Community, Property, and Human Rights: The Failure of Property-as-Respect

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La question de savoir si les droits de propriété privée peuvent être des droits de la personne n'est pas nouvelle. Dans cet article, j'explique la plus récente tentative de Hanoch Dagan et Avihay Dorfman de reconnaître les droits de propriété privée comme étant des droits de la personne. Leur analyse de la propriété privée s'inscrit dans un plus grand projet visant à réinterpréter le droit privé et à mettre l'égalité réelle au centre de celui-ci. Mon article critique le fait qu'ils se concentrent sur les aspects horizontaux de la propriété et ignorent les différentes façons dont la propriété crée un sentiment d'appartenance à la communauté. J'avance aussi que l'approche de Dagan et Dorfman ne règle pas les problèmes qu'elle prétend résoudre, telle que la question des personnes dépossédées à cause de la ruée mondiale vers les terres.

The question of whether private property rights can be human rights is longstanding. In this article, I unpack Hanoch Dagan and Avihay Dorfman's recent attempt to render private property rights as capable of being human rights. Their account of private property forms part of a larger project to re-read private law and argues that the idea of substantive equality is at the heart of private law properly understood. In this article, I critique their focus on the horizontal aspects of property as ignoring the ways in which property always invokes a sense of community. I also argue that Dagan and Dorfman's account does not solve the problems it claims to do, such as addressing those dispossessed by the global land rush.

THE QUESTION OF WHETHER PRIVATE PROPERTY RIGHTS can properly be considered to be human rights is longstanding.[1] Arguably part of the controversy stems from the power which private property grants and the fact of its unequal distribution.[2] These two problems are then compounded by the ways in which property speaks to both an individual's vertical relationship with the state and an individual's horizontal relationship with other individuals. While it is hardly controversial to say that property requires the acquiescence of others and is at least made more effective by the presence of the state, those without property offer a seemingly irresolvable challenge to the claimed benefits of property.

There are a number of responses to these problems. One response is to ignore the distributional aspects of property and focus on what property is, leaving the inequality aspect

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[1] See *e.g.* Jeremy Waldron, *The Right to Private Property* (Oxford: Clarendon Press, 1988) [Waldron, *Right to Private Property*]; Henry J Abraham, "'Human' Rights vs 'Property' Rights: A Comment on the 'Double Standard'" (1975) 90:2 Pol Sci Q 288; Tom Allen, "Liberalism, social democracy and the value of property under the European Convention on Human Rights" (2010) 59:4 Intl & Comp LQ 1055; Zehra F Kabasakal Arat, "Human Rights Ideology and Dimensions of Power: A Radical Approach to the State, Property and Discrimination" (2008) 30:4 HRQ 906; Rowan Cruft, "Are Property Rights Ever Basic Human Rights?" (2010) 12 British J Pol & Intl Rel 142. This list is not exhaustive.

[2] See *e.g.* Waldron, *Right to Private Property*, *supra* note 1 at 5; Nicholas Blomley, "Homelessness, Rights, and the Delusions of Property" (2009) 30:6 Urban Geography 577 at 581.

for another area of law.[3] This approach focuses more on what is essential to property, what rights a person must have to have property, rather than how property affects individuals. A second response is to examine property's role and to argue that private property is justified because of the way it supports autonomous individuals and prevents dependence.[4] Yet rather than calling for redistribution, those in the second group argue that private property is only fully justified in a state with a robust welfare system.[5] Again, the inequality aspect of property is pushed to one side. A third response comes from a group of self-professed progressive theorists who call for property to be reformed to fit democratic and other ideals.[6]

In a recent article, Hanoch Dagan and Avihay Dorfman have offered what might be considered a fourth approach to these problems, centred squarely on whether or not private property can be considered a human right.[7] This article is part of a series of articles and working papers setting out a novel argument about what is unique about private law *as* private law.[8] Their approach, which I set out more fully later, is both a mix of, and a challenge, to the second and third approaches. Their objection to the second approach, which they call the "libertarian account," centres on how it "understands private law as a realm of prepolitical or apolitical interactions;"[9] while they criticize the third approach, commonly associated with critical scholars, because of its tendency to see private law as just another area of public law.[10] What is distinctive about private law, on Dagan and Dorfman's account, is that it is "the law of our horizontal interactions" (as opposed to our vertical interactions with the state) and that it is about vindicating our claim "to relational justice from one another."[11] As they put it, their approach is one committed to "individual self-determination (and not merely independence) and substantive equality."[12] Yet they also argue that, when properly understood, private law is already committed to ideals of *substantive* rather than simply formal equality.[13] At the risk of oversimplifying, their overarching point is that a natural person is owed a certain degree of respect in their interpersonal dealings and a private law which does not recognize that, is not private law as understood by Dagan and Dorfman. Flowing from this, their account of private property, which I call "property-as-respect," understands property as implying "respect from

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[3] This is the approach adopted by James Penner; see JE Penner, *The Idea of Property in Law* (Oxford: Oxford University Press, 1997) at 5-6 [Penner, *Idea of Property*]; James Penner, "The State Duty to Support the Poor in Kant's Doctrine of Right" (2010) 12 British J Pol & IR 88 at 104-05 [Penner, "State Duty"].

[4] Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA; Harvard University Press, 2009) at 31-34, 63, 52, 91 [Ripstein, *Force and Freedom*]; Ernest J Weinrib, *Corrective Justice* (Oxford: University of Oxford Press, 2012) at 263-96 [Weinrib, *Corrective Justice*].

[5] See *e.g*. Weinrib, *Corrective Justice, supra* note 4 at 263-96; Arthur Ripstein, *Force and Freedom, supra* note 4 at 279-286.

[6] See Gregory S Alexander, Eduardo M Penalver, Joseph William Singer & Laura S Underkuffler, "A Statement of Progressive Property," (2008-2009) 94 Cornell L Rev 743 [Alexander et al]. For an example see, Joseph William Singer, "Democratic Estates: Property Law in a Free and Democratic Society" (2008-2009) 94 Cornell L Rev 1009 [Singer, "Democratic Estates"].

[7] Hanoch Dagan & Avihay Dorfman, "The Human Right to Private Property" (2017) 18:2 Theor Inq L 391 (forthcoming), online: <ssrn.com/abstract=2624428> [perma.cc/D27C-UH83][Dagan & Dorfman, "Human Right"].

[8] Hanoch Dagan & Aviahy Dorfman, "Just Relationships" (2016) 116:6 Colum L Rev 1395 at 1414 [Dagan & Dorfman, "Just Relationships"]; Hanoch Dagan & Avihay Dorfman, "Justice in Private" (9 July 2014), online: <ssrn.com/abstract=2463537> [perma.cc/B9N9-72KS][Dagan & Dorfman, "Justice in Private"]; Hanoch Dagan & Avihay Dorfman, "Interpersonal Human Rights and Transnational Private Law" (27 Oct 2016), online: <ssrn.com/abstract=2860275> [perma.cc/Q7SV-UT4T] [Dagan & Dorfman, "Interpersonal Human Rights"].

[9] Dagan & Dorfman "Just Relationships," *supra* note 8 at 1397

[10] *Ibid* at 1398.

[11] *Ibid* at 1398

[12] *Ibid* at 1414.

[13] *Ibid* at 1399.

both public authority and other individuals" for "natural persons' status as free and equal."[14] Consequently, their account matters not just at a national or state level, but at an international and transnational level, given how it is rooted in our relationships with each other as humans not just as citizens.[15]

In "The Human Right to Private Property," Dagan and Dorfman's goals are threefold: first, to offer an account of private property which can fit with human rights' ideals; second, to challenge what they refer to as the "libertarian account" of property; and, third, to offer an understanding of private property which could temper the current global land rush.[16] While I have significant sympathy with Dagan and Dorfman's account, my goal in this paper is to highlight some weaknesses with it. My central objection is to the idea that property law can be explained by the concept of interpersonal relations. The use of interpersonal relations to explain private law can also be seen among theorists Dagan and Dorfman describe as "libertarian."[17] As such, while my focus might be on Dagan and Dorfman's argument, my criticisms have a broader purchase.

I argue that property law cannot be explained as a series of individual-individual relationships, as seems to be implied under the interpersonal account. As some critics of the libertarian approach have pointed out, given how property creates rights good against the world and no-one can have interpersonal relationships with everyone else, private property requires a state to create *in rem* rights.[18] Dagan and Dorfman's account is equally vulnerable to this critique and, as I show later, their attempted response is inadequate. My point is that property necessarily invokes a particular community.

