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Book Review: Property: Values and Institutions, by Hanoch Dagan

Book Review

PROPERTY: VALUES AND INSTITUTIONS, by Hanoch Dagan¹

BRUCE ZIFF²

THERE ARE TWO FOUNDATIONAL QUESTIONS in the study of property law. First, what core meaning, if any, can we give to the concept of property? Second, on what basis, if any, can we justify this institution? Both of these central concerns are addressed by Hanoch Dagan in *Property: Values and Institutions*. This work deals with property theory in an interesting, engaging, coherent, and insightful fashion. Overall, I learned a great deal from this book.

Dagan's overarching goal is to "challenge the noted contemporary trends of conceptual and normative monism" in property law scholarship.³ He is referring, as I understand it, to the tendency he has identified among contemporary thinkers to argue for comprehensive and holistic answers to the two main questions—the what and why of property. As to the first issue, he rejects the "misleading binarism whereby property is either one monistic form structured around Blackstone's formula of 'sole and despotic dominion,' or a formless bundle of rights."⁴ Property does not fit with Blackstone's idea of property as conferring a robust right of exclusion, but neither is the term so malleable in content as to deprive it of any coherent shape or meaning. Instead, he argues for a middle ground that treats property as a set of institutions that bear a familial resemblance to each other. Similarly, Dagan eschews the notion that property can be justified as serving one main goal (such as economic efficiency) or as a single way of balancing competing objectives. Instead, he argues that property should advance a range of liberal values including efficiency (and, more generally, utility), labour, personhood, community, and distributive justice.⁵

1. (Oxford: Oxford University Press, 2011) 311 pages.

2. Professor of Law, University of Alberta.

3. *Supra* note 1 at xi.

4. *Ibid.*

5. *Ibid* at 11-12.

I accept these two key claims. Property is a tool of human invention, one that has taken shape over centuries within a diverse range of social settings and has been filtered through countless institutional processes, including local custom, legislative edict, and judicial creativity. Therefore, it should not be surprising that the resulting outputs are complex and sometimes messy and conflicting. The competing goals of property have been stapled, glued, and welded together in different ways over time. And, as property laws are human artifacts, it should not be surprising that some principles of property seem flawed or become so as times change.

What Dagan does, he does well. But the would-be reader should be aware of what this book is *not*. First, the book is not a substantially new contribution to our understanding of property law and theory. This is certainly true in at least one straightforward way. There are ten chapters in this work, eight of which are republished articles written by Dagan over more than a decade. The republished papers have already had an impact. In fact, all but one—the newest piece—have amassed impressive citation statistics, as the following data indicate:

- Chapter 1 “The Craft of Property” (2003), cited in 56 articles;
- Chapter 4 “Property and the Public Domain” (2006), cited in 16 articles;
- Chapter 5 “Takings and Distributive Justice” (1999), cited in 73 articles;
- Chapter 6 “Just Compensation, Incentives, and Social Meanings” (2000), cited in 23 articles;
- Chapter 7 “Reimagining Takings Law” (2009), cited in 1 article;
- Chapter 8 “The Liberal Commons” (2001), cited in 114 articles;
- Chapter 9 “Properties of Marriage” (2004), cited in 62 articles;
- Chapter 10 “Conflicts in Property” (2005), cited in 17 articles.⁶

The two new chapters, “Exclusion and Inclusion in Property” and “From Independence and Interdependence to the Pluralism of Property,” are designed to add a measure of cohesion and to cover topics not found in the prior essays. I found these new chapters to be the most interesting parts of the book. (Note, however, that even those two papers are available on the Social Science Research Network.⁷) The literature cited throughout is, with very minor exceptions, what was extant at the times that the individual papers were first published. Since they

6. The computation of citations is based on a search using Westlaw (JLR database), conducted on 20 August 2011.

7. “Exclusion and Inclusion in Property” (2009) online: <<http://www.ssrn.com/abstract=1416580>>; “From Independence and Interdependence to the Pluralism of Property” online: <<http://www.ssrn.com/abstract=1602017>>.

are of varying vintage, the literature is current to differing dates. Unfortunately, we do not know whether any of the articles that cite the chapters can be looped back to support or challenge Dagan's arguments, since none of these appear to be cited.

I am also not convinced that the book offers a particularly fresh vision of the big questions. As to the core meaning of property, a comparable framework for analysis was offered by Thomas Merrill over a decade ago. Merrill described three stylized approaches to defining property, which he labelled (i) single-variable essentialism, with the variable being the right to exclude; (ii) nominalism, where property is what the law says it is; and (iii) multi-variable essentialism, meaning that the core includes the right to exclude coupled with other elements (such as the right to transfer).⁸ As Merrill argued, these three styles show up in the case law. In the 1999 decision of the High Court of Australia in *Yanner v Eaton*,⁹ a case dealing with Aboriginal property rights, all three of these definitional forms can be discerned in the several reasons for judgment. (In the end, a majority adopted a definition that is undeniably nominalist.)

