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# Property: Duties, Diversity, and Limits

Ben McFarlane\*

Hanoch Dagan states that his account of the liberal idea of property ‘hopes to open a conversation, inviting critics to refine and revise it’.<sup>1</sup> This excellent book does far more than merely open a conversation: it addresses head on the perennial question of the justification of property and its central requirement that others ‘defer to owners’ authority regarding what to do with an object’.<sup>2</sup> As Dagan rightly notes, in the absence of a suitable justification, this requirement ‘seems arbitrary and unjust’.<sup>3</sup> In addressing this ‘legitimacy challenge’ for property, the book both synthesises and develops Dagan’s existing and impressive work on property, identifying the authority which property endows as ultimately justified by ‘our foundational duty to respect each other’s self-determination’. So, ‘while property writ large is private authority *simpliciter*, liberal property conceives of that authority as a means of self-determination’.<sup>4</sup> The three pillars of liberal property explored in the book—summarised as: (i) carefully delineated private authority; (ii) structural pluralism; and (iii) relational justice—are founded on that ultimate ‘autonomy-enhancing *telos*’.<sup>5</sup> Crucially, the book regards property as part of a seemingly seamless web of an autonomy enhancing liberal private law, thus drawing on and supporting Dagan’s analysis, with Michael Heller, of contract law. The importance of the book thus lies not only in its discussion of property, but also in its significance for private law more generally. In this brief review comment, which will focus on Chapters 1, 2 and 4 of *A Liberal Theory of Property*, I aim to show that there are both strengths and weaknesses of such an approach.

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1 *A Liberal Theory of Property* (CUP, 2021) 12. Hereafter LTP.

2 *Ibid* 2.

3 *Ibid*.

4 *Ibid*, 3.

5 *Ibid*, 4.

## 1. DUTIES

It has long been recognised that, as well as imposing duties, private law includes power-conferring rules. Referring to ‘wills, gifts, contracts, marriages, and the like’, Hart noted that ‘the function of these institutions of private law is to render effective the individual’s preference in certain areas’.<sup>6</sup> As a result, those:

institutions provide individuals with two inestimable advantages in relation to the areas of conduct they cover. These are (1) the advantage to the individual of determining by his choice what the future shall be and (2) the advantage of being able to predict what the future will be.

Although Hart was there considering such cases only to provide an analogy between the ‘mental conditions that excuse from criminal responsibility and the mental conditions that are regarded as invalidating civil transactions’, he also made the crucial point that such devices for bringing ‘the individual’s choice ... into the legal system’ give an individual powers that ‘he would not have “naturally”; that is, apart from these legal institutions’.<sup>7</sup>

Hart’s insight has been developed in different ways,<sup>8</sup> but for present purposes the crucial point is that, as Dagan notes, property law—like contract law—offers more than simply the protection of ‘interpersonal independence’.<sup>9</sup> One undeniable feature of property law is its use of what Harris called ‘trespassory rules’<sup>10</sup> to protect an owner from others’ interference with a particular resource, thus affording that owner the practical opportunity to take advantage of ‘use-privileges’ in relation to that resource. In other words, a set of claim-rights, correlating to duties owed to that owner by (*prima facie*) all others, creates the literal and metaphorical space in which an owner can enjoy her Hohfeldian liberties in relation to a resource. Dagan’s point though is that property law does not support an owner’s autonomy merely in this chiefly negative way, but also gives that owner true Hohfeldian powers i.e. the ability to change the legal relations of others. This is a feature of the structural pluralism of property law, as an owner can use such powers to set up ‘various forms of interpersonal relationships, which would not be possible without an enabling legal infrastructure’.<sup>11</sup> Beyond its minimal structure, then, property law goes further by offering an individual meaningful choices which would not be available in the absence of private law, and the importance of offering such choices in relation to control of the ‘external world’<sup>12</sup> is at the heart of the justification of property.

<sup>6</sup> HLA Hart, ‘Legal Responsibility and Excuses’ in S Hook (ed) *Determinism and Freedom in the Age of Modern Science* (Collier Books, 1958), reprinted in *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd edn, OUP, 2008) 44–45.

<sup>7</sup> *Ibid.*

<sup>8</sup> See e.g. E Voyiakis, *Private Law and the Value of Choice* (Hart, 2017) e.g. at 1–2, drawing on TM Scanlon, *What We Owe To Each Other* (HUP, 1998) 251.

