

BETWEEN RATIONALITY AND BENEVOLENCE: THE HAPPY AMBIVALENCE OF LAW AND LEGAL THEORY

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INTRODUCTION

My aim in this Lecture is to explore an ambivalence of law and of legal theory concerning rationality. The ambivalence I will discuss is one between rationality, narrowly defined as the maximization of an agent's self-interest, and benevolence, broadly understood as behavior that moderates the pursuit of one's self-interest by taking into account the interests of other individuals or of the community as a whole. I will look at two actors, the central heroes of the legal drama: the subjects of law, more particularly the ordinary people who are the focus of private law, and the carriers of law, centering on judges, on whom legal theory places much of its spotlight.

My first task in this Lecture is descriptive. I will show how law assumes its subjects' rationality and also seeks to transcend it. I will also demonstrate how legal theory presents a mirror image of this seeming paradox insofar as judges are concerned: while it expects judges to transcend their self- and group-interest, it suspects that this ideal neither will nor can be perfectly attained. These attitudes may at first glance seem confusing, if not confused, hence my second task, which is to explain and ultimately celebrate these ambivalences. My third and final task is to sketch the complex ways by which law and legal theory face the challenge of sustaining these happy ambivalences.

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I. TWO PUZZLES

Law's conventional story assumes that its subjects are rational maximizers of their self-interest,¹ and that its carriers are benevolent servants of the public good. And yet, at the same time, we can also easily trace within legal discourse the opposite assumptions.

A. Rational But Potentially Benevolent Citizens

I first consider law's conception of its subjects focusing on private law (the laws of property, contracts, torts, and restitution) because private law structures our daily interactions as individuals more than any other part of our law. Law clearly anticipates a subject who rationally maximizes her self-interest. Subjects with such a disposition need, for example, a proper incentive if they are to engage in creative activity at a socially desirable level. Without such a legal incentive in place, creative resources may be undersupplied because the expected costs of their production tend to be high, while the costs of their copying, which may turn the copier into a competitor, are rather low. This account underlies one of the conventional understandings of intellectual property law: as a set of carefully designed carrots that encourage creative activity.²

By the same token, much of the law of remedies can be analyzed as a legal design aimed at discouraging rational subjects from engaging in activities that are either socially detrimental or incompatible with other people's entitlements. This analysis is obviously acceptable to lawyer-economists, but should also be so to those who hold that our private law entitlements, at least partly, are not grounded in welfarist concerns as long as they acknowledge that many of the potential invaders of such entitlements are rational maximizers of their self-interest. Thus, when the law forces infringers of others' entitlements to disgorge the net profit they have reaped, it is vindicating the latter's right by sending a powerful message to rational people to keep out. In some categories of cases, as in the case of patent infringement, the law limits recovery to the harm such invasions may cause, or to the fair market value that the invader would have had to pay had he not bypassed the bargaining table. In these types of cases, the law discourages welfare-reducing infringements without dismissing the appeal of efficient ones.³

1. Or subrational due to difficulties such as imperfect information, cognitive errors, and the like, which are irrelevant to my interest here.

2. See ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 124–26 (5th ed. 2007).

3. See generally HANOCH DAGAN, *UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES* (1997), and HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 210–59 (2004), where I extensively discuss other possible measures of recovery as well as some further complications.

This line of analysis, so familiar to readers of legal scholarship, focuses on the sticks and the carrots that law prescribes as the main method for motivating behavior. It thus anticipates as its audience Holmesian bad men. In *The Path of the Law*, Oliver Wendell Holmes endorses the perspective of the bad man who “cares only for the material consequences” of his acts and discounts other reasons for action “whether inside the law or outside of it, in the vaguer sanctions of conscience.”⁴ The bad man discounts the sheer rhetoric of right and wrong and treats those private law rules, known in the more modern terminology of Calabresi-Melamed as liability rules,⁵ as mere taxes added to his activity and lacking independent normative significance: “It does not matter, so far as the given consequence, the compulsory payment, is concerned, whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it.”⁶ The bad man is, as William Twining explains, “amoral, rational and calculating.”⁷ He perceives law as “one of the facts of life that he has to cope with as an external force, to be avoided, evaded or perhaps used for his own purposes.”⁸

