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Liberal Property and the Power of Law
Response to a Critical Notice by James Penner

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I. Introduction

In *A Liberal Theory of Property*[1] I argue that property is one of society's major power-conferring institutions. Property confers upon people some measure of private authority over things (both tangible and intangible). This temporally-extended private authority dramatically augments people's ability to plan and carry out meaningful projects, either on their own or with the cooperation of others. Property's empowerment, in other words, enhances people's self-determination. But *as such* property also disables (other) people and renders them vulnerable to owners' authority. Therefore, to be (and remain) legitimate, property requires constant vigilance. A genuinely liberal property must expand people's opportunities for individual and collective self-determination while carefully restricting their options of interpersonal domination.

Property cannot carry this justificatory burden on its own; its legitimacy is dependent upon a background regime that guarantees to everyone the material, social, and intellectual preconditions of self-determination. But the significance of property to self-determination implies that such a background regime—crucial as it is—is not sufficient. To properly meet property's legitimacy challenge, law must ensure that property's animating principles and the most fundamental contours of its architecture follow its autonomy-enhancing *telos*. Hence, the three pillars of liberal property—the features that distinguish it from property *simpliciter*:

(1) liberal property carefully circumscribes owners' private authority so that it is adjusted to its contribution to self-determination;
(2) it includes a structurally pluralist inventory of property types so as to offer people real choice; and
(3) it complies with the prescriptions of relational justice so as to ensure that ownership does not offend the maxim of reciprocal respect for self-determination on which property's legitimacy is grounded.

In his *Property and Self-Determination*[2] James Penner embraces liberal property's second pillar—dealing with property's structural pluralism—while vehemently rejecting the jurisprudential and normative foundations on which it is grounded as well as liberal property's other two pillars.

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1. See Hanoch Dagan, *A Liberal Theory of Property* (Cambridge University Press, 2021). All parenthetical numbers are page references to this book.
2. See James Penner, "Property and Self-Determination" (2022) 35:2 Can JL & Jur 537.

Penner pioneered the recent reinvigoration of the Blackstonian conception of property as "sole and despotic dominion,"[3] which *A Liberal Theory of Property* criticizes, and he now defines himself as a "Kantian instrumentalist."[4] Thus, normatively, he sides with Kantian theorists who insist that independence, rather than self-determination, underlies—as it should on this view—liberalism; conceptually, in turn, Penner adheres to his Blackstonian conviction that "the dominion or 'exclusion' view"[5] offers "analytic clarity"[6] to our understanding of property; and, finally, his instrumentalism may explain his concluding statement that "[e]ven a Kantian independence theorist or a dominion theorist like myself can accept Dagan's suggestive thesis about private law types without abandoning their scruples."[7]

Much of Penner's rich and challenging critique relates to the normative arguments I make in *A Liberal Theory of Property*, and I will address these points in Part IV of this Response. But our more fundamental disagreement is jurisprudential. It relates to the power—or, more precisely, the powers—of law. Penner's critique, I argue in Part II, radically marginalizes law's role in constructively and prospectively constituting property's private authority; and it obscures, as I claim in Part III, the way our understanding of property as a legal concept affects legal reasoning and thus the substance of the law.

II. Legally Constructed Private Authority

Penner disputes my characterization of property as a power-conferring institution that instantiates people's private authority over tangible and intangible resources, and he therefore dismisses my claim regarding property's legitimacy challenge. Because these are the book's most fundamental propositions, evaluating his critique must begin with these grievances.

An owner, Penner writes, has "one right and two powers."[8] Owners have a right "to immediate, exclusive possession," which "imposes a duty on all others not to interfere with the object of that right," but "does not empower them in any way."[9] Owners also enjoy two powers: they are empowered to "license others to commit what would otherwise be a trespass," as well as "to give or sell the property to others."[10] But because owners' right is strictly negative, and since other people have no obligation to take advantage of an owner's offers re licensing, giving, or selling, "[t]he owner has no Hohfeldian power to impose a duty on anyone" and saying that they are an authority is "misleading."[11]

3. William Blackstone, *Commentaries on the Laws of England* (University of Chicago Press, 1979) vol 2 at 2 [Blackstone, *Commentaries*].
4. JE Penner, "Taking Raz Seriously: On the Value of Autonomy and Its Relation to Private Law" in Paul Miller & John Oberdiek, eds, *Oxford Studies in Private Law Theory*, vol 2 (Oxford University Press) [forthcoming].
5. Penner, *supra* note 2 at 551.
6. *Ibid*.
7. *Ibid* at 558.
8. *Ibid* at 553.
9. *Ibid*.
10. *Ibid*.
11. *Ibid* at 556.

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This means, Penner concludes, that "property ownership is not personally empowering in any empirical sense."[12] My property, he explains, does not give me "any right to require you to do anything"; all it gives me "is the liberty to do what another person is denied, a liberty to deal empirically with the property as best I can and nothing more."[13] This means that "[w]hat generates the vulnerability of non-owners is their circumstances," and property does *not* face a legitimacy challenge.[14]

This analysis, which echoes Hohfeld's observation that owners' powers only generate in nonowners an "agreeable form of liability,"[15] obscures both the power of property and law's role in its constitution. To see why, consider H.L.A. Hart's famous definition of power-conferring institutions. As Hart noted, alongside doctrines that "impose duties or obligations," thus requiring "persons to act in certain ways whether they wish to or not," there is another type of doctrine.[16] These other laws—Hart discussed contracts, wills, and marriages—"provide individuals with *facilities* for realizing their wishes, by conferring legal powers upon them to create, by certain specified procedures and subject to certain conditions, structures of rights and duties within the coercive framework of the law."[17]

