steven Shavell famously argued that legal rules should be designed with efficiency as a goal: because designing a legal rule to effect redistribution would distort both the labor leisure decision (like a tax) and would distort the substantive behavior to be governed by the rule relative to a rule designed solely for efficiency, the tax system is better at redistribution because it leads to one distortion in individual behavior rather than two.[36] This double-distortion argument has led to an elaborate and protracted literature that is sensitive to a variety of assumptions. Regardless of which set of assumptions one adopts, there remains the problem that all sides in this debate assume that private law rules scale up unproblematically. If rules interact in unforeseen ways, the distortions they cause are less than clear.

As we will argue, if distributional considerations come into private law, we need to know how they should: it cannot be ruled out that private law (or parts of it) are ill equipped to take distributive justice into account and that the tax system can specialize in it better.[37] We also don't rule out that certain high profile parts of private law – tort law

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[34] Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986). On network effects, see, e.g., Joseph Farrell & Garth Saloner, *Standardization, Compatibility, and Innovation*, 16 RAND J. ECON. 70, 70-71 (1985); Michael Katz & Carl Shapiro, *Network Externalities, Competition, and Compatibility*, 75 AM. ECON. REV. 424, 426-27 (1985).

[35] Henry E. Smith, *Emergent Property*, *in* PHILOSOPHICAL FOUNDATIONS OF PROPERTY LAW 320, 335 (James Penner & Henry E. Smith eds., 2013). For a discussion of different notions of public in property law and how they relate to economic notions, see Thomas W. Merrill, *Private property and public rights*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 75 (Kenneth Ayotte & Henry E. Smith eds., 2011).

[36] Louis Kaplow & Steven Shavell, *Why the Legal System is Less Efficient Than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667, 667 (1994); *see also* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 124-27 (2d ed. 1989). For criticisms, see, e.g., Chris William Sanchirico, *Deconstructing the New Efficiency Rationale*, 86 CORNELL L. REV. 1003, 1051-56 (2001); Ronen Avraham, David Fortus, Kyle Logue, *Revisiting the Roles of Legal Rules and Tax Rules in Income Redistribution: A Response to Kaplow & Shavell*, 89 IOWA L. REV. 1125 (2004); *but see* Louis Kaplow & Steven Shavell, *Should Legal Rules Favor the Poor? Clarifying the Role of Legal Rules and the Income Tax in Redistributing Income*, 29 J. LEGAL STUD. 821 (2000). That the distributive effect of legal rules can be haphazard or avoided by contract is more relevant to the considerations of specialization and complexity raised in the text. *See* Polinsky, *supra*, at 123 Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1126 (2001); Kyle Logue & Ronen Avraham, *Redistributing Optimally: Of Tax Rules, Legal Rules, and Insurance*, 56 TAX L. REV. 157, 177-78 (2003).

[37] Henry E. Smith, *Mind the Gap: The Indirect Relation between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959 (2009). For two calls for institutional and systematic analysis that reflect

damages for lost wages, or (in a simpler society) gleaning on newly harvested land, or even the implied warranty of habitability depending on background conditions – might be the most suited of the institutional alternatives for achieving distributive objectives.

The result of this glaring micro-macro gap is that in a wide range of functionalist theories, two fallacies are a constant danger. In the fallacy of composition, one assumes that a whole has the features of its parts.[38] Functionalist theories court this danger: if one can identify the right rule or the right solution to a two-party interaction, it is wrongly assumed that the legal system will share the desirable feature in question – efficiency, fairness, distributive justice. But when rules or situations are aggregated, those properties might be magnified or enhanced – or they might be diminished or eliminated.[39] Thus, the rules of trespass might look like catering to selfishness but might promote efficiency or autonomy overall.[40] Some rules like those governing landlords and tenants might be more detachable from the system and legitimately treated in isolation.[41] But functional theories remain blissfully indifferent to such considerations.

The other fallacy works from the macro to the micro. In the fallacy of division, one concludes that a part must share a feature of the whole. It is wrong to assume that a water molecule must be wet because water is wet.[42] Properties like wetness are emergent. Likewise, theories of law that hold at the macro level don't necessarily scale down. It might be important to put constraints on public law in the name of fairness. These may well be considerations for private law too, as we will see. But we cannot assume without more that they must inform every last rule or situation in a private law setting. Again, it is not incoherent to argue that courts should prevent discrimination in public accommodations and refuse to enforce racially restrictive covenants, but can nonetheless allow owners to invoke the law of trespass when hosting dinner parties – even if we have reason to

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opposite assessments of taxes versus legal rules as instruments for redistribution, see, e.g., Zachary Liscow, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 YALE L.J. 2478 (2014) (presenting a more optimistic assessment of institutional considerations for redistribution through legal rules); David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439, 449-53 (2003) (assessing arguments and calling for systematic institutional argument, and expressing pessimism about the legal system as a method of redistribution compared to tax and transfer system).

[38] JON ELSTER, LOGIC AND SOCIETY 97-106 (1978) (exploring these fallacies in social science settings); *see also* Adrian Vermeule, *Foreword: System Effects and the Constitution*, 123 HARV. L. REV. 4, 8-23 (2009);.

[39] Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1725 (2012) ("[P]roperty is naturally and for practical purposes seen as a holistic law of things.")

[40] Smith, *supra* note 37, at 973.

[41] Smith, *supra* note 28.

[42] Smith, *supra* note 35, at 335.

think the owner's reasons are the wrong ones.[43] In this case we might say that the balance between autonomy and associational interests works out differently in different contexts. The result is to loosen the connection between properties holding between the law as a whole and a particular instance of it.

Connecting the micro and the macro and the pitfalls that follow from a failure to do so are far from unique to private law. Different branches of social science disagree on "methodological individualism," with economics for the most part taking as unproblematic the scaling up of models based on bare individual rationality or simple behavioral psychology.[44] By contrast, some types of sociology engage in generalizations based on notions like power and culture that are hard to pin down (especially in their micro foundations). Even within economics, connecting the aptly named micro and macro economics is beyond reach. And the turn to institutions within the field of economics and related social sciences reflects a belated recognition that the structures between the individual and the society as a whole are important and worthy of study, and cannot be left out of an account of human behavior.[45]

Lest one think that this problem is confined to the social sciences, the natural sciences have likewise struggled with the very different models appropriate to the micro and the macro.[46] Although some progress has been made in the intermediate region (e.g. physical chemistry), there is a recognition that the micro and the macro are not connected in a simple additive way. The rise in the popularity of complexity theory and evolutionary dynamics reflects an attempt to seek generalizations connecting the micro and the macro. Although in its infancy, the application of systems theory in all these areas of social science and natural science has at least moved beyond simply assuming the problem away. Inclusive functionalism is the attempt to do the same for private law.

B. The Limits of Two-Party Models

Functionalist theories suffer from a systematic inability to connect the micro and the macro. This inadequacy stems in part from the tools they employ. Functionalist theories take one or both of two approaches: analytic and statistical. Neither of these is up to the task of covering the middle ground between the micro and the macro. For that we need systems theory.

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[43] This does not mean that enforcement is not public in some sense. *See* Gary Peller & Mark Tushnet, *State Action and a New Birth of Freedom*, 2 GEO. L.J. 779, 790-91 (2004); *see also* THOMAS W. MERRILL & HENRY E. SMITH, THE OXFORD INTRODUCTIONS TO U.S. LAW: PROPERTY 82 (2010).

[44] Some variants of economics do take system effects more seriously. *See, e.g.*, KENNETH BOULDING, ECODYNAMICS (1978); John Foster, *Why Is Economics Not a Complex Systems Science?*, 40 J. ECON. ISSUES 1069 (2006).

[45] NEW INSTITUTIONAL ECONOMICS: A GUIDEBOOK (Eric Brousseau & Jean-Michel Glachant eds., 2008); THRÁINN EGGERTSSON, ECONOMIC BEHAVIOR AND INSTITUTIONS (1990).

[46] *See, e.g.*, MELANIE MITCHELL, COMPLEXITY: A GUIDED TOUR (2009); J.A. SCOTT KELSO & DAVID A. ENGSTRØM, THE COMPLEMENTARY NATURE (2006).

Functionalist theories usually employ analytical techniques on two-party interactions and then immediately scale up additively. In law and economics, this takes the form of figuring out the welfare implications of one typical actor's behavior and multiplying by the number of actors. The actor may impose spillovers or externalities, and the idea is that the societal benefits and costs are simply the sum of the benefits and costs of the activities of these agents. In many situations it can be informative to take a two-party interaction – in a contract or a tort-like interaction – and scale up the costs and benefits of their behavior under different versions of a legal rule that governs that behavior.

These models nevertheless suffer from several related limitations. First, many such models are very fragile at the micro level. Thus, it is well recognized that even behavior in a pair of actors can be highly interdependent. If one seeks to optimize even this limited behavior, models can quickly become unrealistic as a prescription for what actors should do, much less be commanded to do through the law. Ideally we would like to optimize both actors' behavior on the margin, but the behavior is interdependent.[47] This means that each actor will have a more complicated problem to solve and coordination can prove difficult under the best of circumstances.[48] And if either makes a "mistake" in such calculation, the actor's behavior may combine very badly with the behavior of an actor acting optimally on the model.[49]

As an example of non-modularity in law and economics, consider a recent book on contract, tort, and restitution by Bob Cooter and Ariel Porat.[50] As a thought experiment in attempting to optimize the law it is a tour de force. And yet it also exhibits the limits of the optimizing approach. For example, they propose that awards for contract breach should be reduced by the amount of non-legal sanctions.[51] Thus, if a supplier breaches causing $100 in harm to the other party, and the breacher will suffer $25 in reputational harm, a court should award only $75 in damages lest the breacher be overdeterred.[52] Put aside the question of efficient breach: the same logic applies to torts. Part of the problem is that this shows that deterrence cannot be the whole story: compensation

[47] Robert Cooter, *Unity in Tort, Contract, and Property: The Model of Precaution*, 73 CAL. L. REV. 1 (1985); *see also* ROBERT D. COOTER & ARIEL PORAT, GETTING INCENTIVES RIGHT: IMPROVING TORTS, CONTRACTS, AND RESTITUTION 92-104 (2014); Francesco Parisi, Barbara Luppi, & Vincy Fon, *Optimal Remedies for Bilateral Contracts*, 40 J. LEGAL STUD. 245 (2011).