Related to the ways in which property necessarily invokes a particular community is the role of things in Dagan and Dorfman's account. Though their account is interpersonal, that is, it focuses on the individual-individual relationships of property, and thus does not rely on the claim that property is the law-of-things, things still matter. Under property-as-respect an individual's autonomy is respected by others when they avoid trespass or using an individual's property without their permission. Thus the thing functions, as the proxy for the owner which raises two questions.[19] First, how are we to know what things are property without some grasp of the broader practice or community in which the thing is located? Secondly, does the law really respect persons or things and, if the latter, does property law respect a person who owns nothing? I call this second issue the "proxy problem."

Dagan and Dorfman might aim at substantive equality yet the property-as-respect argument does not fully account for the owner's authority over others. Simply making everyone an owner, as they suggest,[20] will not address the power imbalances inherent in owner/non-owner interactions. Property-as-respect may well offer a convincing explanation for the idiosyncrasies of trespass law but it does not account for other doctrines, such as adverse possession, nor does it fully address the inequality of the owner/non-owner relationship.[21]

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[14] Dagan & Dorfman, "Human Right," *supra* note 7 at 393.
[15] Dagan & Dorfman, "Interpersonal Human Rights," *supra* note 8 at 4.
[16] Dagan & Dorfman, "Human Right," *supra* note 7 at 411-415.
[17] These theorists are Ripstein, *Force and Freedom, supra* note 4 at 34; Allan Beever, *Forgotten Justice: Forms of Justice in the History of Legal and Political Theory* (Oxford: Oxford University Press, 2013) at 1-6 [Beever]; Ernest Weinrib, *The Idea of Private Law* (Oxford: Oxford University Press, 2012) at 17.
[18] Dan Priel, "Private Law: Commutative or Distributive?" Osgoode Hall Law School, Research Paper No 56/2013 at 14 [Priel, "Communicative or Distributive"].
[19] Dorfman is explicit about the thing's role as a proxy in Avihay Dorfman, "Private Ownership and the Standing to Say So" (2014) 64:3 UTLJ 402 at 421 [Dorfman, "Standing to Say So"].
[20] Dagan & Dorfman, "Human Right," *supra* note 7 at 394-5, 410-11.
[21] Due to constraints of space I leave the question of how property-as-respect does not account for adverse possession to one side.

What Dagan and Dorfman, along with other theorists, have failed to realize is that property law necessarily creates vertical relationships by virtue of the horizontal relationships supposedly at its heart. To give an example, consider the structure of a corporation. Corporations are not simply a series of horizontal relationships but, internal to themselves, contain a variety of vertical relationships. Admittedly, Dagan and Dorfman leave corporate and commercial law and the question of how to treat legal persons outside of their account,[22] though they do imply that their insights will be applicable to corporations.[23] Nonetheless, the complexity of corporations suggests that, in practice, horizontal and vertical relationships are more intertwined than Dagan and Dorfman have yet accounted for. Or at least, that we might need some way of capturing the hierarchical nature of some horizontal relationships.

I begin by setting out and contextualizing Dagan and Dorfman's account of the private property as a human right. In order to do this, I first examine other property theories and then Dagan and Dorfman's work prior to their new theory of private law. Then I move on to set out their account of private property as detailed in "The Human Right to Private Property." Where relevant, I make reference to the other papers and articles in this series. Part two examines the shortcomings of their argument with respect to private property. In addition to raising doubts over whether their argument could solve the injustice of the global land rush, i part two focuses on the role of things, the question of how *in rem* rights are created and the ongoing need to account for the owner's authority, the proxy problem, and the intertwined nature of horizontal and vertical relationships. To some extent these difficulties overlap and point to the importance of shared understandings in property law and the role of others in creating and maintaining property rights. Private law, particularly property law, is inherently social but the definition of "social" is more than simply a series of individual relationships; it is a complex web which speaks to a certain sense of community, which can be inclusive or exclusive.

I. THE BATTLE OVER PROPERTY THEORY

Both Dagan and Dorfman are established property theorists in their own right. Each has written several articles individually and with other scholars, setting out their approaches to property and other areas of private law. As their work on private property as a human right builds on their previous work and is, in my view, an attempt to marry the major strands of each other's work, this section examines their previous work and then their current, joint work. However, in order to fully understand Dagan and Dorfman's project it is helpful to have a sense of the broader shape of property theory, as both have written and are writing against particular group(s) of scholars. As such, I begin with the broader background of property theory before moving on to examine each of their approaches to property then I set out their argument and goals in "The Human Right to Private Property."

A. THE STATE OF PROPERTY THEORY

The modern flourishing of property theory began as a backlash against the bundle of rights picture of property. Writing in the mid-1990s, James Penner described the bundle of rights as the dominant paradigm of property,[24] but, while the bundle idea clearly has some life left in

[22] Dagan & Dorfman, "Human Right," *supra* note 7 at 393 n7.
[23] Dagan & Dorfman, "Interpersonal Human Rights," *supra* note 8 at 5 n10; Dagan & Dorfman, "Just Relationships," *supra* note 8 at 1399 n7.
[24] JE Penner, "The "Bundle of Rights" Picture of Property," (1995-1996) 43 UCLA L Rev 711 at 712 [Penner, "Bundle of Rights"].

it,[25] it is doubtful that Penner's statement is as true as it once was. In property theory, at least, the bundle of rights idea has fallen out of favour with no dominant vision to replace it. Instead, there are a number of currents and cross-currents amongst different property theorists with a noticeable divide between those theorists who seek to focus on what rights are essential for an individual to have private property or to be an owner, and those theorists who seek to emphasize the role that property plays in society and social welfare. As such, I refer to the former group as 'rights-based theorists' and the latter as progressive theorists.[26] While there are overlaps between these two groups in how they understand the role of property, as well as scholars who do not readily fit into either, these two groupings are meant to be fairly broad and are not representative of specific "schools" of thought but more of broader themes and approaches.[27] There are also, particularly among the rights-based theorists, sub-divisions within these groups. In this sub-section I offer a brief outline of the main ideas in each group in order to better situate Dagan and Dorfman's argument. Before beginning, however, it is important to point out that one key area of agreement across property theory is that property is inherently social. What is more divisive is what is meant by 'social' or the implications that term might have for property.

The primary focus of the rights-based theorists is on what right(s) a person must have to have private property and why they have these rights. The why aspect of the question is often less well-developed than a discussion of the rights which constitute property. Two notable exceptions are Penner and Smith, who root their understandings of property in our interest in using *things* and from this interest, deduce a number of key rights.[28] While Penner offers the rights of exclusion, use, and alienation as being key to his definition of property,[29] Smith sees similar features as being integral but not absolute to property.[30] As such, even though they disagree on some of the details, Penner and Smith agree that property law protects our interest in using things and that this idea is central to understanding what is and is not property and can help explain how property doctrines work. Penner, for example, argues at length that the right to sell is not a property right because it is not encompassed in the use interest. In so doing, Penner distinguishes property from contract.[31] As with Smith, Penner's understanding of the right to exclude is not absolute; for Penner the point is to exclude *some* rather than all.[32] The idea of sharing with some but not all flows from the use interest as many things can only be usefully used by a handful of people. Such an observation illustrates Penner's close attention to the nature of things and how that reflects the property rights we might be able to have in them.

Other rights-based theorists are less explicit about the interest which property protects and focus more on the rights of property, specifically which right or rights constitute ownership. Echoing Penner, Epstein offers three core rights which are essential to ownership:

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[25] Stephen R Munzer, "A Bundle Theorist Holds On to His Collection of Sticks" (2011) 8 Econ Journal Watch 265; Jane B Baron, "Rescuing the Bundle of Rights Metaphor in Property Law" (2014) 82:2 U Cin L Rev 57.

[26] The term rights-based theorists is taken from David Lametti, "Property and (Perhaps) Justice" (1997-98) 43 McGill LJ 663. See also, Dan Priel, "Torts, Rights, and Right-Wing Ideology" (2011) Torts LJ 1. The term progressives is taken from Alexander et al, *supra* note 6.

[27] Nicholas Blomley, "Performing Property: Making the World" (2013) 36 Can JL & Juris 23 at 47 (noting how critics help constitute the schools and approaches they seek to challenge).

[28] Penner, *Idea of Property, supra* note 3 at 49; Henry E Smith, "Property as the Law of Things" (2011-2012) 125 Harvard L Rev 1691 at 1691-93 [Smith, "Law of Things"].

[29] Penner, *Idea of Property, supra* note 3 at 152.

[30] Smith, "Law of Things," *supra* note 28 at 1699; Yun-chien Chang & Henry E Smith, "An Economic Analysis of Civil versus Common Law Property" (2012) 88:1 Notre Dame L Rev 1 at 32-33.

[31] Penner, *Idea of Property, supra* note 3 at 38-64; Penner, "Bundle of Rights," *supra* note 24 at 743, 750-54.

[32] Penner, "Bundle of Rights," *supra* note 24 at 743; Penner, *Idea of Property, supra* note 3 at 75.

exclusion, use, and alienation.[33] The role of things is more implicit than explicit in his argument as his main concern is with property as an individual entitlement.