Contracting parties, for example, have rights and obligations (and only rarely powers) towards one another. But contract is nonetheless rightly considered the quintessential power-conferring institution. The reason for this is that instantiating contract as a legal institution empowers people to be able to solicit other people's commitments and insist on their performance.[18] Promisees enjoy authority over promisors because once (and only once) contracts are enforceable, promisors are legally obligated to respect their contractual obligations and are subject to the coercive power of the law if they don't. As Hart implies, law's function here is both constructive and prospective. Contract law constructs promisees' authority; and it prospectively sets up the rules of the contractual game in which this authority is created and applied, as well as its proper scope and the limits of its power. This authority is not—at least should not be—obvious. Rather, as I argue elsewhere, it is premised upon, and thus should be circumscribed by, contract's service to people's self-determination.[19]

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12. *Ibid* at 555.
13. *Ibid*.
14. *Ibid* at 557.
15. Wesley Newcomb Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23:1 Yale LJ 16 at 54, n 90.
16. HLA Hart, *The Concept of Law*, 3d ed by Paul Craig (Oxford University Press, 2012) at 27.
17. *Ibid* at 27-28 [emphasis in original].
18. *Cf* Arthur L Corbin, "Offer and Acceptance, and Some of the Resulting Relations" (1917) 26:3 Yale LJ 169 at 171.
19. See Hanoch Dagan & Michael Heller, "Autonomy for Contract, Refined" (2021) 40:2 Law & Phil 213 [Dagan & Heller, "Autonomy for Contract"]; Hanoch Dagan & Michael Heller, "Choice Theory: A Restatement" in Hanoch Dagan & Benjamin C Zipursky, eds, *Research Handbook on Private Law Theory* (Edward Elgar, 2020) 112. Penner is thus right to claim that my account of property's legitimacy challenge also applies to other power-conferring legal institutions, such as contract; he just ignores the fact that I have indeed raised it. See Penner, *supra* note 2 at 556.

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Penner implicitly recognizes that the same analysis applies to property, but he radically suppresses its implications. He writes that ownership "is relational in the sense that the owner is 'empowered' by their ownership only in so far as they stand in this right-duty relationship to others."[20] Yes: only in this sense; but this is quite an important sense. It means that but for the instantiation of property, owners would have had no legal power—no authority—to condition the use of resources upon their consent. It also means that, *pace* Penner, property's justificatory challenge is not limited to owners who abuse their powers; indeed, it is not addressed to any particular owner.[21] Rather, the challenge is to a legal system that instantiates a right-duty relationship between owners and nonowners, thus making the latter subject to the former's decisional authority.

And this is, I insist, an awesome challenge, exactly because law's constructive work in property matters. To appreciate that, it is always helpful to compare two worlds—one with private property and another without it—and typify their core conceptual difference. We can think about philosophers' tales of the state of nature (but let us please focus on land, rather than on acorns or apples), or we can engage in any one of the contemporary debates regarding the propertization of resources that are currently part of the public domain. In both cases, we look at a shift from what property theorists refer to as a regime of open access—namely: a "scheme of universally distributed, all-encompassing privilege"[22]—to what we identify as private property: a regime that rests, as Jeremy Waldron notes, "around the idea that contested resources are to be regarded as separate objects, each assigned to the decisional authority of some particular individual (or family or firm)."[23]

It is easy to see why shifting from one world to another is dramatic. In the former, everyone has a liberty to enter the land and use it, or to employ the information that is about to be propertized, as they please. The shift to the latter world involves the creation of a private authority, which is now empowered to decide whether one can or may not—and if one can, under which conditions—do (enter, use, &c.) what beforehand they were perfectly entitled to do with no such permission. This private authority is what I (and others[24]) refer to as the most distinguishing feature of private property.[25]

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20. Penner, *supra* note 2 at 553.

21. See *ibid* at 557.

22. Frank I Michelman, "Ethics, Economics, and the Law of Property" (2004) 39:3 Tulsa L Rev 663 at 668 (discussing commons property).

23. Jeremy Waldron, "Property Law" in Dennis Patterson, ed, *A Companion to Philosophy of Law and Legal Theory* (Blackwell, 2010) 9 at 12. As the following text explains, the term "private authority"—as in the statement that "property systems assign private authority over resources in numerous ways" (3)—is supposed to capture this understanding of property. I hope that this clarification properly responds to Penner's complaint that "Dagan's concept of property is somewhat impressionistic." Penner, *supra* note 2 at 538.

24. See e.g. David Owens, "Property and Authority" (2019) 27:3 J of Political Philosophy 271, whose account I criticize (264).

25. Notice that nothing in this paragraph implies that the private authority of owners takes the form of dominion. In other words, Penner is wrong to claim that "the concept of 'non-owner' . . . is meaningless outside the dominion conception of property rights." Penner, *supra* note 2 at 554.