[48] Shawn J. Bayern, *The Limits of Formal Economics in Tort Law: The Puzzle of Negligence*, 75 BROOKLYN L. REV. 707, 732 n.68, 738 n.83 (2010).

[49] This effect is reminiscent of the second-best problem. See *infra* note 63 and accompanying text.

[50] COOTER & PORAT, *supra* note 47.

[51] *Id*.; *see also* Robert Cooter & Ariel Porat, *Should Courts Deduct Nonlegal Sanctions from Damages?*, 30 J. LEGAL STUD. 401 (2001).

[52] *Id*.

is at least part of the picture, and it is not news that deterrence and compensation are hard to serve at the same time if the plaintiff and defendant are a closed system (meaning that payments from one go to the other, and not, say to the government).[53] It gets worse. How do we know that those imposing the reputational sanction would not be outraged at a lower damage award and up the reputational hit? How do we know that prospective non-breaching parties won't take costly precautions if they will not be fully compensated for breaches?

By contrast, the traditional rules about expectation damages don't look so bad. As Nate Oman argues, the law gravitates towards relatively simple calculations of damages based on focal notions of expectation, which unlike the full bilateral precaution model are not sensitive to more than gross differences in behavior.[54] The main qualifications, that they are limited by requirements of certainty and foreseeability and a defense of lack of mitigation, take care of some blatant problems.

Similarly in torts, commentary is overly receptive to untamed complexity and prone to overlooking the complexity-managing advantages of traditional doctrine. For example, the rule that one is not required to anticipate the negligence of others is greeted with incomprehension from modern commentators.[55] A farmer is not required to take precautions against the negligence of a railroad in emitting sparks from its locomotives.[56]

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[53] *See, e.g.*, STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW 231-32 (1987); Patricia M. Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. LEGAL STUD. 517, 518-19 (1984).

[54] Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829 (2007).

[55] RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW §§ 3.6, 3.8, at 50-52 (7th ed. 2007) (using train spark example to illustrate economic analysis of conflicting activities); Robert D. Cooter, *Coase Theorem*, *in* 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 457, 458 (John Eatwell et al. eds., 1987) (using Coase Theorem example); Susan Rose-Ackerman, *Dikes, Dams, and Vicious Hogs: Entitlement and Efficiency in Tort Law*, 18 J. LEGAL STUD. 25, 35-38 (1989); *see also* Mark F. Grady, *Common Law Control of Strategic Behavior: Railroad Sparks and the Farmer*, 17 J. LEGAL STUD. 15 (1988).

[56] *See* LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry., 232 U.S. 340 (1914). Wood's treatise gives a classic formulation:

> It is the duty of every person or public body to prevent a nuisance, and the fact that the person injured could, but does not, prevent damages to his property therefrom is no defense either to an action at law or in equity. A party is not bound to expend a dollar, or to do any act to secure for himself the exercise or enjoyment of a legal right of which he is deprived by reason of the wrongful acts of another.

1 H.G. Wood**,** A PRACTICAL TREATISE ON THE LAW OF NUISANCES IN THEIR VARIOUS FORMS: INCLUDING REMEDIES THEREFOR AT LAW AND IN EQUITY § 435 (3d ed. 1893) (citation omitted). For a discussion of how one nineteenth-century case, *Kansas Pacific Ry. v. Brady*, 17 Kan. 380, 1877 WL 875 (Kan. 1877), atypically required bilateral care in a train spark case, partly due to exceptionally dry circumstances, but was nonetheless modular in requiring anticipation of "average" negligence, see Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L., Issue 2, Article 5 (2011), www.bepress.com/jtl/vol4/iss2/art5.

This is treated as deeply puzzling on conventional economic models of bilateral care where the train-spark v. crops situation is a stock example. And yet decoupling decisions of one actor from another has the countervailing benefit of simplifying the problem and rendering the tort system more modular. To anticipate somewhat, such a modular approach also dovetails with a traditional natural rights moral account of the doctrine.[57] Similarly, the idea of the economic loss rule, which allows someone to recover for damage to property, but not for loss from a contract relating to property, allows property torts to function in a more modular way.[58]

When it comes to private law, the subjects that get the most attention are those that are amenable to two-party models. Contract law is an obvious application, although the two-party contract is only a special case in reality. In tort law, negligence, strict liability, and various other doctrines are examined by asking what an injurer and a victim will do under various rules. The rules themselves are assumed to be detachable and amenable to study in isolation of the others. Property receives less attention, because apart from its interface with contract and tort it is not two party: property rights have a characteristically in rem respect.[59] They are good against the world. This is reflected not just in torts like trespass, but title is good against others generally. Finally, restitution does not get much attention or respect from functionalist commentators in general, and those in law and economics are no exception.[60] One reason may be that, like equity, restitution wears a concern for individualized justice on its sleeve.[61] Because functionalist theories are interested in generalizations and rules that can capture general policies, this concern for individuals and their particular travails seems to be a sideshow at best.

In any event, it may not make sense to view legal rules in isolation.[62] Economics itself is sensitive to this problem, which relates to the theory of the second best.[63] If one externality counteracts another, then internalizing one may decrease overall welfare. For example, reducing market power would improve welfare in an otherwise perfectly competitive market, but it might worsen welfare if the activity of the monopolist involved some other externality like pollution. The lesson of the second best dovetails with institu-

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[57] Eric R. Claeys, *Jefferson Meets Coase: Land-Use Torts, Law and Economics, and Natural Property Rights*, 85 NOTRE DAME L. REV. 1379, 1393-94, 1413-14, 1418, 1440-42 (2010).

[58] Smith, *supra* note 56, at 25-28.

[59] Smith, *supra* note 37; *see also* Merrill & Smith, *supra* note 5, at 1870-90.

[60] There are notable exceptions. *See, e.g.*, COOTER & PORAT, *supra* note 47; Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65 (1985).

[61] Andrew Kull, *Ponzi, Property, And Luck*, 100 IOWA L. REV. 291 (2014).

[62] H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 621 (1958).

[63] R.G. Lipsey & Kelvin Lancaster, *The General Theory of the Second Best*, 24 REV. ECON. STUD. 11 (1956).

tional economics: we should compare feasible alternatives, and often these alternatives must be compared as packages and not piece by piece.

In sum, functionalist theories rely on models, especially two-party models, that are simple in theory and complex in practice. Classic law and economics has been enriched by behavioral and institutional perspectives, but these amendments don't always do much to address the gap between the micro and the macro. Behavioral law and economics may give a more realistic picture of decision making on the local level, but it leaves intact the assumption that we can move unproblematically from these local decisions to aggregate behavior. Likewise institutional perspectives often retain the character of scaled up two-party models. Something more is needed.

C. How to Manage Complexity in Private Law

The set of interactions governed by private law is itself complex, and private law must deal with the complexity. A standard trope since the days of legal realism has been that the (increasing) complexity of social and economic life calls for a more nuanced and less concept-bound law, along with a more conscious design of sophisticated solutions.[64] Although it is true that the complexity of private interactions calls for a legal response and this can in principle include radical changes to the system, much of the static and dynamic complexity of the private law problem can be handled using the very tools that functionalists typically disdain: legal doctrines and concepts, often grounded in local forms of morality.

What is wrong with existing approaches that deemphasize legal doctrine and concepts? They tend to employ tools that are appropriate only to the micro or the macro but not to the territory in between. Systems theory focuses on this middle ground because of the limits of approaches on either end of the spectrum.

Start with the micro. Here analytical techniques can be appropriate. Game theory is but one example. The problem starts when the size of the system leads to too many interactions for analytical techniques. It is often the case, and private law is no exception, that as the number of interacting entities increases the number of computations in a model increases at least with the square of the number.[65] For all but a very small number of interacting parts, this becomes intractable.[66]

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[64] *See, e.g.*, THURMAN ARNOLD, THE FOLKLORE OF CAPITALISM 114-16 (1937); JAMES E. HERGET, AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY 147-58 (1990) (explaining the relationship between changes in legal doctrine and changes in society's values). Modern-day Post-Realism shares this point of view. *See, e.g.*, RICHARD A. POSNER, REFLECTIONS ON JUDGING 231-35 (2013) (arguing against formalism and for a new judicial realism to deal with the increasing complexity of society).

[65] GERALD M. WEINBERG, AN INTRODUCTION TO GENERAL SYSTEMS THINKING 6-8 (2001).

[66] *See, e.g.*, RAYMOND GREENLAW & H. JAMES HOOVER, FUNDAMENTALS OF THE THEORY OF COMPUTATION: PRINCIPLES AND PRACTICE 287-313 (1998). For an informal introduction, see KEITH DEVLIN, THE MILLENNIUM PROBLEMS: THE SEVEN GREATEST UNSOLVED MATHEMATICAL PUZZLES OF OUR TIME 105-30 (2002).

Coming from the macro, we face a different problem. Here the technique is to characterize the system in terms of averages, for example the average temperature in a room (rather than the individual speeds of gas molecules). Here the problem stems from the kind of error we can expect. If *n* is not large enough, statistical statements are too prone to error to be meaningful. Roughly speaking the error will often be in proportion to the square root of *n*.[67] For middle-sized *n*'s this can be a large enough number to invalidate the approach.

In private law there is yet another reason for exercising caution with the statistical approach. The actors in private law are aware of the system and can therefore respond to the rules. If the rules are designed based on averages and depend for their validity on stable statistical generalizations that in turn depend on randomness, the conscious manipulation by actors can be a big problem in the form of destabilizing feedback. Take, for example, a damages rule based on average harm, which could be termed a liability rule, a protection of an entitlement that allows it to be taken upon payment of officially determined damages (a kind of price).[68] An important result in law and economics is that such a rule outperforms a property rule – one designed to prevent violations and promote consensual transactions – because it perfectly internalizes expected harm.[69] An actor facing liability for the average harm will do the efficient thing, because she will have the right incentives in expectation. This assumes that the actor faces a random draw of rights violations.[70] However, cherry picking can lead the average that a court might use to fail to reflect the benefits to the potential taker or the harm to the plaintiff.[71]

The realm of intermediate number problems, between the deterministic and the statistical, is for systems thinking. How can a system scale up from individuals to society?

