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Property and Self-Determination

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Critical Notice:
A Liberal Theory of Property
by Hanoch Dagan*

The central claim of Hanoch Dagan's *A Liberal Theory of Property* is that property law mostly does and should provide alternative property 'types' (xii, 6-7) in each 'sphere' of property relations (91-96, 104), and that these 'types' are "partial functional substitutes" for each other (6-7). Dagan calls this 'property's structural pluralism'. So, for example, in the sphere of residential property, types such as freehold estates, residential tenancies, condominiums, co-ops, and common interest communities count as partial functional substitutes. In providing a range of types, property law serves the self-determination[1] of individuals, providing them with meaningful choices amongst legal relationships and thereby allowing them better to realise their life-plans than would be the case if a one-size-fits-all approach were taken by the law. So Dagan's functionalism relates the inputs of different values that self-determining people might choose, such as personhood, community, and utility, in varying degrees, to the outputs of partial functional substitutes (50-58). This book is something of a companion piece to Dagan and Heller's *The Choice Theory of Contracts*,[2] whose intellectual structure is similar and with which it overlaps in significant respects.

Dagan thinks that the cogency of the main claim turns upon a number of other theses, which will be the main focus of this notice. These are (1) Dagan's characterisation of 'mainstream liberalism' and 'relational justice'; (2) his critique of the 'Blackstonian' or 'dominion' theory of property; (3) his claim that property is 'power-conferring' and that the relation of owners to non-owners is a kind of authority relation; and (4) property's 'legitimacy challenge'. My conclusion will be that none of these theses are really relevant to the central claim, and that a person might support the latter without endorsing any of the former. But first we must examine the nature of the central claim.

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*Hanoch Dagan, A Liberal Theory of Property (Cambridge University Press, 2021) pp xvi + 326, ISBN 978-1108418546. All parenthetical numbers are page references to this book.

1. Dagan uses the term 'self-determination' interchangeably with 'autonomy' and 'self-authorship' (41), so I shall use 'self-determination' except in cases of direct quotation where the other terms are used. I discuss the differences between Dagan's notion of self-determination and Raz's notion of autonomy in James Penner, "Taking Raz Seriously: On the Value of Autonomy and its Relation to Private Law" in Paul B Miller & John Oberdiek, eds, *Oxford Studies in Private Law Theory: Volume 2* (Oxford University Press) [forthcoming in 2022].
2. See Hanoch Dagan & Michael Heller, *The Choice Theory of Contracts* (Cambridge University Press, 2017).

1. Property's Structural Pluralism

Nowhere in the book does Dagan define what he means by 'property'; neither does he provide us with an account of the basic structure of a property right. He does tell us that there are 'continuities' between property and contract (25). Be that as it may, what Dagan seems to regard as his subject matter is, roughly, the body of legal doctrine which is found in United States property law courses, together with its overlaps or continuities with contract law doctrine. This may be sufficient for Dagan's purposes as he sees them, but it does give rise to some puzzles, so let me begin by setting out a few basics.

Scholars use the word 'property' as it figures in law in different ways. So, for example, McFarlane restricts its use to tangibles, land, and chattels (or goods).[3] For my own part, I would extend 'property' to cover intangibles such as choses in action, and have defined 'property' as exclusive, alienable (private law) rights.[4] By contrast, I think it is fair to say that Dagan's concept of property is somewhat impressionistic.[5] In particular, his discussion of 'property' extends to the justice of markets (Chapter 7). Together with *The Choice Theory of Contracts* Dagan (and Heller) might be said to offer a 'Liberal/Choice Theory of the Facilitative Side of Private Law'.[6] To re-cast the central claim, the state has an obligation to provide, in law, a "rich offering" or "rich repertoire" (31, 35, 37, 51) of different types of legal arrangements from which persons, individually and together, can choose to advance their life plans. It is not of primary importance whether any particular such arrangement is allocated to any particular category or 'silo' within an orthodox mapping of private law, whether 'property law,' 'contract law,' 'trusts law,' whatever. In most cases one would expect these legal 'complexes' to draw upon doctrines from more than one conventionally-defined legal category. So be it.

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3. See Ben McFarlane, *The Structure of Property Law* (Hart, 2008). For discussion see James Penner, Book Review of *The Structure of Property Law* by Ben McFarlane, (2009) 17 RLR 250.

4. See JE Penner, "Property" in Andrew S Gold et al, eds, *The Oxford Handbook of the New Private Law* (Oxford University Press, 2021) 277; JE Penner, "The (True) Nature of a Beneficiary's Equitable Proprietary Interest Under a Trust" (2014) 27:2 Can JL & Jur 473 at 488-89; JE Penner, *Property Rights: A Re-Examination* (Oxford University Press, 2020) at 14 [Penner, *Property Rights*].

5. Irit Samet-Porat suggests (in personal correspondence) that Dagan may be working with an ordinary language definition of property, but if that means a layperson's definition, I think a fair reading of the text suggests otherwise. Dagan is clearly addressing lawyers and legal theorists, not the lay public. The thought could be modified to suggest Dagan is working with the common definition of property as understood by lawyers and legal scholars, but the whole point of this paragraph is that there is no such common definition of property amongst lawyers, let alone property scholars.

6. Now extended to encompass the law of trusts: see Hanoch Dagan & Irit Samet-Porat, "The Beneficiary's Ownership Rights in the Trust Res in a Liberal Property Regime" [unpublished, on file with the author]; Hanoch Dagan & Irit Samet-Porat, "Express Trust as the Missing Piece in the Property Jigsaw" in S Degeling, J Hudson & I Samet (eds), *Philosophical Foundations of Express Trust* (Oxford University Press, forthcoming 2022); Hanoch Dagan & Irit Samet-Porat, "What's Wrong with Massively Discretionary Trusts?" Law Q Rev (forthcoming 2022).

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This is without doubt an interesting perspective on private law. Moreover, it is suggestive. One can start envisaging other cases where the law provides partial functional substitutes. It occurred to me that purchasing a car or entering into a long lease- or hire- arrangement might be such a pair. So also might be the alternatives of donating a painting to a gallery and handing it over on 'permanent loan'. And as any practitioner will know, trusts and joint property-holding regularly serve as will substitutes.

As Dagan recognises, the extent to which the choices offered by law will be real choices, that is choices actually available to its subjects, will depend upon background circumstances (55-56). Economically well-situated people may really be in a position to choose whether to purchase a freehold property (with or without a mortgage), or decide to become a tenant, or decide to enter a common interest community. But it is obviously the case that for many residents of the US the only partial functional substitute on offer to them in practical terms is to rent. The circumstances of legal regulation also matter: I shan't be buying a condo in Florida any time soon.

