Realism’s Illusions

Alan Brudner*

Abstract

This review essay argues that Hanoch Dagan’s self-styled via media between functionalism and formalism is functionalism in another guise, not the synthesis it claims to be. More specifically, it examines Dagan’s claim to have vindicated, from a realist perspective, what may be called the three autonomies: judge-made law’s autonomy vis-à-vis politics, legal theory’s autonomy vis-à-vis other disciplines that study law, and private law’s autonomy vis-à-vis public law. And it argues in each case that the autonomy Dagan believes he has vindicated is illusory.

Introduction

With Reconstructing American Legal Realism & Rethinking Private Law Theory, Hanoch Dagan becomes the premier interpreter of the realist tradition in legal thought.1 Returning to the canonical works of early twentieth-century American legal realism, Dagan fashions them into a novel approach to studying law—one that speaks to today’s controversies about the neutrality of adjudication, the independence of legal theory from other law-oriented disciplines, and the independence of private law from the law directed to public ends. In this book Dagan asks all the important theoretical questions about law and offers a comprehensive answer from the standpoint of a new interpretation of legal realism.

Dagan’s book challenges both sides of the current debate within legal scholarship about the autonomy of law and legal theory. It challenges functionalists, for whom law serves ends set by other disciplines, as well as neo-formalists, for whom law is the self-enclosed object of a separate discipline. Dagan also denies the skeptical thesis that adjudication is but another site for the conflict between political moralities. Against all such one-sided views, Dagan argues that law lives amid various “constitutive tensions” that set it apart from other practices and that legal scholars and practitioners must continually mediate. The tensions he identifies are those between power and reason, science and craft, tradition and progress. The end-result of mediating these tensions is, Dagan believes, a via media between functionalism and formalism—one that preserves what is true in each while avoiding the errors to which both are prone when pursued single-mindedly. Moreover, Dagan does not leave his thesis about law’s constitutive tensions in the realm of abstraction. He substantiates it by showing the mediations at work in private law and especially in the laws of property and restitution. Thus, not only legal theorists but also private law scholars will find much that is illuminating in this book.

* Professor Emeritus, University of Toronto Faculty of Law.

1 Hanoch Dagan, Reconstructing American Legal Realism & Rethinking Private Law Theory (2013). References to this book appear in parentheses within the text.
Dagan’s book is important for another reason. In it, Dagan weaves the discrete writings of the classical realists into a coherent outlook on law that was never explicit in those works. Hitherto, “legal realism” has designated the family resemblance of several pre-war American jurists who debunked the proclaimed value-neutrality of nineteenth-century legal thought and who urged that law be self-consciously ordered to progressive social ends. It was more a polemic than a theory; and it was so clearly (relative to the mechanical formalism it attacked) on the right side of legal history that every non-formalist could think of himself as a realist. With Dagan, this changes. By working out the positive substance of legal realism, Dagan gives it an identity distinguishing it from all other approaches to private law—one from which many non-formalists will no doubt wish to distance themselves. At the same time, he tries to identify a core legal realism that is moderate and attractive, while weeding out the extremes and wayward progeny that he thinks have distorted the central teaching. The moderate core, Dagan believes, lies in the writings of Felix Cohen, Karl Llewellyn, and Benjamin Cardozo; they are for him the heroes of realism. The intemperate extremes are the crude subjectivism of Jerome Frank and the law-as-prediction thesis of Oliver Wendell Holmes. Those who have developed realism in directions Dagan thinks his heroes would have repudiated are the exponents of the one-sided scientism of law and economics and of the rule-of-law skepticism of critical legal studies.

There is much that is praiseworthy in this book. It is ambitious, erudite, and often wise. Certainly, Dagan has mastered the tradition he seeks to develop. A reviewer, however, must be critical, for he must assess his author’s approach to the subject from a standpoint the author might have unconsciously downplayed or ignored; for how else can he help the author attain his end of understanding? In what follows, accordingly, I’ll argue that Dagan’s self-styled via media between functionalism and formalism is functionalism in another guise, not the synthesis he claims it is. More specifically, I’ll examine Dagan’s claim to have vindicated, from a realist perspective, what we can call the three autonomies: judge-made law’s autonomy vis-à-vis politics, legal theory’s autonomy vis-à-vis other disciplines that study law, and private law’s autonomy vis-à-vis public law. And I’ll argue in each case that the autonomy Dagan believes he has vindicated is illusory.