Holmes’s bad man analysis, like John Austin’s sanction theory of law, was of course severely criticized by H. L. A. Hart.⁹ Hart argues that legal norms are taken not only as predictions of judicial action, but also as standards and guides for conduct and judgment, and as bases for claims, demands, admissions, criticism, and punishment. The Holmesian analysis “obscures the fact that, where rules exist, deviations from them are not merely grounds for a prediction that hostile reactions will follow or that a court will apply sanctions to those who break them, but are also a reason or justification for such reaction and for applying the sanctions.”¹⁰ This failure to appreciate the normativity of law is significant, insists Hart, because it ignores the “internal point of view” of people who accept the rules and voluntarily cooperate in maintaining them, who are usually the majority.¹¹ From that point of view, “the violation of a rule is not merely a basis for the prediction that a hostile reaction will follow but a *reason* for hostility.”¹²

4. OLIVER WENDELL HOLMES, *The Path of the Law*, in COLLECTED LEGAL PAPERS 171 (1920).

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

6. HOLMES, *supra* note 4, at 174.

7. William Twining, *Other People’s Power: The Bad Man and English Positivism, 1897-1997*, 63 BROOK. L. REV. 189, 209 (1997).

8. *Id.* at 210.

9. See generally H. L. A. HART, *THE CONCEPT OF LAW* (1961).

10. *Id.* at 82. See also JOSEPH RAZ, *The Relevance of Coherence*, in *ETHICS IN THE PUBLIC DOMAIN* 261, 280-81 (1994).

11. HART, *supra* note 9, at 87.

12. *Id.* at 88.

Even Hart recognizes, however, that the internal point of view he emphasizes is not law's exclusive perspective. At three points along his fierce critique of any attempt to minimize the accepting attitude of law's subjects, he softens his initial claim of normativity being a necessary and sufficient condition of law. First, Hart concedes that the determinative test as to whether social rules impose obligations—the main difference between rules of grammar or of etiquette and rules of law—is the seriousness of social pressure behind the rules.¹³ Second, he acknowledges that:

[t]he external point of view may very nearly reproduce the way in which the rules function in the lives of certain members of the group, namely those who reject its rules and are only concerned with them when and because they judge that unpleasant consequences are likely to follow violation.¹⁴

But he insists that these are normally the minority. Finally, Hart restricts the applicability of his theory even further, saying that the internal point of view needs only to characterize the perspective of the official, who must treat the rules as guides for behavior and judgment. The majority of the law's subjects can, but need not, employ this point of view. In their lives, the compulsory power of the law may exhaust its impact.¹⁵

These concessions by Hart are significant and justified insofar as they go. They show that legal theory should not marginalize law's material consequences, and that power and coercion are constitutive features of law's role in its subjects' lives.¹⁶ They also demonstrate that, at the end of the day, we indeed anticipate the rational maximizer of self-interest as the default recipient of the law. But none of this should lead us to totally dismiss Hart's resistance to conceptualize law's subjects *solely* along the lines of the bad man. Hart is certainly correct in rejecting such a reductionist view of law's conception of its subjects. Indeed, although law never forgets its subjects' rationality, it oftentimes seeks to transcend it and anticipate socially responsible, communitarian, and even altruistic behavior—ideals to which the bad man, “who cares nothing for an ethical rule which is believed and practised by his neighbors,”¹⁷ would have responded with cynicism.¹⁸

13. *Id.* at 84.

14. *Id.* at 88.

15. *See Id.* at 113–14. For a similar “whittling down” of the understanding of law as authoritative reasons for action, see generally H.L.A. HART, *Commands and Authoritative Legal Reasons*, in *ESSAYS ON BENTHAM: STUDIES IN JURISPRUDENCE AND POLITICAL THEORY* 243, 254–68 (1982).

16. *See* Frederick Schauer, *Was Austin Right After All?: On the Role of Sanctions in a Theory of Law*, 23 *RATIO JURIS* 1, 11–13 (2010).

17. HOLMES, *supra* note 4, at 170.

18. I do not argue, of course, that this was the gist of Hart's own critique. Rather, I claim that it is the reason for its intuitive appeal.

Private law again provides numerous examples of doctrines premised, at least to some extent, on the possibility that their subjects would indeed moderate the pursuit of their self-interest through concern for other individuals or for the community as a whole. Realize, for example, that a regime of private property seemingly epitomizing private law in its assumption of self-interested subjects is in fact a type of commons, which means that property law inevitably relies on (some) people's voluntary constraint and cooperation for overcoming the collective action problems inherent in its creation and maintenance.¹⁹ More generally, as Stephen Smith argues, the notion of law's normativity seems plausible given the entrenchment of the social norm of law obedience,²⁰ which implies that alongside the law cynics, there exist a significant number of "law believers" who treat legal rules "as precisely what they purport to be, namely valid directions as to how they should behave."²¹ Indeed, as he insists, "judges and lawmakers who present and explain the law in normative language presumably assume that this language means something to the citizens at whom it is directed."²² This may explain, for instance, why much of the language of contract law conveys its commitment to facilitate trust and collaboration between strangers.²³ Similarly, law's expectation that its subjects will act in accordance with its normative legal reasons also clarifies why the duties that negligence law imposes are specified in terms of reasonable conduct, implying that persons engaged in risky acts should take into account the interests of those they put at risk.²⁴