Meanwhile, other scholars insist that ownership consists of a single, key right. The most famous of the single-right arguments is Thomas Merrill's right to exclude.[34] According to Merrill all other property rights flow from the right to exclude.[35] Merrill's later work emphasizes the limited nature of this right given the role of others and the state, though he continues to argue that property could exist outside of the state.[36] His focus, like Epstein's, is on property as an individual entitlement and the way in which this is reflected through doctrine. As he put it, "[e]xclusion lies at the root of property because the institution of property is dependent on possession, and exclusion lies at the root of possession."[37] Here Merrill's focus is on the owner's power to exclude others from a specific thing, rather than on those being excluded. There are two points to take note of in Merrill's focus on the right to exclude. First, he understands the "legal things" of property to be capable of being bounded and severable from all other things. Secondly, he sees exclusion as resulting from an act of the owner

The idea of exclusion is not always focused on the owner's role in the process. Simon Douglas and Ben McFarlane have argued that what is distinctive about property rights is everyone else's duty of non-interference.[38] Their analysis uses the Hohfeldian account of rights to explain property law. Hohfeld understood all rights as legal relations between individuals and distinguished between claim-rights and privileges or liberties. According to Hohfeld claim-rights exist when someone else has a duty to do or not do something, while liberties are about what an individual is allowed to do. [39] In terms of property law, the right to exclude consists of the duty of everyone else to keep out. This suggests that property is dependent on the acts of others, rather than just the acts of the owner. Such an understanding does not protect an owner's right to use their land,[40] instead the right to use is best understood as a liberty, in the Hohfeldian sense, which is indirectly protected by the property torts of trespass and nuisance.[41] What Douglas and McFarlane's work makes clear is the role of others in creating individual property rights, though they maintain the idea of *physical* exclusion.

The idea of physical exclusion is not always central to the right to exclude as illustrated by Larissa Katz's agenda-setting right. Katz explicitly disavows the "boundary approach" of other rights-based theorists because it cannot properly account for ownership.[42] Instead, she argues that what is distinctive about and exclusive to owners is the right to set the agenda for the owned thing.[43] Implicit in this understanding is the importance of use rights and the need to respect an individual's decision-making power. However, Katz notes that an individual's agenda-setting authority is only supreme vis-à-vis other individuals and is subordinate to that

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[33] Richard Epstein, *Design for Liberty: Private Property, Public Administration and the Rule of Law* (Cambridge, MA: Harvard University Press, 2011) at 77-79 [Epstein, *Design for Liberty*].
[34] Thomas W Merrill, "Property and the Right to Exclude" (1998) 77 Neb L Rev 730 [Merrill, "Right to Exclude"].
[35] *Ibid* at 740-41.
[36] Thomas W Merrill, "The Property Strategy" (2012) 160 U Pa L Rev 2061 at 2076 [Merrill, "Property Strategy"].
[37] Thomas W Merrill, "Property and the Right to Exclude II" (2014) 3 Brigham-Kanner Property Rights Conference Journal 1 at 14.
[38] S Douglas & B McFarlane, "Defining Property Rights" in James Penner & Henry Smith, eds, *Philosophical Foundations of Property Law* (Oxford: Oxford University Press, 2014) 219.
[39] *Ibid* at 221-27.
[40] Larissa Katz, "Exclusion and Exclusivity in Property Law" (2008) 58 UTLJ 275 at 282 [Katz, "Exclusion"].
[41] Simon Douglas, "The Content of a Freehold: A 'Right to Use' Land?" in Nicholas Hopkins, ed, *Modern Studies in Property Law* Vol VII (Oxford: Oxford University Press, 2013) 359 [Douglas, "Content of a Freehold"]. Compare Christopher Essert, "Nuisance and the Normative Boundaries of Ownership" (2016) 52 Tulsa L Rev 85 [Essert, "Nuisance"].
[42] Katz, "Exclusion," *supra* note 40 at 277; See also, Christopher Essert, "Property in Licenses and the Law of Things" (2014) 59 McGill LJ 559 at 564-65.
[43] Katz, "Exclusion," *supra* note 40 at 277-78.

of the state.[44] Additionally, the owner's authority is limited to worthwhile ends and they may not use their property to manipulate others.[45] Here, we can again see the balancing of property as an individual right with the fact that it will exist in a social context with other individuals and their rights.

The argument that Katz and other rights-based theorists are invoking is arguably made explicit by the neo-Kantian rights-based theorists. Unlike Penner and Smith, who root their property theory in our interest in using things, the neo-Kantians begin with the idea of individual autonomy, typically expressed as "the moral idea that no person is in charge of another"[46] and use this idea to construct a theory of property. To put it a different way, property is about solving the question of authority, rather than protecting uses.[47] For neo-Kantians, property is protected because of the way in which it allows individuals to "set[] and pursu[e] purposes" and is protected by "restrictions on the ways in which others may set and pursue purposes."[48] What is striking about the neo-Kantian approach to property is that, given their starting point, they have to find a way to explain the inequalities of private property.[49] Rather than argue for redistribution, neo-Kantians "put[] the state in charge of dealing with the moral problems generated by ownership."[50] In short they advocate for a welfare state.[51]

Instead of locating the answer to property's inequalities outside of property, the progressive theorists seek to address property's inequalities in a manner internal to property. Alexander argues that property contains an inherent social obligation norm which can be used to promote human flourishing.[52] Here Alexander invokes the Aristotelian idea of human flourishing and argues that it explains nuisance law, environmental protections, and other limits on property rights.[53] His point is that these limits are not external to property but a reflection of its inherent social-obligation norm. Relatedly, Alexander's property theory is less individualistic and focuses more on the social aspects of property. That being said, he too is wary of asking too much of owners and maintains an emphasis on property as an individual right.[54]

Alexander's social obligation norm has significant overlap with Singer's social relations model of property.[55] Singer based the social relations model of property around the principles of nuisance law but had a more communitarian understanding of nuisance law than Essert's recent examination of nuisance's role in constituting ownership.[56] Essert's account emphasizes the "reciprocity" of nuisance and is of a piece with the relational theorists insofar

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[44] *Ibid* at 295.
[45] Larissa Katz, "Spite and Extortion: A Principle of Abuse of (Property) Right" (2012) Yale LJ 1444 at 1449-52[Katz, "Spite and Extortion"].
[46] Arthur Ripstein, *Private Wrongs* (Cambridge MA: Harvard University Press, 2016) at 6 [Ripstein, *Private Wrongs*].
[47] Arthur Ripstein, "Possession and Use" in Penner & Smith, eds, *supra* note 37, 156 at 181 [Ripstein, "Possession and Use"].
[48] Ripstein, *Private Wrongs*, *supra* note 46 at 52.
[49] It is not that other theorists don't recognize this, see Merrill, "Property Strategy," *supra* note 36 at 2093.
[50] Larissa Katz, "Ownership and Social Solidarity: A Kantian Alternative" (2011) 17:2 Legal Theory 119 at 128.
[51] Weinrib, *Corrective Justice*, *supra* note 4 at 265. For criticisms see Penner, "State Duty," *supra* note 3. Dagan and Dorfman's response is covered in the next section.
[52] Gregory S Alexander, "The Social Obligation Norm in American Property Law" (2008-2009) 94 Cornell L Rev 745 at 748 [Alexander, "Social Obligation Norm"].
[53] *Ibid* at 780, 796.
[54] *Ibid* at 782.
[55] Joseph William Singer, "No Right to Exclude: Public Accommodations to Private Property" (1995-1996) 90 Nw UL Rev 1283 at 1461 [Singer, "No Right to Exclude"].
[56] *Ibid* at 1461-1477. See also Essert, "Nuisance," *supra* note 41; Douglas, "Content of a Freehold," *supra* note 41.

as he understands ownership to result in no-one being in charge of the owner.[57] In contrast, Singer considers the broader public role of nuisance law rather than seeing it as an issue between owners *qua* owners.[58]

In later work, Singer shifts his approach to "focus[] on understanding the role that property and property law play in a free and democratic society that treats each person with equal concern and respect."[59] Such an understanding places the "shape and equality of human relationships at the core of … determining whether a set of property rights can be accepted as legitimate in a free and democratic society."[60] There is a clear overlap with the neo-Kantian concern for individual autonomy, the key difference being that Singer seems to call for reforms to property in a way which the neo-Kantians do not.

Although there is much more that could be said about arguments and positions in property theory, this brief overview has sought to highlight the main strands. Despite the insistence of some rights-based theorists that property is the law of things, the role of others in property law remains important. Yet whether others are limits on our own property rights, or essential to defining what our rights are, is less clear. Similarly, the role of the state oscillates between being a limiter and creator of property rights. With this in mind, I now move on to examine where Dagan and Dorfman's work fits in the broader scheme of property theory.