Regarding the individuation of types, it appears that Dagan is principally concerned with the 'internal' dimension of property (xi, 81-82, 86), by which I understand him to mean the various 'governance' structures regarding property, broadly conceived to include not only conventionally recognized types such as the joint tenancy but structures such as corporate governance and labour relations. Such a perspective focuses not on the owner's 'right to exclude,'[7] but on various rights to be included in the decision-making over what to do with some resource (xi). As I read him, one reason why we should de-centre the fee simple absolute in possession as the paradigm case of property (by which I think he means a fee simple owned by one individual that reflects the 'Blackstonian' or 'dominion' conception of property) is that it obscures the rich variety of governance structures over property that we find. I agree with Dagan that co-ownership and other structures of governance are not much discussed by theorists of property,[8] and he should be applauded for insisting that theorists pay more attention to this 'internal' side.

It is therefore a bit of shame that Dagan does not provide an update of his and Heller's blistering critique of the two co-ownership structures most familiar to law students and practitioners: concurrent ownership in the form of joint tenancy and tenancy in common.[9] As between each other, these co-owners are entitled not

7. More accurately, the right that non-owners exclude themselves.

8. Clear exceptions are Tom Merrill and Henry Smith. See e.g. Thomas W Merrill & Henry E Smith, "The Property/Contract Interface" (2001) 101:4 Colum L Rev 773. For what it is worth, I have dipped my toe in these waters; see James Penner, "Ownership, Co-ownership, and the Justification of Property Rights" in Timothy Endicott, Joshua Getzler & Edwin Peel, eds, *Properties of Law: Essays in Honour of Jim Harris* (Oxford University Press, 2006) 166. The one thing I failed to do in that piece was make clear that my social, 'sharing' model of co-ownership did not align with the positive law. The common law model of co-ownership is hardly one of sharing: see the text accompanying note 9, below.

9. See Hanoch Dagan & Michael A Heller, "The Liberal Commons" (2001) 110:4 Yale LJ 549 at 602-23.

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to be evicted (literally or constructively) by their co-owner(s), may seek an occupation rent if evicted, may seek partition of the land, may independently (i.e. without consulting their co-owner(s)) license others to do what would otherwise amount to a trespass, and may (upon an order for sale in lieu of partition) demand an equitable accounting for their individual actions that enhance the value of the land. Joint tenants are also free at any time to sever the joint tenancy. In consequence of these rules, for Dagan:

> The default American law of co-ownership invites tragedy: It undermines cooperation even when co-owners seek to work together, encourages distrust and misuse that may delay or even prevent use of emerging resources, and, more generally, imposes enduring losses whenever strategic behaviors or transaction costs deter people from voluntarily adopting a more tailored liberal commons form. American law currently forces people to choose between laboriously contracting for their own liberal commons or suffering under existing background rules that encourage conflict, mismanagement, and division.[10]

What he and Heller call a 'liberal commons' in this passage is now referred to as 'liberal community,' at least with respect to 'marital/intimate property' (109-10, 143-44),[11] and it is unfortunate that Dagan does not set out what particular rights and powers are necessary give to effect to this proposed property type.[12]

2. Dagan's 'Mainstream Liberalism' and 'Relational Justice'

On page 1 Dagan tells us:

> The core claim of this book is that an analysis of property needs to start from the mainstream liberal tradition of the past century, that is, with a concern for self-determination, ensuring to all of us as free and equal individuals the possibility of writing and re-writing our own life stories.

Besides this, Dagan also describes mainstream liberalism as that version of liberalism which (1) insists "that an individual is free not only in the formal (or negative) sense of not compelled by another's choices but also in the stronger sense of being able to make meaningful choices about the course of his or her life" (42); (2) "puts a high value on people's right to reinvent themselves," which entails a "right to exit, withdraw, refuse further engagement, dissociate, and cut off relationships"; and (3) requires the provision by the state of many collective

10. *Ibid* at 603.
11. See also Dagan & Heller, *supra* note 3 at 60-61, 96.
12. Dagan and Heller favourably compare the provisions of other jurisdictions to US law, but I think they would agree that none of the alternative regimes of rules give full effect to liberal community. See Dagan & Heller, *supra* note 9 at 613-22. Matthew Harding suggests (in personal correspondence) that a bit of the spirit of liberal community might be found in the Australian High Court's judgment in *The Trustees of the Property of John Daniel Cummins, A Bankrupt v Cummins*, [2006] HCA 6 at paras 71-73. The court refused to apply the equitable purchase contribution presumed resulting trust rules to a married couple, favouring instead the idea that the relationship of marriage is one of equal sharing. Thus an equal ownership, plus the right of survivorship, i.e. a joint tenancy, was presumed.

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goods (44). This conception of liberalism is linked with another, 'relational justice.' Dagan says,

> Respect for others' self-determination is hollow without some attention to their predicament. . . . While interpersonal independence does not depend on the distinctive features of others, respecting their self-determination necessarily requires that we respect them as they actually are. (114)

This account of liberalism is, unremarkably, set against what Dagan calls the "independence account" of private law, which he most closely associates with Kant and his prominent interpreter, Arthur Ripstein (114-26). Dagan devotes Chapter 5, 'Property's Relational Justice,' to arguing that his mainstream liberalism provides the superior account of US property law. It is worth noting that Dagan and Ripstein do not seem to have different views about the moral correctness, for example, of anti-discrimination law, which Dagan discusses at length (e.g., 131-39). Their difference lies in where they think anti-discrimination law should be placed: for Dagan it is 'internal' to the law of property, infusing part of its 'telos' of self-determination (3, 130). For Ripstein, it is a public law limitation on private law rights and liberties.[13] As Ripstein puts the point, "[p]ublic law steps in to restrict the operation of [private law rights and liberties when] *it must guarantee the conditions of full citizenship*."[14]

Dagan's first argument against the Kantian account seems to me to be a weak one (118-21). The Kantian holds that it is no individual's responsibility to ensure that people have sufficient resources so as not to be dependent on others. Rather, it is the state that must provide them with sufficient resources by complying with its 'Duty to support the poor.'[15] Dagan counters that this "ideal theory" is "detached from real life" because in reality it is very unlikely that the state will provide sufficient resources for this purpose (120-22). But the response to this would prima facie be the one we apply to all collective action problems in a liberal state, which is political action. That public law has failed in meeting its obligations does not, without further argument, show that a re-writing of private law is indicated.

Dagan's second objection to the independence account, set out in a section of the chapter called 'Mission Undesirable,' is to my mind obscure. The motivating idea seems to be that our liberal commitment to self-determination must not be "cast out of our interpersonal relationships" (123). As a believer in the 'social thesis,' roughly that humans are social creatures whose lives are necessarily entwined with those of others, including those in preceding and succeeding generations, I entirely agree that there is between all of us a "deep interdependence in

13. Arthur Ripstein, "Private Authority and the Role of Rights: A Reply" (2016) 14:1 Jerusalem Review of Legal Studies 64 at 80, 81-83, 85.
14. *Ibid* at 85 [emphasis added].
15. See Immanuel Kant, *The Metaphysics of Morals* (Cambridge University Press, 1996) at 100-02, AK 6:326-28. For some difficulties with this account see James Penner, "The State Duty to Support the Poor in Kant's Doctrine of Right" (2010) 12:1 British Journal of Politics & International Relations 88.