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Indeed, property's distinctive significance "does not lie in the way it allocates access to resources but in the way it structures our interpersonal relationships" (263-64, n 93). By instantiating property, "law *proactively* empowers people, expanding their ability to act and interact in the world" (13). In so doing—in requiring people to "respect people's right to property"—law validates, or, more precisely, constitutes—owners' "authority to have the last word, that is, to determine theirs and others' normative situation regarding the resource at hand" (61). Property *necessarily* subjects nonowners to this authority since "law's demand from non-owners to respect the owners' authority is unmediated by any further facts about the world" (61). This means that once law instantiates property, owners' authority is constitutive of any future interaction involving the objects of property; property's powers, in other words, constitute "society's authority structure" (264 n 93). Therefore, they must be situated at the center of property's legitimacy challenge.[26]

III. The Power of Legal Doctrines and Concepts

Because law constructs property as private authority, the liberal theory of property is necessarily, as I emphasize in the book, *legal* theory (13-16). Accordingly, much of my discussion and the defense I offer to liberal property's three pillars is based on the conviction that legal concepts and legal doctrine matter. Penner is again skeptical: "the vast majority of our significant interpersonal relationships," he writes, "are entirely unregulated by private law, or public law for that matter."[27] Moreover, even insofar as we interact "in the 'shadow' of private law," the dominion conception of property is never an obstacle, he insists.[28] Quite the contrary. Penner reminds us that "the common law model of co-ownership is hardly one of sharing,"[29] and insists that the power of dominion is conducive to sharing, since it allows owners "to be generous in certain ways, to make gifts to charity for instance."[30]

There is yet another way in which my account overstates—or maybe *mis*states—the role of law in Penner's view. Penner objects to my use of the term 'animating' as the proper adjective for the principles underlying the competing conceptions of property. While animating "suggests something that should lead to action of some kind," the dominion view of property is only "meant to be an analysis of the basic features of those rights we call property rights."[31] As a dominion theorist, Penner testifies, he seeks "analytic clarity,"[32] and therefore

26. Notwithstanding my many disagreements with Kantian theorists, I think that on this fundamental point we actually think alike. See Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) at 90 ("a purely unilateral act of acquisition can only restrict the choice of all other persons against the background of an omnilateral authorization, which is possible only in a condition of public right").
27. Penner, *supra* note 2 at 542.
28. *Ibid*.
29. *Ibid* at 539, n 8.
30. *Ibid* at 542.
31. *Ibid* at 551.
32. *Ibid*.

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has "never said that the theory gives rise to any prescriptions."[33] Indeed, Penner is doubtful that recruiting the conception of property to prescription is even possible —"an example of this recruitment would be helpful," he thus adds.[34] After all, any attempt "to draw out an evaluative position from an analytic one" falls prey to the is-ought fallacy.[35] "A dominion theorist can be a liberal, a socialist, [or even] an anarchist," since the accurate depiction the theory provides simply sharpens one's understanding of what one can either adore or detest.[36]

But Penner is wrong on both fronts. Law is not only responsible for the instantiation of property (both generally and regarding any specific set of resources), as I've argued above. It also structures the more specific ways in which property manifests itself in society and thus the frameworks within which we govern our affairs. Furthermore—and this relates to the second prong of Penner's critique of my legal-centralism—property law and theory are also responsible for the ways in which property as a concept affects legal reasoning as well as social and political discourse, which in turn are clearly consequential.

I begin with the first prong. Penner is surely correct to state the possible generosity of owners who give resources to others. But giving does not exhaust the meaning of sharing. To share also means "to partake of, use, experience, occupy, or enjoy with others" or simply "to have in common."[37] And while Penner's observation as per the inadequacy of the common law's rules for co-ownership is accurate, Continental systems do offer a happier alternative. As I briefly mention in *A Liberal Theory of Property* and discuss at length elsewhere, these systems (especially those on the German side) provide the infrastructure of commons institutions and supply anti-opportunistic devices that reassure prospective commoners they will not be abused for cooperating (54-55).[38] *Pace* Penner, "sharing and cooperation in these doctrines are not the choice of a person who already enjoys sole and despotic dominion, but rather a constitutive feature of the property [type], which defines the content of that person's property right."[39]

Penner is also mistaken in presenting the debate over the proper understanding of property as practically inconsequential. While developing this prong of his critique, he reasonably requires an example. So consider how Thomas Merrill and Henry Smith—Penner's fellow leading dominion theorists—present their understanding of the way the exclusion view functions in legal discourse.

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33. *Ibid* at 552.
34. *Ibid*.
35. *Ibid* at 553.
36. *Ibid*.
37. *The Merriam-Webster Dictionary*, *sub verbo* "share", online: www.merriam-webster.com/dictionary/share. Indeed, this is the first meaning mentioned by the Merriam-Webster Dictionary, even before "to grant or give a share in" (*ibid*).
38. See also Hanoch Dagan & Michael A Heller, "The Liberal Commons" (2001), 110:4 Yale LJ 549.
39. Hanoch Dagan, *Property: Values and Institutions* (Oxford University Press, 2011) at 41. *Cf* Yara Al Salman, *Sharing in Common: A Republican Defence of Group Ownership* (Doctoral Thesis, Utrecht University, 2022) at 65-67 [unpublished].

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Merrill and Smith insist that while the penumbra of property may include shades and hues, "exclusion retains its presumptive moral and legal force."[40] This means that "efforts to supplement exclusion with various devices governing proper use" are deemed exceptions.[41] Situating these "refinements"[42] outside property's core does not imply that the interests they serve are insignificant; on the contrary, "these interests' importance enables them to come through the heavy gravitational pull of the exclusionary regime."[43] But property's conceptual structure is nonetheless significant because the existence of exceptions should not obscure the basic "core-and-periphery architecture" that typifies property.[44] The "broad presumption" of the law, in this view, is—and for Merrill and Smith should be—"that owners can dispose of property as they wish."[45]

One can—and should—object to Merrill and Smith's embrace of the dominion view of property. But they are correct both in their implicit observation that a legal community's conventional understanding of core legal concepts like property are consequential and in their more explicit articulation of the way the dominion conception functions. The debate over the dominion conception of property matters because, exactly as they imply, presumptions always matter and often quite dramatically so.