<sup>9</sup> LTP, 9.

<sup>10</sup> J Harris, *Property and Justice* (Clarendon Press, 1996) 24–26.

<sup>11</sup> *Ibid.*, 6.

<sup>12</sup> *Ibid.*, 60. See also *ibid.* 2.

In other words, property is 'first and foremost power-conferring'.<sup>13</sup> It is argued that this recognition of the positive role of property is supported by 'the existing and potential legal doctrine' which must be taken seriously in any account of property law.<sup>14</sup> So, for example, the powers of an owner of land, along with others, to set up 'condos, co-ops, common-interest communities, joint tenancies, leaseholds, and trusts' demonstrate the 'pluralistic architecture of property law and its many options'.<sup>15</sup>

As argued by Dagan, both in the book and elsewhere, this analysis can be applied to private law more generally. Indeed, he has argued that 'appreciating private law's autonomy-enhancing *telos* as a central, if not exclusive, design principle is key to enabling private law to achieve its promise'.<sup>16</sup> This recognition, and indeed celebration, of the power-conferring aspects of property law, and private law more generally, is to be welcomed.<sup>17</sup> It does give rise, however, to two, linked concerns: the first will be examined in this section, and the second in section 2 below.

First, does it follow that property law must be seen as *first and foremost* power-conferring? There is a key question as to the analytical priority of, on the one hand, the powers of a holder of property right and, on the other, the duties imposed on strangers by the existence of a property right. On Dagan's view, it seems that, even if the ultimate basis of those powers is 'our foundational duty to respect each other's self-determination',<sup>18</sup> the specific duties owed to, for example, an owner of property are secondary to the powers of that owner. For example, whilst noting that the existence of '[n]onowners' duties ... explain the heavy burden of justifying property', Dagan states that such duties would be:

meaningless in the absence of the owners' legal authority, which is the product of property's power-conferring rules. The role of property's duty-imposing rules is to vindicate that authority and to protect the owners' ability to apply the powers enabled by property. These piggy-backing rules would be pointless in a world that does not recognize property as, essentially, a power-conferring institution.<sup>19</sup>

In other words, whilst the duties that property law imposes on others impose, in turn, the 'heavy' justificatory burden on property law, it is the autonomy-enhancing value of the powers that property law confers which discharge that burden.

It is possible to agree, as I do, that the powers of an owner are crucial in understanding and justifying property,<sup>20</sup> without regarding those powers as necessarily taking

<sup>13</sup> *Ibid*, 63.

<sup>14</sup> *Ibid*, 15.

<sup>15</sup> *Ibid*, 6.

<sup>16</sup> H Dagan, 'Autonomy and Pluralism in Private Law' in A Gold et al (eds) *The Oxford Handbook of the New Private Law* (OUP, 2021) 177, 193.

<sup>17</sup> See too e.g. B McFarlane, 'Equity and the Justification of Private Rights' in S Degeling et al (eds) *Justifying Private Rights* (Hart, 2020) 221, 243.

<sup>18</sup> *Ibid*, 3: see text at n 2 above.

<sup>19</sup> *Ibid*, 63.

<sup>20</sup> Note too that the importance of the powers conferred by property rights has also been recognised in analysis of the trust: see e.g. Penner, 'The (True) Nature of a Beneficiary's Equitable Proprietary Interest

analytical precedence over those specific duties. Such a view finds some support in existing legal doctrine: in *Yearworth v North Bristol NHS Trust*,<sup>21</sup> for example, the claimants, providers of sperm that had been carelessly stored by the defendants, had, under the governing statutory regime, only very limited powers in relation to that resource. In regarding the claimants as having property rights, therefore, the Court of Appeal focussed instead on the duties owed to the claimants by strangers who might interfere with the resource, even though there were no relevant powers, promoting the autonomy of the claimants, on which such duties could ‘piggy-back’. The position of T, a party holding, for example, a freehold, on trust also provides an interesting example—T has a property right, and duties of non-interference are owed to T, even though the powers held by T are precisely *not* to be used in T’s own interests.