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our practical affairs" (123). But there appear to be two further thoughts that are supposed to flow from this one with which I do not agree at all. The first seems to be that 'interpersonal relationships' as a category maps in some way onto private law, or that private law governs all such relationships (123-24). But that's not so. Perhaps we engage in all our interpersonal relationships in the 'shadow of private law' (which I doubt), but the vast majority of our significant interpersonal relationships are entirely unregulated by private law, or public law for that matter. For example, the law simply does not care which people I choose as friends (nor should any stripe of liberal want it to).

The second further thought is that the dominion conception of property renounces law's obligation to facilitate these relationships (103). I shall discuss the 'dominion' conception of property in detail in Part 3, but let me say something briefly about this here. The powers that go with title to my property allow me both to share my property with others and to give it to them.[16] How does that not facilitate interpersonal relationships? I have spent my life pointing this out.[17] A slogan: 'Property does not make you a miser.' You have to have property to be a miser, sure, in the same way that you have to have a body if you're going to assault someone. But it is simply false to say that private law leans people toward, or motivates people, to act in these ways. Rather the reverse I should say. You need property to be generous in certain ways, to make gifts to charity for instance.

The third objection to the independence account is that whilst it causes us to treat others as equal beings, it also causes us to treat them as 'abstract' beings, rather than as the 'real' people they actually are (124). And this takes us to Dagan's ruminations on anti-discrimination law (124-25, 131-39, 146, 195-97). Dagan wishes to situate anti-discrimination law within private law, and this wish appears to turn on the following sort of thought: where a bigoted café owner refuses service to a gay couple, he "disrespects their self-determination" (125). This strikes me as a rather odd characterization of what has occurred.[18] In the first place, the café owner does ill-treat them because of their sexuality. But many would argue, aligning this case with that of sex or race, that one doesn't in any meaningful sense 'determine' one's own sexuality[19] which, if true, means that the reference to self-determination is not really doing any work. Now of course I agree that whether and how one expresses one's sexuality or ethnicity[20] is a matter of self-determination. But if self-determination is our concern, then we have to refine the example. The wrong would be the bigot's objecting to making

16. I have also recently argued that essential to understanding the nature of property rights is to make sense of the concept of 'title,' and I have argued that with respect to tangible property title has a tripartite structure, consisting of a right, the right to immediate exclusive possession, plus two powers, a power to license what would otherwise be a trespass and a power to transfer title to another. See Penner, *Property Rights*, *supra* note 4 at ch 1.

17. See e.g. JE Penner, *The Idea of Property in Law* (Clarendon Press, 1997) at 74-75.

18. I thank Andrew Simester and Irit Samet-Porat for pressing me on the points I make concerning this example.

19. For an illuminating discussion see Leslie Green, "Sexuality, Authenticity, and Modernity" (1995) 8:1 Can JL & Jur 67.

20. 'Expressing one's race' is a much more problematic idea.

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one's gay sexuality public or something like that, in which case he would be happy to serve a 'straight-acting' pair of guys who didn't reveal themselves to be a couple. That is a possible move, but it gives rise to a further question. Is it plausible that the café owner objects only to the 'display'[21] of gay sexuality but not to the sexuality itself? I would say 'no,' as I do not see why a person would object to the 'display' of x if what it displays, x, is innocuous to that person. But if that is right, then we are back to where we started, with the café owner disrespecting the couple's sexuality, which ex hypothesis is not a matter of self-determination. But even if the refined example is seen to be plausible, it seems to drive a wedge between the case of the race bigot who refuses to serve members of a *visible* minority, say Asians, and the expression-of-sexuality bigot in this case, on the basis of their different epistemic situations. The expression-of-sexuality bigot has more detective work to do to identify those he wishes to ill-treat. This doesn't strike me as a salient moral distinction. This is, perhaps, all by way of saying that whilst the wrong here may in some cases raise issues of self-determination, it need not, and we would be falling into error if we slice the wrong too finely.

In the second place, what the bigot does is morally wrongful. The question is in what way? Just because he commits the wrong doesn't entail that this wrong falls under the heading of private law or, indeed, law at all. Dagan's stating that this case "vividly illustrate[s] the indispensable dimension of private responsibility for justice" (125) doesn't, without more, secure the punch Dagan aims to land. He assumes that this is a matter of justice, but that conclusion is premature because the example just on its own doesn't declare which aspects of morality it evokes; it is premature to say that it is a question of justice at all, for not all wrongs are injustices. The concept of justice does not cover the entire field of morality. In my view, what this café owner does is first and foremost rude and unkind.[22] And to stick words into a Kantian's mouth, the law should only intervene in such cases where this sort of behaviour is so significantly widespread and systematic that members of our community, who we say we acknowledge as members of our community, are not allowed truly to be members of our community.[23] (I shall return in a moment to the question whether, when the law does so

21. By which I mean things like holding hands, or hugging, or discussing their wedding plans, which display the bigot would *not find* objectionable if done by a heterosexual couple.

22. In extreme cases what he does can amount to a denial of that person's very humanity, which is a distinct wrong, and one which can *lead* to horrific wrongs, some of which may count as injustices. For the difference between a denial of humanity and an injustice, see JE Penner, "Property, Community, and the Problem of Distributive Justice" (2009) 10:1 Theor Inq L 193 at 205, n 22; PMS Hacker, *The Moral Powers: A Study of Human Nature* (Wiley Blackwell, 2021) at 53.

23. And for an instrumentalist of my ilk, one of the important considerations that would have to be considered before proscribing in law this sort of discrimination would be whatever knock-on effects that it would have; it might, for example, lead to more bigotry, some responding to the proscription as a violation of their freedom of speech. Irit Samet-Porat (in private correspondence) astutely raises a corollary of my position, which is roughly that where the conditions of widespread discrimination no longer obtain, the relevant anti-discrimination law should be abolished. So, for example, where the humanity and dignity of gay people is widely respected, and their self-determination cannot really be said to be in any significant way thwarted by a few

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intervene, this should be regarded as a matter of injustice, and whether a legal remedy for it falls under private or public law.) Now of course we can anticipate a possible reply to these points—what is crucial here is that the café owner's refusal of service limits the opportunities or options available to the gay couple, and in this way inhibits their self-determination. But it is not clear this reply is available to Dagan. Of this case he says:

> Suppose, more particularly, that this café is the only one to practice discrimination against gay people in Manhattan (or, say, San Francisco) so that, in its liberal surroundings, there are easy substitutes and no discernible external effects (material or cultural) to the owner's bigotry. In this hypothetical, *there is nothing that public justice can or should do*; it is a simple private law case in which one private person (who *really* values his or her independence) disrespects the self-determination of another on the basis of the latter's sexual identity. (125, first emphasis added, footnotes omitted)

I am afraid I don't follow the thread of the argument here. Because of the easy substitutes and the absence of external effects, Dagan would appear to be conceding that the bigoted café owner's refusal of service does not in fact affect the couple's self-determination. Neither does the café owner's action seem to bespeak an intention to thwart the couple's self-determination. He simply wants to treat them badly because he doesn't like gay people. So I am not sure how this case is really to be framed as one having to do with self-determination. But the puzzle deepens if we consider the phrase I have italicized. The idea seems to be that if there is no threat to self-determination in fact, public justice or public law has nothing to say. And somehow this thought is meant to lead us to the thought that private law does. But the latter doesn't follow from the former. And since, ex hypothesi, the café owner neither intends to, nor in fact does, inhibit the self-determination of the couple, on Dagan's self-determination account private law should have nothing to say about this either.