I. Law and Politics

Dagan begins by rehearsing the stock themes of the realist critique of classical legal formalism—the formalism now associated with Christopher Columbus Langdell. By pretending that law inhabits a self-contained realm of concepts and rules capable of yielding logically determined answers to real-life disputes, legal formalism masked the value choices that (Dagan says) must be made between the alternative norms that always compete for the resolution of a case. For Dagan, the indeterminacy of law stems not simply (as H.L.A. Hart thought) from the generality of language and the consequent distinctions between core and penumbra, easy cases and hard ones. All cases are hard, Dagan insists, because there is always a plurality of legal sources potentially applicable to a case, and this plurality makes moral choice inevitable (22). Concealing these choices behind a facade of
seemingly neutral concepts prevents their being openly scrutinized and endows the existing inventory of concepts with a false aura of naturalness and necessity (23).

We are all familiar with this critique as well as with the rule-of-law skepticism that many have thought follows from it—the denial of any hard-and-fast distinction between common-law adjudication and the competition among political moralities in the electoral and legislative arenas. However, Dagan, while aligning himself with the realist critique of legal formalism, resists the deconstructive conclusions of that critique drawn by critical legal theorists. One of his central claims is that, properly understood, legal realism can make sense of the boundary between judge-made law and politics. It can reject formalism and embrace moral choice, while still preserving the autonomy of judge-made law—an autonomy demanded (he insists) both by the law’s intelligibility and its legitimacy. Without autonomy from politics, judge-made law would be unintelligible as a relatively stable body of precedent sheltered against the winds of popular sentiment that characteristically buffet legislation; without autonomy, law’s unelected “carriers” could claim no legitimacy in deciding which norms will have the backing of state power (27). Let us examine Dagan’s arguments for the thesis that realism can preserve judge-made law’s autonomy vis-à-vis politics.

Legal reasoning, argues Dagan, is reasonably determinate. It comes to conclusions about cases in ways distinguishable from the exercise of caprice. Yet its determinateness does not inhere in law’s analytically distinct categories and their derivative rules, as the classical formalists believed. Rather, says Dagan, it issues from the interplay between power and reason, science and craft, tradition and progress. These antinomies, he says, make up the common law’s constitutive tensions, and it is by constantly mediating between them that law manages to be law and not politics. Indeed, Dagan argues, these constitutive tensions define law as a distinct social practice. Like politics, law deals in power because the judgments of legal actors are enforced by coercion. The formalists, says Dagan, hid this side of law behind a spurious rationalism. Accordingly, once the formalist mask is torn away, there is need for a forthright legitimation. The realist legitimation of judicial power, argues Dagan, consists in showing that adjudication is not an exercise of sheer power, that it is also a forum of reason (29). Judges are required publicly to justify their decisions as flowing from a pre-existing body of rules, giving sound reasons for their choice of norm and drawing relevant analogies or distinctions between the instant case and decided ones. For Dagan, as we’ll see, its norm of public justification is what finally distinguishes adjudication from politics.

Curiously, though, Dagan does not argue that brute power is cancelled in reasonable power or even that such a thing is an ideal to be aimed at. Instead, he argues that law involves an ongoing struggle with the tension between brute power and reason. The tension, he claims, is intractable, and so the legitimation of power that Dagan promised in lieu of legal formalism’s concealment of power never really materializes. There must always, Dagan implies, be a legitimacy deficit. The reason for this, he says, is that coercion necessarily detracts from law’s normativity. His argument runs as follows (35):
Power cannot simply be appended to norms without affecting them, because backing imperatives with coercion detracts from the normative force that an authority’s utterances might otherwise have had. Coercion is designed to bring about the commanded behavior independently of the agent’s own values and desires. Thus coercion undermines the legal norm’s normative appeal, invalidating any possible reason for deference and voluntary obedience. Power, or the threat of inflicting power, does not append itself to normativity but, rather, displaces it.