B. Benevolent but Potentially Self-Interested Judges

Legal theory's portrayal of its main subjects is a mirror image of the one we have just traced insofar as the subjects of law are concerned. Much of legal theory, mostly from its jurisprudential side, conceives of law's carriers as selfless, namely, as the voice of public-regarding reasons or

19. See James E. Krier, *The Tragedy of the Commons, Part Two*, 15 HARV. J.L. & PUB. POL'Y 325, 333 (1992); Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J.L. & HUMAN. 37, 51 (1990).

20. See TOM R. TYLER, WHY PEOPLE OBEY THE LAW 30–37, 40–68 (2006).

21. Stephen A. Smith, *The Normativity of Private Law*, 31 OXFORD J. LEGAL STUD. ____ (forthcoming 2011) (p. 36 of draft, on file with the Alabama Law Review).

22. *Id.* at 11. Smith also discusses "law akratics": "citizens who sometimes lack the will to do what the law requires despite accepting, in a general way, that they should [do what the law requires]." *Id.* at 23.

23. See respectively CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 7–17 (1981); Daniel Markovits, *Contract and Collaboration*, 113 YALE L.J. 1417 (2004). Another example to the ambivalence—and the baseline—discussed in the text comes from law's reluctance to impose duties of rescue versus its relative receptivity of restitution claims by good Samaritans. See DAGAN, LAW AND ETHICS, *supra* note 3, at 105.

24. See Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996); Avihay Dorfman, *Private Law and Liberal Solidarity* (2008) (unpublished J.S.D. Dissertation, Yale Law School) (on file with author).

considered judgments about the common good, as opposed to preferences that reflect their self-interest or the interests of the subgroup to which they belong.²⁵ But numerous accounts surrounding this “official story,” ranging from critical legal studies to political science and economics, are suspicious of judges’ alliance with their self- and group-interest and tend to portray them as Holmesian rational maximizers.²⁶

Consider first the official canon. Formalists and positivists describe “the standard judicial function [as] the impartial application of determinate existing rules of law in the settlement of disputes.”²⁷ This rather modest version of selflessness, however, is insufficient for post-realist theorists who, justifiably,²⁸ reject the idea that law is or can be “a self-regulating system of concepts and rules, a machine that, in run-of-the-mill cases, simply runs itself.”²⁹ These theorists highlight the doctrinal indeterminacy generated by the multiplicity of sources inherent in legal doctrine and thus repudiate the equation of law with doctrine. Instead, they understand law as “a going institution,”³⁰ and thus focus their attention on the dynamics of legal evolution, notably adjudication. Judges tend to be the heroes and heroines of many of these agent-dependent accounts. This traditional optimism of legal theory as to judicial benevolence follows Benjamin Cardozo’s vivid description of adjudication as an “endless process of testing and retesting,” aimed at removing mistakes and eccentricities and preserving “whatever is pure and sound and fine.”³¹

Ronald Dworkin’s Herculean judge, who transcends his self-interest and group affiliation, may be the most famous exemplar of this genre.³² But Dworkin is not alone in conceptualizing law as “an exhibition of intelligence” and emphasizing “the personal self-effacement” of its carriers.³³ John Rawls argues that the court is “the only branch of government that is visibly on its face the creature of [public] reason and of that reason

25. Notice that while I (deliberately) use the term “reason” in a rather minimalist sense, this sense is still sufficiently distinct from preferences. Reasons are judged by their cogency as per the public interest. Preferences, by contrast, are at bottom about self-interest and are accordingly weighted by the intensity with which they are held. See Hanoch Dagan, *Political Money*, 8 ELECTION L.J. 349, 351 (2009).

26. This section is not an exact mirror image of the previous one: while law is internally ambivalent about its subjects, legal theory is by and large divided between champions of these diametrically conflicting accounts; as I explain below, while at first sight law’s “internal ambivalence” may seem unprincipled and thus inferior, I find it preferable to the “external ambivalence” that typifies legal theory.

