

Manuscript version: Author's Accepted Manuscript

The version presented in WRAP is the author's accepted manuscript and may differ from the published version or Version of Record.

Persistent WRAP URL:

<http://wrap.warwick.ac.uk/163699>

How to cite:

Please refer to published version for the most recent bibliographic citation information.

Copyright and reuse:

The Warwick Research Archive Portal (WRAP) makes this work by researchers of the University of Warwick available open access under the following conditions.

Copyright © and all moral rights to the version of the paper presented here belong to the individual author(s) and/or other copyright owners. To the extent reasonable and practicable the material made available in WRAP has been checked for eligibility before being made available.

Copies of full items can be used for personal research or study, educational, or not-for-profit purposes without prior permission or charge. Provided that the authors, title and full bibliographic details are credited, a hyperlink and/or URL is given for the original metadata page and the content is not changed in any way.

Publisher's statement:

Please refer to the repository item page, publisher's statement section, for further information.

For more information, please contact the WRAP Team at: wrap@warwick.ac.uk.

Crucial Options: Dagan on Self-determination and Structural Pluralism

Katy Wells

Hanoch Dagan's *A Liberal Theory of Property* sets out a theory of property with autonomy, or self-determination, at its core. Appealing to this liberal value, Dagan contends, is the key to surmounting the justificatory challenge presented by the institution of property. Grounding property in autonomy also, he argues, yields some important conclusions for the re-shaping of current property law. One of these conclusions, the structural pluralism proposal, is the focus of this response.

A Liberal Theory of Property is a rich, complex and powerful work, and one that will be of interest and significance not just for legal theorists, but also for liberal political philosophers. For the former group, it resuscitates the liberal perspective on property, something neglected in contemporary discussions of property law. For the latter, it offers a detailed vision of what a property regime might look like, given an underpinning commitment to the importance of individual self-determination.

In the chapter addressed here, "Property's Structural Pluralism", Dagan defends the titular "structural pluralism" as both a descriptive and a normative claim. As a matter of fact, he argues, property law is structurally pluralistic, that is, it contains a diverse range of different property types. Here, Dagan challenges those he calls property monists, who hold that all forms of property can be understood with reference to some core feature, such as exclusion. For Dagan, however, it is not just the case that property law is structurally pluralistic, it also should be: it follows from a commitment to autonomy that property law should feature a wide range of different types of property.

In the present comment, I focus on Dagan's normative, rather than his conceptual, claims. There are several aspects of Dagan's argument, here, that invite discussion. One of these is the demanding nature of his vision of structural pluralism, in terms of what it requires of the state. The second is his claim that liberal property law must not only contain a diverse range of property types, but that it must contain certain property types, certain "crucial" options, notably "strong" or "Blackstonian" ownership. Here, I raise questions about Dagan's argument for the inclusion of this "crucial" option. I conclude the comment with a somewhat broader point about "crucial" property options we would expect a liberal state to include.

Property, Dagan tells us, stands in need of justification. When we hold property, we have power over others.¹ Others must comply with our view of what is to be done with this property. It is the power of owners of property over others – or, to put things another way, others’ vulnerability given the power of property owners – that stands in need of justification. Dagan argues that the source of justification is to be found in the liberal value of autonomy, or self-determination. At bottom, Dagan argues, property serves autonomy, and this is what justifies the institution. For Dagan, autonomy or self-determination are complex ideas, having a number of associated “intrinsic and instrumental values”, including independence (on which more below) and community.² However, his central statements characterising autonomy draw on familiar Rawlsian language. Autonomy, he argues, is the right “to have, to revise, and rationally to pursue a conception of the good.”³

Much of *A Liberal Theory of Property* seeks to spell out the implications, for property law, of grounding the institution of property on autonomy. In Chapter 4, we find Dagan spelling out what he takes to be one major implication for property law of grounding the institution of property on autonomy: structural pluralism.

Many contemporary theorists of property are taken by Dagan to sign up to what he calls *property monism*.⁴ Here, all forms of property can be understood with reference to some core feature. Dagan’s focus is, in particular, on a dominant variety of monism, which understands property with reference to a

¹ Dagan, *A Liberal Theory of Property* (Cambridge: Cambridge University Press), pp. 60-62.

² *Ibid.*, p. 49.