Here Dagan has identified normativity with the normativity of morality. Obviously, compliance with a norm of morality from fear of power does not count as meeting the moral obligation. One must comply spontaneously for the sake of the human good the norm advances. However, there is a respectable tradition of legal thought according to which legal norms are different from moral norms—different not only in rendering norms of virtue and decency publicly knowable and determinate, but categorically different. According to this view, legal norms command respect for the rights of persons, and the power by which these norms are enforced, so far from detracting from their normativity, realizes their normative force against acts that contradict it. Here, therefore, power is essential to the norm—indeed, constitutive of it. Were the right not mighty, its normativity would be defeated by the claimed normativity of might. Were the legal norm’s realization dependent on spontaneous virtue, the rights of persons would be hostage to individual character, and so they would be self-contradictory as rights. Accordingly, Dagan has given us no good reason to think that reason and power must always stand in tension with each other. His argument that they do collapses the distinction between right-based and virtue-based obligation.

If, however, reason and power are in tension, what is the nature of the qualified legitimation of law’s power that Dagan offers as an alternative to formalism’s masking of power? Here as in several other places Dagan quotes Llewellyn. Law’s power is constrained by reason insofar as “protagonists of diverging normations [sic] struggle to capture the backing of the system of imperatives … to persuade relevant persons that such capture will serve the commonweal” (36). That description of the legal process, however, also fits the competitive political process from which Dagan promised to differentiate law. So how is legal argument distinguished from political debate? Dagan’s answer is that adjudication is a forum in which exercises of power require justification by reasons acceptable to all affected parties (Llewellyn’s “Entirety”), whereas politics is an arena in which public justification in terms of the common good need play no role at all (36). It turns out, then, that Dagan’s conception of law’s distinctiveness presupposes a particular—and a particularly low—opinion of the nature of politics. Law is distinct from a politics of partisan self-interest and brute power—that is, from what many might characterize as a pathological politics. However, law as Dagan conceives it is identical in nature to a politics of persuasion to what will advance the common good, to a politics of public justification, reasoning, and accountability. If, as civic republicans argue, such a politics is what politics ought to be, then the ideal of law turns out to be the same as the ideal of politics. That is to say, the regulative nature of law and the regulative nature of politics are the same natures. But Dagan promised a legitimation of law’s power that would make sense of power
exercised by non-elected officials. Instead, by describing law’s ideal nature in terms equally applicable to ideal politics, he has delegitimized the power exercised by such officials.

Perhaps because he sees this difficulty, Dagan moves beyond reason-giving, persuasion, and accountability as the differentiae of law. Legal reasoning is distinctive, Dagan now tells us, in that it lives amid the tensions between science and craft and between tradition and progress. By science Dagan means the positive social sciences that are capable of understanding and predicting the social and economic consequences of applying different legal norms. Following Roscoe Pound, Dagan argues that legal actors must be attuned to this type of knowledge, because they must be sensitive to the social consequences of their moral choices (46, 86). However, they must also situate the insights of the positive sciences within the context of a moral judgment reflecting a customary ethical sensibility, as courts do when they admit “Brandeis briefs” into legal argument (48). Using social science in this way is what Dagan means by mediating the tension between value-free science and impressionistic craft. It is, he thinks, what distinguishes law from the social sciences it presses into service. But does it distinguish adjudication from politics?

It is difficult to see in the marriage of science and craft anything different from what Aristotle called phronesis and Aquinas prudentia—that is, from the practical wisdom that both thinkers considered the specific virtue of the statesman. What government leader would deny the wisdom of harnessing the health sciences to health policy, economics to economic policy, or the empirical sciences generally to the public ends that moral judgment prescribes? So again, the natures of legal reasoning and political prudence seem, on Dagan’s realist analysis, to be exactly the same. The fact that legal actors must balance the goods of progress and tradition only serves to reinforce our impression that Dagan’s jurisprudence is practical wisdom by another name—not the special knowledge distinct from the King’s that Coke and other common lawyers took it to be.