Conversely, there are cases where a party does have a large degree of authority over a resource without generally being regarded as holding a property right—a holder of a power of appointment, for example, has such authority but, in the absence of duties owed to that holder by strangers, would not usually be seen as owner of the relevant resource;<sup>22</sup> an agent can similarly have extensive authority to dispose of a resource whilst ownership remains in the principal, to whom strangers owe their duties of non-interference. Certainly, under existing doctrine (although of course it is perfectly open to Dagan to argue that his analysis shows why such doctrine should be changed), such duties do not coincide with all cases in which a claimant has *some* authority over resources which is conducive to self-authorship.<sup>23</sup> Such duties may be denied even in favour of a party who has practical authority in relation to a resource, but as a result of a contract<sup>24</sup> or a trust,<sup>25</sup> rather than a legal property right.

Certainly, to understand the powers held by an owner, the duties owed to that party must be considered. For example, the power to license another to make use of a resource involves the power to release that party from a duty otherwise owed, and a power to alienate property is additionally a power to alter the duties of third parties, so they are now owed to the transferee rather than the transferor. It might be said that these two powers (whilst identified by Penner as forming two distinct parts of

Under a Trust’ (2014) 27 Can J L & Juris 473, 474–76, where T holds a freehold of land, for example, on trust for B, it is generally the powers held by T as owner which are of most practical benefit to B.

<sup>21</sup> [2009] EWCA Civ 37, [2010] QB 1.

<sup>22</sup> Certainly where the power is one which the holder is not permitted to exercise in her own favour. For discussion of the position where the holder is so permitted, see e.g. *Tasarruf Mevduatı Sigorta Fonu v Merrill Lynch Bank and Trust Co (Cayman) Ltd* [2012] 1 WLR 1721 (PC): in that case, a non-fiduciary power to revoke a trust was seen as ‘tantamount to ownership’.

<sup>23</sup> See LTP p.60: ‘property is above all about having some *authority* over resources, which is conducive to self-authorship’.

<sup>24</sup> See e.g. *Cattle v Stockton Waterworks Co* (1874–5) 10 LR 453; *Robins Dry Dock & Repair Co v Flint* 275 US 303 (1927).

<sup>25</sup> See e.g. *Leigh & Sullivan Ltd. v Aliakmon Shipping Co. Ltd. (The Aliakmon)* [1986] AC 785 (HL). See too Restatement (Third) Of Trusts §§ 107–08 (2003); *Slaughter v Swicegood* 162 N.C. App. 457, 464 (2004): ‘The common law rule provides that any injury to the property placed in trust may only be redressed by the trustee.’ Contrast *Shell UK Ltd v Total UK Ltd* [2011] QB 86.

the 'tripartite' structure of ownership<sup>26</sup>) are less significant than the simple liberty to make use of a resource, but as a mere absence of a duty, such a liberty is not something which the legal system as such provides and so is not an authority conferred by the institution of property.<sup>27</sup> Of course, by imposing duties of non-interference, property law does play a vital role in protecting the enjoyment of such practical powers, but the extent to which those duties 'piggy-back' on the powers is debatable.

Moreover, there may be in some cases a further reason for giving priority to duties owed by others rather than the powers of owners. In some cases at least, developments in private law doctrine which begin as primarily duty-imposing led over time to the recognition of important power-conferring rules. So, for example, the recognition that T will be under a duty to B where T acquires a right from S having consented to hold that right on trust for B led over time to S's ability to set up a trust in B's favour simply by declaring that S holds a particular right on trust for B.<sup>28</sup> Similarly, an initial decision that C will be under a duty to B if C acquires land from A with knowledge of a covenant made between A and B as to the permissible use of that land<sup>29</sup> developed over time, and with important restrictions, into a power of A and B to impose limits on the use of land that are *prima facie* binding on later owners, even without notice.<sup>30</sup>

## 2. DIVERSITY

The second concern arising from the prioritising of the autonomy-enhancing aspects of property is as to the continuity between property law and private law more generally, and whether Dagan's account sufficiently recognises the distinctiveness of property. The book makes an important point about diversity *within* property law, and the different types of property rights that may exist, rightly arguing that it would be a mistake to overlook such differences. It is clear, for example, that there are significant differences between the content of an easement and of a freehold or lease, and that an attempt to claim an easement which confers a right to exclusive possession of land will fail.<sup>31</sup> Dagan often makes reference to the different types of property rights recognised by the current law in order to rebut a 'monist' view of property, which prioritises an owner's general right of exclusion in its characterisation of property law. Intriguingly, this diversity in 'property types' is seen as not inconsistent with and, indeed, as evidence for the *single* underlying aim of property law as enhancing autonomy: the wide set of

<sup>26</sup> J Penner, *Property Rights: A Re-Examination* (OUP, 2020) ch 1.