Take, for example, the most important recent property case of the US Supreme Court, which dealt with the constitutionality of a regulation that grants farm labor unions a limited right of access to an employer's property. When addressing this very topic in *A Liberal Theory of Property*, I've started with liberal property's first pillar, which implies—given the indirect service of ownership of means of production to owner-employers' autonomy—that their private authority should be delineated with particular care so as to ensure that it does not include excessive powers that may impinge upon workers' basic rights. This is why I've argued that even before we resort to the perspective of labor law, ownership of factories, farms, and other types of both tangible and intangible property that serve as means of production *must not* include a right to exclude labor organizers and activists, insofar as such an exclusion might jeopardize the workers' right to unionize that is entailed by the liberal commitment to relational justice (5, 42, 69, 199). The Court reached a diametrically opposite conclusion and its reasoning is telling. California's access regulation, it held, constitutes a *per se* physical taking and is thus unconstitutional "[g]iven the central importance to property ownership of the right to exclude," which—as Blackstone notes—"the very idea of property entails," and is thus "universally held to be a fundamental element of the property right."[46]

40. Thomas W Merrill & Henry E Smith, "The Morality of Property" (2007) 48:5 Wm & Mary L Rev 1849 at 1891.
41. *Ibid*.
42. *Ibid*.
43. Henry E Smith, "Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law" (2009) 94:4 Cornell L Rev 959 at 965.
44. *Ibid*.
45. Merrill & Smith, *supra* note 40 at 1892.
46. *Cedar Point Nursery v Hassid*, 141 S Ct 2063 at 2072-73 (2021).

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So the stakes of what is the central understanding of property that judges and lawyers read into the many contexts in which they address disputes involving property cannot be higher; and the implications of the unfortunate hegemony of the dominion exclusion-based view of property are quite dramatic. Discarding this skewed understanding of property would facilitate a careful critical analysis of each property type and its proper incidents. It would thus also prevent, for example, the judicial pitfalls of English doctrines dealing with intellectual property rights, rights under a trust, and choses in action, criticized recently by Ben McFarlane and Simon Douglas, which are all caused by their mistaken interpretation under the dominion paradigm.[47]

The ambition of *A Liberal Theory of Property* is accordingly to reconstruct the meaning of private property, thereby changing the terms of some of our debates. It recognizes not only law's material power, but also its expressive implications, which Penner ignores, and thus the prescriptive significance of its core concepts, which he denies. Merrill and Smith's elucidation of the core-exception structure these concepts tend to impose on our legal reasoning also highlights the practical significance of the debate over their central meaning. The 'on the wall' understandings of core legal concepts such as property necessarily entail crucial implications on the way law is applied, interpreted, and developed. I do not claim that affecting these understandings is easy. But exactly because they are taken for granted based on an "implicit sense of obviousness shared by insiders," they can be—and have been—successfully challenged.[48] In fact, reconsidering such conventional wisdoms typifies some of the happier episodes of legal evolution, often triggered by either public interest lawyering or legal scholarship and legal education.[49]

Penner may respond that he has ordinary language on his side, which may be the case. But then this would be just another example for the risks of what Liam Murphy terms "everyday libertarianism."[50] Furthermore, at least insofar as societies in which legal discourse is socially salient are concerned, re-negotiating the legal meaning of property can also be a potent means for social and political action, because it affects to some extent the power of owners' and nonowners' claims and thus their respective influence. Our public understanding of property shapes people's vision of the rights of owners, their expectations of owners, and the limits of what they perceive to be the legitimate interests of owners.

The potential impact of de-centering the dominion conception of property may be limited, but it is not insignificant. This is why I hope that *A Liberal Theory of Property* would push social scientists to develop tools for empirically assessing the performance of existing property systems in terms of people's

47. See Ben McFarlane & Simon Douglas, "Property, Analogy and Variety" (2022) 42:1 Oxford J Leg Stud 161.
48. Hanoch Dagan, "The Real Legacy of American Legal Realism" (2018) 38:1 Oxford J Leg Stud 123 at 128.
49. *Ibid* at 128-35.
50. Liam Murphy, "The Artificial Morality of Private Law: The Persistence of an Illusion" (2020) 70:4 UTLJ 453.

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self-determination, and not only their welfarist consequences (24, 68, 247). Such tools may be helpful, to give one example, because property features in internationally influential indices, such as the *Ease of Doing Business Index*, the *Global Competitiveness Report*, and *The International Property Rights Index*.[51] Currently, the indicators these indices employ mostly presuppose the dominion conception of property. But if the impact these indices have on decisionmakers is as significant as they claim, then supplanting—or at least supplementing—these indicators with autonomy-based ones may do some work in convincing both true friends of property and those who present themselves as such to follow reformers by pushing our existing, quite imperfect, property systems closer to the liberal ideal.

IV. Between Independence and Self-Determination

But should this ideal indeed be founded on people's right to self-determination as I claim? Penner insists that it should not. He prefers the Kantian premise of a right to independence—adding that an independence-based dominion conception of property is "structural pluralism's necessary foundation"[52]—and he therefore repudiates liberal property's first and, especially, third pillars. Indeed, much of Penner's critique is addressed at my account of liberal property's relational justice.

Penner objects to relational justice on three main grounds: he claims that (1) it is normatively dubious; and, moreover, that even if—or to the extent that—it is acceptable, (2) it has nothing to do with private law; and (3) its underlying concerns are better (or at least as well) addressed by public law.