B. DAGAN AND DORFMAN'S UNDERSTANDING OF PROPERTY

Both Dagan and Dorfman have written extensively about property prior to their joint work on property as a human right. As with the previous sub-section, I do not intend to offer an exhaustive overview of their work, instead my goal is to capture the general arguments and to explain how they have responded to the property theories set out above. For ease of analysis I will take both in turn.

Dagan describes himself as both a Legal Realist and a liberal.[61] He understands property as a plurality of institutions rather than being reducible to any one factor or regulatory principle.[62] These institutions are not, however, unlimited in number. Instead, because they are "unifying normative ideals for core categories of interpersonal relationships … they must be limited in number and standardized."[63] Such limits allow property to be an effective framework for these relationships.[64] Accordingly, "property institutions," to borrow Dagan's term, will differ depending on the resource and the social context.[65]

Not surprisingly, Dagan has criticized the neo-Kantian strand of the rights-based theorists and the neo-Aristotelian strand of the progressive theorists for their reliance on a single explanatory factor as the basis for property law.[66] For Dagan, the failure of each of these

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[57] Essert, "Nuisance," *supra* note 41 at 99-102 ("the thought here is that, unless I am in charge of some location, then everywhere and always, I am in a location where others are in charge of me" at 102). Arguably Essert's account leans more towards Dagan and Dorfman as he also suggests everyone might need property, *ibid* at 89; Christopher Essert, "Property and Homelessness" (2016) 44:4 Phil & Pub Aff 266 at 281.

[58] Singer, "No Right to Exclude," *supra* note 55 at 1464.

[59] Singer, "Democratic Estates," *supra* note 6 at 1047.

[60] *Ibid* at 1050.

[61] Hanoch Dagan, "The Craft of Property" (2003) 91 Cal L Rev 1517 at 1564 [Dagan, "Craft"]; Hanoch Dagan & Michael Heller, "The Liberal Commons" (2000-2001) 110 Yale LJ 549 [Dagan & Heller].

[62] Hanoch Dagan, *Property: Values and Institution*s (Oxford: Oxford University Press, 2011) at 57 [Dagan, *Property*]; Lisa M Austin, "Pluralism, Context, and the Internal Life of Property: A Response to Hanoch Dagan" (2013) 63 UTLJ 22 at 26 [Austin].

[63] Dagan, "Craft," *supra* note 61 at 1562.

[64] Hanoch Dagan, "Property's Structural Pluralism: On Autonomy, the Rule of Law, and the Role of Blackstonian Ownership" (2014) 3 Brigham-Kanner Propr Rts Conf J 27 at 34 [Dagan "Property's Structural Pluralism"].

[65] *Ibid* at 33.

[66] Dagan, *Property*, *supra* note 62 at 57.

strands is the mirror image of the other: the neo-Kantians are too individualistic, while the neo-Aristotelians do not ensure "proper legal safeguards for their members' independence."[67] The concern with individual independence, and a particular concern for an individual's ability to exit any property relationship is, for Dagan, a key liberal value.[68]

The Legal Realist aspect of Dagan's approach is evidenced by his concern with relationships and his "legal optimism."[69] By "legal optimism," Dagan means "an attempt to explain and develop the existing property forms in a way that accentuates their normative desirability while remaining attuned to their social context."[70] In other words, his account locates the certainty of property law in the relationships it can facilitate rather than in doctrine.[71] As such, Dagan's understanding of property is explicitly normative and views legal doctrine as indeterminate and malleable. Despite his recognition of relationships, "[c]ommunity is never an end in itself" for Dagan,[72] and his main goal remains enhancing and supporting individual autonomy.[73] Thus, even though he has long been concerned to capture a thicker understanding of the individual than the abstract equality of the neo-Kantian and libertarian approaches to property law, individuals are still more important than community for Dagan.

In terms of where Dagan fits in the broader scheme of property theory, he is perhaps more of a progressive than a rights-based theorist. Certainly, his Legal Realist sympathies would not endear him to many of the rights-based theorists who continue to use Legal Realism as their chief foil.[74] Dagan's concern with human relationships overlaps with Smith's argument that property is a framework for human interaction,[75] but Dagan emphasizes relationships rather than mere interactions, suggesting a more intimate, or at least interconnected, understanding of society. What distinguishes Dagan from the progressive theorists with respect to the role of society is his stronger emphasis on individual autonomy. That being said, his optimistic reading of property doctrine suggests more in common with progressive theorists than rights-based theorists.

In contrast, Dorfman's work seems more closely aligned to that of the rights-based theorists. His work on property has tended to be both a critique and re-reading of rights-based accounts of property law. For example, he argues that the rights-based theorists' definition of private ownership, what he calls the "exclusive-use" thesis, "is not a theory of private ownership … it is a theory of possession that fails to account for elementary features of private ownership such as the idea that it takes the form of a private-law practice."[76] Dorfman argues that what is distinctive about ownership is "the authority to fix in some measure the normative

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[67] *Ibid* at 66.
[68] Dagan & Heller, *supra* note 61 at 567.
[69] Dagan, "Craft," *supra* note 61 at 1564.
[70] *Ibid* at 1564.
[71] Austin, *supra* note 62 at 25.
[72] Alexander, "Social Obligation Norm," *supra* note 52 at 759
[73] Hanoch Dagan, "Inside Property" (2013) 63 UTLJ 1 at 21 [Dagan, "Inside Property"].
[74] Henry E Smith, "The Persistence of System in Property Law" (2015) 163 U Pa L Rev 2055 at 2055-2067 [Smith, "Persistence"]; Andrew S Gold & Henry E Smith, "Sizing Up Private Law" (10 Aug 2016), online: <ssrn.com/abstract=2821354> at 9 [perma.cc/A43Q-U3TP].
[75] Smith, "Law of Things," *supra* note 28 at 1707.
[76] Avihay Dorfman, "Private Ownership" (2010) 16 Legal Theory 1 at 2 [Dorfman, "Private Ownership"]. His description of "exclusive-use" ignores that the theorists he claims to promote this understanding also emphasize some form of alienation. For example, he calls Penner an "exclusive-use" theorist but downplays Penner's account of alienation, Dorfman, "Private Ownership," *ibid* at 2n2, 8, 12-16, 33 but see Penner, *Idea of Law*, *supra* note 3 at 153-168. See also Penner "Bundle of Rights," *supra* note 24 at 742.

standing of others in relation to an object."[77] As such, he adopts the Hohfeldian position that legal norms "govern relationships between persons."[78]

Moreover, Dorfman insists that the right of alienation is essential if we are to understand ownership in a specifically *private* law manner. Alienation is how owners can fix or alter the standing of others to objects. The benefit of Dorfman's account is that it leaves room for disagreement about the *scope* of ownership.[79] As such, his account sidesteps the difficulty rights-based theorists have in accounting for the limitation of ownership rights. For example, under Dorfman's thesis, the way planning law limits use rights is not necessarily a violation of ownership because the owner can still sell their property and so on.[80]

In arguing that what is distinctive about ownership is the position of authority over others, Dorfman's account necessarily raises questions about the legitimacy of that authority.[81] As a partial answer to the question of an owner's authority, Dorfman developed an account of property best described as property-as-respect. Under property-as-respect, the idea underlying key property doctrines is that one person should not substitute their judgment for another's..[82] To put it differently, property law respects an individual by respecting their decisions about their property.[83] Dorfman argues that property-as-respect better explains the strictness of trespass—by which he means the ways in which trespass can result in damages even if no harm was done—because the trespasser has substituted his judgment for the owner's.[84] Here, Dorfman's argument has some similarities with David Lametti's assertion that property law should be understood as being about relationships mediated through a thing.[85] Dorfman recognizes that property law can still make demands on other people but, because such demands are made by an individual and not in the name of the state, property law remains an area of private law.[86] That being said, because of the recognition inherent in property law, it does have an inescapably political aspect.[87]

Dorfman's property-as-respect argument overlaps to some extent with the neo-Kantian account of property. Both agree on "the relational structure of rights and duties" but where they differ is that neo-Kantians do not imbue the fact of ownership with any justificatory significance.[88] That an object is the subject of property ought to be enough, in Dorfman's view, to govern how a person approaches it; an assessment of whether using another's property will interfere with their ability "to set and pursue ends" is unnecessary.[89] While Dorfman does not comment on the neo-Kantian response to the inequalities of property, Dagan does and he insists that it is inadequate.[90] Neo-Kantians argue for a robust welfare system to mitigate the