Merrill prefers single-variable essentialism, while Dagan does not. Still, the point here is that there is no false dichotomy in the Merrill taxonomy. The middle-ground, multi-variable essentialism, is fairly akin to Dagan's preferred view that, at best, property defines a set of institutions that share a family resemblance. And even that metaphor, coined in another context by Ludwig Wittgenstein, is not novel. The philosopher Alan Carter employed it over twenty years ago to define property as a jural concept.¹⁰

Likewise, Dagan's conception of property is fairly similar to Stephen Munzer's analysis. In *A Theory of Property*,¹¹ published in 1990, Munzer sought to show that there are three main (but not exclusive) rationales for property: (i) the pursuit of utility and efficiency; (ii) justice and equality; and (iii) desert based on labour. These various goals can lead to conflict at the operational level where hard choices need to be made. Both Dagan and Munzer refer to their approaches as pluralist—and both are. They share the same distrust of one-size-fits-all approaches to the normative bases for property. I do too.¹²

8. "Property and the Right to Exclude" (1998) 77 Neb L Rev 730.

9. (1999) 201 CLR 351 (HCA). A recent online symposium offers some support for Dagan's critique of the bundle-of-rights versus right of exclusion binarism, but it also contains some more refined accounts of the meaning of property. See "Symposium" (2011) 8 Econ Journal Watch, online: <<http://econjwatch.org/>>.

10. *The Philosophical Foundations of Property Rights* (London, UK: Harvester Wheatsheaf, 1989) at 5.

11. (Cambridge, UK: Cambridge University Press, 1990).

12. Bruce Ziff, *Principles of Property Law*, 5th ed (Toronto: Carswell, 2010) at 10-47. See also

As *Property: Values and Institutions* is not a true monograph, we do not receive a thorough explication and analysis of some important supporting concepts. A successful example of such work is the late James Harris's *Property and Justice*.¹³ Rather, this collection is part of an ongoing conversation among scholars in law and other fields about the meaning, purposes, and shape of the law of property. It does not take long to see this: The first substantive chapter, entitled the "Craft of Property," examines the meaning of property by reference to a controversy around the tenancy by the entirety, an ancient form of marital property holding. No longer part of Canadian law, this special type of joint tenancy remains part of the law of property in a handful of American states. This topic would otherwise seem an odd place to start a work of this nature.

Owing to the fact that the book is not a stem-to-stern analysis à la James Harris, it is assumed that the reader understands certain core concepts. Consider, for instance, the term "personhood." Dagan asserts that the advancement of personhood interests is an appropriate aim of the law of property. A book that seeks to methodically convince its reader would, I think, want to explain and to interrogate the meaning of that word. There is, among other things, a wealth of literature on the psychological dimensions of ownership that might help us understand the role that personhood should play in defining property rights.¹⁴ However, to be able to benefit from this work, one must already be conversant with that concept.

There is also no innovative methodological approach in this anthology. It is a theoretical inquiry, which draws on doctrine on a need-to-know basis. Of course, there remains warrant to pursue those meta-questions in the very manner employed in this book. However, to examine questions in this way is destined to increase our understanding only at the margins. The return on the intellectual investment is likely to be minimal. In contrast, there are vast areas of inquiry that remain under-examined. In that latter category I place, pre-eminently, our knowledge of the empirical world of property: what we know about how owners act, what conduct property law actually affects, what effect a given reform of property law has had on the behavior of owners, and so forth.

Consider the chapter on the liberal commons, which is an abbreviated version of an article co-written with Michael Heller. It provides a framework for understanding the optimal structure of co-ownership rules, and it identifies

Nestor Davidson, "Standardization and Pluralism in Property Law" (2008) 61 Vand L Rev 1597 at 1637 *et seq.*

13. (Oxford: Clarendon Press, 1996).

14. See the literature cited in Ziff, *supra* note 12 at 30ff.

weaknesses in the current law. That is a worthwhile endeavour, although parts of the chapter lack sufficient examples and reference points for my taste. I accept the importance of adopting effective and sensible default rules. Nevertheless, I kept asking myself: How many unwieldy co-ownership arrangements are out there? Surely, the typical legal framework for a serious commercial venture is to repose ownership in a corporation in which the sharing is accomplished through (the aptly named) shares. More generally, I wonder whether the current default rules cause grief to many co-owners. My guess is that the overwhelming majority of co-ownership relationships involve two parties, that most of those parties are spouses, that joint tenancy is the most commonly used form, and that accounting problems—even if not fully anticipated at the outset—are largely ironed out based on common sense and expectations as to how the law might respond. I surmise that many such resolutions occur in the course of nuanced and context-laden bargaining. Of course, I don't know whether any of that is true, and neither, it seems, does Dagan.

Dagan's book, then, serves as an illustration of a larger complaint I have about current property law scholarship—a complaint to which I, too, feel vulnerable. There is no robust tradition of empirical study of property law, and that limits what we can hope to accomplish. Dagan uses existing empirical information to good effect in various places. Even so, as I read his collection, I tried to spot moments where the author needed to fall back on assumptions, educated guesses, and hunches. There are plenty of places where data would help.

Property: Values and Institutions is an interesting and well-written book in which a range of cogent arguments and ideas about the law of property are assembled in one volume. Do not expect more.