First, the system must be locally simple. We turn in the next Section to the kinds of morality that internal-interpretivist theories of the law advocate. These are exactly the kinds of basic components and relations that form the backbone of a manageably complex system. They are also realistic in that actual people have to navigate the system. The modularity permits the system to operate more smoothly and to evolve through a certain range. At the same time it permits participants and observers to understand its subject

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[67] Weinberg invokes Schrödinger's "Square Root of N Law." WEINBERG, *supra* note 65, at 14-18. This "law" is controversial but not in respects important for our purposes.

[68] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

[69] Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 725-32 (1996).

[70] *See* Daniel R. Ortiz, *Neoactuarialism: Comment on Kaplow (1)*, 23 J. LEGAL STUD. 403, 403-06 (1994); Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1774-85 (2004).

[71] *Id.*

matter. Because law is a human construct and a social institution, these two desiderata – operation and cognitive processing – are closely related. This close relation goes a long way toward explaining why external and internal theories of the law converge as much as they do in this middle ground.

Breaking the system into modular components helps with the square law of computation. Problems that could otherwise be intractable can be handled in much shorter order. Managing the complexity of private law requires first of all eliminating attention from interactions that are not important or are per se not worth considering.[72] The concepts here make up a basic ontology of the legal system.[73] There need be nothing deep and metaphysical to this: from a practical point of view, we need to organize the world into actors, things, and activities in order to manage complexity. To a great extent, the legal ontology tracks an everyday ontology: actual persons are legal persons and physical objects are (or correspond closely to) legal things.[74] In some cases, the law must refine the basic ontology with additional apparatus. Land does not come pre-parcelized, and boundaries must be surveyed and sometimes even recorded to be effective. Intangible rights do not correspond with everyday objects. And notions like corporations or patent are entirely creatures of the law.

The functional concepts so detested by the legal realists serve to enrich the ontology in order to tame complexity. Central to property law's contribution to managing complexity is the legal thing.[75] The thing of property serves as the focal point and a semi-opaque module – it is a method of organizing activities in a modular fashion. Doctrines of tort law like duty and foreseeability group activities into manageable chunks.[76] Corporations and other entity property likewise manage complexity. As devices for asset partitioning, certain forms of interaction – the creditors of shareholders versus the creditors of the corporation – are taken off the table in a way that allows for planning and reasonable cost.[77] There is nothing magic or mysterious about such concepts, but the alternative of

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[72] In other words, we are reducing the degrees of freedom; in an analogy to physics, we are identifying the collective variables or order parameters (out of the set of those possible). *See* KELSO & ENGSTRØM, *supra* note 46, at 112-113.

[73] Leo Zaibert & Barry Smith, *Real Estate: Foundations of the Ontology of Property*, *in* THE ONTOLOGY AND MODELLING OF REAL ESTATE TRANSACTIONS 35 (Heiner Stuckenschmidt, Erik Stubskjær, & Christoph Schlieder eds., 2003); see also L. Thorne McCarty, *A language for legal Discourse I. basic features*, *in* PROCEEDINGS OF THE 2ND INTERNATIONAL CONFERENCE ON ARTIFICIAL INTELLIGENCE AND LAW (ACM 1989); Daniela Tiscornia, *Mapping a Formal Ontology onto a Legal Ontology*, 52 SYRACUSE L. REV. 1331 (2002).

[74] Henry E. Smith, *The Elements of Possession*, *in* LAW AND ECONOMICS OF POSSESSION 65 (Yun-Chien Chang ed., 2015).

[75] Smith, *supra* note 39; *see also* Henry E. Smith, *The Thing about Exclusion*, 3 BRIGHAM-KANNER PROP. RTS. J. 95 (2014).

[76] Smith, *supra* note 56.

[77] Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000).

replicating them by the thinnest form of contract is a non-starter in any advanced economy.

Thus to take an infamous example, it is not nonsensical or laughable to ask "where" a corporation is located, if we understand that the device we are using to answer such questions gains from treating a cluster of questions in wholesale and consistent fashion.[78] Of course if it makes sense to have a shallower concept or answer the question in a special detached way, that's fine. The point is that organizing the set of interactions of actors around what we call a corporation benefits from the structure provided, and it makes little sense to insist on keeping the fully articulated set of ultimate social atoms in view all the time for all purposes. We return in the next Section to the role concepts play in the coherence of the law and why this matters.

The set of legal concepts benefits from its congruence with relatively simple local forms of morality. Forms of morality that deal with what one individual owes another are well suited for the basic set up of a system of private law. Consider corrective justice: the considerations that bear on the interaction between parties are quite local and easily within the cognitive grasp of the participants. The same can be said for civil recourse and redressive justice as well, as we will see. Further, if the law draws on this type of morality, it is much easier to inculcate the law's requirements in those who are expected to follow it and to gain their support for it. The basic torts of assault, defamation, trespass, theft, and the like, track this kind of morality. This is equally true of the torts that protect property, which likewise have to reach a wide and diverse audience.[79] The same goes for the extent to which contract law tracks the morality of promising. Certainly contract law can diverge from the morality of promising, just as legislation can go beyond corrective justice. Nevertheless, the ability to draw on simple local morality is an important starting point.

Legal concepts also interact in stylized ways to allow for a manageable complex system. In the end, managing complexity through modular structures allows the connection of the micro and the macro. Desired properties like efficiency and fairness are sometimes emergent, rather than infused directly.

Inclusive functionalism pays attention to private law as a system. Because the set of actors and activities governed by private law is complex, it is not trivial to connect the micro and the macro. Once an external theory is required to face this problem, the structure of private law starts to make sense. Because part of the complexity problem is solved by not requiring any part of the system to direct activity as a whole, the participant-eye perspective is closely related to the complexity problem. Not coincidentally, this perspective is related in turn to internal perspectives on private law, to which we now turn.

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[78] Cohen, *supra* note 8.

[79] Merrill & Smith, *supra* note 5.

II. The Interpretivist Approach

In the philosophy of science, simplicity has been an important but highly controversial criterion for theory selection. Many have questioned whether a simpler theory is more likely to be true, or more testable than a more complex one that is consistent with the same data.[80] On the other hand, even opponents of a simplicity criterion admit that parsimony and "elegance" do in practice play a role in theory building, and that parsimony plays a role for pragmatic reasons as a heuristic.[81] Here "pragmatic" refers not to the philosophical movement but to contextualism: features of the context – what a theory is a theory about – determine the appropriateness (or not) of a parsimony criterion.[82]

We argue that the pragmatic reasons in favor of a simplicity criterion in legal theorizing are quite strong. The context of law calls for parsimony for reasons of information cost. The simplicity criterion operates here at a level close to the law: the theory implicit in the private law itself needs to be simple in order to manage the complexity of the interactions of a multitude of private parties dealing with potentially everything and every action. The morality immanent in the law, or with which the law is consistent, also needs to be modular in order to manage complexity. And, as we indicate above, the morality immanent in the law needs to scale up well.

But how does this fit in with the approach of interpretive theories? To see the connection, we need to understand the aims of an interpretive theory: theories of this type are concerned with figuring out private law from the internal point of view, or, in another formulation, with capturing the law's "self-understanding". Doing so enables us to discern the content of the moral norms that the law adopts. We will argue that successful attempts to ascertain the internal point of view will need to take into account private law's tendency toward simplicity at the level of legal reasoning. Functional theories and interpretive theories should converge in recognizing that a certain type of conceptual structure is embedded in the law.

One way that interpretive theories pick up on simple and generalizable moral norms is through the standard criteria that interpretive theorists apply. Fit, coherence, morality, transparency, and consilience criteria each play a major role for interpretive approaches to the explanation of private law. In combination, we will suggest, these criteria select for the very norms that an inclusive functionalist approach indicates are needed for private law systems to function well.

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[80] *See, e.g.*, BAS C. VAN FRASSEN, THE SCIENTIFIC IMAGE 87-96 (1980); *see also* HUGH G. GAUCH, SCIENTIFIC METHOD IN PRACTICE 269-326 (2002); ELLIOTT SOBER, OCKHAM'S RAZORS: A USER'S MANUAL (2015).

[81] *Id.* at 92-94.

[82] This is the meaning of "pragmatics" in linguistics and the philosophy of language. *See* Kepa Korta & John Perry, *Pragmatics*, The Stanford Encyclopedia of Philosophy (Edward N. Zalta, ed., Summer 2011), available at: http://plato.stanford.edu/archives/sum2011/entries/pragmatics/.

We will argue, however, that interpretivists should also adopt an explicit simplicity criterion in order to more reliably capture the law's self-understanding. Indeed, just as inclusive functionalism is a step forward for functionalist explanations of private law, there is an important sense in which an *inclusive interpretivism* is an advance for interpretive explanations. An effort to understand the law from the internal point of view must take into account the likely influences on and tendencies of judicial reasoning – and problems of intractable complexity are clearly relevant to this reasoning. Functional considerations can thus help us to accurately discern the content of the law's self-understanding, even if that self-understanding is not itself functionalist. To this extent, interpretivism should make room for at least some functionalist considerations in order to better succeed on its own terms.

We will turn first to interpretivism's implicit concern with simple and generalizable moral norms, a concern that flows from the standard interpretive criteria. We will then explain why an explicit simplicity criterion should also be adopted.

A. The Implicit Tendency Toward Simple, Generalizable Norms

Conceptual analysis is prominent across a range of recent private law theories. The majority of these theories – often called interpretive theories – are concerned with rendering legal practices intelligible.[83] In particular, they seek to render the law intelligible from the internal point of view, the point of view shared by legal actors.[84] Because the internal point of view is taken as a starting point, legal and moral concepts occupy a central place in the resulting theories.[85]

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[83] *See* STEPHEN A. SMITH, CONTRACT THEORY 5 (2004) ("Interpretive theories aim to enhance understanding of the law by highlighting its significance or meaning."). As Smith indicates, this aim is achieved "by revealing an intelligible order in the law, so far as such an order exists." *See id*. *See also* WEINRIB, *supra* note 6, at 2 (suggesting an approach to explaining private law that "treats private law as an internally intelligible phenomenon by drawing on what is salient in juristic experience and by trying to make sense of legal thinking and discourse in its own terms.").