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[77] Dorfman, "Private Ownership," *supra* note 76 at 18. See *ibid* at 20-23 for his differentiation from Katz's account.
[78] Dorfman, "Private Ownership," *supra* note 76 at 23.
[79] *Ibid* at 27-34.
[80] My point here is that Dorfman sees the special authority of owners as being rooted in the way in which they can alter others' positions towards legal things, Dorfman "Private Ownership," *ibid* at 16-23.
[81] *Ibid* at 35.
[82] Avihay Dorfman, "The Normativity of the Private Ownership Form" (2012) 75:6 Mod L Rev 981 at 998 [Dorfman, "Normativity"].
[83] *Ibid*.
[84] *Ibid* at 981-85;
[85] David Lametti, "The Concept of Property: Relations *Through* Objects of Social Wealth" (2003) 53 UTLJ 325 [Lametti, "Concept of Property"].
[86] Avihay Dorfman, "Private Ownership and the Standing to Say So" (2014) 64:3 UTLJ 401 at 408, 422-38 [Dorfman, "Standing to Say So"].
[87] *Ibid* at 425-38.
[88] *Ibid* at 428-432.
[89] *Ibid* at 427. But see Ripstein, "Possession and Use," *supra* note 47 at 160 ("the nub of a property right is that the owner *rather than others* gets to determine how the thing will be used" [emphasis in original]).
[90] Hanoch Dagan, "The Public Dimension of Private Property" (2013) 24 King's LJ 260 at 269 [Dagan, "Public Dimension"].

inequalities of property but, as Dagan has pointed out, this creates the very dependency the neo-Kantians are trying to avoid.[91] Given his account of property-as-respect, Dorfman has suggested that the solution to the inequalities for property would be for everyone to have some.[92]

In summary, both Dorfman and Dagan understand property as primarily being about relationships and about promoting respect for individual autonomy. Both adopt some of the *bêtes noires* of the rights-based theorists, such as a commitment to Legal Realism and an understanding of property as being about social relationships rather than person-thing relationships. So too, both reject attempts to offer a core list of rights which an individual *must* have to be considered an owner. With this in mind, I now turn to the argument advanced in "The Human Right to Private Property."

C. THE HUMAN RIGHT TO PRIVATE PROPERTY

Dagan and Dorfman's article, "The Human Right to Private Property," has three goals of varying degrees of ambition. These are: first, to offer an account of private property which could be understood as a human right; second, to argue against what they refer to as the libertarian understanding of private property; and, third, to show that their understanding of private property could challenge the current global land rush.[93] In this section, I set out their account and how they advance their argument. Where relevant, I refer back to their earlier work and to the other papers in their autonomy-based private law project. First, however, it is helpful to note a few aspects of their approach which are unclear.

In common with many property theorists, it is not immediately obvious whether Dagan and Dorfman are writing about *all* kinds of property or just property-in-land. The boundary approach of many rights-based theorists suggests that the classic example of an "owned thing" is a piece of land or a freehold estate in land.[94] Similarly, progressive theorists seem to focus the bulk of their attention on property-in-land as shown by their discussion of nuisance and what it reveals about property.[95] That is not to say other legal things are ignored in property theory, rather that *land* is the archetypical legal thing for property theory. Given that Dagan and Dorfman are concerned (at least partially) with challenging the adverse impacts of the global land rush, it is fair to assume that their account of property is properly an account of property-in-land.

Another common elision in property theory is defining property as individual ownership.[96] Ownership may well be the most important aspect of property but many of the benefits of ownership can be guaranteed through secure tenancies and so on. It does not matter much from the perspective of trespass law whether the owner or her tenant is in possession at

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[91] *Ibid* at 269.

[92] Dorfman, "Normativity," *supra* note 82 at 1007. In so doing he answers Jane Baron's critique that relational accounts of property ignore questions of inequality; see Jane B Baron, "Property and "No Property"" (2005-2006) 42 Houston L Rev 1425 at 1428.

[93] What Dagan and Dorfman mean by the global land rush is large-scale, transnational transfers of, primarily agricultural, land without adequate protections for those who actually live and work on the land, Hanoch Dagan, "Property Theory, Essential Resources, and the Global Land Rush" in Olivier De Schutter & Katharina Pistor, eds, *Governing Access to Essential Resources* (New York: Columbia University Press, 2015) 81. See also, Olivier De Schutter, "The Green Rush: The Global Race for Farmland and the Rights of Land Users" (2010) 52 Harv Int'l LJ 504

[94] For an overview of this approach see Katz, "Exclusion," *supra* note 40 at 276-82.

[95] Alexander, "Social Obligation Norm," *supra* note 52 at 780; Singer, "No Right to Exclude," *supra* note 55 at 1455-62.

[96] Singer, "No Right to Exclude," *supra* note 55 at 1453; Sarah E Hamill, "Private Rights to Public Property: The Evolution of Common Property in Canada" (2012) 58:2 McGill LJ 365 at 370-80.

the time of the trespass; the law will prosecute the trespasser regardless. Such a situation is, in my view, compatible with Dorfman's property-as-respect argument though it raises the question of whether property law really respects individuals or whether it respects things. At best, it can be said that the thing is a proxy for the individual. I return to this point later. In terms of whether Dagan and Dorfman's account is about property writ large or ownership, they explicitly argue for "turning non-owners into private owners" which suggests the latter.[97]

The approach in "The Human Right to Private Property" is a marriage of Dagan and Dorfman's earlier work. It adopts Dorfman's property-as-respect argument, Dagan's legal optimism, and their shared emphasis on property's relational aspects. The thrust of their argument in this joint work is that by changing our definition of property, we can make private property compatible with our commitment to individual equality. They open with a reference to the Universal Declaration of Human Rights' protection of private property and a comment that this right seems to be one "which focuses solely on people's formal opportunity to become owners and conceptualizes violations only in terms of deprivation of pre-existing recognised rights to private property."[98] They call this account of private property rights "libertarian" and argue that it cannot account for property as a human right.[99]

In order for private property to be a human right it must "be due to [its] significance for the maxim of treating every person as a human being whose dignity – or normative agency – fundamentally matters."[100] Dagan and Dorfman argue that the libertarian account of private property cannot do this because human dignity cannot be guaranteed by the formal independence or negative freedom arguments of libertarians. Here, they associate libertarian formal independence with the neo-Kantian approach and argue that it fails to protect the right to self-determination which is essential for any "fully human life."[101] It is not just that private property can be made compatible with the self-determination essential for such a life but that, properly understood, private property is *essential* to a fully human life. They argue that private property has a "unique contribution to our autonomy" due to "the requirements it places on others, in both the vertical and horizontal dimensions."[102]

The vertical dimension refers to the respect demanded from the state, while the horizontal refers to respect demanded from others.[103] The fact that owners are in a position of authority over others is one reason why private property raises questions of legitimacy given that not everyone is an owner. Dagan and Dorfman face this question of legitimacy head on. In contrast to libertarians who argue that it falls to the state to address the inequalities produced by ownership, a stance which avoids redistribution and thus protects private property rights,[104] Dagan and Dorfman argue that "the authority of owners is founded on a requirement of *reciprocal* respect and recognition among self-determining persons."[105] Such an understanding means that for private property to be legitimate everyone must be an owner.[106]

Given their account's emphasis on the relational aspects of property, Dagan and Dorfman adopt an unusual position with respect to the relationship between property rights and

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[97] Dagan & Dorfman, "Human Right," *supra* note 7 at 410-11. The text itself is: "(1) Everyone has the right to own property alone as well as in association with others. (2) No one shall be arbitrarily deprived of his property," Universal Declaration of Human Rights, 10 December 1948, GA Res 217 A (III), art 17.
[98] Dagan & Dorfman, "Human Right," *supra* note 7 at 393.
[99] *Ibid* at 393.
[100] *Ibid* at 396.
[101] *Ibid* at 396. Due to constraints of space I leave aside the potential critique that this conception of humanity has no room for those incapable of self-determination such as those with serious mental disabilities.
[102] Dagan & Dorfman, "Human Right," *supra* note 7 at 397.
[103] *Ibid* at 397-98.
[104] *Ibid* at 400-03.
[105] *Ibid* at 403 [emphasis in original].
[106] *Ibid* at 410-11.

the state. Some rights-based theorists argue that private property can be considered pre-political in that it pre-dates the state.[107] Others, such as the neo-Kantians, argue that private property can only be fully justified in a particular kind of state.[108] For Dagan and Dorfman property is an inescapably political way of being, but one which is not necessarily statist.[109] In other words, we can think about property without reference to a state because it is about "our interactions with other persons in their capacity as private individuals, and not as co-citizens."[110] As the other papers in this series makes clear, they understand the whole of private law to be inherently political but not inherently statist.[111] It is not clear whether Dagan and Dorfman mean the formal state apparatus or *any* kind of organized social grouping with territorial control when they talk about "the state." Most rights-based theorists seem to mean the latter when they talk about property being pre-political. Dagan and Dorfman, however, seem to understand *any* human relationship as political.[112] Their concern appears to be with how individuals interact with other individuals *qua* individuals and so it seems that they too mean any organized social grouping with territorial control when they talk about "the state."