Thus, normatively, Penner claims that it is hard to see why law should "intervene" in the case of a private owner of a boutique café who practices discrimination against a gay couple in an otherwise gay-friendly city.[53] Penner characterizes relational justice's limit on the right to exclude in such a case as "a theory of choice restriction,"[54] since it would "essentially and necessarily reduce the scope of people's rights to make their own choices."[55] Such a limitation may be founded, he writes, on socialist grounds, but cannot be premised on grounds related to self-determination. Moreover, and this is the other side of the same coin, it is unclear, Penner claims, that the owner's refusal to serve infringes upon anyone's right to self-determination. The reason is twofold. First, one's sexuality is not necessarily self-determined; more generally, Penner finds "the idea

51. See World Bank Group, "Doing Business Report, 2020" (2020), online (pdf): *World Bank Group* www.worldbank.org/en/programs/business-enabling-environment/doing-business-legacy; Klaus Schwab, "The Global Competitiveness Report, 2019" (2019), online (pdf): *World Economic Forum* www.weforum.org/reports/how-to-end-a-decade-of-lost-productivity-growth; Sary Levy-Carciente, "International Property Rights Index, 2020" (2020), online (pdf): *Property Rights Alliance* www.internationalpropertyrightsindex.org/full-report.

52. Penner, *supra* note 2 at 550.

53. *Ibid* at 543.

54. *Ibid* at 546.

55. *Ibid*.

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that we must respect the real selves of others in all their variety" too vague to do any meaningful work.[56] Second, while "rude and unkind," the owner does not really "affect" the excluded person given that, in this hypothetical, there are easy substitutes.[57]

Either way—and now I turn to his second complaint—Penner finds the notion of incorporating relational justice into private law puzzling. He recognizes that "certain concrete limitations on certain property types in their respective spheres will be justifiable when that type's specific way of serving self-determination would otherwise be inhibited."[58] But he claims that "respect for 'self-determination' … does not seem to generate any kind of applicable principle for consistent action"[59] that can be systematic throughout property's domain, nor can it reliably prescribe principled limits on the other-regarding burdens and obligations which relational justice seems to impose. Finally, Penner maintains that the difficulties at hand can be solved or significantly diminished by either "legalizing at least some duties of virtue,"[60] curbing owners' dominion where their action is "malicious,"[61] or properly applying property's structural pluralism, thus allowing people to avoid interacting in potentially offensive frameworks.

Turning from private to public law (and to the third objection), Penner marginalizes the difference between my position, in which anti-discrimination law is internal to property, and the Kantian view, in which "it is a public law limitation on private law rights and liberties,"[62] one that emerges—as Arthur Ripstein, whom he cites approvingly, states—from public law's duty to "guarantee the conditions of full citizens."[63] Moreover, turning from discrimination to poverty, Penner insists that public law is the only appropriate home for addressing its injustices. "It is not at all obvious," he claims, what private law could do to address the problem: "[a]llow trespasses on Tuesdays?"[64]

Finally, Penner argues that nothing in these critiques impinges upon structural pluralism, which he endorses. "The independence account," he writes, "is not anti-facilitative."[65] Quite the contrary: Penner sees no difficulty in treating the "'internal' governance arrangements,"[66] which are necessary for property's structural pluralism, as part of contract, rather than property, and he insists that they fit "seamlessly"[67] within the dominion view of property. His claim goes even further than that: "[t]he dominion conception of

56. *Ibid*.
57. *Ibid* at 543-44.
58. *Ibid* at 547.
59. *Ibid* at 546.
60. *Ibid* at 548.
61. *Ibid* at 549.
62. *Ibid* at 541.
63. *Ibid* at 541, citing Arthur Ripstein, "Private Authority and the Role of Rights: A Reply" (2016) 14:1 Jerusalem Review of Legal Studies 64 at 85.
64. Penner, *supra* note 2 at 552.
65. *Ibid* at 549.
66. *Ibid* at 553.
67. *Ibid*.

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property," he contends, "is the necessary foundation for all of Dagan's different property types."[68]

These are significant concerns. But they can all be properly addressed once we appreciate—as I hope we do at this stage—the profound ways in which law is involved in constituting property as a power-conferring, autonomy-enhancing social institution.

Thus, Penner's reference to relational justice as one that unjustifiably reduces owners scope of choices *assumes* a baseline in which they are entitled to sole and despotic dominion. But because property is a power-conferring institution, property's powers—the scope and content of owners' authority—must not be simply presupposed. Quite the contrary: to be legitimate, property law "necessitates an *ex ante* discussion about the ways that [it] can and should enhance people's autonomy" (14); and because a liberal property regime rests its legitimacy on the maxim of reciprocal respect for self-determination, the café owner in our hypothetical example has, as I explain in Chapter 5 of *A Liberal Theory of Property*, no entitlement to discriminate the gay couple *to start with*.

In other words, the grievance against the owner who purports to keep them out of their café has nothing to do with either malice or etiquette, let alone lack of virtue. Its focus instead is on the owner's attempt to go beyond their jurisdiction. For a genuinely liberal property regime, the attempt to illegitimately expand one's private authority is on par with a copyright owner who seeks to block fair use, or a patent owner who tries to extend a monopoly beyond twenty years. In all three cases the word "their" (copyright, patent, café) need not, should not, and indeed does not mean sole and despotic dominion. By acting *ultra vires*, the café owner affects the excluded persons irrespective of their possible substitutes. Simply put, the burdens and the affirmative duties that liberal property's relational justice prescribes delineate the powers property can legitimately confer; they are prerequisites to owners' private authority.