There is another feature of this example and Dagan's response to it which I find puzzling, and which really does call for further elaboration.[24] Dagan takes this example to show that private law should not be aloof (126) from peoples' real selves, which requires taking into account their individual self-determinations, if I can put it that way. But even if, assuming what I have doubted above, that one's

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remaining bigots, should the law depart from the scene? I would say 'yes,' subject to a couple of 'empirical' caveats. If the abolition of the law would in fact lead to the status quo ante the legislation, and bigoted behaviour would once again become widespread, then of course the law must not be abolished. Secondly, for some (many?) people the law has a symbolic value, and having such a law in place would be symbolic of our society's commitment to human dignity, so should be retained even if now, thank heavens, the law is desuetudinous. This consideration opens up a huge can of worms, since it is not at all clear that people should accord the law significant, or indeed any, symbolic value. In a genuinely free and flourishing society I think the starting point should be to accord it none whatsoever. For an interesting discussion on a related issue, see Simon Keller, *The Limits of Loyalty* (Cambridge University Press, 2007) at chs 3, 4, 8.

24. This treatment of the issue draws upon Ripstein's consideration of the same issue. See Ripstein, *supra* note 13 at 80, 82-86.

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sexuality is a matter of self-determination, what the bigot does wrong is exactly that he takes one such self-determination, i.e. the couple's sexuality, into account—he is distinctly not remaining 'aloof' to these prospective customers' real selves. The logic of this example seems to point in exactly the opposite direction—that the café owner should treat this couple as 'abstract' prospective customers—as 'coffee seekers,' no more no less—not as the 'real selves,' gay and all, that they actually are.[25]

In the final part of Chapter 5, Dagan aims to put flesh on the bones of relational justice. He says,

> An autonomy-enhancing conception of property thus requires precisely the kind of accommodative structure [i.e. accommodative of individuals as they actually are] that the dominion conception [i.e. independence account] of property precludes. (127)

So, what does relational justice, in legal terms, require and what does it not?

Relational justice should not overemphasise personal differences, though it does entail 'some measure' of interpersonal accommodation (127), and "property rights [must not] confer powers that authorize violations of reciprocal respect for self-determination" (127). But relational justice in property law faces a challenge. Dagan sets it out as follows:

> Critics of relational justice may worry that it would completely destroy property's private authority since it implies that 'everyone has a standing duty to see to it that particular other persons with whom they are interacting lead autonomous and successful lives.' Alternatively, if the commitment to relational justice is ineliminable, does this not imply that the private authority granted to certain owners is actually unjustifiable? (128, footnotes omitted)

Dagan's answer is that

> . . . although the tension between private authority and relational justice cannot be dissolved, it can be contained, and that its circumscription is principled rather than ad hoc. (128)

This principled approach is set out in terms of "inherent limits," the "nature of law," and the "rule of law" (129-30). The 'inherent limits' and the 'nature of law' do not seem especially relevant to relational justice qua its relationality, as opposed to its being a matter of justice. These 'inherent limits' are that it would be inappropriate for the law to regulate certain interpersonal relationships like friendship. I have already adverted to this point above, and it is good that Dagan agrees, but it doesn't provide any limitation on the accommodative

25. Dagan pursues this sort of example further at 133-35, but I don't think anything he says there detracts from what I have said. Dagan does say that he sees no difference between the "uneducated bigot and the misguided but sincere religious believer" for his treatment of the issue. I do, but as the example I am discussing concerns bigots and Dagan distinguishes the two (though does not find the distinction *relevant* for his purposes), I shall not pursue the matter here. But see further the text accompanying note 36, below.

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approach *within* private law, which is what the concern expresses. The 'nature of law' is more relevant: this is the view that the law in general and private law in particular should be able to give effective guidance to its subjects. But again, I think it misses the gravamen of the critic's challenge. Dagan writes:

> [This guidance requirement] helps to defuse the potentially intrusive and demanding aspects of accommodation. This effect is attained by setting out clear categories and doctrines for individuals to adequately distinguish their duties on the one hand and, on the other, allowing them to exercise their rights of accommodation. (129)

Clear rules do provide a measure of certainty, but the challenge is not about certainty—look at the challenge again. The challenge is that whatever 'accommodative rules' are brought into the property law system, they will essentially and necessarily reduce the scope of peoples' rights to make their own choices, because there will be fewer aspects of life in which their choice matters. Now Dagan may believe that this is the way forward. Perhaps his view is that many of our choices, presently facilitated by private law, should not be ours to make. That does seem to be the drift. But we are still left searching for what might be called the more concrete specification of the mainstream liberal principle of self-determination which justifies this theory of choice restriction. For example, one kind of socialist would say that the means of production should not be privately owned. I understand that. I have argued that the only rights in land that are morally justified are use- or usufructory rights.[26] I believe I understand what I mean by that. But respect for 'self-determination' per se, the idea that we must respect the real selves of others in all their variety, does not seem to generate any kind of applicable principle for consistent action at all. Regarding the guidance function of law, Raz stresses that the law's guidance is only guidance when it issues more or less specific directives.[27] 'Do the right thing' is of no help at all, because it just throws the problem of determining what to do back into the hands of the subject. How is 'respect the self-determined lives of other real selves' any different? Now Dagan can reply by saying, for example, that armed with the self-determination principle, judges or legislatures will, or at least can, come up with more specific rules on a case by case basis. And it is fair to say of both *A Liberal Theory of Property* and *The Choice Theory of Contracts* that the substantive content of the legal doctrine they favour and disfavour is mostly provided by way of the examples they give us. In my view, however, it is open to a reader to remain firmly agnostic about whether, taken together, these examples reveal any consistent 'theory' of self-determination in private law that generates the necessary guidance.

Finally, regarding 'inherent limits,' which relates to the point just made, Dagan tells us:

26. See Penner, *Property Rights*, *supra* note 4 at 172-73, 177-80, 193-99.
27. See e.g. Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Clarendon Press, 1994) at ch 9.

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> The duty of accommodation is not an all-encompassing requirement to accommodate each and every person in every single area of their practical affairs. (129)

Why not? Is there any principled 'inherent' limitation on the principle to respect people's real selves in all our interactions with them? As far as I can see no such principled limitation is provided.