<sup>27</sup> For example, even if X does not have a property right in a thing, X still has a liberty as against very many others (usually, all parties *other* than those with a property right in that thing) to use that thing: see S Douglas and B McFarlane, 'Defining Property Rights' in J Penner & H Smith (eds) *Philosophical Foundations of Property Law* (OUP, 2013).

<sup>28</sup> See S Agnew and S Douglas, 'Self-Declarations of Trust' (2019) 135 LQR 67.

<sup>29</sup> See e.g. *Tulk v Moxhay* (1848) 2 Ph 774.

<sup>30</sup> See e.g. *re Nisbet & Potts' Contract* [1906] 1 Ch 386 (CA). For discussion of the process, see e.g. B McFarlane, 'Tulk v Moxhay (1848)' in C Mitchell & P Mitchell (eds) *Landmark Cases in Equity* (Hart, 2012).

<sup>31</sup> See e.g. *Copeland v Greenhalf* [1952] Ch 488.

different legal relations entailed by different types of property ‘facilitates the coexistence of a diverse set of social institutions crucial for our autonomy’.<sup>32</sup>

The question here, however, is whether this view sufficiently distinguishes property from other legal concepts. In other words, perhaps there is a greater diversity, not at the level of property types, but at the more abstract level of categories within private law. Dagan is clearly aware of this concern and deals with it directly in relation to the ‘notable continuities between property and contract’, stating that the ‘facilitative role of property law’ may thus be problematic ‘for those who insist that property and contract are sharply and qualitatively distinct categories’.<sup>33</sup> It is argued however that ‘such continuity need not threaten a more modest view, which justifies the distinction between property and contract as categories of thinking by reference to the relative abundance and indefiniteness of property’s duty-holders’<sup>34</sup> and ‘[w]hilst property facilitates planning by securing stability as per people’s authority over resources, contract does so by allowing them to count on the future contribution of others’.<sup>35</sup> I agree that there are important similarities between contract and property. However, just as I would hesitate to see powers as taking analytical priority to duties, equally here I worry that there is a risk of losing the distinctiveness of property. These concerns are closely linked: if one wishes to take seriously the distinction made by legal doctrine between property and contract, this requires a clear distinction between property rights and personal rights, which in turn depends on an analysis of the different duties imposed by those distinct types of right.

Dagan links the continuity between contract and property to ‘Hohfeld’s insistence, which goes even further back to Kant’s doctrine of private rights, that property is relational through and through’,<sup>36</sup> and, discussing the analysis of Henry Smith,<sup>37</sup> considers how that relational analysis sits with the view that property is better seen as ‘first and foremost the law of things’. Dagan argues that any tension between the importance of the thing in property law and a relational view of the subject can be resolved. He does this by pointing to Smith’s recognition that the ‘thing’ to which property relates can be intangible as well as tangible, and thus constructed by law, and by arguing that, whilst the nature of the particular thing in question has some role in determining the content of a party’s rights, that role is ‘secondary’ and does not ‘challenge the primacy of property’s relationality’.<sup>38</sup>

In my view, it is right to say that the focus on a thing is compatible with the relationality of property. However, that is true even if we limit our analysis to physical things. This can be seen most easily by, again, focussing on the duties that are

<sup>32</sup> *LTP*, 22.

<sup>33</sup> *LTP*, 25.

<sup>34</sup> *Ibid.* The notion of a ‘category of thinking’ is a useful one, which I will return to below.

<sup>35</sup> *Ibid.*, 26.

<sup>36</sup> *Ibid.*, 27.

<sup>37</sup> See e.g. H Smith, ‘Property as the Law of Things’ (2012) 125 *Harv L Rev* 1691, ‘The Thing About Exclusion’ (2014) 3 *Brigham-Kanner Property Rights Conference J* 95, 117.