[84] The classic statement on the internal point of view is H.L.A. HART, THE CONCEPT OF LAW 89 (2d ed., 1994) (describing the internal point of view). For examples of this approach in the private law theory literature, see WEINRIB, *supra* note 83, at 13 ("An internal account deals with private law on the basis of the juristic understandings that shape it from within."); SMITH, *supra* note 83, at 15 (emphasizing the importance of "law's self-understanding"); Benjamin J. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 705 (2003) ("Weinrib, Coleman, and other philosophers focus on an explanation of the concepts and principles that are in the law, as these concepts and principles appear on their face and as they are deployed in ordinary inferences by legal participants."); Goldberg & Zipursky, *supra* note 6 (discussing tort law duties from this perspective). For a recent suggestion that the internal point of view may have more than one meaning, see Charles L. Barzun, *Inside-Out: Beyond the Internal/External Distinction in Legal Scholarship*, 101 VA. L. REV. 1203 (2015).

[85] *See* WEINRIB, *supra* note 6, at 16 ("Because legal concepts and institutions are indicia of the law's self-understanding, an internal account attempts to make sense of them on their own terms by allowing them to have the meaning they have in juristic thought."). *See also* Benjamin J. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 458 (2000) (contending that "an interpretive legal theory must provide a nonreductive account of the conceptual structure of the substantive law.").

A common feature of interpretive approaches is a concern with telling us what the law *is*, rather than what the law does.[86] On this view, an interpretive inquiry is different from an inquiry into the effects of a law on future behavior, or from an inquiry into a law's costs and benefits. That said, interpretive theories are nonetheless thought to have significance for legal policy. As Benjamin Zipursky suggests, we may need an account of existing legal concepts before we decide to reform the law. For, as he indicates, there are "a whole range of considerations about precedent, stare decisis, and institutional role that are simply elided by the functionalist account of what the law is."[87] Knowing what the law is can help inform our judgments as to what the law should be.

From this perspective, doctrinal fit is a standard measure against which to assess an interpretation of the law.[88] Under this criterion, a successful account should be one that generally matches the legal doctrine that the theorist seeks to explain. If an account describes features of the private law that are unrecognizable to the reader, or which appear to occupy some other area of legal practice, the failure to fit existing legal practices indicates that the interpretation is incorrect. It is not generally considered necessary for a theory to fit every single case – no plausible theory could do so – but a substantial level of fit is required for a successful theory.

Coherence is also an important criterion for a successful interpretation. One suggested reason is that a coherence criterion increases the likelihood of following the internal point of view. Ernest Weinrib, for example, suggests that "those who think about private law in its own terms must include the law's pervasive impulse toward coherence within their purview."[89] A more basic reason for adopting a coherence criterion is that it ties in with the aim of rendering the social practice of private law intelligible.[90] Although one can explain incoherent practices, coherent practices are often considered more intelligible than incoherent ones.

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[86] *See* JULES COLEMAN, THE PRACTICE OF PRINCIPLE 14 (Oxford: Oxford University Press, 2001) ("I do, however, want to insist that there is a significant gap between, on the one hand, the goals or functions that a social practice may happen to serve, and, on the other hand, the goals, functions, and other features that constitute the nature of that practice and tell us what it *is*."); Zipursky, *Pragmatic Conceptualism*, *supra* note 85, at 482 (describing the view that, "in characterizing what the law *is*, we should not look first to what the law *does*.").

[87] *Id*. at 477. *See also* SMITH, *supra* note 83, at 6 ("Before attempting to reform the law, reformers must understand the law that they are planning to reform."); Zipursky, *supra* note 84, at 707 (suggesting that conceptual analysis "permits us to ask questions about whether the law should be changed").

[88] *See* SMITH, *supra* note 83, at 7 (noting that "[t]he most obvious criterion for assessing interpretive theories is whether they fit the data they are trying to explain.").

[89] *See* WEINRIB, *supra* note 6, at 13-14.

[90] *See id*. at 13-14 (suggesting a link between coherence and the intelligibility of the features of private law). *See also* SMITH, *supra* note 83, at 11 ("A theory that reveals the law as inconsistent is less successful at achieving what was described earlier as the basic goal of interpretation: that of revealing an intelligible order in the law.").

Interpretive theorists likewise apply a morality criterion. This approach need not stem from a commitment to natural law theory or from a theorist's desire to cast the law in the best light. Instead, a morality criterion may follow from the theorist's interest in the internal point of view of legal actors.[91] Stephen Smith's work in contract theory nicely illustrates this type of approach. He argues that contract law is a practice that must be explained from an internal perspective if it is to be adequately understood.[92] On his account, a morality criterion then flows from the interpretive concern with law's self-understanding.

As Smith notes, a major part of the law's self-understanding is that the law "provides morally good or justified reasons to do what the law requires."[93] Part of the law's self-understanding is that law is morally justified, as law is typically understood to claim a *legitimate* authority.[94] And, to the extent that individuals disobey the law, this is considered to be wrongful conduct.[95] The point here is not that the law actually is morally justified – rather, the point is that this is a part of what the law claims to be. From the internal point of view, law has these moral features, and this means that a theory should at least demonstrate how private law concepts could be thought to be moral (whether or not they actually are). The law's moral plausibility should thus figure in an interpretive account of legal practices.

Another important part of the law's self-understanding is that the law is transparent.[96] In this setting, transparency suggests that judges mean what they say: "[l]aw is transparent to the extent that the reasons legal actors give for doing what they do are their real reasons."[97] Law thus lacks transparency if the true reasons for the actions of legal actors are hidden.[98] As a practical matter, the transparency of the law is clearly a contingent feature. But law claims to be transparent, and because this claim is a fundamental feature of private law it is important to account for it.

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[91] *See id*. at 13-32.

[92] *See id*. at 13-15.

[93] *Id*. at 15. *See also* WEINRIB, *supra* note 6, at 12 ("In any sophisticated legal system, private law is a collective wisdom … that elaborates the grounds for regarding certain results as justified.").

[94] *See* SMITH, *supra* note 83, at 15.

[95] *See id*. ("From the internal perspective, it is considered *wrong*, and not merely foolish, irrational, or contrary to self-interest to disobey the law.").

[96] *See id*. at 24-25.

[97] *Id*. at 24.

[98] *See id*. at 24-25.

In its moderate version, a transparency criterion is concerned with whether an explanation is "internal" or "legal" – *i.e*., it is concerned with whether an explanation makes use of recognizably legal concepts.[99] On this view, "an explanation is legal if it is recognized as such by the consensus of those familiar with the law."[100] This takes into account the public understanding of the law without assuming that the law is correct in its specific applications. Furthermore, the moderate version's requirements are not overly rigorous. As Stephen Smith indicates, "[o]ne way of implementing this test is to ask whether the theorist's explanation is of the sort that, once translated into concrete concepts, could be accepted by a court, even if no court has yet done so."[101] Theories can comply with this requirement even if their details differ from current judicial understandings.[102]

A notable addition to the list for some interpretivists is a criterion of consilience. A theory that can explain more things is, typically, thought to be better than a theory that can explain fewer. As Jules Coleman has explained: "[t]he value expressed in the norm of consilience is that, other things equal, it is good when a theory can bring a diversity of phenomena under a single explanatory scheme – and the greater the range of phenomena thus explained, the better."[103] Given the aims of most legal theories, a consilience criterion has broad appeal.

It is important to use care in adopting a consilience criterion: Coleman suggests that consilience can be reductive or non-reductive. Reductive consilience often eliminates pre-existing principles and categories in favor of a single principle. Non-reductive consilience, as the name suggests, may leave these principles and categories intact. Utilitarianism offers a reductive consilience for moral theory. As Coleman notes, utilitarianism "purports to offer a single principle that exhaustively explains the rightness or wrongness of any action or institution, eliminating the fundamental explanatory value of any subordinate principle."[104]

In the case of non-reductive consilience, the process works differently. As Coleman describes this type of consilience:

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[99] *See id*. at 28-29.

[100] *See id*. at 30.

[101] *See id.*

[102] Notice that a conspiracy theory would not meet this test. Moreover, in some settings it is questionable whether a standard efficiency account will meet this test. *See id*. at 132-36 (suggesting efficiency theories of contract law violate the moderate transparency criterion).

[103] *See* COLEMAN, *supra* note 86, at 41. For a recent application of the consilience criterion to private law theories, see Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L.J. 1873, 1913 (2011). For an influential account of consilience in the scientific setting, see Paul Thagard, *The Best Explanation: Criteria for Theory Choice*, 75 J. PHIL. 76, 79-85 (1978).

[104] *See* COLEMAN, *supra* note 86, at 41.

> A theory may unify diverse phenomena without eliminating the need for subordinate principles and categories. . . . The consilience of such a non-reductive theory may lie in its showing how a single principle ties together and illuminates the relations among a number of distinct explanatory elements – including, perhaps, other principles.[105]

Furthermore, as Coleman indicates, "[t]he kind of consilience we seek in a theory, whether reductive or not, depends on the kind of phenomenon to be explained."[106]

We turn now to simplicity. A strong argument can be made that the commonly used interpretive criteria implicitly approximate a simplicity criterion, especially when acting in combination. The explanations of private law that conform to fit, coherence, morality, and transparency – not to mention consilience – are likely to pick out moral norms that are both simple and generalizable. A moderate morality criterion does not have this effect on its own, but it is also worth noting that the norms of morality may turn out to exhibit simplicity and generalizability. In some settings, this is a very real possibility. Moral principles can be elaborated in multiple ways, but on a prominent view they are sensitive to information cost concerns.[107]

The tendency toward simplicity is particularly evident given the interpretive interest in coherence as a benchmark. Consider, for example, a moderate coherence criterion. Under this criterion, "a good theory must show that most of the core elements [of a field] can be traced to, or are closely related to, a single principle."[108] Assessing private law theories on this basis is an effective way of selecting private law theories that make use of simple moral concepts that scale up. A case by case particularism may well comport with salient views of morality, but it is not a congenial approach if we seek accounts that will let us trace the core elements of a private law field to a single principle.[109]

A transparency criterion also contributes to locating simple, generalizable norms, when we take into account the way that this criterion builds on concepts that have previously been recognized by courts. As the language of precedent in private law has often

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[105] *Id*. For further support of a non-reductive approach to legal theory, see WEINRIB, *supra* note 6, at 16 (suggesting an internal account of private law is non-reductive with respect to legal concepts).