In some cases of interpersonal interaction, our real selves matter more than in others. This is perfectly obvious. My real self is implicated in my friendships in a much more serious way than in my interactions with a shopkeeper. I shall not press the point, but arguably the law should step away the more our real selves are pertinent to the relationship.[28]

Dagan is on much firmer ground when, rather than framing an abstract principle regarding the place of self-determination in private law, he is relating the significance of self-determination to specific property types. I am not sure why he doesn't reply to the challenge, not by setting out abstract limitations, but by saying that we can appreciate that certain concrete limitations on certain property types in their respective spheres will be justifiable when that type's specific way of serving self-determination would otherwise be inhibited, emphasising that these types are freely chosen by the participants (when they are). But beyond that, Dagan might say that the very solution to this problem is the law's provision of partial functional substitutes which differently and to greater or lesser extents engage with particular aspects of a person's real life. (Wouldn't that be more in keeping with the project?) Elsewhere (23, 50-58) Dagan makes it plain that different types might implicate people's real selves in different ways, focussing differentially on liberty, privacy, private sovereignty, the ability to retreat into a safe haven, personhood, community, and utility. Think again of the residential housing sphere. I take it that a 'common interest' community necessarily implicates peoples' real lives more than a one-year standard lease of a typical flat. The clue is in the very name. But if the only residential option was entering into a common interest community, that would inhibit self-determination for, as Dagan points out, the right to self-determination encompasses a right not to associate with others. The solution would be to provide a less real-self-involving option, such as a standard tenancy. If this thought is along the right lines, then I think the problem of incorporating a principle of self-determination in private

28. The situation is obviously more complicated with respect to workplace relationships. On one side we have Gardner, for whom occupations and the meanings they generate for people are first and foremost governed by social, cultural norms. These the law can either support or undermine. A significant undermining, he feels, is going on right now, under the spectre of what he calls 'contractualisation'; see John Gardner, "The Contractualisation of Labour Law" in Hugh Collins, Gillian Lester & Virginia Mantouvalou, eds, *Philosophical Foundations of Labour Law* (Oxford University Press, 2018) 33. Dagan has replied, arguing roughly that a non-independence, self-realisation account of contract would not undermine the important social and cultural aspects of employment relationships; see Hanoch Dagan, "The Liberal Promise of Contract" in Haris Psarras & Sandy Steel, eds, *Private Law and Practical Reason: Essays on John Gardner's Private Law Theory* (Oxford University Press) [forthcoming]. I shall not adjudicate the dispute here.

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law, thus meeting the challenge, is largely solved, or at least significantly diminished, and I am not sure why Dagan doesn't bring it to the table.

This brings us back to the question of where—in public or private law—we should think discrimination law is placed. Not all independence accounts, even ones very mindful of Kant, are the same. To take one example: Kant seems committed to the idea that the earth must be divided into what is owned, owned in the sense of being exclusively the owner's, and what is not owned and thus free for appropriation. I think this is misguided,[29] as I think usufructory rights are genuine rights, which should not be interfered with any more than 'full-blown' exclusive property rights should be.[30] With respect to land, restricting rights in land to usufructory rights would *entail* a right to roam. This right to roam would be internal to the property law, because it would reflect property law's own underlying concepts. On the other hand, if you are a Kantian taking the 'exclusive right'-only view, then instituting a right to roam could only be justified as a matter of public law because it restricts what would otherwise be perfectly rightful as a matter of interpersonal relationships, here the right not to associate with others by refusing them a licence to enter. So, as I understand it, Dagan believes that if we replace the independence account with a self-determination account (which includes, as we have seen, an element of independence), we will have provided an underlying set of concepts in which public accommodations law, for example, is reflected. We need to hear more. Given what I have said above, it is hard to see how much work the concept of 'real selves' can do here. Perhaps because of the discursive environment, Dagan seems to accept that, for example, public accommodations law is something of a departure from the normal exclusionary rules of property and contract. But if departures from the prima facie right were truly internal to property, one would expect them to be systematic, the way that the power to consent by licence and the power to alienate are. Arguably, the public accommodations law, in so far as it is meant to prohibit discrimination, is not systematic at all, and neither is fair housing legislation. Prima facie neither seems capable of extending to other areas of private law discrimination; the basis for any such extension needs to be articulated.

On the question of whether the law can only deal with injustice, or violations of 'right,' I have elsewhere argued that the law does, in one case at least, enforce what a Kantian would call a 'duty of virtue': the case of the liability mistaken payment.[31] Dagan seems to accept that sort of reasoning.[32] So it might be worth considering that self-determination may best be served by legalizing at least some duties of virtue. That might be one way of thinking about the bigot and his café.

Another suggestion regarding the possibility of private law's internalization of some wrongs that reflects a concern for self-determination arises from something

29. See Penner, *supra* note 15 at 99-102.
30. See the text accompanying note 26, above.
31. See JE Penner, "We All Make Mistakes: A 'Duty of Virtue' Theory of Restitutionary Liability for Mistaken Payments" (2018) 81:2 Mod L Rev 222.
32. See Hanoch Dagan & Michael Heller, "Autonomy for Contract, Refined" (2021) 40:2 Law & Phil 213 at 216-17.

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Ripstein says about the significance of malice in certain private law wrongs.[33] In order for each of us to be freely available to use our means, A must not employ their own means simply to frustrate B's use of theirs. A quotation provides the flavour of the argument:

> Suppose you are walking across a public square. I do not need to move aside to provide you with a path. I can also pursue my purpose of moving from one place to another without wronging you. My coming and going as I please is consistent with your coming and going as you please. If instead I move from place to place always blocking (what was about to be) your path, I do something different—I act in a way that could not be a member of a consistent set of permissible actions.[34]

To put the point in different terms:

> [T]he plaintiff's complaint is not about the *side effects* of the defendant's actions. The plaintiff's complaint is that they are not side effects at all. It is not that the effects of the defendant's use of his means turns out to be incompatible with the plaintiff's preferred use of his; it is that the defendant is using his means *to create* that incompatibility because this incompatibility is the means through which the defendant hopes to achieve his end.[35]

Applying this thought to the bigoted café owner, it might be argued that his action is malicious in the relevant sense. His refusal to serve the gay couple is not merely a side effect of pursuing his own means to achieve his purposes, running a café, but is directly intended to thwart the exercise of the gay couple's means, here their power to enter into a contract to buy a cup of coffee. If that is correct, then the café owner's wrong is a wrong *within private law*, since his refusal could not be a member of a consistent set of permissible actions.[36]

Let me conclude this section with a question about why Dagan seems so determined to set his self-determination account against the independence account, for the two accounts' concerns seem to be orthogonal to each other. The independence account does not imply no interdependence; otherwise it presumably would not facilitate interpersonal interactions by granting owners a power to license what would otherwise be a trespass or individuals a power to enter into contracts with others. The independence account is not anti-facilitative; rather, it insists that no personal interactions should be coerced. It sets the normative framework of rightful interactions between individuals. First, it tells you what things (your body, your property, your powers to enter into contracts with others)

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33. See Arthur Ripstein, *Private Wrongs* (Harvard University Press, 2016) at ch 6. He centres the discussion on the famous nuisance case, *Hollywood Silver Fox Farm v Emmett*, [1936] 2 KB 468.