Dagan and Dorfman see their account of property law and private law more broadly as being universal but not universalizing. That is, they are not calling for the "universal harmonization of private law,"[113] but attempting to identify the motivating idea at the heart of any system of private law. In earlier work, Dagan eschewed doctrine, or at least downplayed its role.[114] The role of doctrine in autonomy-based private law is somewhat ambiguous. At times, they seem to caution against case-by-case decision-making yet at other times, particularly in the context of combatting the global land rush, they suggest that formal rules of title should be dispensed with where it is clear that blind adherence will work an injustice.[115] Their method is similar to Ripstein's neo-Kantian approach, in that they, like Ripstein, take a particular moral idea and see how private law fits with it.[116] Where they differ is that Ripstein uses the idea that no person should be in charge of another as his starting point.[117] Then again, Dorfman's earlier work on trespass works backwards from the strictness of trespass doctrine to argue that only property-as-respect fully explains why trespass takes the shape that it does, suggesting an approach more in keeping with how Weinrib examines private law.[118] Weinrib starts from how private law is structured and works backwards to argue that Kantian ideas form the normative underpinning of private law.

It is possible for the moral idea at the core of Dagan and Dorfman's account of private law to be both internal to private law as it currently is and capable of offering normative guidance. The demand to be recognized by others as "substantively free and equal agents" can fit with a wide variety of alternative private law rules. As I understand it, Dagan and Dorfman's project is primarily, though not exclusively, transnational in that they see their core idea as

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[107] Merrill, "Property Strategy," *supra* note 36 at 2076.
[108] Weinrib, *Corrective Justice, supra* note 4 at 263 ff.
[109] Dagan & Dorfman, "Human Right," *supra* note 7 at 405-06.
[110] *Ibid* at 407.
[111] Dagan & Dorfman, "Interpersonal Human Rights," *supra* note 8 at 4-5; Dagan & Dorfman, "Justice in Private," *supra* note 8 at 14-15.
[112] Dagan & Dorfman, "Human Right," *supra* note 7 at 405-06.
[113] Dagan & Dorfman, "Interpersonal Human Rights," *supra* note 8 at 6, 29.
[114] See *e.g.* Hanoch Dagan, "The Realist Conception of Law" (2007) 57 UTLJ 607 at 615; Austin, *supra* note 62 at 24-25.
[115] Dagan & Dorfman, "Just Relationships," *supra* note 8 at 1400, 1421-24, 1426; Dagan & Dorfman, "Human Right," *supra* note 7 at 414-15.
[116] See Ripstein, *Private Wrongs, supra* note 46 at 6.
[117] *Ibid.*
[118] Ernest J Weinrib, *The Idea of Private Law* (Cambridge, MA: Harvard University Press, 1995) ch 1; Sandy Steel, "Private Law and Justice" (2013) 33 Ox J Leg Stud 607 at 612-17. The observation about different starting points is taken from Sandy Steel, "Saving Private Wrongs" (2016) 14:1 Jerusalem Rev Legal Stud 1.

most useful in settling disputes in international private law.[119] However, their account of property law does contain particular implications which flow from the special authority owners have.

One of the implications of Dagan and Dorfman's account of property has already been noted: that everyone must have private property in order for it to be the human right it is often claimed to be.[120] The other key implications of their account of property are of a transnational scale. It is here that the significance of their non-statist account of private property becomes clear. They argue that their understanding of private property could challenge the global land rush by emphasizing that the buyer who buys land from which those without formal property rights will be displaced commits "an international private wrong" by failing to respect the claims of the displaced persons.[121] As such property-as-respect can challenge the deference of "traditional international private law … to domestic property rules" [122] Dagan and Dorfman recognize that, in the context of the global land rush, many of the displaced lack formal property rights but they argue that the displaced can rely on property's foundational values of "self-determination and relational equality" to imbue their informal claims with the full force of private property rights.[123] The point being that we as individuals should pay less attention to the rules of formal title and more attention to the actual occupants of the land. In this way, private law will rescue us from the failures of international human rights law. As Dagan and Dorfman put it, "only private law can form and sustain the variety of frameworks necessary for our ability to lead our conception of the good life; and only private law can cast them as interactions between free and equal individuals who respect one another as the persons they actually are, thus vindicating the demands of relational justice."[124] Thus not only can we dispense with doctrine (to some extent, under some circumstances) but we can also, potentially, dispense with the state and rely on private law to protect those at risk of displacement.[125]

II. SOME ISSUES WITH DAGAN AND DORFMAN'S ARGUMENT

Dagan and Dorfman's main goal is to offer an account of private property which can make property rights human rights. In this section I highlight some issues with their account. To some extent the implications flowing from their account are utopian, particularly the argument that everyone should become an owner. That aspects of their account are utopian is not fatal to their account as a whole, what is more challenging is the lingering question of private property's equality. As I argue in this section, it is doubtful whether the authority problem of private property can simply be solved by giving everyone *some* property or by turning everyone into an owner. First, however, I return to the proxy problem.

Dagan and Dorfman limit the respect inherent in their understanding of private property to "natural persons."[126] The question of how their account would matter for legal persons is left to one side.[127] Given that it builds on Dorfman's earlier account of private property which does

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[119] Dagan & Dorfman, "Interpersonal Human Rights," *supra* note 8 at 28-30.
[120] Dagan & Dorfman, "Human Right," *supra* note 7 at 410-11.
[121] *Ibid* at 414-15.
[122] *Ibid* at 415.
[123] *Ibid* .
[124] *Ibid* at 408; Dagan & Dorfman, "Just Relationships," *supra* note 8 at 1416.
[125] On this point see, Dagan & Dorfman, "Human Right," *supra* note 7 at 403 n44.
[126] *Ibid* at 393, n 7.
[127] At present, their joint private law project mentions corporations only to acknowledge that while they are mostly the defendants in the transnational wrongs they seek to challenge, corporations as such are beyond the scope of

not limit itself, at least not explicitly, to natural persons there is no *prima facie* reason why it could not also apply to legal persons. Even if it did not, how can anyone be sure of what property is owned by a natural person and what is owned by a legal person?

To the extent that Dorfman's account of the strictness of trespass fits with the idea of not substituting our wishes for those of the owner, the thing is the proxy for the owner. We respect the owner by respecting the boundaries of the legal thing. For example, the house at the corner of my street might well have been abandoned and have no owner but the vast majority of people walking past are not likely to feel they can cut across the garden or through the house. As Lametti points out, in Anglo-common law countries or, indeed, most western countries, we assume that houses have owners and modify our behaviour accordingly.[128] So the question becomes, are we respecting the owner by not trespassing or are we respecting the thing? According to the property-as-respect view, it is both but, in practice, we assume certain things are owned and we behave towards them in the same way as we would whether they are owned by a person or by a corporation or, indeed, if they have been abandoned.[129]

Here the proxy problem raises the long-standing debate in property theory about the Hohfeldian approach to rights, particularly his argument that all legal relations are between two people. In an earlier article, Dorfman offered a lengthy defence of Hohfeldian rights against Penner's critique.[130] The debate centres on distinguishing *in personam* rights, that is those rights good against a specific individual, from *in rem* rights, which are those good against the world. In particular, the disagreement is whether or not the latter are relational and, even more exactly, whether impersonal norms can be relational. Both Penner and Dorfman use trespass to illustrate their argument. Penner's objection to the Hohfeldian account stems from his understanding that, for Hohfeld's theory of relational rights to be true, when the owner of Blackacre changes "everyone else in the world exchanges one duty for another."[131] Under this interpretation, we would always need to know *who* the owner is in order to properly execute our duty not to trespass. Yet, as Penner puts it, "the duty not to interfere with the property of owners is not owner-specific."[132] Accordingly, rights *in rem* are rights to things rather than taking the relational structure of rights and duties between individuals envisioned by Hohfeld. Penner further supports this with the idea that trespass is owned to possessors rather than owners.[133] Suggesting, once again, that it does not matter who is in possession—the owner, her tenant, her tenant's house-sitting friend—the duty not to trespass remains the same.

Dorfman objects to Penner's account because the relational aspect of trespass is a duty to acknowledge that "for any given object which can reasonably be identified as being owner by another, there is someone … who can fix the normative standing of others in relation to that object."[134] His point is that if we understand the duty against trespass as respecting the "practice of property," as Penner does, we will turn owners into "mere patients" rather than agents.[135] In order for trespass to be a truly private law doctrine, according to Dorfman, it must not rely on general practices but on the respect owned to each individual as an individual. Insofar as Dorfman rescues the Hohfeldian account against Penner's critique, he only manages to show

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their argument at this stage. It may be that Dagan and Dorfman's future work will explain how relational justice can apply to corporations, see *supra* notes 20-23 and accompanying text.

[128] Lametti, "The Concept of Property," *supra* note 85 at 345.