Indeed, relational justice is not a guide for a response to what parties in a particular interaction have done. Rather, like liberal property's other two pillars, it constructively and prospectively sets up the terms of these interactions. Instead of merely addressing ad-hoc encounters, say, between this or that owner and customer, relational justice directs property law (and private law more generally) in its construction of edifices of human relationship. The terms of the interactions it prescribes are thus prospective: they function as stage-setters, establishing preconditions for legitimate horizontal interactions.[69]

Accordingly, the question at hand is *not* one of intervening with the owner's private authority. Rather, the issue is one of delineating this authority—that is: setting up relatively clear rules that prescribe its contours—in a way that befits the types of interactions that this property type is designed to facilitate given the constitutive features and choices that typify the pertinent parties as well as their

68. *Ibid* at 554.

69. See Hanoch Dagan & Avihay Dorfman, "Poverty and Private Law: Beyond Distributive Justice" (2022), online (pdf): SSRN ssrn.com/abstract=3637034.

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characteristic circumstances.[70] Relational justice implies, for example, that a bright line proscription of discriminatory (or other unjustified) rejections of potential customers is the proper rule for the property type of public accommodation given its characteristic features (131-35), just like it implies that no parallel rule should apply to the property type of homeownership (24).

To be sure, relational justice—unlike the Kantian interpersonal vision of reciprocal respect for independence—"is not reluctant to restrain the independence of some people when its significance to their self-determination is *minimal* and upholding that independence could jeopardize their (or others') self-determination or undermine the substantive equality among persons."[71] But because independence is an intrinsic value, constitutive of our self-determination, relational justice takes it very seriously, and it thus strictly upholds people's independence where it is "crucial for ensuring their self-determination"[72] as well as where "there is no threat to [others'] self-determination and formal equality roughly approximates substantive equality."[73]

These comments should also reassure Penner that relational justice *can* be systemically applied throughout property's domain. This does not mean that reciprocal respect for self-determination fully determines all the rules of property law. Quite the contrary, "any given property type is shaped by the balance between its intrinsic and instrumental values—independence, personhood, community, and utility—that creates its unique animating principle" (38). But while these values play a major role in liberal property, they "are always accommodated only *after* property law faces its autonomy-enhancing *telos*" (38). This means that *pace* Penner's suggestion, property's structural pluralism cannot be the response to the wrongly-excluded persons, since for property to be legitimate, *all* property types must comply with relational justice.

As I've just explained, following this *telos*—and specifically the requirement of relational justice, on which Penner focuses—does generate meaningful and not overly-demanding prescriptions. Relational justice's duty of accommodation "is not an all-encompassing requirement to accommodate every other person in every area of their practical affairs"; rather, it "establishes fair terms of interaction in and around one sphere of action."[74] Moreover, while relational justice rejects the independence-based (Kantian) idea that people's interpersonal duties can be only negative, the burdens it entails cannot, *on its own terms*, be too onerous—an

70. Penner is bothered by my use of the term "real selves" (64), implying that respect to self-determination would require the legally-impossible attention to people's subjective inner-identity. See Penner, *supra* note 2 at 545-48. But as the text implies, the purported binarism of authentic selves and abstract selves, which leaves the latter (Kantian) alternative as the only plausible candidate for law, reflects neither the law nor the way people experience themselves in their social interactions. See Hanoch Dagan, "The Jurisprudence of Liberal Property" (2023) Jurisprudence (forthcoming).

71. Hanoch Dagan & Avihay Dorfman, "Just Relationships" (2016) 116:6 Colum L Rev 1395 at 1426 [emphasis added].

72. *Ibid* at 1427.

73. *Ibid*.

74. *Ibid* at 1423.

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excessive burden undermines self-determination and would thus be self-defeating. This is why relational justice's positive requirements are intrinsically limited to *modest* affirmative other-regard.[75] Chapter 5 of the book discusses a few examples of such qualitative judgments that can identify such modest burdens of accommodation; and private law writ large is full with many more.[76]

Adjusting the private authority of owners to property's autonomy-enhancing *telos* ensures property's legitimacy and is independent of whatever public law obligations owners may justifiably incur. This is not only theoretically significant. Citizens are, as John Rawls argues, duty-bound to support their states' just institutions,[77] and this obligation is indeed enshrined in states' constitutions and public laws. But what about, for example, jurisdictions—such as Australia—who have no bill of rights at Federal and most state levels? Cathy Sherry recently claimed that replacing the Blackstonian conception of property with its liberal counterpart in which relational justice is a core feature may help Australian courts that are currently struggling with the question of the application of discrimination law to private communities.[78] Similarly, while our Rawlsian-public-law obligations attach to our capacity as citizens, relational justice's private-law-duties refer to our interactions as persons, and thus apply also towards individuals who are not members of our polity.[79] Finally, the public law perspective, which properly looks at social ills, misses the ways in which a property law that ignores relational justice proactively confers upon people an authority (to discriminate) that runs counter to its own normative foundation.[80]

Poverty, like discrimination, is certainly a social ill, and the public law mechanisms of tax and redistribution are surely important—probably the most important—means for addressing it. Yet, both relational justice and liberal property have important implications to the way law should—and to some extent already does—address poverty.

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75. *Ibid*. See also e.g. Dagan & Heller, "Autonomy for Contract", *supra* note 19 at 215-219; Hanoch Dagan & Avihay Dorfman, "Justice in Contracts" (2022) 67:1 Am J Juris 1; Hanoch Dagan & Avihay Dorfman, "Precontractual Justice" (2022) 28:2 Leg Theory 89.