Perhaps to avert collapsing the judge’s virtue into the statesman’s practical wisdom, Dagan proceeds to grant jurists an institutional monopoly on practical wisdom. In effect, he redistributes that virtue from the politician to the judge. So, he says, all judgment is infected with class bias, but judges’ biases are counteracted by the institutional structure of common-law adjudication, which “invites disagreements respecting questions of fact, opinion, and law,” thus “creating a forum where … judges’ normative and empirical horizons are constantly challenged by … conflicting perspectives” (217). The implication is that judges’ class biases are tempered by institutions, whereas those of politicians run rampant. But this again distinguishes an ideal legal process from a non-ideal political one, hardly an apt comparison. When we compare apples to apples, we find that institutional restraints on particularism are not unique to common-law adjudication. Political institutions—for example, broad-based political parties and winner-take-all electoral systems—temper the class biases of politicians. Dagan points to institutional features such as the adversary system and reason-giving that push judges toward impartiality without draping a full Rawlsian veil over facts pertinent to their self-interest (54). Supposedly, this distinguishes adjudication from the unrestrained factionalism of politics. But one cannot
help thinking that Dagan’s conception of politics has been colored by the peculiarities of Israeli politics. In many democracies, the political process is likewise structured so as to modulate without cancelling group self-interest. Think of Madison’s prescriptions in *Federalist* No. 10, the population-based voting constituencies that militate against deputies’ representing cohesive group interests, and bi-cameral legislatures wherein sectional loyalties and abstract citizenship supplement each other. Here again the institutional constraints on partisanship mentioned by Dagan fail to differentiate the adjudicative process from a well-ordered political one. Nor do the character traits that he says are demanded of lawyers and judges: a combination of sympathy and detachment (58).

So the constitutive tension between science and craft does not define law as a distinctive enterprise nor, specifically, does it distinguish jurisprudence from the statesman’s art. Under Dagan’s guard, law’s distinctiveness becomes conditioned by a false generalization from pathological politics to politics, or at least by a dubious equation of brute power politics with the essential nature of politics. What about the third constitutive tension—that between tradition and progress? Here I’ll simply reproduce two of Dagan’s quotes from Llewellyn, which he thinks encapsulate the realist conception of the ideal judge as one who reconciles respect for precedent with a commitment to worthy social goals. For Llewellyn, as for Dagan, the common law’s “Grand Style” involves a “functioning harmonization of vision with tradition, of continuity with growth, of machinery with purpose, of measure with need .... [It involves an] on-going renovation of doctrine, but touch with the past is too close ... the need for the clean line is too great, for the renovation to smell of revolution or, indeed, of campaigning reform” (61). Their ponderousness aside, these sentences would not have been out of place in *Reflections on the Revolution in France*, where Edmund Burke argues for a similar harmony, though not to judges. Understanding law in light of vague generalities about reconciling tradition and progress fails to distinguish it from a Burkean vision of politics. Indeed, it makes these pages of Dagan’s book read like a left-Tory manifesto.

I have argued elsewhere that the common law’s autonomy vis-à-vis politics is grounded in the justified (but not absolute) autonomy within the total life sufficient for dignity of a right-based normative paradigm ordered to the dignity of persons conceived as atomistic and apolitical. Within this paradigm there is no common good for judges to aim at, hence no virtue of practical wisdom defining their excellence; there are only boundaries between strangers to delineate fairly and to vindicate against implicit claims of permission to transgress them. Rejecting such an ethically limited paradigm but still seeking law’s distinctive nature, Dagan is left grasping at straws.

**II. The Autonomy of Legal Theory**

In chapter four, Dagan and Roy Kreitner ask, “Does it make sense to imagine legal theory as a distinctive academic endeavor” (84)? Once we abandon formalism’s view of legal theory’s autonomy as impermeable self-containment, does legal theory dissolve into an instrumentalist search for the best means of achieving ends set by economics or morality?
Many have thought that the interdisciplinary turn in legal studies carries this implication and that the inevitable outcome is the reduction of law faculties to “mini-departments” of other disciplines. But Dagan and Kreitner deny the implication and offer a realist program for an autonomous legal theory—one that steers a middle course between formalist self-containment, on the one hand, and the reduction of legal theory to applied morality or economics, on the other. Their aim in chapter four is to “describe legal theory as an enterprise robust enough to justify separate naming” (85). This is a noble endeavor. Let us see whether the success they claim is real or merely apparent.