27. H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969, 971 (1977).

28. See Hanoch Dagan, *The Realist Conception of Law*, 57 U. TORONTO L.J. 607, 611–17 (2007).

29. *Id.* at 621. See also ROGER COTTERRELL, *THE POLITICS OF JURISPRUDENCE* 99, 110–12 (2d ed. 1989).

30. K. N. Llewellyn, *My Philosophy of Law*, in MY PHILOSOPHY OF LAW 183 (1941).

31. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 179 (1921).

32. See RONALD DWORGIN, *LAW’S EMPIRE* 259–60 (1986).

33. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 14–15 (1995).

alone.”³⁴ Justices, in this account, “develop and express in their reasoned opinions the best interpretation of the constitution they can”³⁵ In performing this task, which is “an aspect of the wide, or educative, role of public reason,” they resort to “their knowledge of what the constitution and constitutional precedents require” as well as to “the public conception of justice or a reasonable variant thereof.”³⁶ Rawls emphasizes that justices do not “invoke their own personal morality” or “their or other people’s religious or philosophical views,” which “they must view as irrelevant.”³⁷ The only values to which they can, and should, appeal “are values that they believe in good faith . . . that all citizens . . . might reasonably be expected to endorse.”³⁸

Legal theorists of this optimist tradition are not assuming that judges are superior human beings. Rather, they typically rely on their role morality. Thus, Owen Fiss emphasizes that although judges are not unique in their personal characteristics, they do have a “capacity to make a special contribution to our social life”³⁹ This capacity derives from “the definition of the office . . . through which they exercise power,” which “enable[s] and perhaps even force[s] the judge to be objective”⁴⁰ The crux of the matter, argues Fiss, is “the process that has long characterized the judiciary”⁴¹ The judicial process—notably the requirement of judicial independence, the concept of a non-discretionary jurisdiction, the obligation to listen to all affected parties, the tradition of the signed opinion, and the neutral principles requirement—facilitates judges’ benevolence. Fiss seems to be so confident in the self-effacing effects of these procedures of adjudication that he analogizes them to Rawls’ original position, thus implying that judges can indeed transcend their self-interest and their group alliances.⁴²

Alongside this glorious tradition of judicial benevolence, contemporary legal theory is full of accounts about judges as rational maximizers of their self- or group-interest. Some of these accounts present judges’ utility functions in rather mundane terms, as if they are motivated by the desire to maximize pleasure, leisure, influence, the probability of promotion, or their prestige among significant audiences. Others place partisan politics and ideology at the core of judges’ pertinent preferences, suggesting that judges maximize these preferences either directly or strategically, that is,

34. JOHN RAWLS, *POLITICAL LIBERALISM* 235 (Columbia Univ. Press 1993) (1921).

35. *Id.* at 236.

36. *Id.*

37. *Id.*

38. *Id.*

39. OWEN FISS, *THE LAW AS IT COULD BE* 11 (2003).

40. *Id.*

41. *Id.* at 68.

42. *Id.* at 14, 54–55, 68, 163–64.

while taking into account the expected actions and possible reactions of other relevant players—other judges, the legislature, or even the public at large.⁴³

This contemporary, interdisciplinary literature typically begins with a Jerome Frank-like ridicule of “the myth about the non-human-ness of judges,”⁴⁴ and then turns to a painstaking analysis of the pertinent incentives that motivate judges as “all-too-human workers,”⁴⁵ namely, as rational maximizers. The different emphases of recent scholars on mundane versus political preferences also echo to some extent the debate between Jerome Frank and Felix Cohen as to the relative significance of personal factors in judicial behavior versus the social forces that mold it.⁴⁶ But interestingly enough, these tough-minded portrayals of judges reintroduce at some critical points of the analysis some notion of judicial benevolence, which is why I treat the model of the benevolent judge as the “official story,” notwithstanding the voluminous literature contesting it.

The benevolence presupposition comes up, for instance, in Lawrence Baum’s critique of the idea that judges are driven by their political preferences.⁴⁷ Baum argues that this notion is naïve because political preferences are also, at bottom, driven by ideals about the common good.⁴⁸ Thus, he claims that, similar to *Star-Trek*’s Mr. Spock, who being half-Vulcan is an altruist, judges in this model are assumed to act “in order to advance the general good.”⁴⁹ The strategic model, adds Baum, exacerbates this deficiency. It assumes that judges invest “arduous . . . efforts to advance their conceptions of good policy,” making “the fully strategic judge seem[] enormously altruistic.”⁵⁰ But then Baum’s own account that, like Cohen’s, emphasizes the impact of the social and professional groups that judges seek to please, also ends up with a somewhat smiling face. This happens when he acknowledges that both the relevant social circles and the legal professional community are saturated with norms that encourage judges to act “as people who embody virtues such as impartiality that they

43. For helpful overviews, see LAWRENCE BAUM, JUDGES AND THEIR AUDIENCES 5–14, 21–23 (2006); Frank B. Cross, *What do Judges Want?*, 87 TEX. L. REV. 183 (2008).

44. JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 147 (1949).

45. RICHARD A. POSNER, HOW JUDGES THINK 7 (2008).

46. Compare JEROME FRANK, LAW AND THE MODERN MIND 108–26 (1930), with Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 843–46 (1935).

47. See BAUM, *supra* note 43.

48. This may be an overstatement. While political preferences are preferences about convictions, namely, political causes we care about, they are still significantly similar to other preferences more directly related to people’s interests. The reason is that, rather than reflecting the cogency or the importance of specific convictions, these sometimes intense preferences reflect their holders’ passions about these convictions, which is irrelevant to their status *qua* reasons.

49. See BAUM, *supra* note 43, at 18.

50. *Id.*

associate with good judges”⁵¹ and “as committed to the law and skilled in its interpretation.”⁵²

Richard Posner, who argues that judicial behavior is best explained by studying “what judges want” and that “they want the same basic goods that other people want, such as income, power, reputation, respect, self-respect, and leisure,” ends up with an even rosier account of the judicial utility function.⁵³ What most motivates judges, he concludes, is “a taste for being a *good* judge,”⁵⁴ which “requires conformity to the accepted norms of judging.”⁵⁵ Judges, says Posner, or at least “[m]ost judges, like most serious artists, are trying to do a ‘good job,’ with what is ‘good’ being defined by the standards for the ‘art’ in question,”⁵⁶ either because they are motivated by a “desire for self-respect and for respect from other judges and legal professionals,” or due to “the intrinsic satisfactions of judging”⁵⁷

II. JUSTIFIED COMPLEXITY

Law’s ambivalence on both counts is well-justified because people, both citizens and judges, are indeed self-interested and potentially other-regarding and community-seeking. Many scholars have of course noted the reductionism of the rational maximizer of self-interest model for years.⁵⁸ Recently, Yochai Benkler added an updated synthesis of studies from such diverse fields as experimental economics, evolutionary biology, psychology of motivation, and organizational sociology, in addition to the more familiar literature on common property and on online collaboration and social software design.⁵⁹ Benkler concludes that “human beings have diverse motivational–behavioral profiles.”⁶⁰ More specifically, he reports that in most experiments:

[A]lmost one-third indeed behave as predicted by selfish *homo economicus*. But more than half act cooperatively. Many are active reciprocators – respond kindly and cooperatively to cooperating

51. *Id.* at 90.

52. *Id.* at 106. See also Frederick Schauer, *Incentives, Reputation, and the Inglorious Determinants of Judicial Behavior*, 68 U. CIN. L. REV. 615, 615–17, 619–21 (2000).

53. POSNER, *supra* note 45, at 11.

54. *Id.* at 60.

55. *Id.* at 61.

56. *Id.* at 12.

57. *Id.* at 371.

58. See, e.g., BEYOND SELF-INTEREST (Jane J. Mansbridge ed., 1990); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051, 1126–43 (2000).

59. See Yochai Benkler, *Law, Policy, and Cooperation*, in GOVERNMENT AND MARKETS: TOWARD A NEW THEORY OF REGULATION 299, 304 (2010).

60. *Id.* at 300.

others, and punish, even at a cost to themselves, those who behave uncooperatively. Others cooperate unconditionally, whether because they are true altruists or solidarists, or because they simply prefer to cooperate and do not measure what others are doing.⁶¹

Furthermore, “[n]ot everyone falls neatly . . . into one or the other of these categories. The distribution of behaviors is not smooth, but has modes around what a selfish actor would do and what a cooperator or reciprocator would do.”⁶² Finally, Benkler observes that, whether these differences are “innate, acquired, or mixed,” the evidence “supports the proposition that these behavioral patterns are also situational”; namely, they can be affected by the pertinent institutional context.⁶³