34. Ripstein, *supra* note 33 at 172.

35. *Ibid* at 169 [emphasis in original].

36. Of course this case is a very special one, and the principle would not cover most of what we understand to be anti-discrimination law, as Ripstein emphasizes in Ripstein, *supra* note 13 at 83-85. In particular it would not cover unintentional discrimination (83-84), as where an employer sets up a work schedule which inhibits the religious observances of its employees; it would also require Dagan to distinguish the case of the bigot from the sincere religious believer (see *supra* note 25).

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are yours in the sense that no one else can tell you what to do with them, and explains that our powers of rightful interaction are to be regarded as freely exercised when not coerced. This Kantian independence can be described in a number of different ways,[37] but the basic insight is surely correct; only on some such basis can the idea of rightful agency, and responsibility for our enacted choices, be conceived. On no fair reading of this account is it "self-regarding" (120) in the sense that it counsels owners or contracting parties to ignore or discount the interests of others. How could it? For as Ripstein has told us time and again, it is not an account about interests at all.[38] To put it another way, the independence account answers the question: what are the ways in which we can *rightfully pursue* our interests, whatever those interests happen to be? As I see it, Dagan wants to insist that private law should have more in its sights than merely securing this condition of rightful agency. Fair enough. But I do not understand why he doesn't adopt the strategy of more/and rather than either/or. So, for a Kantian instrumentalist like myself, Dagan's pluralistic account of contract/property types is interestingly suggestive. Kantian independence has nothing to say about the extent to which the law should support a variety of property types. Correspondingly, as I argue in the next section, I don't think property's structural pluralism undermines in the least what he calls the dominion view of property. It builds upon it; indeed, it is structural pluralism's necessary foundation.

3. Inside and Outside

Dagan purports to show why the Blackstonian or dominion conception of property has failed. He tells us that it is a 'monistic' theory of property which "can hardly account for property's vast heterogeneity" (19). This of course is only a failing if accounting for property's vast heterogeneity is an ambition of the dominion conception of property in the first place. I shall argue that it isn't. As regards monistic theories of property as a group, Dagan has two pertinent complaints.[39] The first goes as follows:

> They can redefine their subjects marginalizing the (potentially important) sections that do not respond well to the animating principle they advocate . . . [for example by] the advocates of the dominion view [renaming] the significant portions of property law dealing with property governance as 'contract' and refer to those that vindicate non-owners' claims of relational justice as 'regulation.' (21)

I dealt with the issue of relational justice, and whether it should be seen as public 'regulation' in the last section, so will say no more about it here. But as to two other points: first, on the idea of an 'animating principle', I have described title to tangible property as comprising the right to immediate exclusive possession, the

37. Some better than others; see text accompanying note 46, below.
38. See e.g. Ripstein, *supra* note 33 at x, 8-10.
39. A third (21) is to "discard any pretense to account for existing law" but since that is not true of the dominion account, I shall ignore it here.

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power to license what would otherwise be a trespass, and the power to transfer the title to another, which is a thumbnail sketch of the dominion or 'exclusion' view.[40] I do not think that this characterisation amounts to an 'animating principle.' It is meant to be an analysis of the basic features of those rights we call property rights. 'Animating' suggests something that should lead to action of some kind. In undertaking that analysis, I was seeking analytic clarity, not any kind of marching orders.

Second, as to the placing 'property governance' within contract, I have already commended Dagan for pointing out that property theorists have neglected co-ownership and other 'internal' governance structures of property. But since Dagan's theory of private law types is not concerned with sorting the individual features of these into 'property' or 'contract' conventionally understood, I am not sure why it is a criticism of dominion theorists that they draw the line in a different place than he does so long as they address these governance issues. Perhaps[41] Dagan's claim is that a *judge* in a dispute will deny a claimant a just remedy because she characterises the dispute as a 'property' dispute following the orthodox legal categories, holding herself helpless by saying something like, 'this is a matter for regulation, and thus for the legislature,' which might have led, for example, to the opposite result in a case like *State v. Shack*.[42] He may indeed be right about this, but without more detail, it is not clear exactly how the self-determination account would draw the line between private law and public law regulation of an owner's behaviour, for I do not think Dagan is claiming that there can be no legal regulation of owners that is properly conceived of as public law regulation, nor that if the regulation concerns or is justified on the basis of self-determination it ipso facto falls under private law. And there is the tricky issue of what might be called private law 'policy' considerations, such as the common law's ancient dislike of restraints upon alienation. Dagan discusses alienability fairly briefly (184-85), and he might have illuminated his account by making sense of the 'principle'/'policy' distinction within property law or private law more generally.

In any case this monistic strategy of marginalizing governance threatens to undermine property's legitimacy by diluting "the normative constraints of property's liberal foundation" (21). Dagan goes on:

> A liberal property law must ... shape property as a means to enhance people's autonomy. It should thus circumscribe owners' authority to its autonomy-enhancing function *and ensure that everyone has property*. (21, emphasis added)

Again, the autonomy question, which means the same as the self-determination question, has been addressed in the last section, but in the italicized phrase we find something new. I take it that this means that private law should have rules

40. See Penner, *Property Rights*, *supra* note 4 at ch 1.
41. Irit Samet-Porat suggested this to me.
42. 277 A (2d) 369 (NJ Sup Ct 1971), discussed at 199.

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which impose duties on individuals to ensure that everyone has property. It is not at all obvious what such a private law rule would look like. Allow trespasses on Tuesdays? An example of such a rule would be instructive, for I cannot imagine a workable one. No example is given.

As a matter of the interpersonal moral relations of individuals, a duty to assist the poor is the classic example of what Kant would call a duty of virtue, a 'wide' duty which correlates with no right in a possible recipient. Now, with something like a duty of easy rescue or the duty to return a mistaken payment, it has been argued that such a wide duty may 'crystallise' in certain circumstances, generating a correlative right-duty relationship between a rescuer and the person needing rescue or the mistaken payee and the payor.[43] At the limit, I can see a similar duty arising upon A to provide some of their property to B where B is seriously necessitous and A is the only one, or one of only a few people, in a position to address B's plight. But outside cases of necessity, I can see no feasible principle whereby A would be required as a matter of private law to spread their property around to the poor, a private law right enforceable by someone just because they could properly be described as poor. And the idea that we could frame a private law duty upon every property owner, qua property owner, i.e., poor or not, to *ensure* that *everyone* has property strikes me as nonsensical.

The other complaint is that monistic theories try to save their skin by resorting to abstraction (21-22), which is "unobjectionable per se" (21).