[106] *See* COLEMAN, *supra* note 86, at 41-42.

[107] *See* T.M. SCANLON, WHAT WE OWE TO EACH OTHER 189 (Cambridge, MA: Harvard University Press, 1998).

[108] *See* SMITH, *supra* note 83, at 13.

[109] Note that Joseph Raz's idea of local coherence may also be relevant here. *See* JOSEPH RAZ, *The Relevance of Coherence*, *in* ETHICS IN THE PUBLIC DOMAIN 314-19 (Oxford: Oxford University Press, 1994) (suggesting that, even if law is not globally coherent, it may be coherent in individual areas, such as the mental conditions required to establish fault in private law).

called for the application of deontological moral concepts, a transparency criterion tends to produce legal theories under which such moral concepts are more than epiphenomena. Moreover, while the content of what is "recognizably legal" is contingent on prior case law, to the extent that prior case law is adopting moral norms that are sufficiently widespread that legal theorists can characterize them as such, it is drawing on norms that are apt for generalizing.

Non-reductive consilience similarly points toward generalizability, albeit generalizability of a particular type. When we seek to show "how a single principle ties together and illuminates the relations among a number of distinct explanatory elements – including, perhaps, other principles," we are seeking to show how a single principle cuts across a diversity of legal contexts. This is another way of selecting for a principle that is generalizable, even if the various contexts in which it applies are not reducible into a single phenomenon. Such consilience may likewise occur on a more local level. If it turns out that private law or a private law subfield is pluralist to a degree – incorporating multiple distinct principles – a non-reductive consilience criterion will select for principles that are generalizable within that field or subfield.[110]

In short, while the traditional interpretive criteria do not specifically call for theories that recognize simple, generalizable moral norms, these are precisely the type of norms that these criteria bring to the surface when they are applied in combination. A simplicity criterion is implicit in the way interpretive theories are assessed, and inclusive interpretivism makes this simplicity criterion explicit. The result, then, is that an effort to understand private law's self-understanding – an effort to capture the internal point of view – converges on the same conceptual structure that inclusive functionalism recognizes in a legal system.

B. Toward An Explicit Simplicity Criterion

As noted, several of the existing criteria – morality, coherence, transparency, and consilience – suggest a de facto simplicity criterion. In combination, these criteria increase the likelihood that a successful interpretive theory will make use of simple moral concepts: moral concepts that are accessible to legal actors and embedded in modular systems. Naturally, it is still possible that these interpretive theories will diverge from the results that an express simplicity criterion would support. We are not just making a descriptive claim about existing interpretive theories, however. Even if existing theories are not concerned with simplicity, they ought to be. Accordingly, with a call for inclusive interpretivism, we offer what is hopefully a friendly amendment for interpretive theorists: a simplicity criterion should be an express part of legal interpretation, given the interpretive theorist's interest in the internal point of view.

[110] Indeed, if entire private law fields like contract or tort are modular, this may be a mechanism for adopting moral norms that generalize well at the mid-level, without requiring generalizability to the fullest possible extent.

There are several reasons courts might adopt simple, generalizable moral norms as part of the internal point of view. First, the moral norms that are salient in a given community can be sensitive to information cost concerns. For example, the morality of promising plausibly takes into account the ability of promisors and promisees to figure out when they are bound,[111] and this type of consideration can lead to moral norms that scale up. To the extent that the moral norms judges find attractive (on whatever basis) show this sensitivity to information costs, judges may thus incorporate simple and generalizable moral norms into private law. This is an example of an indirect incorporation of scalable norms – judges may not consciously have in mind scaling up, but the kind of moral norms they are drawn to will nonetheless have this feature.

Second, the need for simple, generalizable norms may also play a more direct role in legal reasoning, whether or not it is present in the moral reasoning that produces those norms. When courts select among candidate moral norms, they may aim for moral norms that are both simple and generalizable. This selection could occur in several ways. It may reflect an understanding of what law's claim to authority requires, it may reflect an application of rule of law values, or it may result from a more pragmatic judicial predilection for workable doctrine.

As noted, interpretivists take into account law's claims when they develop interpretive criteria; Stephen Smith, for example, looks to law's claim of authority in support of a morality criterion.[112] This same claim of authority points toward a simplicity criterion, for implicit in law's claim of authority is the possibility that citizens have the capacity to follow the law's guidance. It is not merely that judges are likely to shun concepts that are too hard, or even impossible, for them to apply in the course of legal decision-making. It is very difficult to see how private law could be authoritative for the citizens it regulates if it makes use of concepts that are so complex or inaccessible in practice that they will not provide answers within a reasonable time frame, if any. Implicit in legal authority is an ability to comply with what the law commands.[113]

Judicial opinions also respond to rule of law concerns, and these likewise suggest a simplicity criterion. Interpretivists who recognize this feature of judicial reasoning thus have an added basis to take into account the simplicity of legal concepts and doctrines. The rule of law includes a range of concerns, and one of these is a concern with the un-

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[111] *See* SCANLON, *supra* note 107, at 205 (discussing information cost concerns relevant to the determination of promise-related moral principles).

[112] *See id*. at 15.

[113] *Cf*. Dru Stevenson, *Toward a New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1547-48 (2005) ("When the law sees unknowable, it increases the likelihood that it is arbitrary and capricious, or that state actors will exploit their positions of power to further their own self-interest."). *See also id*. at 1541 n.25 (noting Bentham's interest in the law's being easily knowable, and citing *Letters from Jeremy Bentham to the Citizens of the Several American United States*, reprinted in Jeremy Bentham, 'Legislator of the World': Writings on Codification, Law, and Education 117 (Philip Schofield & Jonathan Harris eds., 1998)).

derstandability of the law.[114] It is famously alleged that the emperor Nero posted edicts at such a height that citizens could not read them; this is not considered consistent with the rule of law.[115] Intractable complexity has a similar effect for rule of law purposes, even where the doctrine that produces this complexity is well-publicized. There may be answers to intractably complex legal problems, but those answers are not knowable by either judges or the regulated parties.[116]

As we have indicated, it is not just simplicity in deciding particular cases, but generalizable simplicity, that is necessary for a well-functioning private law doctrine. Characteristically legal reasoning supports the adoption of such generalizable norms, with courts selecting moral norms that operate well in bridging the micro and the macro. While judges do not always reason with an aim of addressing system effects – they may not consciously think about scaling up – it is commonplace for them to consider what a decision in one area will mean for other decisions that raise analogous fact patterns. Thinking in this way pushes legal doctrine toward norms that are generalizable, at least across a private law field if not to the level of private law as a whole.

Rule of law values are also relevant to this generalizability. With concepts that are intractably complex to apply, it is likely that individual judges will reach inconsistent decisions.[117] As a practical matter, this would mean that no single outcome may govern the parties subject to these legal doctrines.[118] The same concern arises if judges should choose to adopt situation-specific moral reasoning, without building on moral principles that scale up so that they will apply across contexts. Where moral norms are not generalizable in this way, private parties face an increased difficulty in figuring out how other

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[114] This idea may also be tied to rule of law desiderata, which include the idea that the law must be understandable. *See* LON L. FULLER, THE MORALITY OF LAW 38-39 (Revised edition, 1969) (describing eight ways in which legal rules may miscarry, including "a failure to make rules understandable").

[115] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) (noting that "[i]t is said that one of emperor Nero's nasty practices was to post his edicts high on the columns so that they would be harder to read and easier to transgress."). *See also id.* (citing KARL N. LLEWELLYN, THE COMMON LAW TRADITION 17 (Little, Brown, 1960), on the significance of "reckonability").

[116] For this reason we have doubts about Jody Kraus's proposal of a determinacy criterion, a criterion which would support an efficiency-based interpretation based on its capacity to produce determinate results in principle. If such determinacy is not plausibly accessible to real-world legal actors due to the complexity involved, the likelihood that courts will prefer an economic analysis on that basis is low. *Cf*. Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 304 (2007) ("Thus, if deontic theories appear to have a leg up on economic theories of the common law because they enjoy a more natural fit with its language and structure, economic theories appear to have the edge on deontic theories because their explanations of judicial decisions systematically yield more determinate results, at least in principle.").

[117] *Cf.* Martin Shapiro, *Toward a Theory of* Stare Decisis, 1 J. LEGAL STUD. 125 (1972) (drawing on communications theory to show how using less informaiton though stare deciss can lead to better decisions).

[118] We thank Ben McFarlane for emphasizing this point.

fact patterns will be addressed, and they face an increased likelihood that different courts will address those fact patterns in different ways. Judges are likely to seek scalable doctrines for these reasons, and this means that generalizable moral norms have an advantage over more particularized, situation-specific moral reasoning.[119]

Lastly, judges may plausibly be influenced by the ease of usage that results from simple, generalizable norms. Particularly in those cases where courts are choosing among norms that already cross a threshold of moral plausibility, considerations of a more practical sort are predictable influences on judicial reasoning. When the alternatives are intractably complex, a selection of simpler norms may reflect a form of judicial modesty, or at least a form of self-awareness. It is, in any event, necessary for courts to avoid calculations that take an inordinate time span to complete. While courts can sometimes mistake the intractably complex for the manageably simple, over time it is predictable that courts will recognize and avoid calculations that involve a level of intricacy that exceeds their capabilities.

Each of these features suggests that law will evolve away from intractable complexity and toward simple moral norms that are generalizable. This is not to say that private law has evolved toward the most simple, generalizable norms available, or even that it has reached an optimal level of simplicity and generalizability; the development of private law is affected by a variety of factors, and the manner of its evolution is itself complex. Nevertheless, from an interpretivist's perspective it is reasonable to think that private law will at least have evolved to avoid intractable complexity, and likewise towards legal norms that scale up to a reasonable degree. This, in turn, gives us a basis for an inclusive interpretivism that adopts an explicit simplicity criterion: all else equal, an interpretation of a private law field is more likely to be correct if it incorporates simple, generalizable moral norms.