Dagan and Kreitner begin by observing that legal theory “focuses on the work of society’s coercive normative institutions” (85). This, as they are aware, fails to distinguish legal from political theory, from the sociology of the state, or from criminology. But, they continue, legal theory studies these institutions in a unique way because it alone asks what the nature of law is and what its relation to morality is (85). This of course equates legal theory with analytic legal philosophy—the terrain on which Austin, Kelsen, Hart, Raz, and the Dworkin of “The Model of Rules” contend. That equation makes legal theory distinct, but it does so (as the authors concede) at the cost of robustness, for it excludes from legal theory interpretive accounts of legal doctrine. Dagan and Kreitner desire a legal theory more capacious than analytic legal philosophy, yet one that does not collapse legal theory into “law and policy” studies, the socio-historical analysis of law, or the analysis of legal craft. By “law and policy” they mean studies inspired by Holmes’s view that legal actors ought to regard law as a means to attaining social ends. In the contemporary context, it is the view championed by Richard Posner and George Priest, for whom law is subordinated to the various other disciplines that prescribe ends for it. By socio-historical analysis, Dagan and Kreitner mean all non-normative understandings of law as an historical and cultural product. Both approaches, say the authors, reduce legal theory to other disciplines, leaving it with no core identity of its own (87, 90). By contrast, law as craft is a group of studies focusing on legal practice’s distinctive professional norms, method of reasoning, and lawyerly virtues—on what it means to “think like a lawyer.” This, they say, is a study internal to law, but it too is unsatisfactory taken alone, because, if “law and x” is too reductive of law, law as craft is too navel-gazing. It equates the object of legal theory with professional practice and skills-training, thereby separating it from academic disciplines (93).

So, what is the legal theory that is not too external and not too internal but just right? The specific aim of legal theory, say Dagan and Kreitner, is to expose the power dimension in a discourse that often hides it as well as to set the goals whose achievement will bring law’s coercive institutions closer to justice. So a distinctive legal theory “seeks to shed light—either explanatory, justificatory, critical, or reformist—on society’s coercive normative institutions” (97). Now it must be plain that this job description fails to distinguish legal theory categorically from political science or political philosophy. Indeed, it makes legal theory a sub-discipline of political science—the sub-discipline concerned with courts, administrative tribunals, Attorneys-General, and lawyers. But Dagan and Kreitner are not through. The distinctive character of legal theory lies in its openness “to insights from other
discourses about law” (97). In exposing the power dimension in a discourse that often
masks it, legal theory borrows insights from socio-historical analyses of law—analyses that
show the historical contingency and class bias of institutions that legal discourse often takes
for natural features of the environment. In assessing the impact of current law, legal theory
looks to economics, sociology, anthropology, and political science. In evaluating law norma-
tively and reconstructing normative goals for law, legal theory borrows from “law and
policy” studies—economics, ethics, and political philosophy. And to gain a “deep under-
standing of the evolution and dynamics of law,” legal theory requires “inside information
that only law as craft can provide” (97). In sum, the authors write, “more so than their
counterparts in the social sciences and humanities who write about law, legal theorists often
synthesize … these critical dimensions into their accounts” (97).

In the end, therefore, legal theory differs from each of the social sciences and hu-
manities that study law in that it combines their insights under its own name. It is
absorbed by none because it absorbs them all. Its core identity seems to be that of a
sponge. This is indeed a description of a legal theory warranting a separate name, but, alas,
no non-pejorative one comes to mind. True, a legal theory of the kind the authors de-
scribe is no longer in danger of becoming a mini-discipline within a department of
political science, economics, or philosophy. But that is because it has become an interdi-
siplinary “center” at which scholars from other disciplines give talks while legal theorists
sit quietly and take notes. Dagan and Kreitner admit as much when they finally say,
“[R]ather than seeking to establish law as an autonomous academic discipline, [legal theo-
ry] celebrates its own embeddedness in the social sciences and the humanities” (98). In
view of this capitulation, it is surprising that Dagan and Kreitner recommend advanced
legal education in something called legal theory rather than a joint doctoral degree in the
disciplines that legal theory combines. “To the extent that legal theory has content, then
legal theory itself should be part of the toolkit imparted to the aspiring legal academic. In
other words, legal academics should have a background in legal theory—they should
study it as a field” (102). One can only scratch one’s head at this advice. What would stu-
dents learn besides the other disciplines legal theory comprises?