<sup>38</sup> *LTP*, 29.

characteristic of property law. On a Hohfeldian analysis, if, for example, B has ownership of a car, then this means, *inter alia*, that, *prima facie* at least, A (like other strangers) is under a duty to B—B thus has a claim-right against A. B's ownership of the car is, in that sense at least, relational. However, we also have to examine the content of A's duty to B under the current law. In such a case, it seems, the physical thing to which B's right relates is crucial in defining the content of A's duty.<sup>39</sup> Interference with that physical thing can lead to A's being under a liability to pay substantial damages to B, even if no planned use of the thing by B has been interfered with;<sup>40</sup> conversely, where a planned use by B has been thwarted by A's conduct, but there has been no interference with the physical thing, then there may have been no breach of that duty by A.<sup>41</sup> Indeed, the specific means by which the State interferes with B's planned use of B's property is also significant when considering the takings jurisprudence discussed in the final chapter of *A Liberal Theory of Property*: in *Horne v Department of Agriculture*, for example, it was stated that it would therefore be 'inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a regulatory taking and vice versa'.<sup>42</sup>

Where B's property right is a right to, or in relation to, a physical thing, that thing is thus crucial in defining the duties owed by others to B. As Smith has noted, using the physical thing as a means to define the duties of others can be vital to the form of property rights, as it 'allows property rights to be simple enough and impersonal enough to reach an *in rem* set of duty bearers and to be more easily transferable from one party to another'.<sup>43</sup> Dagan, accepting that 'Smith's most important insights can, and indeed should be embraced by the liberal theory of property',<sup>44</sup> recognises this point and also that the 'nature of the resources subject to property rights does make a difference'.<sup>45</sup> Further, Dagan's analysis, which emphasises the diversity of property types, can deal well with an important danger, as it provides a means to resist the argument made by B, a holder of an intangible asset, that her right must have the *same* effect on third parties as the right of an owner of a physical thing.<sup>46</sup> As shown by the current law, the fact that B in such a case can describe her right as 'property' does not, by itself,

<sup>39</sup> See S Douglas and B McFarlane, 'Defining Property Rights' (n 27 above).

<sup>40</sup> See e.g. *Owners of the S.S. Mediana v Owners of the Lightship "Comet" (The Mediana)* [1900] AC 113 (HL) at 117; *Mountain View Coach Lines Inc. v Storms* 102 AD 2d 663, 476 NYS 2d 918 (1984); Restatement (Second) Of Torts § 931(a), comment b. (Am. Law. Inst. 1965). Note too *Bocardo v Star Energy* (n 9), [35].

<sup>41</sup> *Club Cruise Entertainment and Travelling Services Europe BV v Department for Transport (The Van Gogh)* [2008] EWHC (Comm) 2794, [2008] 2 CLC 708.

<sup>42</sup> *Horne v US Department of Agriculture* (2015) 135 S Ct 2419, 2428, per Roberts CJ, citing *Tahoe-Sierra Preservation Council Inc v Tahoe Regional Planning Agency* (2002) 535 US 302, 323.

<sup>43</sup> H Smith, 'The Thing about Exclusion' (2014) 3 Brigham-Janner Prop Rights Conf J 95, 113 (cited in *LTP* at p. 28).

<sup>44</sup> *LTP*, 28.

<sup>45</sup> *Ibid*, 29.

<sup>46</sup> For discussion of the danger of this form of argument, see B McFarlane and S Douglas, 'Property, Analogy, and Variety' (2022) 42 OJLS forthcoming: <https://doi.org/10.1093/ojls/gqaa043>.



justify imposing the same strict duties of non-interference on strangers as arise when a party has ownership of a physical thing.<sup>47</sup> One way of explaining this feature of the law is to adopt Dagan's view of property as a 'category of thinking' rather than a category 'for decision', on the basis that:<sup>48</sup>

An autonomy-based theory of property that appreciates the significance of property's deep heterogeneity does imply that the normative concerns underlying property types are so diverse that simply labelling something as 'property' is not enough to justify any concrete decision, result, or reform consequence. In other words, we cannot justify treating property as a *category for deciding*. But this does not eliminate the significance of property as a doctrinal category because, while types differ in their normative concerns, there are enough similarities between them to justify viewing 'property' as a useful *category for thinking*.

A crucial question for a reader of the book, therefore, is whether she will be content with regarding property in this way, or whether instead she would prefer to have a concept of property which can be used, by judges and others, precisely to decide on practical questions such as whether a defendant has breached a duty to the claimant. It is important to note here that, the book, as recognised therein,<sup>49</sup> takes some time to approach a definition of property, as opposed to a discussion of its justification and functions. The key idea is that property operates to grant authority over resources, such resources being external to the holder of the authority. Property is thus understood as a 'an umbrella for a set of autonomy-enhancing types'.<sup>50</sup>