³ John Rawls, *Justice as Fairness: A restatement* (2001), p. 19. Cited in Dagan, *A Liberal Theory of Property*, p. 36. Despite the use of Rawlsian language, we should be careful not to see Dagan as a Rawlsian political liberal. Instead, it seems that he is committed to a version of comprehensive liberalism, that is, a liberalism that is committed to certain ethical, religious, or metaphysical claims. In Dagan’s case, as with many comprehensive liberals, the commitment is to the intrinsic value of autonomy. We might plausibly view Dagan as what Jonathan Quong calls a *comprehensive antiperfectionist*. On a comprehensive antiperfectionist view, while the state can act to ensure the basic pre-conditions of autonomy (understood as intrinsically valuable) are in place, it cannot act beyond this to promote or discourage any specific ways of life on the basis that these ways of life are good for, or bad for, people. Quong, *Liberalism Without Perfection* (Oxford University Press, 2010), p. 19. This seems to fit with Dagan’s view, since he wants to resist the idea that his view has implications that a liberal neutralist – someone who accepts that the state ought to be neutral between different conceptions of the good life – might find concerning. Thus, he argues that on his account, “an autonomy-based property law is committed to empowering individuals to form and pursue their own conception of the good life as long as it does not disparage others. An autonomy-based property law, therefore, is not vulnerable to any neutralist concerns about unequal treatment of different conceptions of the good.” See Dagan, pp. 77-78. For concerns about comprehensive antiperfectionism, also see Quong, pp. 21-26.

⁴ Dagan, p. 19.

core idea of exclusion.⁵ To have property in some thing, on this view, is to have a right to exclude others from that thing, and for others to have a duty to exclude themselves.⁶ Dagan, however, argues that property monism is misguided, ignoring the reality of property law. In property law we find, instead, *heterogeneity* or, alternatively, *structural pluralism*: a “variety of distinctive property types governed by divergent animating principles.”⁷ Some of property law protects rights of exclusion, but much is also concerned with helping to ensure co-operation in cases where different parties have an interest in one thing⁸ – law governing marital property is just one example of this.

That there is structural pluralism in property law is, Dagan argues, vital: “to be genuinely liberal”, he argues, “a property law *must* offer a diverse range of property types.”⁹ To get us from self-determination to structural pluralism as a normative claim, Dagan draws on Raz, arguing that the self-determining individual must be offered an appropriate range of options from which to choose, when it comes to their plan of life.¹⁰ Dagan argues that we should take this claim seriously in the domain of property. The self-determining individual should be faced with a range of *property options* from which they can choose, in carrying out their plan of life. A diverse range of property types, we might think, allows liberal citizens to pursue a wide range of different plans and projects, since different property types can be associated with, and will allow liberal citizens to pursue, different kinds of projects and aims. In addition, not just any range will do. Dagan defends what he calls “intra-sphere multiplicity”, that is, he holds that within the important domains of an individual’s life (here, he mentions work, home, and intimacy) there should be a range of options available.¹¹

Nor is it sufficient for a property law to offer the appropriate range of already-established property types. Instead, Dagan argues, amongst other things, that a liberal state should seek to discover and establish new property types in law, and that liberal citizens should be able to completely depart from

⁵ This view is particularly associated with James Penner and the work of Merrill & Smith. See J.E. Penner, “The ‘Bundle of Rights’ Picture of Property”, 43 UCLA Law Review (1997), 711; Thomas W. Merrill & Henry E. Smith, “The Morality of Property”, 48:5 Wm & Mary Law Review (2007), 1849; Henry E. Smith, “Property and the Law of Things”, 125 Harv. L. Review, 1691.

⁶ Dagan, *A Liberal Theory of Property*, p. 80.

⁷ *Ibid.*, p. 89.

⁸ *Ibid.*, p. 82.

⁹ *Ibid.*, p. 79.

¹⁰ *Ibid.*, p. 90-91.