76. In addition to the examples from contract law referred to in *supra* note 75, see Avihay Dorfman, "Relational Justice and Torts" in Dagan & Zipursky, *supra* note 19; Hanoch Dagan, "Autonomy, Relational Justice and the Law of Restitution" in Elise Bant, Kit Barker & Simone Degeling, eds, *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar, 2020) 219.

77. See John Rawls, *A Theory of Justice*, revised ed (Belknap Press, 1999) at 293-94.

78. See Cathy Sherry, "Book Review of *A Liberal Theory of Property* by Hanoch Dagan" (2022) 18:2 International Journal of Law in Context 241 at 243-44; Cathy Sherry, "Does Discrimination Law Apply to Residential Strata Schemes?" (2020) 43:1 UNSWLJ 307 at 338.

79. See Hanoch Dagan & Avihay Dorfman, "Interpersonal Human rights" (2018) 51:2 Cornell Intl LJ 361.

80. See Hanoch Dagan & Avihay Dorfman, "Justice in Private: Beyond the Rawlsian Framework" (2018) 37 Law & Phil 171. Penner is concerned that vindicating relational justice in cases of private discrimination that have no clear detrimental *social* consequences might "lead to more bigotry." Penner, *supra* note 2 at 543, n 23. I do not share this conjecture, especially once relational justice is understood as a prerequisite to property's *ex ante* authority. But even if it is valid, it suggests that we need to properly consider *both* dimensions of justice as well as the implications of favoring one or the other, a consideration which is blocked if we fail to appreciate relational justice's freestanding significance.

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Thus, because poverty can impair one person's ability to interact with another on terms reflecting reciprocal respect for their self-determination, it triggers the maxim of relational justice; and while there are institutional limitations on the operationalization of poverty accommodation in private law, there are also promising ways for its incorporation in a broad range of private law frameworks. Or at least so Avihay Dorfman and I claim and demonstrate while analyzing doctrines such as minimum wage, the non-waivable warranty of habitability, and fair access to credit, which instantiate modest private law duties of poverty accommodation.[81]

Insofar as these doctrines implicate owners' rights—as some of them clearly do—they affect property as well. But entrenching the liberal conception of property may also yield even broader implications, since while property theory is surely not a full-blown theory of justice, liberal property does point out some of the features of a just background regime necessary for property's legitimacy. Thus, since—as with money and utility—the marginal autonomy-enhancement of each additional unit of property is likely to be diminishing, liberal property requires law to impose the costs of the ongoing maintenance of this background regime on those who are particularly well-off. The duty of the well-off to cover these costs is not only grounded in their Rawlsian obligation to support just institutions; it is also a precondition to the legitimacy of their own property rights (38).[82]

Finally, while I'm delighted that Penner endorses liberal property's structural pluralism, I dispute both Penner's presentation of it as "orthogonal"[83] to the independence/self-determination divide and his claim that the dominion conception of property is the foundation of the various types offered by a genuinely liberal property law.

I do not deny that for an independence-based Kantian theory of property, supplying a variety of types so as to make life more convenient may be nice to have.[84] But for liberal property the status of structural pluralism is dramatically different: "to be genuinely liberal, a property law *must* offer a diverse range of property types" (79). In other words, "the commitment to structural pluralism is an integral part of the liberal idea of property" (270 n 1); it is not "a discretionary add-on," which is "premised on some extraneous normative ideal" (21, 270 n 1).

Furthermore, whereas property's internal affairs and its external affairs are analytically distinguishable, excising the latter from property's heartland by pigeonholing it into contract (as exclusion theorists suggest) would be unfortunate. Rules of governance—dealing with the *inter se* rights of co-owners, a

81. See Dagan & Dorfman, *supra* note 69. As the brief discussion of poverty and discrimination implies, at times relational justice requires *active* accommodation, while in other cases it implies *not* considering certain characteristics when making decisions. (This clarification addresses, I hope, Penner's critical observation that the café owner "is distinctly not remaining 'aloof' to these prospective customers' real selves." Penner, *supra* note 2 at 545).

82. For more on liberal property's 'radiating effects', see Dagan, *supra* note 70.

83. Penner, *supra* note 2 at 549.

84. *Cf* Arthur Ripstein, "The Contracting Theory of Choices" (2021) 40 Law & Phil 185 at 211.

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landlord and their tenant, or owners of units in condos, among many other examples of forms of divided ownership—are treated as part of property law for a reason. Property's internal and external affairs are inextricably connected, both theoretically and practically.

They are theoretically connected because they both respond to liberal property's *telos*, which requires law to shape property types that are conducive to people's ability to pursue—oftentimes with others—various projects and plans. It is thus not surprising that the proper governance regime for a given property type is often also relevant—and this is the practical point—to the way property law should, and does, set up the rules governing the rights of innocent third parties who interact with one of the stakeholders in the property type at hand (81-82, 86-87, 271 n 6).[85]

V. Back to Blackstone

I will conclude not with any truly conclusive statement but rather by circling back to William Blackstone, the purported father of the dominion conception of property, which Penner so forcefully defends.