This is not the place to advance an alternative conception of legal theory’s auton-
omy. Perhaps, however, I can suggest an obvious one. Legal theory is a theory of the
corpus juris. It is the understanding of law’s categories and doctrines in light of law’s own
fundamental ends—the bringing to light of the dialectical (self-critical) reason immanent
in the various branches of law and the reformation of doctrine in light of that reason. So,
legal theory is a dynamic theory of private law, criminal law, administrative law, constit u-
tional law, and international law. It is thus the continuation at a fully self-conscious level
of what legal actors already do intuitively. But Dagan’s realism has forsaken legal theory
because, missing the dynamism and self-criticism of law’s internal reason, it equates sur-
render to law’s reason with legal formalism’s deference to what exists—with its presenting
a contested and fluid normative paradigm as a neutral arrangement of ossified concepts.
Given this false equation, realism must deny law’s immanent reason, and then no course remains but to subordinate law to reasons outside it.

III. The Autonomy of Private Law

In chapter five, Dagan addresses the question whether the law of transactions is a private law for two interacting parties or a public law directed to the ends of political society as a whole. Here the extremes he challenges are the economic analysis of law—for Dagan, the quintessential instrumentalist discipline—and neo-Kantian formalism, the paradigmatic anti-instrumentalist doctrine. Both, he argues, are misguided because transactional law is neither unqualifiedly autonomous vis-à-vis public goals nor unqualifiedly at the disposal of such goals. Founded on what he calls perfectionist values, transactional law cannot regard reasoning from social goods as foreign to and illicit for it. Yet, he argues, this need not mean a case-by-case pragmatism that bypasses private law’s categories and settled rules, nor need it imply a one-sided public policy orientation to which the relation between plaintiff and defendant is subsumed. That is so, Dagan argues, because both those categories and that relation are themselves socially valuable. Stable categories facilitate planning, so enhance autonomy; bilateral relations create spaces for free choice and individuality (114, 207). No doubt they do. As we’ll see, however, Dagan’s vindication of private law’s partial autonomy is not even partly real.

Dagan denies that private law reasoning can wholly divorce itself from social values because, he says, social values determine the initial entitlements that private law enforces. Those entitlements are basically property rights, which Dagan regards as “a key, and perhaps even the key, concept of private law” (108). Yet property, he reminds us, is a contested concept open to competing interpretations, and social values ultimately determine the doctrinal choice among these alternatives. In that sense, private law is embedded in the normative framework underpinning a particular social order. It is, Dagan says, “a construction of social values” (108). Moreover, he argues, the content of an owner’s property varies with different social contexts and different kinds of resources: the owner of a pen does not have same rights as the owner of a matrimonial home; the owner of a copyright does not have the same rights as the owner of land. These variations, he says, are the result of political decisions reflecting the social ideals pertinent to diverse human relationships (109).

Nevertheless, Dagan argues, acknowledging private law’s embeddedness in social values does not entail denying its autonomy outright. Here Dagan accepts Ernest Weinrib’s understanding of private law’s autonomy as resting on the correlativity of a plaintiff’s right to reparation from the defendant and the defendant’s duty to repair the loss suffered by the plaintiff. For Weinrib, sustaining the logic of correlativity requires excluding from the justification of liability all reasons (for example, compensation and deterrence) extrinsic to the parties’ bilateral interaction and that apply to one or the other but not to both in unison. It requires that a successful plaintiff’s argument at once single out the defendant for liability and himself for recovery. For his own instrumentalist reasons (having to do...
with the value of free choice and individuality), Dagan wants to hold on to a correlativity constraint on private law justification—or at least to a version of it. In his words, he wants to hold justification in private law to a “more modest formulation of the correlativity injunction” (110). According to this formulation, a plaintiff has a twofold justificatory burden. First, she must show the desirability of the state of affairs that would ensue if claims of the type she asserts were vindicated. Second, she must show why “someone in her predicament” should be entitled to extract the remedy she seeks from “someone such as the defendant” (111)—that is, from a class of people of which the defendant is a member. Dagan’s supposed bow to correlativity consists in his acknowledging that even if the plaintiff can pass the first (consequentialist) hurdle, she should not succeed unless she can pass the second.

Dagan insists that his amendment to the “correlativity injunction” still subjects instrumentalist justification to a privity constraint, but that is an illusion. This is so because, departing from Weinrib, Dagan argues that the social values determining ideal personal interactions within different kinds of relationship (for example, between neighbors or spouses) must also determine the sort of reasons for liability the plaintiff may invoke in diverse social contexts. That I am sole despotic master of something is a reason for defendant’s liability for a taking in some situations but not in others, because different social values inform different kinds of property relationship. Weinrib’s requirement that the reasons for liability themselves invoke no public good external to the parties’ bilateral relationship is, Dagan says, too demanding and, in any event, unnecessary to private law’s autonomy (110).

