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Review of:
Hanoch Dagan, *A Liberal Theory of Property*
(Cambridge University Press 2021)

Brian L. Frye*

While it doesn't necessarily take a theory to beat a theory, it certainly helps. In his new book, *A Liberal Theory of Property*, Hanoch Dagan offers a theory of property intended to counter the prevailing utilitarian theory. Along the way, he also criticizes "monistic" Blackstonian, Kantian, and Nozickian theories of property, while borrowing arguments he finds useful. His goal is to provide a theory that explains why property is justified, without rendering it either merely instrumental or absolute.

In a nutshell, Dagan argues that property is justified only if and when it promotes "individual autonomy, self-determination, and self-authorship."¹ This fundamental premise is the touchstone of his entire theory, guiding all his conclusions. What does it mean? According to Dagan, property is an essential feature of a liberal legal regime because it uniquely enables people to realize their autonomy. Of course, while property is necessary to liberalism, it isn't sufficient. Health, education, and subsistence "are surely more basic."²

Moreover, liberal property rights aren't absolute. On the contrary, they must always respect the rights of non-owners. The principle of relational justice means that property owners and non-owners alike owe duties to each other, all of which must serve their mutual goal of self-determination. And yet, while liberal property is

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¹ HANOCH DAGAN, *A LIBERAL THEORY OF PROPERTY* 1 (2021).

² *Id.* at 2.

guided by relational justice, it guides in turn our "foundational duty to respect each other's self-determination," the *telos* or inherent purpose of property.³

Dagan seeks to convince Rawlsians that property is not only consistent with liberalism, but also required by it. He makes this claim against the backdrop of utilitarianism, which argues that property is just a means to maximizing welfare that ought to be abandoned as soon as a more efficient means becomes available. Even Rawlsians can be tempted by utilitarianism in service of distributional equity, especially because property has lots of normative baggage. Nobody loves a landlord.

So Dagan is at pains to reject the utilitarian premise. It isn't welfare we want, but autonomy, and property is the only way to get it. Dagan argues that property has the unique capacity and flexibility to give people the tools they need to realize their own autonomy. The government can give people what they want, but only property can give them what they need. According to Dagan, if liberalism means individual autonomy, not just preference maximization, we need property to get there.

Still, it's gotta be the right kind of property. That's where Dagan's theory gets interesting, if also more questionable. Obviously, he doesn't think all property is alike. Some kinds of property promote autonomy and are entitled to full protection, but others don't and aren't. For example, while homeownership promotes autonomy, business ownership doesn't. It's a bold claim, which some might find unfounded. After all, some people are indifferent to the place they call home, and others are deeply invested in their businesses. In any case, liberal property theory makes distinctions about how property

³ *Id.* at 3.

should be protected based on the nature of the property interest at stake.

But liberal property theory also cares about how people use property to achieve autonomy. Specifically, it looks at the ways people arrange property ownership to understand what property rights should mean and how they should change. If people use property to structure their social relationships to each other, then liberal property needs to accommodate their innovations in order to promote autonomy.

Utilitarian theories of property reduce property to a tool for minimizing transaction costs. Dagan argues that property is more, a tool by which people structure social relationships and convey meaning about themselves. Interestingly, he even makes common cause with Robert Nozick's libertarian theory of property. While he rejects Nozick's premise that property rights must be absolute, he agrees that they can't be meaningless. According to Dagan's account of both Nozick and Rawls, mere preference satisfaction "cannot be an ultimate goal."⁴ What matters is autonomy and the "act of choosing."⁵

I can see why Rawlsians would find Dagan's theory of property appealing. He takes property, an uncomfortable fixture of the law, and gives it a progressive spin. If you can't beat 'em, join 'em. But it's hard for me to see Dagan convincing anyone who isn't already a Rawlsian. If you're a utilitarian, why credit his premise that property promotes autonomy better than welfare? If you maximize welfare, people can do whatever they like with their newfound wealth. Who says they need property to be autonomous? And if you believe property is absolute or nothing, Dagan sounds like a socialist. If

⁴ *Id.* at 57.

⁵ *Id.*

property only exists when the government thinks it's good, does it really exist at all?

From a reader's perspective, Dagan's book is resolutely theoretical. So much so, it offers precious few examples of what liberal property looks like in practice. It's all well and good to say that liberal property has to promote autonomy, but another thing entirely to explain what that means in practice. The few problems Dagan provides are abstract, and frankly not that hard to solve. Unsurprisingly, liberal property supports deliberative democratic decisions, but not racial discrimination. It supports the right of labor to collective bargaining, but not of businesses to lockouts. And it supports tenants over landlords.