C. Illustrations of a Simplicity Criterion in Practice

Granting the place for a simplicity criterion, one might nonetheless question its significance. The above insights would have limited relevance if each explanatory approach fared equally well under a simplicity criterion. This might seem like a realistic possibility in practice, given relatively accommodating criteria for successful interpretation. Notably, there is a range of views on private law that can survive the application of a moderate morality criterion, and the same is true for moderate versions of the fit, coherence, and transparency criteria. Yet only some of these interpretations are likely to give us simple, generalizable moral norms. We will offer two examples below to illustrate.

[119] We do not deny that some components of private law doctrine are situation-specific; we are describing regularities in legal reasoning, not absolute rules. The reasonable person standard in tort law, for example, is highly sensitive to context. Even here, however, there is an objective aspect that renders the doctrine comparatively scalable.

First, consider the case of equitable remedies in contract law. There is a broad view of equity that appeals to judicial discretion, as implemented in ex post standards.[120] This type of equity invokes a wide-ranging and amorphous notion of fairness; it calls for a highly contextualized analysis, one that often requires a sweeping judicial inquiry into morally relevant facts. There is also a more traditional view of equity. This view treats equity as a structured safety valve aimed at discouraging opportunism.[121] Assume that we are trying to interpret the equitable remedies in contract law, and assume also that our sole choices are either the broad view of equity or the traditional safety valve view of equity. Should we interpret contract law in light of the first view of equity, or the second view?

Individual cases may implicate one type of equity or the other, but it is reasonable to think that both types of equity will demonstrate a significant level of doctrinal fit. Moreover, a morality criterion is not a challenge here. The broad view of equity is overtly moral, and will almost certainly meet a moderate morality criterion. Likewise, a safety valve approach should have no difficulty with a morality criterion, given its emphasis on remedying opportunism. Each view arguably results in a coherent interpretive outcome: most contract law principles will hang together given either understanding of equity.[122] Each view of equity also employs recognizably legal concepts, and as a result a moderate transparency criterion is met for each. We thus have an interpretive impasse – our standard interpretive criteria have left us with two viable options.

When it comes to simplicity, the picture looks quite different. An all-things-considered fairness principle, much like an all-things-considered efficiency principle, can be enormously complex to apply. Clear cases will exist, but in many fact patterns there is an abundance of potentially relevant information to consider. The weight of each piece of information, moreover, is unclear. Under this all-things-considered view, equity will be very hard to enforce consistently. (Thus, the common references to the Chancellor's foot when equity is under critique.)[123] More to the point, this all-things-considered type of eq-

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[120] For a discussion, see Douglas Laycock, *The Triumph of Equity*, 56 L. & CONTEMP. PROBS. 53, 53 (Summer 1993) ("The distinctive traditions of equity now pervade the legal system. The war between law and equity is over. Equity won.")..

[121] Henry E. Smith, Equity as Second-Order Law: The Problem of Opportunism (January 15, 2015). Harvard Public Law Working Paper No. 15-13, available at SSRN: http://ssrn.com/abstract=2617413; Henry E. Smith, *The Equitable Dimension of Contract*, 45 SUFFOLK L. REV. 897, 906 (2012). *See also* Kenneth Ayotte, Ezra Friedman & Henry E. Smith, A Safety Valve Model of Equity as Anti-Opportunism (ms., December 2013).

[122] We say "arguably", as the broad view of equity does run some risk of inconsistent holdings when different courts apply this type of moral reasoning to different fact patterns.

[123] *See id.* at 901, n.17 (citing Selden). John Selden offered this humorous critique of equity:

> Equity is a Roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the Standard for the measure we call a Foot, a Chancellor's Foot; what

uity will be very hard to apply without an exhaustive inquiry into context. And even then, the vagueness of the doctrine may lead to indeterminate results in specific applications. This type of equity entails high information costs, for both judges and citizens.

In contrast, a safety valve view of equity employs simple, everyday morality in a way that is much more constrained. This traditional view of equity adopts presumptions, and these presumptions then flip when particular, limited fact patterns arise.[124] In many cases, the trigger for presumption flipping will be easily recognizable to both judges and litigants. The trigger for presumption flipping will also require far less inquiry in order for judges to ascertain whether it applies. From an information cost perspective, the traditional view of equity is substantially simpler to employ than the all-things-considered view.

Disproportionate hardship is a good example of one of these triggers. In the contractual setting, its application is nicely illustrated in *Jacob & Youngs, Inc. v. Kent*.[125] *Jacob & Youngs* involved a contract to construct a country residence. The contract specified that only wrought iron pipe made in Reading was to be used. Instead, the builder used pipe which had been manufactured elsewhere, but was apparently the same in quality, appearance, market value, and cost. The plaintiff had constructed the house, and sought a final payment under the contract. The defendant, however, refused to pay unless the substitute pipe was replaced with pipe from Reading. Unfortunately, the now completed house would have to be ripped up in order to replace the pipe.

Judge Cardozo concluded that "the measure of the allowance is not the cost of replacement, which would be great, but the difference in value, which would be either nominal or nothing."[126] In reaching this conclusion, the court described a set of presumptions designed to avoid oppressive forfeitures.[127] In a case like *Jacob & Youngs*, the promisee is limited to the difference in value if the shortfall is not in bad faith, and disproportionate hardship effectively shifts the burden to the homeowner to be clear what was contemplat-

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> an uncertain Measure would be this. One Chancellor has a long Foot, another a short Foot, a Third an indifferent Foot: 'Tis the same thing in the Chancellor's Conscience.

JOHN SELDEN, *Equity*, *in* TABLE TALK: BEING THE DISCOURSES OF JOHN SELDEN, ESQ. 43-44 (Israel Gollancz ed., J.M. Dent & Co. 1906) (1689).

[124] For helpful discussion of the simplifying effect of presumptions, see LON L. FULLER, LEGAL FICTIONS 108 (1967) (suggesting that "[t]he presumption introduces into an entangled mass of interrelated events a certain tractable simplicity without which the effective administration of justice would be impossible.").

[125] 129 N.E. 889 (N.Y. 1921).

[126] *Id*. at 244.

[127] *See id*. at 242-44 (citations omitted).

ed. Insisting on completion of the work to the letter of the contract would be so costly in comparison to the benefit that it raises a presumption of opportunism.[128]

Notably, determining whether a case implicates disproportionate hardship is comparatively simple. What stands out for present purposes is that a safety valve conception of equity is implicated in the more extreme (and readily cognizable) fact patterns.[129] Because equity intervenes where sharp discontinuities occur, the safety valve conception of equity is substantially simpler to apply than the all-things-considered conception. A simplicity criterion can thus help us distinguish between these different perspectives on equity, even if fit, morality, coherence, and transparency cannot. For, even if both types of equity are able to satisfy these other criteria, only the traditional, narrow view of equity will demonstrate the necessary simplicity.

Tort theory offers us another helpful comparison. On one moral account of private law, individuals are to be treated as independent and formally equal, in a way that abstracts away from many of their particular features and idiosyncrasies. This view emphasizes the objectivity of standards, and it is, broadly speaking, associated with the Kantian understanding of private law.[130] On another view, recently espoused by Hanoch Dagan and Avihay Dorfman, tort law is (and should be) addressing the relationships that exist between specific individuals, as they actually are.[131] They describe this as a "relational justice" understanding. The first, Kantian view is an example of a perspective that incorporates simple, generalizable moral norms; depending on how it is elaborated, the alternative relational justice view may raise concerns about intractable complexity.[132]

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[128] For insightful discussion of this case and its history, see Victor P. Goldberg, *Rethinking* Jacob & Youngs v. Kent, 66 CASE WESTERN L. REV. 111 (2015). *See also* Henry Smith, *Is Equitable Contract Law a Pipe Dream?*, available at: http://blogs.harvard.edu/nplblog/2016/06/09/is-equitable-contract-law-a-pipe-dream-henry-smith/ (discussing Goldberg's analysis in light of opportunism concerns).

[129] This is only one example of the type of context in which traditional equity will intervene. Other comparatively simple triggers also exist. *See* Smith, *supra* note 120, at 907 (discussing spite, pretext, unclean hands, and estoppels as proxies for opportunism).

[130] *See* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 171 (2009) (contending that "[o]bjective standards are required because a subjective standard would entitle one person to unilaterally determine the limits of another's rights.")

[131] *See* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016).

[132] Similar concerns may arise under economic accounts, depending on which variables are included in an economic analysis. For helpful discussion of variable selection questions, see James M. Anderson, *The Missing Theory of Variable Selection in the Economic Analysis of Tort Law*, 2007 UTAH L. REV. 255. For discussion of complexity problems when collateral costs and benefits are included, see Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 85 (2010) (contending that "[i]t is not possible to account for all of tort's costs and benefits; the informational demands are simply too high.").

In developing their account, Dagan and Dorfman give the example of "a person with mentally diminished capacity who is hit by a car while crossing the street."[133] They argue that in such cases the car driver owes extra care, and that the law of torts reflects this.[134] If this sensitivity to the capacities of plaintiff and defendant takes a roughly categorical form, then the norms involved may be simple enough and generalizable enough to avoid problems under a simplicity criterion. Moreover, the relational justice account takes note of reasonable foreseeability as an important feature of tort law,[135] and that doctrine bears on the informational challenges that private parties must face. So, perhaps both Kantian theories and relational justice theories should pass the interpretive threshold.

Notice, however, that the relational justice account calls for a comparatively fine-grained picture of what matters. On this view, a potential injurer's accommodating the victim includes a range of considerations:

> [P]ersonal qualities that ought to be accommodated by the duty of reasonable care must be connected to the kind of interdependence that brings the injurer and victim together. In this context, the relevant qualities are those associated with both the ability to decide where and when to cross the street and the competency to respond to the surrounding environment and, especially, approaching cars. Physical, mental, and cognitive disabilities are the first to come to mind, along with other forms of insufficient ability to adapt oneself to the potential risks.[136]

Such examples are indicative of a tort law that looks to individuals as they actually are, but a tort law along these lines could (in theory) also implicate very case-specific features of the world. Depending on how the doctrine is elaborated, a tort law concerned with how individuals actually are might then need to take into account such subtleties as: the defendant's mild near-sightedness, the plaintiff's occasional tendency toward daydreaming, the defendant's episodes of clumsiness, the plaintiff's imperfect dexterity, the defendant's slightly above average risk-preferences, the plaintiff's sub-par reflexes, etc. Assessing the interactions between these considerations could easily reach intractable levels of complexity.