It is puzzling how Dagan can think that this position preserves private law’s autonomy even a little. If the plaintiff may invoke social values to justify the defendant’s liability “to someone in her predicament,” then she may invoke efficiency concerns (it would be prohibitively expensive to seek out the private prosecutor selected by pure economics) to justify her enforcing the defendant’s civic obligation to exercise cost-justified care in order to deter others from excessive risk-taking. Her recovery is then a windfall result of what is in essence a public sanction. If the plaintiff’s justification for the defendant’s liability need refer only to the defendant’s class (deep pockets?) and not to the defendant himself, then the defendant’s liability is a means to whatever social end (amelioration of suffering?) the plaintiff successfully invokes in justification. It seems that all Dagan means by correlativity is that there is a good social reason why the defendant should pay and another good social reason why the plaintiff should receive the payment; and so there are good social reasons for dealing with a loss by the expedient of a lawsuit rather than by an administrative scheme. But since the grounds for liability and recovery need not be one reason looked at from different sides, Dagan’s reformulation erases a correlativity constraint under the guise of preserving a “modest” version of one. Certainly, it is a far cry from the correlativity of gain and loss (my loss is your gain and vice-versa) that necessitates a bilateral solution and so makes sense of a distinct province for corrective justice within the justice system as a whole. Dagan thinks that just because he would require
the plaintiff to give reasons why someone in her predicament should be entitled to extract a remedy from a class of persons of which the defendant is a member, his solution does not collapse into blunt instrumentalism. But if public reasons are admissible to justify the civil liability of “someone such as the defendant,” then the remedy will be instrumental to those reasons and the particular defendant will be subordinated to them. The loss-spreading rationale of strict enterprise liability satisfies Dagan’s eviscerated conception of correlativity. Indeed, Dagan admits that his idea of correlativity is satisfied by the plaintiff’s serving as a private attorney-general for numerous other plaintiffs or, as in market-share liability, by a defendant’s liability irrespective of his having caused the plaintiff’s injury (111). It is difficult to see this as a middle course between instrumentalism and non-instrumentalism. It is straightforwardly instrumentalist.

Dagan’s examples clarify somewhat the sense in which he sees himself as preserving a modest space for private law. He can, he thinks, admit public ends into private-law entitlements while still regarding some public reasons for liability as internal to private law, hence admissible in litigation, and some as external and out of bounds. The rule of equal division of property on divorce reflects, he says, not the formal equality of abstract persons who deserve an equal share of what they have produced but a social conception of the ideal marriage as an “egalitarian liberal community” (116). Accordingly, that conception of marriage may be invoked in marital disputes about the division of property, because it shapes the ex ante entitlements. However, justifying a property allocation on divorce as promoting a certain population policy, Dagan says, would be inappropriate, because that policy has nothing to do with the initial entitlements (117). So the definition of an “external” consideration of public policy is one that does not inform the ex ante entitlement. Private law’s autonomy is protected, in Dagan’s view, by distinguishing between public ends or values that shape the entitlements and those that do not. But is it? Neither economists nor social egalitarians will see in this distinction a serious constraint, because their efficiency and distributive goals shape the entitlements. Indeed, the constraint on justifying reasons that Dagan proposes is not an internalist constraint at all, but a rationality constraint. The distinction is no longer between considerations internal to the parties’ bilateral relationship and those external thereto but between external considerations that are relevant to the entitlement and external considerations that are irrelevant. But then Dagan’s realism fails to preserve even a sliver of private law’s autonomy; it merely preserves public law’s rationality.

IV. Conclusion: Dagan’s Structural Pluralism

I’ll conclude by commenting on Dagan’s important restatement of the thesis he elaborated in a previous book and for which he is perhaps best known: that the private law of property is best understood in the light of a plurality of values informing a corresponding plurality of property institutions regulating access to diverse categories of resource.2 In Reconstructing

American Legal Realism, Dagan extends this thesis to all branches of private law, but I'll confine my remarks to his analysis of property (196). As we'll see, much of what initially appears persuasive in Dagan's case for value pluralism hinges on his having reduced the distinction between ends internal to private law and ends external to private law to one between collective values relevant to the entitlement and collective values irrelevant thereto.