> But this strategy nonetheless requires caution because it implies that such theories cannot—and thus must not purport to—perform the prescriptive function for which they are at times recruited. (21)

Again, an example of this recruitment would be helpful. I am a dominion theorist, but I have never said that the theory gives rise to any prescriptions, nor can I see how it could be recruited to do so. Now doubtless there are many pro-property types out there, who may fall prey to some version of the is-ought fallacy, so that they think that the very existence of the property rights we have must somehow justify them. But these people, we all agree, are just confused. Indeed, I am worried that Dagan may suffer a little from the same confusion, because, as we shall see, he does think that dominion theorists are prescriptively biased in certain directions in the same way, as we saw above, he seems to think that Kantian independence theorists treat agents as 'self-regarding.' Let me assure him we are not. Dagan goes on to say:

> The common denominator of the wide terrain of legal doctrines covered by wholesale legal categories, such as property, tends to be so thin that it can hardly be determinative enough to provide significant guidance as to the evaluation or development of the doctrines at hand. (22)

43. See Penner, *supra* note 31 at 229-34.

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I agree whole-heartedly. To adapt the old lawyer's joke that no one ever cited *The Concept of Law* in their pleadings, it would be just as silly to cite Waldron's *The Right to Private Property*.[44]

Here are some other things Dagan says about the dominion conception of property. It is reflected in the 'hegemony' of the fee simple absolute (22). The fee simple absolute serves liberty, privacy, private sovereignty, and the ability to retreat into a safe haven (23). The dominion theorist is "likely to object" to a pluralist vision of property law whose justification is framed in terms of whether it secures self-determination (24); such a theorist holds that:

> [L]iberalism's conventional understanding of the public private distinction implies that property law need not, indeed should not, undertake the task [of securing self-determination]. Rather, property law, like private law more generally, should be solely guided by a commitment to individual independence and formal equality. Providing a rich repertoire of property types or imposing affirmative interpersonal obligations is, therefore, none of its business. (24)

The dominion theorist thus relegates this task to public law (39). All I can say is that we seem again to be faced with Dagan's trying to draw out an evaluative position from an analytic one.

A dominion theorist can be a liberal, a socialist, an anarchist, whatever. A socialist might be attracted to dominion theory because it accurately depicts, and thus sharpens their understanding of, what they detest.

So what is the dominion theorist committed to? I can only speak to my own view, but let me pin down the essentials, restricting our attention to tangible property. As I have said, title to tangible property is tripartite, one right and two powers.[45] Let us first look at the right, the right to immediate, exclusive possession. It imposes a duty on all others not to interfere with the object of the right. Because the owner is not under such a duty with respect to that object, they are at liberty to do things with the object within the general limits of the law. The law does not empower them in any way in this regard. If they intend to farm Blackacre, no one is required to assist them in this project. Now, the powers. The owner may license others to commit what would otherwise be a trespass but they, of course, have no obligation to take advantage of the licence. The owner may offer to give or sell the property to others, but again, they have no obligation to take the owner up on the offer. As a Kantian might frame it, ownership is negative and relational. It is negative in that the only obligation involved is that of everyone not to interfere with the object of the right. And it is relational in the sense that the owner is 'empowered' by their ownership only in so far as they stand in this right-duty relationship to others.

How, then, does dominion theory relate to property's structural pluralism? Dominion theory is not directed towards co-ownership or other 'internal' governance arrangements. But those arrangements fit within it seamlessly. Whether

44. See Jeremy Waldron, *The Right to Private Property* (Clarendon Press, 1988).
45. See the text accompanying note 40, above.

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you are a tenant in common, or a member of a common interest community, as one of the owners you have the same right against interference by non-owners and, acting singly or together depending on the form of governance, licences may be issued to non-owners and the property can be transferred away. The dominion conception of property is the necessary foundation for all of Dagan's different property types as far as I can see. And let me point out why this is foundational regarding property as a concept. Some property is solely owned. In these cases, there is no internal management structure. So, neglected though the internal management structures for property types may be, these structures are not universal features of property rights. They come second, conceptually, in the order of exposition.

A final point. As we shall see in the next section but one, Dagan's legitimacy challenge to property depends on the concept of 'non-owner,' a concept which is meaningless outside the dominion conception of property rights.

4. Property, Power Conferral, and Authority

Dagan tells us that property is a "power-conferring institution" (63-65). What he means by this, first, is that unlike our rights to our bodies, property law does not vindicate "existing rights" (63). I can only interpret this to mean that there are no pre-legal morally conceivable rights in relation, say, to the tangible resources of the earth. I disagree. But for Dagan, if I understand him correctly, only property law itself could confer this kind of right. Its conferring such a right is a conferral of authority (60), so to Dagan's concept of authority we must turn.

But first it is fruitful to examine the views of Ripstein on private authority as a point of comparison.

Ripstein employs the concept of authority to explain private law rights, but I think he must at times regret it.[46] This is not to say that he himself is led into any confusion by his use of the term. The problem is that his use is idiosyncratic, and is apt to give rise to confusion in others. When Ripstein uses the term 'authority,' he aims to capture the familiar idea that no person is in charge of another. This 'no other in charge' idea extends to a person's property as well. This intuition is then spelt out in terms of the negative and relational situation of individuals vis-à-vis each other in private law. In case you think that this kind of authority is related to the kind of authority which interests Raz and is subject to his normal justification thesis, you would be wrong, as the back and forth between Ripstein and Gardner has brought into sharp relief.[47] Private authority of this kind, for Ripstein, entails that no one is able to dictate how you act with your body or your property, and you have to answer to no one about the choices you make (so long, of course, as they are lawful under the general law). They are entitled to no justification from you whatsoever.

46. I discuss this also in Penner, *Property Rights*, supra note 4 at 31-36.

47. See Ripstein, *supra* note 13 at 64-70; John Gardner, "Private Authority in Ripstein's *Private Wrongs*" (2016) 14:1 Jerusalem Review of Legal Studies 52.

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But here is the problem with the language of 'in charge of' and 'authority' in the private law context. When we talk about someone being in charge of something, we normally associate that with some empirical control over that thing. So we say that someone is in control of a vehicle when they are effectively driving it, and that they lose control when, for example, their hands slip off the wheel. But private law right is blind to any such notion of being in charge or in control. If I own Black Beauty, but am a hopeless rider and cannot control him, it doesn't matter so far as my ownership is concerned. The point, again, is that property ownership is not personally empowering in any empirical sense. All property gives me is the liberty to do what another person is denied, a liberty to deal empirically with the property as best I can and nothing more. This idea should not be confused with the idea that facilitative private law can be 'empowering' in the sense that property rights, contracts, trusts, and so on are very effective means for pursuing our goals, both alone and with others, providing us with some types of security, and so on. But this idea of what might be called 'legal empowerment,' takes us directly to the 'authority' side of this issue.

As the Gardner-Ripstein exchange also shows, when we say that private right has the structure of an authority relationship between individuals, it is easy to associate that with the idea that an owner has authority *over* non-owners, in the way that a captain has authority over their sailors, or a parent has authority over their children. In these cases, we naturally think that the authority may issue binding directives with which their subjects must comply. But that would be a mistaken association here. Neither my ownership of property nor my power to contract gives me any right to require you to do anything. As I have already pointed out, property and contract do empower me to offer to license, to transfer, to agree with you to provide you a service for money, but you never have to take up the offer.