The ambivalence of law and legal theory documented above should be understood with this human heterogeneity in mind. More specifically, given this complexity, both the baseline assumptions of law regarding judges and citizens, as well as the fact that their corresponding opposites always accompany the portrayals of these heroes of the legal drama, are well justified. Thus, notwithstanding the truism that judges are human, the somewhat romantic canon of legal theory is justified as a baseline because it is part of a cultural and institutional structure which strengthens our expectations that judges will transcend their self- and group-interest and will serve the public good. Legal theorists as well as ordinary citizens should, by and large, remain indifferent between judges’ intrinsic pursuit of the common good and their instrumental desire for the high regard of their peers and friends. What should matter most for us all is that judges behave as if they were benevolent Vulcans, trying to be good judges, devoting time and effort to carefully and impartially deciding cases, and developing the law so that it will indeed vindicate people’s rights and promote the public good.⁶⁴

Law’s opposite baseline regarding its subjects being rational maximizers of their self-interest is also easy to understand and justify. While liberals realize that true autonomy requires collective goods⁶⁵ that often require people to behave benevolently, a liberal society must assume and, as far as possible, must also ensure that these communal goods and pursuits are aspects of individual self-fulfillment.⁶⁶ Neither the associations to which we belong nor the other-regarding commitments we undertake should

61. *Id.*

62. *Id.* at 309.

63. *Id.* at 310.

64. See Lynn A. Stout, *Judges as Altruistic Hierarchs*, 43 WM. & MARY L. REV. 1605, 1609–10, 1625–26 (2002).

65. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* 193, 198–207 (1986).

66. Cf. ANDREW MASON, *COMMUNITY, SOLIDARITY AND BELONGING: LEVELS OF COMMUNITY AND THEIR NORMATIVE SIGNIFICANCE* 23, 58–59 (2000).

erase our individual identity. Associations and commitments may be constitutive of people's identity, but each one should be able to decide whether and for how long to remain within them. This is true because of the crucial role that geographical, social, familial, and political mobility play in the preservation of individual freedom,⁶⁷ and also because, at least partly, the value of such other-regarding commitments and collective associations is due to the fact that they are realized through voluntary choice—if not *ex ante*, then at least *ex post*.⁶⁸ Thus, a broad assumption of rationality sets an appropriate baseline for a society committed to allow its citizens to pursue their own individual conception of the good.

But neither baseline should exhaust our attitude towards law's carriers and law's subjects, and, therefore, their "underground" accounts are also significant. Thus, it is justified to be suspicious of the ability and inclination of judges to transcend their self- and group-interests, and it is therefore imperative to constantly remember that the ideal of selfless adjudication is a benchmark that is seldom perfectly attained. Legal theory should be aware of the complacent portrayal of adjudication as purely a public-regarding institutional service and constantly guard against such self-serving (and at times self-deluding) judicial judgments. Challenging the canon's romantic account is particularly important given the subtle ways in which law's power manifests itself. Law's coerciveness is not exhausted by the obvious fact that, unlike other judgments, those prescribed by law's carriers can recruit the state's monopolized power to back up their enforcement. It also has manifestations that are far more elusive, founded on institutional and discursive means that tend to downplay at least some of the dimensions of law's power. Among the most notable are the institutional division of labor between "interpretation specialists" (read: judges) and the actual executors of their judgments, as well as our tendency to "thingify" legal constructs and accord them an aura of obviousness and acceptability.⁶⁹

Similarly, membership in constitutive communities and commitments to other-regarding causes are indeed crucial components of individual autonomy and even of personal identity. Hence, it is important for the law to facilitate not only market-like interactions between rational maximizers of self-interest, but also types of interpersonal relationships typified by communitarian and other-regarding norms. A legal regime that is solely pre-

67. See Leslie Green, *Rights of Exit*, 4 LEGAL THEORY 165, 176–77 (1998); Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 11–12, 15–16, 21 (1990).

68. Cf. Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 632, 637 (1980).

69. See Cohen, *supra* note 46, at 811–12, 820–21, 827–29; ROBERT COVER, *Violence and the Word*, in NARRATIVE, VIOLENCE, AND THE LAW 203 (Martha Minow et al. eds., 1992); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195, 212–14 (1987); Louis L. Jaffe, *Law Making by Private Groups*, 51 HARV. L. REV. 201 (1937).

mised on the model of rational maximizers of self-interest defines our obligations *qua* citizens and *qua* community members as exchanges for monetizable gains. To be sure, as I noted above, law can and should acknowledge the virtues of impersonal norms that liberate individuals from personal ties and obligations. Nonetheless, it should avoid allowing these norms to override those of the other spheres of society. Law participates in the constitution of some of our most cooperative human interactions, prescribing the rights and obligations of spouses, partners, co-owners, neighbors, and members of local communities. Imposing impersonal and alienated norms on these divergent spheres ignores and may threaten these spheres of human interaction and would thus undermine both the freedom enhancing pluralism and the individuality enhancing multiplicity crucial to the liberal ideal of justice.⁷⁰

