

Relating - Equally - Through Property

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Hanoch Dagan, [A Liberal Theory of Property](#) (2021).

For anyone seeking a rational and convincing justification for private property, Hanoch Dagan's newly published book, *A Liberal Theory of Property*, is a compelling read. The book provides an ideal – even utopian – vision of property ownership, arguing that such ownership is, and can only be, legitimate if it is “premised on a fundamental commitment to autonomy as self-determination or self-authorship. This commitment explains and justifies both the private authority that characterizes all property types and their inherent limitations.” (P. xii.) At the same time, the book provides many highly pragmatic descriptions of how property law actually functions to promote and protect self-authorship, as well as prescriptions for how to revise property law to accomplish this function more fully.

Thus, the book is not only a fascinating read for property law professors and political philosophy diehards, but it is a (perhaps surprisingly) valuable read for those who engage in lawmaking and law practice and who want to think about the practical legal value and *limits* of property ownership.

The particular limits that Dagan spends a good deal of the book elaborating are limits on the right of exclusion, often considered the *sine qua non* of property ownership, as well as more broadly on an owner's private authority via ownership.

However, Dagan does not articulate these limits as critiques of the institution of ownership. Rather (and this is one of the core strengths of the book), he develops an affirmative vision of property as a vehicle for self-authorship that relies on a particular vision of the rights *and obligations* of all property owners that are necessary to ensure that property can promote self-authorship for all.

Thus, Dagan argues in Chapters 3 through 5 of the book, a genuinely liberal property law must rest on three foundational “pillars”: 1) “carefully delineated private authority” to ensure that ownership “follows property's contribution to self-determination;” 2) “a structurally pluralistic inventory of property types offering people real choice;” and 3) “compliance of owners' powers with relational justice to verify that property does not offend the principle of reciprocal respect for self-determination.” (P. 4.)

Dagan frames his discussion of these three pillars in Chapter 2 by elaborating on his mission of developing a legal theory for property law that is appropriate for a “liberal polity,” (P. 10), namely a society that prioritizes autonomy. He then completes his analysis, in Chapters 6 through 8, by discussing the institutions and contexts through which a liberal understanding of property must be developed and maintained.

Thus, in Chapter 6, Dagan argues that both the legislature and the judiciary must be involved in upholding liberal property as a human right, one that may at times restrain state power. In Chapter 7, Dagan specifies the necessary features of the market in which a genuinely liberal property can flourish. Finally, in Chapter 8, Dagan analyzes how time interacts with adjustments to ownership regimes, focusing especially on circumstance in which sudden adjustments may legitimately trigger takings claims.

While I find Dagan's entire argument about autonomy and property thought-provoking, I want to focus for the remainder of this review on Dagan's third essential pillar: the requirement that property ownership must comply with and promote relational justice.

In developing this pillar as a foundation for his justification of property law, Dagan departs from the "conventional" view that equality must be achieved through property and private law (if at all) by compliance with "a negative duty of non-interference," and that any more affirmative duties to achieve equality must be left to the state, for example by levying taxes to support the poor. (P. 115.) Dagan argues instead that property law depends on and must promote substantive equality by imposing a duty on *private* owners to "focus[] on the acceptable terms of interpersonal interactions and ... the demands of justice among private persons" (P. 128.)

Dagan's argument is one of the most powerful and convincing justifications for law reforms to dismantle structural racism (and myriad other forms of discrimination and oppression) that I have read. To understand its power, it is useful to reflect on one of several pragmatic examples that Dagan provides:

Consider the private owner of a boutique café who decides not to let customers enter the premises adducing some morally arbitrary grounds, such as their sexual orientation. Suppose, more particularly, that this café is the only one to practice discrimination against gay people in Manhattan ... so that ... there are easy substitutes ... to the owner's bigotry. (Pp. 124-25.)

As Dagan points out, the traditional view of property would find that the owner's bigotry was a private matter that could only be limited for certain protected classes, which (depending on the jurisdiction) may or may not include LGBTQ individuals.

Dagan, however, argues that it is *inherent* to a just property law that is committed to self-determination to require the owners of cafés – and any other places of business open to the public – to allow access to *all* individuals. In his words, "the prescription of relational justice runs directly from owners to nonowners.... Relational justice focuses on the acceptable terms of interpersonal interactions and establishes the demands of justice *among private persons*." (P. 128, emphasis added.)

In addition to the context of public accommodations, Dagan examines the value of relational justice as a basis for expanding fair housing laws as well as owners' responsibilities concerning such things as disclosure and rescue.

Especially at this time, when our society must prioritize legal interventions to address structural racism, Dagan's insights are absolutely crucial for several reasons. His approach provides a powerful justification for requiring antidiscrimination rules both *within* and outside of property law. Dagan thereby greatly expands and legitimizes the menu of possible legal prescriptions to address discrimination.

At a more abstract, but still vital, level, he also develops the idea of antidiscrimination as a *private* obligation that *each* of us owes to our fellow human beings. In these and other respects, Dagan forces us to think of ownership as a tool partly for achieving racial and other forms of equality.

Equality, he argues, is essential to self-authorship. And self-authorship is the only legitimate justification for private property in a just society. Private ownership, then, obliges all owners to uphold equitable access to the resources we own. It will behoove us all to think deeply about the implications of Dagan's argument.

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