It is true that any attempt to include the broad set of rights that are generally said to fall within property law (e.g. intellectual property rights, contractual choses in action such as bank accounts, and rights arising under trusts) requires a definition of property which goes well beyond physical things. Nonetheless, three points can be made. First, it may be that, given the formal differences in the operation of such rights, for example in relation to third party effect, and the different grounds on which they can arise, it is unduly optimistic to think that they might share the same substantive justification. Second, it may be that a definition which includes such rights also includes *any* right that does not relate to its holder's own person, as the right itself can be seen as a resource over which the holder has authority. This means, for example, that the continuities identified in the book between contract and property may stem from the broad definition of property, and may overlook the distinct nature of those property rights that do in fact relate to a physical thing. Third, it is very difficult in practice to prevent judges from regarding property as a category for deciding, and thus, for example, finding, contrary to previous authority, that, because a beneficiary of a trust is the "'real" owner' of the physical thing to which the trust relates, that beneficiary must

<sup>47</sup> See e.g. *OBG Ltd v Allan* [2008] 1 AC 1.

<sup>48</sup> *LTP*, 23.

<sup>49</sup> *LTP*, 27: 'we have not yet addressed what exactly is property to begin with'.

<sup>50</sup> *LTP*, 35.

be able to recover economic loss caused to it as a result of the defendant's careless interference with that thing.<sup>51</sup>

Indeed, whilst Dagan rightly recognises the interdependence of form and substance in property law,<sup>52</sup> it can be argued that, by focussing on the broader concept of private authority, the analysis may miss some formal differences which, in fact, contribute to the diversity within the law, and can thus play an important role in enhancing self-determination. For example, reference is made to the role that trusts can play in allowing a settlor to 'engage in many type of complicated carving up of interests'<sup>53</sup> and thus to avoid some of the limits imposed by the *numerus clausus* principle (to be discussed in section 3 below). However, it can instead be argued that the trust (and other means of creating equitable interests) does not simply provide a further means of allowing a settlor to confer property rights on beneficiaries, but rather allows a holder of a right to create a quite different form of right, with distinct forms of third party effect.<sup>54</sup> The argument here would be that the diversity of legal relations recognised by private law extends beyond the traditional divide between personal rights on the one hand and property rights on the other. On that argument, the autonomy-enhancing effects of the power to create a trust are significant indeed, qualitative rather than quantitative, as that power allows a settlor not simply to set up a further type of property right, but rather to create a wholly distinct type of legal relation, transcending the standard divide between property rights and personal rights.

### 3. LIMITS

It might be objected that the point just made on the nature of equitable interests is largely a semantic one—if it is accepted that the law enhances the autonomy of a holder of a right by allowing her the opportunity to create such rights, does it matter whether this power is seen as falling inside or outside the scope of property law? Nonetheless, in *A Liberal Theory of Property*, such questions of demarcation are, rightly, taken very seriously. Indeed, a key claim of the book is that certain limits on the authority of owners are best understood as internal workings-out of, and not external constraints

<sup>51</sup> See *Shell UK Ltd v Total UK Ltd* [2011] QB 86 [132]: an analysis which sees the beneficiary as the 'real' owner may find some support where property is used, in Dagan's terms, as a 'category for thinking', but in *Shell* the court then proceeded to attribute immediate legal consequences to the availability of that analysis, thus using it as a category for deciding. For more detailed consideration of the application of Dagan's analysis to the trust, see H Dagan and I Samet, 'Express Trust: The Dark Horse of the Liberal Property Regime' in S Degeling et al (eds) *Philosophical Foundations of the Law of Trusts* (OUP, forthcoming).

<sup>52</sup> *LTP*, 31–35.

<sup>53</sup> *LTP*, 112, quoting H Smith, 'Standardization in Property Law' in K Ayotte and H Smith (eds) *Research Handbook on the Economics of Property Law* (2011) 148, 153.

<sup>54</sup> See e.g. the 'rights against rights' analysis of equitable interests discussed in e.g. B McFarlane, *The Structure of Property Law* (Hart, 2008) and B McFarlane & R Stevens, 'The Nature of Equitable Property' (2010) *J Eq L*.

on, the logic of property. For example, as can be seen in the book's treatment of the courts' approaches in *Shelly v Kraemer*<sup>55</sup> and *State v Shack*,<sup>56</sup> Dagan rejects the view that concerns which are unrelated to maintaining an owner's relational independence can only operate as external constraints on property law or on private law. So, for example, a racially restrictive covenant should be 'deemed void per se', rather than merely unenforceable by a court, as an 'obvious violation of liberal property's relational justice'.<sup>57</sup> An important claim in the book is that such reforms would make property law better at being property, not simply better at being liberal.<sup>58</sup>