III. SUSTAINING FRAGILE AMBIVALENCES

Herein lies the challenge confronting law, given the heterogeneity and malleability of human nature. On both fronts—regarding law’s subjects as well as its carriers—law needs to accommodate these seemingly contradictory pictures and resist collapsing into the poles of naïve utopianism or hopeless cynicism. I want to dedicate my last comments in this Lecture to argue that, at its best, law can and indeed does avoid this dangerous binarism. Both the law of the people and the law of our judges do so by subtly utilizing the fact that some people tend to behave benevolently, at least in the right institutional settings. This allows law and legal theory to use a mixture of material and expressive means in order to construct and maintain spheres of human interaction that are governed by varying degrees of concern for others. For judges *qua* judges, this is the way law constructs the institution of adjudication, which is their vocational home; for the rest of us, this underlying strategy guides the construction of valuable options for association and organization that law offers without overwhelming us with the unacceptable alternative of overreaching universal benevolence.

Consider the law of property, which prescribes the entitlements people have vis-à-vis one another and society as a whole with regard to scarce resources. Property law constructs various property institutions that fittingly illustrate this broad description. Each property institution combines aspirational expressive doctrines seeking to tinker with people’s preferences and protective safety nets addressing the potential risk of failure in this benevolent transformation, that is, the risk of defection and potentially

70. See generally ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 141–167 (1993); DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY 156, 166–68, 173–75 (1989); MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY (1983).

devastating opportunism.⁷¹ The default arrangement in liberal societies, namely, individual ownership or fee simple absolute, is not very ambitious about people's benevolence. Although it must rely, as I have noted, on some voluntary constraint and cooperation, property law also sets material disincentives against violation and, in proper cases, is not shy of applying them rather sharply.⁷² But individual ownership is only one property institution, and the repertoire of property institutions includes others that are or can be more ambitious.

Michael Heller and I typified one important cluster of such property institutions that includes, for example, marital property, co-ownership, condominiums, partnerships, and close corporations as belonging to a family we call "the liberal commons."⁷³ A liberal commons is a family of property institutions that enables a "limited group of owners to capture the economic and social benefits from cooperative use of a scarce resource, while also ensuring autonomy to individual members who retain a secure right to exit."⁷⁴ Each of these property institutions encourages people to come together to create limited-access and limited-purpose communities dedicated to shared management of a scarce resource. Each offers "internal governance mechanisms to facilitate participatory cooperation and the peaceable joint creation of wealth, while simultaneously limiting minority oppression and allowing exit."⁷⁵ The mechanisms of these diverse property institutions vary, as does the degree of their "benevolence ambition." But they all recognize, at least to some extent, the intrinsic value of interpersonal trust and cooperation, and therefore provide complex platforms for fostering such communities without sacrificing the liberal commitment to exit.⁷⁶

A similar combination seems to prevail in the institution of adjudication. Even Baum and Posner, who insist on presenting judges as rational maximizers of self-interest, admit that this unique institutional setting facilitates good judging. As scholars from both this and the canonical tradition recognize, this setting relies on a subtle mixture of cultural messages that seek to generate a role-morality that tinkers with judges' preferences and protective sets of incentives: sticks in the form of public and professional critique together with carrots by way of judicial legacy. No one, in my

71. See generally HANOCH DAGAN, *PROPERTY: VALUES AND INSTITUTIONS*, Parts I & III (forthcoming 2011).

72. See *Edwards v. Lee's Adm'r*, 96 S.W.2d 1028 (Ky. 1936) (restitutionary damages); *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154 (Wis. 1997) (punitive damages).

73. Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 YALE L.J. 549, 553 (2001).

74. *Id.* at 553.

75. *Id.*

76. See *Id.*; Hanoch Dagan & Michael A. Heller, *Conflicts in Property*, 6 THEORETICAL INQUIRIES. L. 37 (2005).

view, has formulated this complexity better than the great legal realists, Karl Llewellyn and Felix Cohen.