¹¹ *Ibid.*, p. 92.

the property types offered to them by law, and invent their own, based on their “particular needs and circumstances”.¹²

It certainly seems plausible that a liberal property regime with autonomy at its core ought to offer citizens a range of different ways of gaining access to goods. More controversial, perhaps, is likely to be Dagan’s insistence that the state is required to do much more than simply enshrine a reasonable range of different property types in law, but is also required to seek out and establish new property types and provide the appropriate legal framework for individuals to successfully invent their own. Apart from the fact that these proposals clash with the dominant understanding of the *numerous clausus* principle,¹³ it is a demanding vision of the state’s responsibilities in this domain, which seems to go beyond the provision of the kind of adequate range of options strictly required by a commitment to individual self-determination. A state’s merely enshrining a reasonable range of property types without, for instance, allowing citizens to invent their own property types would, it might be countered, still facilitate citizens’ pursuit of a wide range different plans and projects, and this is all we might reasonably expect of the state.¹⁴ Consider, for instance, the range of different plans and projects that flourish in contemporary liberal societies, societies whose property regimes undoubtedly fall short of what Dagan seeks to defend. Dagan is concerned that if we do not allow people to invent their own forms of property, then citizens will not be free to “reject... at least some of the values recommended by the state”.¹⁵ But in providing citizens with an adequate range of property options that allow for a diversity of different plans and projects to flourish, it is hard to see the state as “recommending” any particular value or values in a way that we would view as troubling.

Not any range will do, for Dagan, for a second reason, and this is that, in a liberal property regime, there is at least one property option that is a “*crucial* option”,¹⁶ that must be present, and this is what Dagan variously discusses under the heading of “Blackstonian ownership”, “strong ownership” and the fee simple absolute.¹⁷ Dagan denies that we must be able to have strong or Blackstonian ownership

¹² Ibid., p. 112.

¹³ Dagan, pp. 110-113.

¹⁴ Thanks to the participants of the MANCEPT “Housing in Crisis” panel for a discussion of this point.

¹⁵ Dagan, p. 112.

¹⁶ Ibid., p. 101.

¹⁷ Ibid.

of all types of resource (indeed, he is concerned to reject the idea that we must be able to have it with respect to the means of production), but argues that with at least some it is imperative that we should.

Now, claiming that a liberal society ought to allow people to have “strong ownership” over at least some things may not seem controversial. Indeed, it is a claim made in central statements of liberalism, as Dagan himself notes.¹⁸ However, the way Dagan goes about justifying this claim does look to have some controversial implications.

To see this, we need to look at one central claim Dagan makes in justification of the inclusion of Blackstonian or strong ownership as a “crucial” option in liberal property law. This is the claim that

“By shielding individuals from the claims of others and from the power of public authority, this particular property type guarantees a relatively untouchable private sphere that is a prerequisite to personal development and autonomy.”¹⁹

Now, if the “relatively untouchable private sphere” guaranteed by Blackstonian or strong ownership is “a prerequisite to personal development and autonomy,” this means that those who lack such a private sphere also lack a prerequisite to personal development and autonomy. This produces a strong claim about strong or Blackstonian ownership: we can’t achieve personal development or autonomy without it.

This, however, is a claim about which we might be sceptical. Consider, for instance, one obvious candidate for a type of resource we ought to be able to have strong or Blackstonian ownership with respect to: housing. Dagan’s discussion of the importance of an “untouchable private sphere” as well as his invocation of property law’s privileging of home-ownership in the context of this discussion²⁰ suggest that he is also thinking of housing, under this heading. If we take Dagan’s claim regarding strong or

¹⁸ In other work I have discussed Rawls’s claim that there is a basic right to own certain kinds of resource, and cast doubt on whether this claim can be satisfactorily established. Since this discussion considered, in part, whether owning housing (or personal property) was necessary for the development and exercise of a capacity for a conception of the good I make some similar points in the present comment, and also draw on a second paper discussing a right to housing. See Wells, “The Right to Personal Property”, *Politics, Philosophy & Economics* 15:4 (2016), pp. 358–78 and Wells, “The Right to Housing”, *Political Studies* 67:2 (2019), pp. 406–421.

¹⁹ Dagan, p. 101.

²⁰ *Ibid.*, p. 100.

Blackstonian ownership and insert housing as our candidate resource, we get the following kind of claim: we can't achieve personal development or autonomy without owning our own home.