The question of whether particular rules are internal or external to property law is also important in relation to the different 'property types' identified in the book. Examples such as 'condos, co-ops, common-interest communities, joint tenancies, leaseholds and trusts' are given to demonstrate the heterogeneous nature of property law and the 'existing inventory of land-ownership'.<sup>59</sup> It is clear of course that the specific rights enjoyed by, say, a leaseholder, a beneficiary of a trust, and a joint tenant of a freehold all have a different content, and that such rights are structured through different 'governance mechanisms'.<sup>60</sup> Such differences are seen as internal to property law, and thus as something that a satisfactory theory of property law should explain. However, it could be argued, developing Maitland's analysis, and consistently with Smith's work on modularity, that the interest of such structures from a property law perspective lies not only in the diversity of the rights that those *inside* the arrangement have as against each other, but also in the general similarity of their effect on *external* third parties. This is certainly the case when considering trusts. For example, in emphasising the practical importance of unincorporated bodies in different walks of English life, from Wesleyan chapels to the Jockey Club, Maitland argued that the trust provided a 'hard, exterior shell for whatever lies within'.<sup>61</sup> As long as that 'external wall' remains in good repair, so that the trustees endowed with title can protect the relevant assets from third parties, and mechanisms such as overreaching are in place to protect third parties where the trustees act beyond the authority given to them under those internal arrangements, property law has only a limited concern with the precise nature of the rights of individuals within the organisation. On a view, then, that sees the impact of a right on strangers as key to whether it should be characterised as property, the

<sup>55</sup> (1948) 33 US 1.

<sup>56</sup> (1977) 58 NJ 297, 277 A.2d 369.

<sup>57</sup> *Ibid.*, 139.

<sup>58</sup> This does not mean, of course, that the burden of showing property law's legitimacy can be met *only* by property law, or by private law: 'some division of labor, which delegates parts of this weighty mission to public law, is not only unobjectionable but rather required if property's legitimacy is to be upheld' (*LTP*, 39).

<sup>59</sup> *LTP*, 6.

<sup>60</sup> *Ibid.*

<sup>61</sup> F Maitland, 'Trust and Corporation' reprinted in D Runciman and M Ryan (eds) *State, Trust & Corporation* (CUP, 2003) at 105.

diversity of possible entitlements within a particular structure does not, by itself, demonstrate diversity within property law.

As acknowledged in the book, an important challenge for its analysis is provided by a limit on the autonomy-enhancing aspects of property law: the *numerus clausus* principle. Dagan usefully shows how standardisation within specific property types is compatible with a liberal theory of property;<sup>62</sup> the difficulty however comes if there is no avenue for a party whose preferred form of legal relation is not provided by that list of permitted property types. Property law, it is argued, should therefore 'also include *one* residual category for private arrangements in addition to the state-sponsored property types'.<sup>63</sup> This discomfort with the *numerus clausus* principle is surprising, however, if the duty-imposing aspects of property rights are borne in mind, as, on a liberal theory, the principle can then be related to relational justice. Whilst property may have a power-conferring role, there is no obvious reason why an agreement between A, an owner of property, and B should, by itself, impose an immediate duty on third parties. The 'hostility of *numerus clausus* to tailor-made property rights',<sup>64</sup> as exemplified by a case such as *Hill v Tupper*,<sup>65</sup> is unsurprising if it is emphasised that the key feature of such a property right is to impose a new *prima facie* duty on the rest of the world to B, such that a liberty which X formerly held against B is lost. Indeed, third parties holding such liberties include those with property rights in other property (such as Mr Tupper), and so limiting A's power to confer property rights on B protects the autonomy of owners of other property.<sup>66</sup> If, as stated in the book, respect for the self-determination of others is an internal limit on the powers of an owner, then the *numerus clausus* is not an obstacle to a liberal theory of property: quite the contrary.

#### DISCLOSURE STATEMENT

No potential conflict of interest was reported by the author(s).

<sup>62</sup> LTP, 112, 150–151.

<sup>63</sup> LTP, 112.

<sup>64</sup> *Ibid.*

<sup>65</sup> (1863) 2 H & C 121.

<sup>66</sup> I am grateful to Ernesto Vargas Weil for pointing this out to me.