[129] See also Penner, *Idea of Property*, *supra* note 3 at 27

[130] Avihay Dorfman, "The Society of Property" (2012) 62 UTLJ 563 at 568-579 [Dorfman, "Society of Property"]. For Penner's critique see Penner, *Idea of Property*, *supra* note 3 at 23-31.

[131] Penner, *Idea of Property*, *supra* note 3 at 23

[132] *Ibid* at 23.

[133] *Ibid* at 26-27

[134] Dorfman, "Society of Property," *supra* note 129 at 572.

[135] *Ibid* at 573

that Hohfeldian rights and duties can be impersonal and we do not actually need to know *who* the owner is, just that there *is* an owner, or *could be* an owner.[136]

As compelling as Dorfman's reconstruction of the Hohfeldian account is, it does not escape the necessity of some understanding of the practice of property to order to make trespass intelligible. As I understand it, Dorfman's version of Hohfeldian rights requires the relational aspects of *in rem* rights to arise as a result of each person being recognized as substantively free and equal and this respect for individuals *qua* individuals is all we need to understand our duty against trespass. Except that understanding everyone as free and equal tells us nothing about where we can be and what we can use. Without knowing which objects might be owned, we cannot be sure of when we will have the duty to avoid trespassing.

To give an example, Scotland, famously, has an extensive right to roam which is part of an ancient tradition.[137] While the right to roam also exists in England, it is much less extensive and covers much less land and fewer rivers.[138] A Scottish person unaware of the more restricted rights in England might inadvertently commit trespass when travelling through England. The inadvertent trespass here is unlikely to be prosecuted,[139] nonetheless it illustrates how important it is that we know what things are owned and whether we actually have a duty not to trespass. Scottish landowners are clearly still owners in the Dorfmanian sense, they can still alter another person's standing by selling their property,[140] it is just that the content of ownership is different than in other countries; the *practice* of property is different in Scotland.

One response to the inability of property-as-respect to tell us when the duty against trespass might be owed is that the whole point is to leave scope for different property regimes. To phrase it differently, Dagan and Dorfman's goal is to find a core idea which holds good across *all* private property systems. Yet, both acknowledge that "[p]rivate ownership … constitutes a common framework of property coordination structured around the owner's demand for recognition from other persons."[141] The concept of a framework suggests something more than just individuals relating to individuals as individuals, it suggests individuals relating to each other as part of a community with a shared understanding of what private property means. What neither accounts for is that an individual will also have a relationship with this framework, in addition to the interpersonal relationships which constitute it. To put it another way, we have relationships with the various communities to which we belong, just as much as we have relationships with the individual members who constitute those communities.

The "common framework of coordination" refers back to Dorfman's earlier work and his differentiation of contract from property.[142] The key difference Dorfman identifies is that contract's coordinating framework is selective while property's is not.[143] Property's social coordination is not a daisy-chain of individual agreements but a "common endeavour" of "coordinati[ng] competing claims of distinct persons over an object."[144] The benefit of this

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[136] On this point see Lametti, "Concept of Property," *supra* note 85 at 345; Penner, *Idea of Property, supra* note 3 at 26.

[137] Land Reform Review Group, *The Land of Scotland and the Common Good* (Edinburgh: Scottish Government, 2014), section 29.1, paras 5-6, online: <gov.scot/Publications/2014/05/2852/298184> [perma.cc/CZX5-K8J2].

[138] *Countryside and Rights of Way Act 2000*, c 37; Gavin Parker, "Countryside Access and the 'Right to Roam' Under New Labour: Nothing to CRoW about?" in Michael Woods, ed, *New Labour's Countryside: Rural Policy in Britain Since 1997* (Bristol: The Policy Press, 2008) 135.

[139] Neil Cobb, "Property's Outlaws: Squatting, Land Use and Criminal Trespass" (2012) 2 Crim Law Rev 114 at 114..

[140] Dorfman, "Private Ownership," *supra* note 76 at 16-25.

[141] Dagan & Dorfman, "Human Right," *supra* note 7 at 405.

[142] Dorfman, "Society of Property," *supra* note 130 at 579-94. See also, Dorfman, "Private Ownership," *supra* note 76 at 14-16.

[143] Dorfman, "Society of Property," *supra* note 130 at 579-94.

[144] *Ibid* at 589.

common framework is that everyone with a claim is treated as an agent rather than being represented by someone else as would be the case in a series of contracts.[145]

The common framework seems to arise as a result of "the respect and recognition established by property" [146] but it is not clear *why* this framework and the respect it demands are unconditional. Following the logic of Dorfman's argument it seems as though property simply has to exist in order for individuals to be respected as agents. For example:

> [T]hese acts [larceny and deliberate trespass] of violating the property right of another are inconsistent with a commitment on the part of society to coordinate activities in a distinctively respectful manner which is *un*conditionally binding upon all persons by virtue of being persons.[147]

Such an understanding raises a variation on the proxy problem because a person who does not own anything seems to lack the respect and recognition they are owed by virtue of being a person.[148] Dorfman has suggested that everyone will need to be an owner in order to make property fully legitimate, an argument which is also referenced in "The Human Right to Private Property."[149] However, even if everyone was a private owner, this still would not provide a full answer to the question of why it is that an owner's authority is legitimate and binding on everyone, even those the owner will never meet.[150]

Granting private ownership to all would, admittedly, solve some of the legitimacy problems presented by private property. If everyone is a private owner, the human rights protections for private property do make more sense as human rights. Yet the legitimacy of the owner's authority remains doubtful. As I understand it Dagan and Dorfman's property-as-respect suggests that by granting everyone ownership, everyone will get the respect and recognition they are owed as persons. In addition, because of the special authority owners have—that of having the power to change the normative standing of others with respect to what they own—making everyone an owner goes some way to resolving the unequal authority ownership creates. Yet the inequality in owner/non-owner interactions remains even if the non-owner is an owner in other interactions.

To give an example, if I own a mall I may, if I so choose, ban protesters from my property. It does not matter if the protesters in question own land elsewhere, they may not access mine without my permission. One potential response to this critique is that protesters who ignore my wishes here are not recognizing me as an agent. Another potential response is that, as an owner, my rights will not be absolute and I may have to make some interpersonal accommodation for the protesters. In practice, however, when these kinds of situations arise, the mall owner wins unless there is a legislative exemption for certain kinds of protester, such as workers on a lawful strike.[151] My point is that the fact of ownership, *by itself,* can offer no

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[145] *Ibid* at 594.
[146] *Ibid* at 596.
[147] *Ibid* at 604.
[148] It also raises the question of whether property is at the risk of collapsing into tort but, again, due to constraints of space, I leave this argument to one side.
[149] For an earlier reference Dorfman, "Normativity," *supra* note 82 at 1007.
[150] But see, Dorfman, "Private Ownership," *supra* note 76 at 35.
[151] The rule about striking workers is discussed in *Harrison v Carswell,* [1976] 2 SCR 200 at 217-219. For discussion see Jim Phillips & Philip Girard, "A Certain "Mallaise": *Harrison v Carswell,* Shopping Centre Picketing and the Limits of the Post War Settlement" in Judy Fudge & Eric Tucker, eds, *Work on Trial: Canadian Labour Law Struggles* (Toronto: Osgoode Society for Canadian Legal History and Irwin Law, 2010) 249. See also Eric Tucker, "The Malling of Property Law?: The Toronto Eaton Centre Cases, 1984-1987 and the Right to Exclude" in Eric Tucker, Bruce Ziff & James Muir, eds, *Property on Trial: Canadian Cases in Context* (Toronto: Irwin Law, 2012) 303. For some examples of the issues raised by malls in other jurisdictions see, Timothy Zick, "Property, Place, and Public Discourse" (2006) 21 Wash UJL & Pol'y 173; Antonia Layard, "Public Space: Property, Lines, Interruptions" (2016) 2 JL Property & Soc 1.

solution in these sorts of situations, it requires some background framework which is more than the coordinating framework suggested by Dorfman and Dagan.

Dagan and Dorfman's response to this point might be that I have misunderstood their argument and that private law can and should accommodate demands like those of protesters on mall property. The specific example they use to illustrate the importance of relational justice as well as collective justice is that of fair housing. The rules about fair housing might be considered by many to properly belong to public law or, at least, are public-law limitations on private law doctrines. However, for Dagan and Dorfman fair housing provisions are inherently part of an autonomy-based private law given how such rules avoid "social relationships that proceed in defiance of the equal standing and autonomy of the person subjected to discrimination."[152] Their point is that by discriminating in housing provision, landlords fail to "respect the individual on her own terms."[153] In short, theirs is a private law which naturalizes human rights.