If relational justice called for this, it could bring us into the territory that Scanlon is worried about in his discussion of moral principles; a sufficiently fine-grained set of

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[133] *See* Dagan & Dorfman, *supra* note 131, at 34.

[134] *See id.* (citing Noel v. McCaig, 258 P.2d 234, 241 (Kan. 1953); Johnson v. Primm, 396 P.2d 426, 430 (N.M. 1964); Campbell v. Cluster Hous. Dev. Fund Co., 668 N.Y.S.2d 634, 635 (N.Y. App. Div 1998); Stacy v. Jedco Constr., Inc., 457 S.E.2d 875, 879 (N.C. Ct. App. 1995)).

[135] *See id.* (discussing reasonable foreseeability as a requirement).

[136] There are, of course, limits to the facts properly under consideration. *See id*. at 37 ("[F]or instance, it makes no sense to take into account the victim's political sensibilities (or, for that matter, his love of surfing) in setting the contents of the injurer's duty of care.").

moral norms would mean that the informational burden individual parties face is severe. This is not to say that Dagan and Dorfman's theory calls for such results – in addition to foreseeability, they also take into account the burdensomeness of legal prohibitions[137] – but if a focus on interacting with people "as they actually are" required a truly fine-grained level of particularity, then it too would face challenges under a simplicity criterion. Abstracting away from individual idiosyncrasies – at least to some degree – may be a signal that an interpretive theory is on the right track.

As the above examples suggest, interpretive theories tend to comply with a simplicity criterion, but this outcome is by no means assured. While interpretivists usually adopt a holistic perspective in explaining private law, they often assume without discussion that the micro-level morality that applies between individuals will scale up effectively. This should not be an automatic conclusion. The moral norms that are immanent in private law need to be simple and generalizable, and the existing interpretive criteria ordinarily will select for this. An explicit simplicity criterion espoused by inclusive interpretivism should increase the likelihood that we are accurately discerning the law's self-understanding.

III. The Partial Convergence of Private Law Theories

The need to manage the complexity of private law through modular structures based on simple, general forms of morality has major implications for how we should think about private law. In this Part we explore how our perspective sheds light on how private law has – and has not – changed since the Legal Realist era. Correspondingly, much of the apparent disagreement among private law theorists is misplaced: certain middle-level structures of the private law are robust for a reason – they allow the rules and standards of the private law to scale up – and so are not the proving ground for different normative approaches to private law. This remarkable convergence does not mean that private law should be uncontroversial. On the contrary, our "sizing up" perspective allows us to see where the stakes in normative conflicts over private law really reside.

As the term "scaling up," implies, we face the question of what happens when the simple, modular local morality of the private law does *not* scale up. Which additional considerations, whether of distribution, fairness, or even efficiency, should be allowed to come into the picture to ensure that private law plays its proper role in the legal system and society at large? What exactly is that role, and how specialized can private law afford to be? After establishing convergence on robust local and middle-level structures of the private law, we still face the question of what grounds the system. What are the normative foundations of private law and are there normative foundations at all? No degree of understanding of the need to manage complexity is going to answer those basic questions, but we are now free to focus on them – without the illusion that they will be decided by

[137] *See id.* ("Accordingly, the injurer's autonomy to pursue worthwhile ends might be adversely affected by a requirement to take extraordinary care toward victims like the mentally disadvantaged. Therefore, although an accommodative duty of care should be costly for an injurer to discharge in light of—and, so, in recognition of—his victim's peculiar sensibility, it must not be *prohibitively* so.").

analysis of much of private law doctrine. Finally, we end this Part with a discussion of how our perspective counsels an overall more inclusive approach to private law.

A. Private Law and Pseudo-Controversies

The sizing up perspective sheds light on where private law has been and where it's going. For all the controversies about private law since the Legal Realist era – including over whether it even exists – the law itself has been stable in the parts we would expect. This relative stability reflects the need to manage complexity as private law scales up to the macro level, and we argue that this renders many controversies in private beside the point.

The Legal Realists are the source for much of the conventional wisdom about private law among commentators and some judges today. Although Realism came in degrees, it generally regarded private law as plastic and ready for remolding for policy reasons. Realists believed that private law was regulation by other means, and were skeptical about the distinction between private and public law.[138] In a sense, Realism aspired to collapse the micro and the macro. It treated various situations as amenable to tinkering, believing that the sum of these solutions would function in an additively predictable way.

There is a deep irony in this. The Legal Realists saw themselves as practical – even pragmatic – and regarded themselves as social engineers, ready to bring to bear the insights of social science in the way that engineers apply the natural sciences. As we have pointed out, though, a concern for engineering principles and the science of complexity points in a very different direction.

We are not arguing that controversies in private law are illusory. The sizing up perspective allows us to distinguish which controversies are real and what is at stake in them. Later in this Part, we take up the foundational questions that remain after one appreciates the systemic aspect of the middle-level operation of private law. For now, we are in a position to sift through which issues at this middle level implicate foundational visions of the purposes of private law and which do not.

In conventional private law theory, especially functional theories, there is a tendency to assume a congruence between the purpose and structure of the law. In law and economics, the first generation exhibited some hubris in touting the explanatory benefits of efficiency analysis: break down the law into rules, evaluate them in terms of efficiency, and show the contours of the law reflect efficiency.[139] As the gap opened up between

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[138] *See, e.g.*, Green, supra note 8; *see also* Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 528-32 (reviewing, LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986)). Developments subsequent to Legal Realism have emphasized and may have exaggerated its importance to the Realists themselves, Brian Leiter, *Legal Realism and Legal Doctrine*, 163 U. PA. L. REV. 1975, 1980-81 (2015).

[139] Arthur Allen Leff, *Economic Analysis of Law: Some Realism about Nominalism*, 60 VA. L. REV. 451 (1974) (analyzing Richard Posner's Economic Analysis of Law as a picaresque novel about the character Efficiency).

what appeared efficient from this point of view and the actual structures of the law, the attitude became "so much the worse for the law," and the field made a sharp turn to the normative. Time for the fusty law to get with the efficiency program. Notice, though, that at all times the relation – whether descriptive or normative, between actual or recommended structures of the law and functional criteria – was direct and transparent.

This directness and transparency is true of much post-Realist – which is almost to say most American – theorizing about private law. As we saw in Part I, theories of private law that profess to be pluralist or based on multifaceted notions like human flourishing also take the law rule by rule and hold it up to the light of the preferred normative criterion. They may take issue on almost everything with law and economics, but both approaches miss the systemic aspect of law and its associated problem of complexity and scaling up.

How does this picture change once we take complexity, system, and scaling up seriously? Overall we should expect much more convergence on middle level structures of the law than we now see. Inclusive functionalism and inclusive interpretivism incorporate sensitivity to system effects and the need for relatively simple, local modular structures to manage complexity of the system. As such, the two kinds of theory will tend to converge, and if the actual law is responsive to these reasons of complexity, we should expect a convergence as well on some aspects of existing legal doctrine.[140] That is not surprising for interpretivists, but it does call for a different attitude to the law among functionalists. For interpretivists, it requires being more explicit about the role of simplicity and generality than they have been heretofore. None of this is to say there will be universal agreement or that the law will suddenly seem perfect. We will be able to clear away pseudo-controversies and focus on genuine points of disagreement.

B. Scaling Up, Intervention, and Public Law

One set of issues that remain open is which values should come in as we scale up private law. Or to take one version of this question: which institutions should inject public law values or corrections to the system that would otherwise scale up?

Consider the range of opinions that will remain on the question of intervention even after the systemic aspect of private law is fully appreciated. There will inevitably be disagreement about the need for intervention and the costs of that intervention. Libertarians are likely to see little benefit and great cost to intervening in private law as we scale up. They are likely to see the local forms of morality as scaling up unproblematically: once force and fraud are addressed – through local simple forms of morality and morally inflected law – the system can be trusted to give an overall result. As noted earlier, there

[140] For helpful discussion of convergence between different theories in private law, see Nathan B. Oman, *The Failure of Economic Interpretations of the Law of Contract Damages*, 64 WASH. & LEE L. REV. 829, 864-67 (2007). *See also* Jody S. Kraus, *Reconciling Autonomy and Efficiency in Contract Law: The Vertical Integration Strategy*, *in* SOCIAL, POLITICAL, AND LEGAL PHILOSOPHY 420 (Ernest Sosa & Enrique Villanueva eds., 2001).

are libertarian and classical liberal theorists who see the public as a scaled up version of the private.[141] That is in a sense the extreme version of the complacent approach to scaling up.

The picture for libertarians here is a little similar to Robert Nozick's preference for historical principles of justice in transactions, and his highlighting of how theories of distributive justice, or justice based on overall results in terms of criteria like fairness, will always require continuous intervention because voluntary transactions will not automatically produce the desired results in terms of pattern-based justice.[142] If the pattern of transactions gave the right – pattern-based just – result at all times it would be fortuitous. In private law, those who do not see local justice as the exclusive criterion for the justice of private law or society overall, face a similar problem. The local forms of morality will give the overall just result only by happenstance. For non-libertarians the question becomes what to do about it.[143]

The more important the justice-based reasons for intervening are, the more inclined that will make one to intervene. Not surprisingly, those who emphasize forms of justice not captured at the local level, distributive justice for example, will be inclined not to leave private law to its own devices. These controversies are real, and the sizing up perspective sharpens them.

Much of the sharpening comes on the oft-neglected cost-side of intervention. Importantly, these costs are in large part a function of the benefits of modularity in private law as a method of managing complexity. Fairness constraints on private law will require looking into modules or enriching interfaces or even remodularizing the system. Take trespass again. Should an owner's decision to invoke the law of trespass to exclude others be subject to evaluation for reasonableness by a judge? Should decisions by corporate boards be protected by a strong form of the business judgment rule or more opened up to scrutiny? When should courts pierce the corporate veil?