This is a controversial claim, and one that has important bearing on present-day debates around housing. Many people in the present day rent their primary accommodation, in more or less palatable rental markets.²¹ Many in poorly regulated and expensive rental markets in the present day are, undeniably, miserable.²² However, from prominent voices in the social sciences, especially in the UK, we find a robust rejection of the idea that expanding home ownership – a policy pursued vigorously by some governments – is the right solution.²³ One alternative this literature offers is more *state* housing, taking the form of long-term, secure rental accommodation.²⁴ However, if it were true that we couldn't achieve personal development or autonomy without owning our own home, then this casts doubts on these kinds of solutions to housing crises, and supports the alternative of trying to ensure more and more home-ownership, facilitated and secured through mechanisms like shared ownership and home equity insurance, two policies that Dagan discusses elsewhere in the chapter.²⁵ Energetic pursuit of this alternative would surely be justified – indeed, urgently required – if the “relatively untouchable private sphere” furnished by strong ownership, was indeed “a prerequisite to personal development and autonomy”.²⁶

Now, it seems entirely plausibly that having a *home* is something of great importance. Indeed, in elsewhere in the book, Dagan re-frames his argument about Blackstonian or strong ownership as an argument about the home, claiming:

²¹ In other work I have also cast doubt on the necessity of owning one's home for the development of a capacity for a conception of the good. See, in particular, Katy Wells, “The Right to Personal Property”, *Politics, Philosophy & Economics* 15:4 (2016), pp. 358–78 and Katy Wells, “The Right to Housing”, *Political Studies* 67:2 (2019), pp. 406-421.

²² For some anecdotal evidence of this in the UK see the following, one of many articles of its kind: Rhiannon Lucy Coslett, “‘I have sleepless nights’: the looming mental health crisis facing generation rent”, *The Guardian online*, May 9th 2018, available at: <https://www.theguardian.com/society/2018/may/09/mental-health-crisis-generation-rent-millennials-own-home-wellbeing> (accessed, September 8th, 2021).

²³ See, in particular, David Madden and Peter Marcuse, *In Defense of Housing* (London; New York: Verso, 2016).

²⁴ *Ibid.*

²⁵ Dagan, pp. 107-109.

²⁶ We should also note that if we can't achieve personal development or autonomy without exercising strong or Blackstonian ownership with respect to our housing, then this also calls into question housing arrangements such as leasehold property in the UK. Thanks to Yael Lifshitz for drawing my attention to this point.

“The *home* is a bastion of individual independence, shielding us from the demands of others and from the power of public authorities, while providing us with an almost sacrosanct private sphere that is a prerequisite for our personal development and autonomy [my italics].”²⁷

It is widely argued that access to a private sphere and/ or to a stable home space is vital.²⁸ Particularly relevant to Dagan’s arguments in *A Liberal Theory of Property*, perhaps, is a connection sometimes made between the importance of a private sphere and the ability of the individual to perform actions, in the development or exercise of their plan of life, that would attract criticism or mockery.²⁹ A home shields us from what would be unpleasant or intolerable (and therefore inhibiting) in the reactions of others.³⁰ In doing so, the institution of the home allows a wider range of plans and projects to flourish, by allowing individuals to pursue, more freely, their chosen conceptions of the good and by allowing them to experiment with different activities in peace.

But it would be too quick to move from making claims like these about the importance of home to making a claim about the necessity of home-ownership. It seems plausible that a protected private sphere, or stable occupancy of a home-space, could be provided through other means.³¹ One alternative, for instance, is an affordable and well-regulated rental market, that ensures a decent minimum tenancy and robust protections against eviction – or some form of state housing that does the same.³² This kind of housing, we might think, provides the kind of protected private sphere and stable home-space that liberal thinking views, rightly, as so important.

Dagan offers us what seems to be a separate argument for the importance of Blackstonian or strong ownership, and this is an argument about independence. Independence, on Dagan’s account, is a constituent of self-determination, and, as such, is “intrinsically valuable”.³³ Recognition of the

²⁷ Ibid., p. 136.

²⁸ Recent work in political philosophy has focussed on the importance of the stability of occupancy of a particular home space, and of a particular geographic location. See, for instance, Cara Nine, “The Wrong of Displacement: The Home as Extended Mind,” *The Journal of Political Philosophy* 26:2 (2018) pp. 240–257; Anna Stilz, “Occupancy Rights and the Wrong of Removal,” *Philosophy and Public Affairs* 41:4 (2013): 324–356.

²⁹ See, for example, Ruth Gavison, “Privacy and the Limits of Law,” *The Yale Law Journal* 89:3 (1980), pp. 421–471, see in particular pp. 448–455. See also my discussion in Wells, “The Right to Housing”.

³⁰ Ibid.

³¹ Wells, “The Right to Personal Property” and “The Right to Housing”.

³² Wells, “The Right to Housing”.