What about the harder cases? Dagan's theory doesn't have much to say. Should a regulatory taking be compensated? Maybe. Should property law respect religious objections? It depends. Of course, abstract theories aren't made to answer concrete questions. As Dagan observes, that's what judges are for, and why judges are often better than legislatures at answering hard questions.

That's a little unsatisfying. I wanted to know how Dagan's theory would respond to pressing, real-world questions, but didn't feel like I could even hazard a confident guess. For example, Dagan argues property is essential to autonomy because it enables people to structure their relationships. He presents the development of cooperatives as an archetypal example of liberal property facilitating autonomy. Ok. But what about other organizational forms? These days, most businesses are limited liability companies. States created the LLC form because people wanted it. Does that make LLCs a form of liberal property? They don't really seem all that focused on promoting autonomy or relational justice.

Similarly, I wondered how Dagan's theory would account for novel organizational forms and new kinds of property. Right now, a

lot of people are forming decentralized autonomous organizations or DAOs, in order to pursue a wide range of different goals.⁶ In some ways, DAOs look like cooperatives, but in other ways they look like LLCs. How should a liberal theory of property assess their desirability? And what about non-fungible tokens or NFTs? They are a new kind of property that came into existence because they enabled a kind of ownership that people wanted, but property law didn't already recognize. Essentially, NFTs are digital Veblen goods, which enable people to trade in pure status.⁷ Should a liberal theory of property endorse or condemn NFTs? They certainly seem to promote the autonomy of the people participating in the NFT market, who want to maximize their clout.⁸ But what about the risk to unwary investors, not to mention the environmental costs? It's easy to say liberal property has to balance the benefits and costs of property rights, but it's a lot harder to actually do it.

I study intellectual property, so I couldn't help wondering what Dagan's theory has to say about copyright ownership. After all, copyright theory is all about the tension between collective welfare and individual autonomy. He only mentions it once, observing that copyright was "originally understood in terms of delegating society's interest in fostering culture, research, and development to private individuals and firms," but "is by now understood as a potentially constitutive medium of the self," which still "must

⁶ See, e.g., Carla Reyes, *Autonomous Corporate Personhood*, 96 WASH. L. REV. 1453 (2021).

⁷ See, e.g., Kal Raustiala & Christopher Jon Sprigman, *The One Redeeming Quality of NFTs Might Not Even Exist*, SLATE (Apr. 14, 2021, 4:59 PM), <https://slate.com/technology/2021/04/nfts-digital-art-authenticity-problem.html>.

⁸ See, e.g., Brian L. Frye, *After Copyright: Pwning NFTs in a Clout Economy*, 46 COLUM. J.L. & ARTS (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3971240.

comply with the thin but still noteworthy constraints entailed by property's commitment to relational justice."⁹

For better or worse, that's the conventional description of how the social meaning of copyright has changed over time.¹⁰ What began as mere welfarist policy eventually became a morally laden expression of autonomy, as copyright ownership went from the means of production to a means of self-authorship, limited only by the self-authorship rights of others. So Dagan's theory is at least consistent with current copyright ideology.

But it doesn't seem all that liberal. Copyright is supposed to encourage the creation and distribution of works of authorship, and occasionally it even succeeds. It wasn't designed to promote authorial autonomy and does so only at the expense of everyone else's autonomy. After all, without copyright, works of authorship would be public goods, which everyone could use for free without depleting them. If liberal property theory requires relational justice, how can it enable copyright owners to exclude non-owners, merely in order to enhance their own autonomy? Surely that's precisely the kind of discriminatory exclusion Dagan condemns as *ultra vires*. Why should copyright enable copyright owners to prohibit the use of their works? That isn't promoting autonomy, it's just rationalizing power.

But enough criticism. Theory is hard, and it's unrealistic to expect an abstract theory to provide detailed answers to concrete problems. Dagan's project is to provide a model that can explain why property is not only consistent with liberalism, but also essential to it. There, I think he succeeds. If you accept the premise that liberalism means

⁹ DAGAN, *supra* note 1, at 58.

¹⁰ See, e.g., Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship,"* 1991 DUKE L.J. 455, 456 (1991).

individual autonomy, then you should find Dagan's theory broadly compelling. How can the government promote autonomy, other than property? If you don't accept Dagan's premise, at least his theory will help you understand your ideological opponents.