The costs of intervention are tied to the system effects of private law. If intervention decreases modularity, then the costs of intervention are the foregone benefits of that modularity. Sometimes these costs will not be high: if an area like landlord-tenant is more detachable from the rest of the law, then intervention will not destabilize the system. In property law, much of the change in the twentieth century happened in those parts of the system that were least tied to the systemic aspects of property law.[144] Many of those more

[141] *See supra* notes 30-35 and accompanying text.

[142] ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 150-64, 167-69, 171-72 (1974).

[143] For an interesting discussion of the potential for tension between micro and macro perspectives, see Bernard Williams, *Modernity and Ethical Life*, *in* IN THE BEGINNING WAS THE DEED 50 (Princeton University Press, 2005) ("Such a speculation would lead us to the idea of a kind of ethical federation, with denser ethical considerations being deployed at more local levels, and 'thinner,' more procedural, notions being deployed at higher levels….").

[144] *See* Smith, *supra* note 12.

detachable aspects have a heavy contractual basis. Contract law may be systematic, but we can intervene in it without some of the wholesale effects one would get from more systemic aspects of property law like possession, accession, trespass, land records, and the like.

Interventions into in rem aspects of property are among those that will implicate system effects. Thus, if a rule like trespass hides a lot of information about owners' activities and potentially interacts with other law and associated activity, the effects can be hard to predict – as they are in an untamed complex system. If the law required evaluation of trespasses on a case by case basis or if it protected property always by damages and never injunctions, actors might not be able to integrate the reliance on a property right with their other plans in a stable enough way for overall projects to succeed. Precisely because these system effects are hard to anticipate they are difficult to isolate empirically. The evidence for and against them will have to be indirect, sometimes based on price effects, sometimes based on natural experiments with aspects of the system, and sometimes representing guesses from cross-society comparisons – the last being the trickiest of all.[145] We might also consider evolutionary theories of law, which allow the kinds of testing that evolutionary models of a wide variety of other natural and human-designed systems afford.[146] Indeed, an "engineering" perspective calls for no less, and it would be astounding if the hard work of getting a handle on system effects were less worthwhile in law than in these other areas. However, the difficulty of addressing them is no reason to ignore them.

None of this is a call for unreflective libertarianism or formalism. Recognizing the costs of intervening in a modular system is not to counsel against doing so. It is to be clear on what we're giving up even if we agree on what is to be gained thereby. No doubt it is rhetorically simpler to present law as a reductively transparent collection of rules that are costlessly customizable: in selling a program of intervention that is certainly one way to stack the deck. For anyone interested in explaining and justifying the private law rather than selling a program, it is a woefully incomplete picture.

C. Genuine Controversies over Foundations.

Even when disagreements over the middle level of private law and the relation of public to private law are sharpened, we are left with foundational questions. To the extent they respond to problems of complexity, the structures of private law might well do it in a similar way even if the benefits to be achieved might be grounded very differently. Thus,

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[145] For a discussion of the empirical challenges, see Holger Spamann, *Empirical Comparative Law*, 11 ANN. REV. L. & SOC. SCI. 131 (2015).

[146] This is not to deny the challenges faced when assessing legal evolution. *Cf.* Adrian Vermeule, *Many-Minds Arguments in Legal Theory*, 1 J. LEGAL ANALYSIS 1, 12 (2009) ("If the rate of change in social, economic, and technological environments is high, however, then social evolution faces a shifting target: even if social structures constantly evolve towards efficiency, they may at any particular point remain very far from it."). For an example of an evolutionary model in property, see, e.g., Lee Alston & Bernardo Mueller, *Towards a More Evolutionary Theory of Property Rights*, 100 IOWA L. REV. 2255 (2015).

versions of private law aiming for autonomy, efficiency, or even fairness and distributive justice might show similar modular structures to manage complexity.[147] Thus, a kind of incompletely theorized agreement over some mid-level structure of private law would stem from (some) agreement on the cost side (managing complexity) even if there is more disagreement on the benefit side (the purposes of private law).[148] Again, complexity costs cannot be the whole story, but that part of the story may produce some convergence of theories.

What remains is controversy where the benefits from a proposed purpose may outweigh complexity considerations. What also remains are the foundations of private law itself. Theoretically we might achieve a great deal of convergence on the structure of private law, perhaps with a variety of different public law interventions or different pairings with tax-and-transfers systems. We would still have plenty to disagree about. Is contract about promise or efficiency? Is tort about corrective justice or deterrence? We are not claiming there will be total convergence at the middle level. What we do claim is that putting the middle level aside, it is still worthwhile to argue over why we have private law in the first place.

D. Inclusiveness

As the discussion in this Part already implies, we advocate a large degree of inclusiveness in private law theory. Inclusive functionalism and inclusive interpretivism can bring a greater – not total – degree of unity in private law theory. By recognizing how private law deals with complexity and the problem of scaling up from the micro to the macro, this ironically opens theory up to be more pluralistic. If middle-level aspects of private law don't decide between different normative theories, we have a greater degree of freedom to invoke them – at least until someone comes along with a decisive argument for their superiority on their own terms.

With the New Private Law we see forms of convergence between approaches to private law, which our inclusivism can only foster. The New Private Law aims to take the structures of the law seriously,[149] and one aspect of that is not to overlook the problem of complexity and the methods for managing it. At the same time, the New Private Law is interdisciplinary, whether in a functionalist or interpretivist mode. Stressing the problem of complexity will require an interdisciplinary approach starting with systems theory and its overlap with economics, psychology, philosophy, sociology, and other areas relevant to the study of law.

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[147] *Cf.* JULES COLEMAN, THE PRACTICE OF PRINCIPLE 36 n.20 (Oxford: Oxford University Press, 2001) (describing a "hybrid account in which efficiency or utility maximization enters at the grand level of political theory – not as a way of determining the enforceable duties, but rather as a way of justifying a practice of enforcing duties as a matter of corrective justice").

[148] *See* Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

[149] See the New Private Law Symposium, Volume 125 of the HARVARD LAW REVIEW (2012).

The inclusiveness we counsel both for functionalists and interpretivists is very much in the spirit of the New Private Law. Sometimes the New Private Law is associated with the much overused term "pragmatism."[150] Although we hesitate to invoke that term and its twentieth-century baggage, we find it understandable that people would find our "inclusivism" to be pragmatic. By including system effects and the scaling up problem in the picture we are requiring private law and theories of private law to respond to aspects of the real world. Practical considerations come to the fore, partially defuse normative debates, and put them in proper focus. If that's pragmatic, so be it.

Conclusion

As Paul Valéry's famously said: "Everything simple is false; everything which is complex is unusable."[151] Ironically, the classic Legal Realist approach and its modern-day progeny fare poorly on both fronts. By treating the concepts and moral norms of private law as mere surface phenomena, they oversimplify private law as a system – and accordingly their accounts are false. At the ground level of legal reasoning, they call for calculations that are intractably complex – and accordingly their accounts are unusable by legal actors. In this case, moreover, both concerns are interrelated, for it is precisely the simple, moral norms of private law – the norms that the Legal Realists downplay – which enable private law to manage complexity at the ground level.

Inclusive functionalism recognizes the moral norms that are immanent in private law, and it takes these norms seriously. While such norms may not always be viewed in functional terms by legal actors, they nonetheless play a crucial functional role: they bridge the micro and the macro. Simple moral norms are a mechanism for cabining information costs at the micro level. The modularity of these norms is a way to manage what would otherwise be intractable complexity, given the various interactions between the parties to a potential dispute, the wide range of possible effects on third parties of any legal rule or standard that might be adopted, the interdependencies of these relationships, and the manner in which parties may opportunistically react to whichever legal doctrine is ultimately enforced. The complexity of such calculations is such that they cannot be figured out in real time. Simple moral norms are thus vital. When these norms are not only simple, but generalizable, private law is able to function as a system: the moral norms of private law can scale up.

Interpretivists are ordinarily thought to be at odds with functionalists; interpretivists are concerned with figuring out the internal point of view, with explaining the law in light of its self-understanding. This perspective on private law already points in the right direction: interpretivists implicitly select for those theories that incorporate simple, generalizable moral norms. This is because the standard interpretive criteria – fit, coher-

[150] See John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640 (2012); Benjamin C. Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457 (2000).

[151] Paul Valéry, *Mauvaises Pensées*, *in* 2 ŒUVRES 783, 864 (Paris: Gallimard 1960) ("Ce qui est simple est toujours faux. Ce qui ne l'est pas est inutilisable.").

ence, morality, transparency, and consilience – typically support explanations of private law that include such features. We suggest, however, that interpretivists should be open to functional concerns when they think about the law – they should be inclusive interpretivists – and this means adopting a simplicity criterion. Just as law has a pervasive impulse toward coherence, it has a pervasive impulse toward simple moral norms that scale up. Thinking about the internal point of view in private law means recognizing this fact.

Inclusive functionalists and inclusive interpretivists should thus converge in recognizing the simple, moral norms of private law for what they are: central components of private law as a system. Once the micro and macro are taken into account, these seemingly opposed schools of thought should be able to agree on the core features of private law. Private law norms need to be simple to apply, and they also need to prove their usefulness and plausibility across contexts – that is, they must be able to scale up. Whether one is a functionalist or an interpretivist, simple generalizable moral norms are evident parts of private law reasoning, and their continued durability is a sign of their practical significance. These structures are robust for a reason.

Recognizing the need for simple, generalizable moral norms does not mean that all of the familiar legal theory and policy debates should now dissolve. Not everyone can agree on which norms are in operation at the micro level. There is also room for substantial disagreement about the normative foundations of private law – these foundations could be deontological, utilitarian, or even pluralist. Insights into how private law functions as a system will not resolve such foundational questions. Likewise, at the very macro level, there are lingering questions whether the moral norms of private law scale up adequately. Some may conclude that distributive justice or other society-wide aims call for modifying the modular structures of private law. There is divergence both on the question of when scaling up is a problem, and on what to do about it if it needs fixing.

We suggest that these are the questions to which private law theorists should now turn. Treating the moral norms of private law as epiphenomena should be a non-starter. The more interesting questions concern the proper place for, and elaboration of, these private law norms.