Students of Blackstone's *Commentaries* have pointed out the dramatic gap between his notion of "sole and despotic dominion"[86] and the very different view of property that emerges out of his detailed exposition of English land law that follows. As David Schorr puts it, "at every turn, on every page" we see that "the paradigmatic property *right* for Blackstone was *not* allodial ownership or dominium."[87] Blackstone's property varies amongst types, and its inventory includes a variety of commons property forms, which are—on Blackstone's description—commonplace and (at that time) subject to a sophisticated system of governance. Moreover, throughout his long discussion, Blackstone explicates the many limitations and qualifications of property rights, while "'absolute' ownership [is] hardly discussed even as a mythological ideal type."[88] Thus, Schorr concludes that "the anointment of Blackstone as the symbol of property absolutism is more than a quirk of intellectual history—it is perverse."[89]

Blackstone scholars offer conflicting explanations to this gap. On one view, "the 'sole and despotic dominion' apostrophe represented for Blackstone the enlightened view of the true essence of property,"[90] while on another Blackstone was in fact *not* a dominion (or Blackstonian) property theorist.[91]

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85. See also Dagan, *supra* note 39 at 41; Hanoch Dagan & Irit Samet, "The Beneficiary's Ownership Rights in The Trust Res in a Liberal Property Regime" (2022), online (pdf): SSRN ssrn.com/abstract=4050514. *Cf* Sarah Worthington, "Revolutions in Personal Property: Redrawing the Common Law's Conceptual Map" in Sarah Worthington, Andrew Robertson & Graham Virgo, eds, *Revolution and Evolution in Private Law* (Hart, 2018) 227 at 235-42, 245.

86. Blackstone, *supra* note 3 at 2.

87. David B Schorr, "How Blackstone Became a Blackstonian" (2009) 10:1 Theor Inq L 103 at 107 [emphasis in original].

88. *Ibid*.

89. *Ibid* at 105.

90. *Ibid* at 116.

91. *Ibid* at 114-17, 124.

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Carol Rose, who seems to take the former position, treats the gap at hand as one response to what she terms "Blackstone's Anxiety," encapsulated in "the extremely nervous sentences" that follow the confident talk of "sole and despotic dominion."[92] In these sentences, Blackstone writes that "we seem afraid" to "consider the original and foundation" of property rights, as we are "fearful" that

> there is no foundation in nature or in natural law, why a set of words upon parchment should convey the dominion of land ... or why the occupier of a particular field or of a jewel, when lying on his deathbed and no longer able to maintain possession, should be entitled to tell the rest of the world which of them should enjoy it after him.[93]

Questioning the foundation of property, Blackstone writes, is "troublesome," as it might upset the obviousness with which "the mass of mankind" accept "the laws when made, without scrutinizing too nicely into the reasons of making them."[94] Faced with this anxiety—that Rose attributes to property's distributive implications, while I read it to refer to the core difficulty of having a *legitimate* private authority—Blackstone seeks, Rose claims, "to smooth the waters and steer the great ship of the common law back on course";[95] and his lengthy "description of property's legal structure"[96] is thus an exercise of "deflection"[97] and "comfort,"[98] one which is particularly needed given that his other effort—to ground property in a "utilitarian story"[99]—may show that respecting Blackstonian property would be "useful,"[100] but does *not* offer any reason why people should forbear with respect to others' property rights.[101]

Other students of Blackstone's text tend to adopt the opposite view. Frederick Whelan writes that "[i]n light of what follows, the opening assertion"—namely: the idea that property is sole and despotic dominion—"appears almost an ironic allusion to popular or unsophisticated usage."[102] Schorr concurs, suggesting that Blackstone's text may reflect his "lawyerly disapproval of natural-law scholasticism or revolutionary enthusiasm," or alternatively his "mocking" of the "common usage" of property at that time, a reading which is "further buttressed by [Blackstone's] references to 'the imagination' (as opposed to the intellect?), the 'affections of mankind' (as opposed to those of the bar), and the sweeping exaggeration of 'in total exclusion of the right of any other individual in the

92. Carol M Rose, "Canons of Property Talk, or, Blackstone's Anxiety" (1998) 108:3 Yale LJ 601 at 604.
93. Blackstone, *supra* note 3 at 2.
94. *Ibid*.
95. Rose, *supra* note 92 at 606.
96. *Ibid*.
97. *Ibid* at 609.
98. *Ibid* at 610.
99. *Ibid* at 609.
100. *Ibid* at 613.
101. *Ibid* at 605-12.
102. Frederick G Whelan, "Property as Artifice: Hume and Blackstone" in J Roland Pennock & John W Chapman, eds, *Property: Nomos XXII* (New York University Press, 1980) 101 at 119.

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universe.'"[103] Schorr also observes that Blackstone's "pithy but hoary phrase"[104] was only picked up by scholars and courts some sixty years ago, after two centuries in which it was mostly forgotten, which may further indicate that Blackstone himself wasn't Blackstonian after all.

Either way, Blackstone may actually stand for propositions that are much closer to *A Liberal Theory of Property* than to Penner's critique. On both readings it is clear that Blackstone recognized the descriptive pitfalls of the dominion theory and did not subscribe to the conceptual claims contemporary scholars offer on its behalf. The normative anxiety Rose attributes to Blackstone is even more suggestive. Blackstone started his discussion of property with the one conception that was available to him, given the *Commentaries*' reliance on "Roman-law superstructure and natural-law theorizing."[105] But, in sharp contrast to Penner and his fellow Blackstonians, Blackstone was well aware of property's awesome legitimacy challenge. Rushing to a detailed description of property's multiplicity and its various limitations and qualifications that dramatically departs from the dominion view need not be read as a deflection (or an irony, for that matter). It can instead stand as a suggestive gesture, which implies that we need another conception of property—one that better fits the law and can offer property the legitimacy it so desperately needs. On this interpretation of Blackstone, *A Liberal Theory of Property* may be read not as (another) exercise of challenging Blackstone, but rather as an attempt to address the important challenges Blackstone implicitly posed.

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103. Schorr, *supra* note 87 at 117.
104. *Ibid* at 124.
105. *Ibid* at 114.

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