But Dagan thinks otherwise, and I think it is unfortunate that he does. (And whether he is right on this matter or I am has nothing to do with justifying a rich repertoire of property types.) We have to go through his thoughts on this carefully, because I am uncertain exactly what picture of authority is supposed to emerge.

Dagan tells us:

> [P]roperty is above all about having some *authority* over resources, which is conducive to self-authorship. This authority allows people to employ the (tangible and intangible) external world to ensure their independence and establish their personhood. (60, emphasis in original)

This seems innocuous enough, on the reading that 'authority' here only means liberty to employ external resources without interference. But Dagan shortly thereafter says:

> For property to serve these values, owners need to have some authority over others—both other individuals and society as a whole. (60)

Dagan explains this in terms of property's 'relationality.' As far as I know it is common ground that property rights are relational in the sense that, simply qua rights, they concern normative relations between individuals. Dagan, unfortunately, reprises

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Morris Cohen's sloppy thinking when he says this relationality in and of itself entails that property thus instantiates a "private imperium over [their] fellow human beings" (60). This idea, for Dagan, 'recognises' "property's unique form of empowerment" (60). We can get the gist of what Dagan means by this 'unique form of empowerment' when he quotes Dorfmann and Cohen, respectively, to make the points that property makes an owner a reason-provider for a non-owner (61), and gives the owner, where they control things necessary to the life of a non-owner, a power 'limited but real' to make the non-owner do as they want. Dagan goes on to say that:

> Although property does not always influence non-owners, it invariably subjects them to the owner's Hohfeldian power. Property *necessarily* involves this vulnerability because the law's demand from non-owners to respect the owner's authority is unmediated by any further facts about the world. (61, emphasis in original)

As you might expect from a dominion theorist, I regard this as mistaken. Let's start with the last quotation. I presume that if this so-called power of imperium is a Hohfeldian power, then it is a legal power. But what is it? As we have seen from the dominion account, an owner is not entitled to coercively recruit another to do anything; it is not a power to order that other to do something. That other must agree. A truly Hohfeldian power would subject the non-owner to a liability. Now it is necessary to recall here that 'liability' has no negative valence for Hohfeld, in contrast to normal usage. I have a Hohfeldian liability in relation to your power to make a gift to me. And the only Hohfeldian liability the non-owner is subject to would seem to be of a positive kind, i.e., the liability to be made a legally effective offer which the offeree then has the power to accept or reject. The owner has no Hohfeldian power to impose a duty on anyone (which is why, again, saying they are an 'authority' can be so misleading). So much for the doctrinal position.

As to the broader social position, which is clearly what animates this thinking, everyone agrees that the exercise of private law powers can, if unregulated in certain contexts, be exploitative. I have wondered before[48] why this issue always seems to fall into the lap of property theorists rather than contract theorists—Dagan and Heller raise no counterpart 'challenge' in *Choice Theory*—even though the power to contract is just as much a 'power of imperium' over others, as any captain of a sinking ship with a salvor nearby will be only too pleased to explain to you. And even in Cohen's 'necessity' example, saying the non-owner is 'made to do something' can only mean they will by circumstances be forced to conclude an exploitative but enforceable *contract*. Three points on this. First, as my salvor example shows, the problem of the exploitative exercise of powers has nothing in particular to do with property.[49] Second, private law recognises, albeit not perfectly, this sort of danger in its doctrines of duress, necessity, and so on. So

48. See James Penner, "On the Very Idea of Transmissible Rights" in James Penner & Henry E Smith, eds, *Philosophical Foundations of Property Law* (Oxford University Press, 2013) 244 at 266-67.

49. Indeed, as Fred Wilmot-Smith asked me to point out, it is the property owner who is at risk of exploitation in this case.

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the lesson of this sort of example has already been 'internally recognised' in private law, which should have made Dagan happy. And finally, the argument as a whole is misguided. All powers can be abused. This doesn't mean the power is itself suspect. Compare the case of democracy. Everyone knows all too well that democracies are not perfect, and the powers democratic states confer on officials can be abused (and just as in the case of the abuse of private law powers, public law, albeit not perfectly, addresses such abuses). If you are a democrat, does that fact shake your faith in democracy itself? It shouldn't, and if it does you are not really a democrat. *Mutatis mutandis* with a police officer's power to arrest, a judge's power to decide cases, and the owner's powers of title.

5. Property's Legitimacy Challenge

I have dealt with this issue before,[50] and shall be brief here. Dagan tells us that those wishing to justify property law face a challenge, which derives from the fact that the "authority property law confers on owners *generates* the vulnerability of non-owners, thereby posing a potential threat to their autonomy" (62, emphasis in original). For reasons given in the last section, I think this is mistaken. What generates the vulnerability of non-owners is their circumstances (although an investigation of the historical private law transactions that may have contributed to their being in this fix will be relevant in various ways), and private law tries to deal with those cases in which exploitative transactions result.

Relatedly, Dagan also thinks poverty poses a legitimacy challenge (116-17). Dagan thinks poverty poses a particular problem for the power to appropriate what is unowned, but since that is not the only source of poverty, and since the problem is that property allows "the proprietor to subordinate others to his or her purposes" (116), the problem is essentially identical to the problem of the owner's authority as set out in the last paragraph.

Property, however, is not made illegitimate because of poverty; rather, property is the solution to poverty. If people don't have enough, they should have more, and the more consists in the property rights they should receive. Despite the rhetorical fog that surrounds this issue, a fog which seems to have the half-life of cobalt thorium G, everybody actually takes the point. In a more or less liberal society which recognises some version of Kantian independence, and in which the ownership of property, in particular money, confers a measure of independence, only the provision of property will secure a life not continually dependent upon the choices of others.[51] Thus, all on its own, the existence of poverty itself creates a potent justification for property rights. Only if property rights, protected by law, exist, can those rights be appropriately distributed and redistributed and the independence of all assured.

50. See e.g. Penner, *supra* note 48 at 266-67; Penner, *supra* note 15 at 105.

51. I am not here denying that there is a conceivable regime of rights to resources under which no one has any exclusive rights, and that if such regime were in place poverty would ipso facto be eradicated. But since Dagan's view is that, suitably adjusted, a liberal property regime can be justified, that needn't be gone into here.

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6. Conclusion

I have not spent much time in this notice examining the spheres of property and the property types situated within them, for two reasons. First, I want to wait to do that until Dagan or others provide a more systematic investigation into types across private law. Second, I thought it more important now to explore the connections Dagan finds between the issues discussed in sections 2-5 and property's structural pluralism. As we have seen, I don't really see any connections between them. Thus we can end on a hopeful note for Dagan. Even a Kantian independence theorist or a dominion theorist like myself can accept Dagan's suggestive thesis about private law types without abandoning their scruples.

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