³³ Dagan, p. 101.

importance of independence requires, Dagan argues, the presence of Blackstonian or strong ownership: the “intrinsic value of independence prescribes that a liberal polity must offer individual natural persons the realm of solitude that such strong ownership represents.”³⁴ However, when it comes to housing, it is again unclear that those who don’t own their housing must, in virtue of this, lack independence, that is, subject to the will of another in a way that we find troubling, and that is inconsistent with self-determination.³⁵ In a rental market that ensures a decent minimum tenancy and robust protections against eviction, the individual’s independence looks to be adequately protected. Indeed, if we consider the many people who live in secure council housing in the UK, or in the secure and well-regulated rental housing of, say, Germany and Austria, we may doubt that they are either are living in a context that fails to provide them with the general conditions for autonomy or personal development, or stand in troubling relations with others, such that their independence is in question.

Dagan’s defence of strong or Blackstonian ownership, then, has controversial implications with respect to one important resource: housing. This leaves the question of whether a robust form of ownership might be vindicated with respect to other categories of resource. More discussion from Dagan on this score would have been welcome.

When Dagan asks what property options are “crucial”, that is, what property options a liberal property law must make available, he asks an important question. His answer to this question focusses on strong or Blackstonian ownership. However, we might ask whether there are *other* crucial property options that must be available. In the closing part of this comment, I very briefly consider, moving somewhat outside the scope of Dagan’s own discussion, an obvious candidate for a property option we are likely to think a just liberal *state* must make available: public property or, more specifically, public space. I consider this candidate because it also suggests that in considering, broadly, the question of property in a liberal context, we will sometimes want to go beyond a commitment to self-determination as an underpinning value for property.

Why might public space be important? There are two reasons, for which I draw on Elizabeth Anderson. One reason to have public space is that it is a place where citizens meet as equals. With

³⁴ Dagan, p. 101.

³⁵ On this see also Christopher Essert, “Property and Homelessness” *Philosophy & Public Affairs* 44:2 (2016), pp. 266-295 and my “The Right to Housing”.

respect, particularly, to parks (although the insight applies to all forms of genuinely public space), Anderson argues: “[t]he fact that all members gain access to the park freely and in the same way prevents invidious distinctions from arising among them, enabling all to meet each other on terms of equality.”³⁶

A second, widely-recognised function of public space is as political space, somewhere where citizens can engage in political activity, such as protest.³⁷ We are likely to think that, to borrow a phrase from Dagan, “to be genuinely liberal”, a society must ensure the presence of public political spaces, as one of the essential conditions of the exercise of the basic political rights and freedoms. In such spaces, citizens engage in political speech, association, and action, such as protest. Anderson notes that one reason why it is important for citizens to be able to engage in political activities in public space is that others, in the space to pursue their own purposes, may be moved to join these activities. Political actors can, in this way, gain support for their endeavours.³⁸

However, to fully understand the importance of citizens being able to exercise these rights and freedoms, we are likely to want to consider them not just as self-determining agents, but as *political* agents. In Rawlsian political philosophy, citizens are taken not just to possess a capacity to form, revise and pursue a conception of the good (broadly, a capacity for self-determination), but a capacity for a sense of justice. This is the capacity “to understand, to apply, and to act from (and not merely in accordance with) the principles of justice” that govern society.³⁹ The importance of the political rights and freedoms is generally understood with reference to this capacity, not the capacity for a conception of the good, that is, not self-determination. To be a political agent, here understood as someone capable of thinking about matters of justice, and acting on the basis of an understanding of what justice requires, citizens, unsurprisingly, need to be able to *act politically*,⁴⁰ and, acting politically, as we normally understand it, includes performing certain kinds of action (gathering, protest) that take place in public spaces. Consideration of the case of public property, then, suggests that liberal thinking about property will

³⁶ Elizabeth Anderson, “The Ethical Limitations of the Market”, *Economics and Philosophy* 6:2 (1990), pp. 179-205, at p. 195.

³⁷ This is also noted by Anderson, “The Ethical Limitations of the Market”.

³⁸ Anderson, “The Ethical Limitations of the Market”, pp. 195-6.

³⁹ Rawls, *Justice as Fairness: A Restatement* (Cambridge, MA and London: Harvard University Press, 2001), pp. 18-19.

⁴⁰ Samuel Freeman, *Rawls* (New York: Routledge, 2007) p. 56.

sometimes need to look beyond the value of self-determination, even if property and self-determination are, undeniably, intimately connected.