For Dagan, there is no single theory that explains all property entitlements. There are rather different kinds of relationship to which different ideals apply. Dagan discerns a profusion of values in property law: autonomy, utility, labor, personhood, community, and distributive justice. "Property at its best," he writes, "tailors different configurations of entitlements to different property institutions, with each such institution designed to match the specific balance between property values best suited to its characteristic social setting" (164). Accordingly, there is for Dagan no core meaning of property. Property, he says, is an "umbrella" term for a variety of institutions that regulate the use of resources in different ways for different purposes and in the service of different social goods (186, 193). The fee simple absolute is the institution adapted to arms-length market actors, but other, more co-operative forms of property are suited to marriage, common-interest communities, corporations, and so forth. Moreover, no comprehensive end connects the plurality of values as necessary parts of a whole. There is no whole. There is just an array of values embodied in a corresponding array of institutions. Dagan calls this polycentric feature of property law "structural pluralism," and he distinguishes between two ways of justifying it ethically. One, following Joseph Raz, justifies structural pluralism by reference to the fundamental good of autonomy, which requires a menu of institutional forms from which individuals can "choose and revise their forms of interaction with other individuals respecting diverse types of resources" (164). Another, associated with Elizabeth Anderson, sees autonomy as one value among others and value pluralism as itself fundamental. On this view, structural pluralism is justified by its conforming to our experience of moral judgment as being sensitive to context and as frequently involving trade-offs between incommensurable goods (172). Dagan seems agnostic as between these two justifications of structural pluralism, confident that they will converge on the same prescriptions (173).

Observe, however, that structural pluralism works as a plausible account of private law only because Dagan includes within the private law of property matters normally regulated by statute—matters such as marital law, partnerships, patent law, condominium law, landlord-tenant regimes, and so forth. So his argument is really about the value pluralism of property law as a whole, not about the private law of property, whose specific difference (I have argued) is that it protects against interference a direct (unmediated by collective values) relation of mastery between a person and a thing. Against this objection, Dagan argues that cooperative forms of property implying limitations on the right to exclude are not external to the private right to exclude but elaborations of it; for they further the very same values—autonomy or utility—that underlie the private right (168). But this argument again depends on reading collective goods into private-law entitlements, hence on erasing private law as a category distinct from public law. Dagan is entitled to do this, I
suppose. But he is not entitled to call the result private law, or to think that he has demonstrated the structural pluralism of the private law of property.

Finally, Dagan’s case for structural pluralism assumes a dichotomy between monism and pluralism. He rejects monistic accounts of property law because no single idea or value can capture the diversity of property institutions. But he thinks that this rejection of one-sided monism compels acceptance of monism’s opposite: structural pluralism, understood as a multiplicity of unconnected values, each informing a particular institution. But this is a false dichotomy, as any complex organism in nature illustrates. Monism and pluralism are reconcilable because the one end that unifies an organism can be differently instantiated in sub-systems ordered to proximate ends. The human body is an example. It would be absurd to say that one end alone organizes the human body because the body is organized into diverse systems each ordered to its own end—oxygenation, digestion, sense-perception, etc. But it would be equally absurd to deny the one life that is present in each system and that each system furthers by attending to its own function. I have elsewhere argued that transactional law is like the living body. It is unified by one idea: the mutual recognition of independent ends for the sake of their validation as ends. But this idea is differently instantiated in diverse sub-systems ordered to proximate ends—in the private law of property ordered to the free will’s dominion and in the autonomy-based equity paradigm that stops the enforcement of someone’s dominion when enforcement would unilaterally subordinate one party to the other. Indeed, it would hardly be a stretch to see the norm of mutual recognition also inscribed for the benefit of concrete individuals in the law of marital property—Dagan’s favorite counterexample to “sole despotic dominion.” So property law (indeed each division of transactional law as well as transactional law as a whole) is neither a simple unity ordered to a singular value, nor a sheer plurality of institutions embodying unconnected values. It is a complex unity-in-plurality.

I have focused too much on my disagreements with this book and not enough on its virtues. Not the least of these is the irrepressible love of the law the book exudes on every page. Hanoch Dagan is a worthy successor to his realist heroes.