Llewellyn and Cohen forcefully claimed that the judicial ethos, epitomized by the adversary process and the judicial opinion and reinforced by “[t]ime, place, architecture and interior arrangement, supporting officials, garb, [and] ritual,” directs judges to be “[o]pen, truly open, to listen, to get informed, to be persuaded, to respond to good reason.”⁷⁷ Indeed, for them, these structural characteristics of the judicial office have a “majestic power” to channel judges into “service of the whole.”⁷⁸ These features turn the legal arena into a forum in which the participants’ normative and empirical horizons are constantly challenged by conflicting perspectives. They thus encourage lawyers, notably judges, to develop the “synoptic vision” that is “a distinguishing mark of liberal civilization.”⁷⁹ Hence, at its best, legal professionalism makes lawyers “experts in that necessary but difficult task of forming judgment without single-phase expertness, but in terms of a Whole, *seen whole*.”⁸⁰

Yet, because they realize that judges, like the rest of us, have interests and preferences that cannot be wholly set aside when they take the bench, these legal realists would have undoubtedly rejected the comparison between judges and Rawlsian impartial representatives, as well as the accompanied portrayal of adjudication as a purely public-regarding institutional service. Law, they insisted, should be separated from morality in order to “hold the responsibility for working toward the Right and the Just within the hard legal frame . . . to defuse and deconfuse the merely authoritative . . . from the Just or the Right, and to get into spotlighted pillory so much of Law as has no business to be Law”⁸¹ Indeed, unchecked, law may serve “to perpetuate class prejudices and uncritical moral assumptions which could not survive the sunlight of free ethical controversy,”⁸² hence the realist commitment to constantly challenge existing law and critically examine its carriers’ utterances. At the same time, these legal realists never reduced law to “brute power,” nor did they dismiss the judges’ reliance on an “element of recognition” so that it is indeed “in tune with the net requirements of the Entirety”⁸³

77. KARL N. LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 46–47 (1960)

78. *Id.* at 48.

79. FELIX S. COHEN, *Field Theory and Judicial Logic*, in *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* 121, 125 (Lucy Kramer Cohen ed., 1960).

80. KARL N. LLEWELLYN, *American Common Law Tradition, and American Democracy*, in *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 282, 310 (1962). *See also* Katharine T. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829, 880–87 (1990).

81. K. N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 *YALE L.J.* 1355, 1372 (1940).

82. Cohen, *supra* note 46, at 840.

83. Llewellyn, *supra* note 81, at 1367, 1399. *See also Id.* at 1364, 1370, 1372–73, 1381–83, 1398–99.

CONCLUDING REMARKS

Instead of summarizing my claims, I want to conclude this Lecture with a comment that accords with the interdisciplinary emphasis of this distinguished Series, in which I am honored to participate. Most of the time, when legal academics talk about interdisciplinarity, they mean using a theoretical discipline from the social sciences or from the humanities for the analysis of law.⁸⁴ The intellectual openness to law's neighboring disciplines is certainly imperative. The subtext implicit in these pronouncements, however, whereby no significant theoretical lesson intrinsic to law that is important for legal theory could also be potentially enriching to these neighboring disciplines, is in my view both wrong and unfortunate. This is obviously a broad issue that I will not attempt to discuss here.⁸⁵ But I hope that my foray into the way law and legal theory conceptualize the human subjects they address demonstrates at least two of the potential contributions of legal research to the social sciences, as identified recently by Chris McCrudden.⁸⁶

First, while economics and sociology often accept legal rules and concepts "as a datum, as fact, unproblematic, and one-dimensional," legal research shows, McCrudden claims, that legal norms and concepts are "likely to be complex, nuanced and contested."⁸⁷ As we have seen, this complexity is true not only regarding law's obvious products—rules and concepts—but also regarding the human nature that law reflects.

Second, and even more significantly, McCrudden argues that many social scientists fail to appreciate the role that law plays "in the social and economic phenomena they are attempting to analyse."⁸⁸ Law, he maintains, never "simply reflect[s] social context, but also shapes it," and "many of the ideas and categories through which we understand the world are in part legally determined"⁸⁹ The role of rationality and benevolence in the lives of both citizens and judges is no exception. Therefore, legal research cannot content itself with the undoubtedly important and challenging task of adjusting legal doctrines to the social scientific findings regarding the pertinent actors' motivational behavioral profiles. Rather, we must always also ask what is the normatively desirable human attitude

84. See, e.g., Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761, 779 (1987).

85. See Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 CORNELL L. REV. (forthcoming 2011).

86. Christopher McCrudden, *Legal Research and the Social Sciences*, 122 L.Q. REV. 632, 647–49 (2006).

87. *Id.* at 648.

88. *Id.*

89. *Id.* at 649.

for the pertinent setting and whether law and legal theory can prescribe institutional arrangements that nurture such an attitude.⁹⁰

90. I use the word “nurture” here deliberately in order to flag to the possible role not only of law but also of legal theory and legal education in generating the proper attitudes about our institutions.