As laudable as this attempt to make human rights central to private law is, it downplays the fact that fair housing provisions took years of work by campaigners and the enactment of anti-discrimination legislation to make them effective.[154] Historically, private law doctrine has tended to allow the discrimination which fair housing rules prohibit. Courts invoked freedom of contract and freedom of commerce to uphold discriminatory treatment. It is only with the dawn of human rights legislation and their acceptance and recognition by courts, politicians, and the public that interpersonal discrimination has come to be addressed.[155]

Dagan and Dorfman's concern with finding a way internal to property law to address the injustices of the global land rush illustrates the continued resistance to human rights-based claims. Theoretically those without formal title, including those at risk of displacement under the "global land rush," already have human rights. Moreover, they should also have the right to housing and an adequate standard of living as guaranteed under article 11 of the International Covenant on Economic, Social and Cultural Rights.[156] These rights have proven difficult to realize even in advanced countries less at risk from the land rush.[157] Thus while such socio-economic rights might seem to offer a way around the lack of formal title, in reality they do not and formal title continues to be championed by a range of international institutions.[158] This is a point Dagan and Dorfman acknowledge by arguing that our attention to the relational

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[152] Dagan & Dorfman, "Interpersonal Human Rights," *supra* note 8 at 23.

[153] *Ibid.*

[154] For some discussion of the history of fair housing in Canada see Frank Luce & Karen Schucher, ""The Right to Discriminate": Kenneth Bell versus Carl McKay and the Ontario Human Rights Commission" in Tucker, Ziff & Muir, *supra* note 149 at 119. Similar efforts were needed to ensure equal access to some kinds of privately owned property in the US, Singer, "No Right to Exclude," *supra* note 55.

[155] James W St G Walker, "The Law's Confirmation of Racial Inferiority: *Christie v York*" in Barrington Walker, ed, *The African Canadian Legal Odyssey: Historical Essays* (Toronto: UTP, 2012) 243; Austin, *supra* note 62 at 28; But see Singer, "No Right to Exclude," *supra* note 55 at 1300 (arguing that the right to exclude in such publicly accessible property was the result of mid-nineteenth century racism).

[156] *United Nations International Covenant on Economic, Social, and Cultural Rights* (19 May 1976), Article 11, online: <ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx> [perma.cc/LM6G-PSWV].

[157] See by way of example the work on Canada's failures with respect to this right, Bruce Porter, "Judging Poverty: Using International Human Rights Law to Refine the Scope of *Charter* Rights" (2000) 15 JL & Soc Pol'y 117; See also, Darcel Bullen, "A Road to Home: The Right to Housing in Canada and Around the World" (2015) 24 JLSP 1; Tracy Heffernan, Fay Faraday & Peter Rosenthal, "Fighting for the Right to Housing in Canada" (2015) 24 JLSP 10; Margot Young, "*Charter* Eviction: Litigating Out of House and Home" (2015) 24 JLSP 46; Claire Lévy-Vroelant, "The Right to Housing in France: Still a Long Way to Go from Intention to Implementation" (2015) 24 JLSP 88; and Fiona King, "Scotland: Delivering a Right to Housing" (2015) 24 JLSP 155

[158]For critical commentary of this see, Joel M Ngugi, "Re-examining the Role of Private Property in the Market Democracies: Problematic Ideological Issues Raised by Land Registration" (2004) 25 Mich J Int'l L 467 at 513, 524. Compare Jeremy Waldron, *The Rule of Law and the Measure of Property* (Cambridge: Cambridge University Press, 2012) at 92-94.

aspects of property law should grant private property rights to those on the land but without formal title. In other words, we should recognize others as having private property rights because they are human and because we respect them as such.

Coupled with the abandonment of questions of formal title and thus much of property doctrine, Dagan and Dorfman's proposed response to the global land rush runs the risk of being arbitrary. As laudable as their attempts to limit displacement of those without formal title may be, their solution effectively turns private law into a matter of individual conscience. Absent in their account is any discussion of how such violations of "foundational property values" are to be enforced. While private law, including private property, can be understood in a way which fits with the claim that it is about individuals relating to individuals as equals, that understanding is based on trust. As Dan Priel observes, "peaceful mechanisms that allow neighbours to settle their disputes without law, are easier to sustain when a state with well-functioning institutions exists in the background."[159] The point being it is much easier to treat someone else as an equal if you know that their failure to do the same to you will be punished.

Pointing out that peaceful dispute mechanisms work best when there is a well-functioning state is perhaps unfair given that it is a factual answer to a conceptual argument. A more serious critique is Priel's point about the impossibility of interpersonal relations with everyone.[160] Priel's critique is aimed at Allen Beever,[161] a neo-Kantian scholar, rather than Dagan and Dorfman's account of property, but it holds for their description of property as well. Priel's point is that "because property rights impose limits on *all* others, they cannot be grounded only in interpersonal relations" and hence require a state to create the kind of rights that can bind everyone.[162]

Beever's account of property law and private law is part of the same "libertarian account" which Dagan and Dorfman critique. Dagan and Dorfman distinguish their account from the libertarian one on the grounds that by relying on the welfare state to justify private ownership they cannot recognise the substantive equality of each individual, merely their formal equality.[163] This distinction does not answer Priel's question about how private property can possibly bind everyone as nobody has "interpersonal relations with all other humans."[164] Here Dorfman's earlier attempt to revive the Hohfeldian account of *in rem* rights could offer one answer in that *in rem* rights are impersonal and general, yet again, such an account tells us nothing about how we can fulfil that duty without also knowing the thing(s) through which that duty will be mediated. It also does not fully explain why such rights would bind everyone.

Here the problem is Dagan and Dorfman's insistence on separating the horizontal and vertical aspects of property law. Their reference to Dorfman's argument about the common framework private property creates, undermines the horizontal relationships they are attempting to describe. A common framework cannot operate solely at a horizontal level, it necessarily speaks to some kind of vertical relationship with an authority akin to that of a state. Condominiums offer an example of how our horizontal property-law relationships result in vertical relationships with non-state entities. All those who own or rent in a condominium are normally answerable to the condo board which sets specific rules and regulations for the condominium.

My point is that private property rights arise as the result of a collective effort and in particular social contexts. It is not the result of individuals recognizing each other as having inherent worth. Even as Dagan and Dorfman insist on recognizing a thicker conception of the

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[159] Priel, "Communicative or Distributive," *supra* note 18 at 22.
[160] *Ibid* at 14.
[161] More specifically it is aimed at Beever, *supra* note 17.
[162] Priel, "Communicative or Distributive," *supra* note 18 at 14-15 [emphasis in original].
[163] Dagan & Dorfman, "Human Right," *supra* note 7 at 401-03.
[164] Priel, "Communicative or Distributive," *supra* note 18 at 14.

individual and that property is inherently social, they fail to recognize that property law (and perhaps private law more broadly) is about community as well as individuals. The closest they come to recognizing this is their brief reference to how property creates a common framework. It may be that in some property systems this framework helps to create, rather than being constituted by, the freedom and equality of each individual.[165] For example, Joel Ngugi's work highlights the deeper social aspect of property rights, he takes seriously the role that society has to play in creating property.[166] If property is inherently social the meaning of social cannot be exhausted by individual-individual relationships but must also include the influences (both positive and negative) of community and the shared understandings which structure property law.

III. CONCLUSION

Dagan and Dorfman's autonomy-based account of private law is an ambitious project and it is one which I find both sympathetic and attractive. However, as I have attempted to show in this paper, their argument, particularly as it applies to private property, has several weaknesses. First, while it is true that many property doctrines can be explained by the idea of property-as-respect, the idea of respecting an individual by respecting their property also requires us to know *what* their property actually is. The *what* of property law cannot be explained simply by reference to individual equality and autonomy. It has to be explained with reference to the shared understandings of each system of property, which in turn suggests the intertwined nature of property's vertical and horizontal relationships.

Second, making everyone an owner does not provide a full answer to the question of private property's legitimacy. It does grant everyone the unique power of ownership, but the unique power of ownership only relates to the property an individual owns does not matter when a person is away from that property. Accordingly, the imbalance of power between non-owners and owners remains.

The third problem with Dagan and Dorfman's account is the proxy problem. I may agree that their account of property is more plausible as a human right than other accounts but it runs the risk of only recognizing people as having human rights if they have property instead of recognizing people as having private property because they are human. It also raises the question of whether property law really respects individuals or whether it respects the things—whatever they may be—which individuals own or could own.

Dagan and Dorfman's autonomy-based private law can be understood as an attempt to make human rights, or the ideal they argue is at the core of human rights—individual equality and freedom—inherent in private law. As laudable as this goal is, history has shown us again and again that this is not true. Private law does not automatically recognise *everyone* as of equal worth and it has taken decades of activism to ensure that we could be in a position where Dagan and Dorfman's argument might be compelling. Such activism should not be downplayed with the claim that private law, properly understood, always recognised such rights.

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[165] Ngugi, *supra* note 158 at 485, 522.
[166] *Ibid* at 513, 522-27.