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Liberalism and the Common Callings

Nick Sage*

Travelling through some country that observes the common law you might come across a stranger on the road who asks for help—for food, or shelter, or a ride to the next town, or assistance with their vehicle. You might be able to supply this assistance, and they willing to reimburse you for it. Nevertheless, you would be entitled to ignore their appeal and pass by on the other side.

This striking rule has attracted the attention of legal theorists, especially proponents and opponents of the broadly liberal tradition. The rule arguably shows the commitment of the common law—or at least the part of the law governing private individuals—to a strong conception of individual freedom or autonomy in interpersonal relations. Indeed, for some theorists influenced by Kant's legal philosophy, the rule shows that private individuals are essentially *independent* of each other.

But what if, in some country subject to 'the good old common law',[1] you ran a business that provided certain goods, services, or facilities to the public—an inn offering meals and rooms for the night, or a railway with a regular passenger service, or even a forge for fixing broken horseshoes? Here the law would not allow you to ignore a stranger who arrived at your premises seeking your help and willing to reimburse you. You would be liable for damages if you turned them away without good reason.

This striking rule has attracted less theoretical attention, but is one key piece of evidence Hanoch Dagan discusses in chapter five of his *Liberal Theory of Property*.[2] Dagan seeks to articulate a liberal theory of private law in general, and of property law in particular, which is more persuasive than the Kantian theory. According to Dagan, private individuals are autonomous or self-determining. But they are not merely independent of each other; rather they stand in a more generous sort of relation. Each person is obliged to *accommodate* each other's self-determination—which may mean taking active steps to help. Dagan argues that this principle explains, among other things,

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1 *Bell v Maryland* (1964) 378 US 226, 294, 296.

2 (CUP 2021) ('*LT*').

the duties of the businesses known as 'common callings', such as innkeepers, carriers, and farriers.

At first blush Dagan's account does seem better placed than the Kantian account to explain this part of the law. But upon closer inspection, I will argue, both accounts face similar objections. I will suggest that Dagan could avoid my objections if he set aside his commitment to individual autonomy, and instead developed different ideas sketched elsewhere in his book: his conceptions of 'community' and 'structural pluralism'. But then the resulting account would no longer be, at least in Dagan's sense of the term, a *Liberal* Theory.[3]

THE RIVAL ACCOUNTS

Dagan develops his theory by contrasting it with the influential Kantian theory expounded especially by Ernest Weinrib and Arthur Ripstein.[4] To a large extent, both theories share the same abstract structure. They both incorporate a conception of the individual person as a sort of agent. According to the Kantians, each person is a *purposive* being: someone who can take up means to achieve purposes or ends she sets for herself.[5] You might set yourself the purpose of growing vegetables in your garden, and take up means to achieve it by tilling the soil, planting seeds, and so forth. Dagan conceives of the individual person as '*self-determining*' or '*autonomous*', by which he means: a person who is the author of her own life story, because her accomplishments are the result of her projects and plans.[6] These conceptions of individual agency are not all that far apart—though Dagan tends to emphasise the narrative arc of an overall life and the Kantians less extended, more quotidian activity.

Both accounts also incorporate a principle mandating how each individual agent must relate to each other. However, the accounts adopt quite different principles of relation. The Kantians claim that individual agents stand to each other in relations of *independence*.[7] Each person owes negative duties not to disrupt each other's purposive control of their body and property. Hence, I cannot lawfully push you over, or trample through your garden. But each person owes no positive duties to help another achieve their ends. Even if you desperately want, or need, a flourishing vegetable patch, you cannot enlist me to produce it. This stark principle allows Kantians to explain the absence of any general duty in private law to rescue or assist others.

3 Do the common callings fall within a Theory of *Property*? They apparently lie at the confluence of property (is there a 'right to exclude' potential customers?), contract (does 'freedom of contract' permit a refusal to deal?), and tort (is exclusion or refusal an actionable wrong?). Dagan, who wants to understand private law as a whole, ignores this issue and I will too.

4 Also, the liberal political philosophies of Rawls and Dworkin, eg *LT* 122 & n35.

5 See *LT* 115-16.

6 *LT* 126-27; 42-44.

7 See (n 5) above.

Dagan's principle governing how individuals must relate to each other is not so easy to pin down. He sometimes says each individual must 'respect' each other's self-determination. [8] But 'respect' could mean a lot of things—Kantians often use the same word. More suggestive are Dagan's references to duties of '*accommodation*'.[9] Because one thing is clear: his principle specifying how individuals must relate to each other is *not* purely negative. One person may be obliged to take some positive steps to help a second person realise her aims, so long as this does not too greatly diminish the autonomy of the first. Dagan regards it as a virtue of his view that, to ascertain how much positive assistance each individual must render each other, we must conduct a sort of autonomy calculus. We must undertake 'the unexciting but indispensable chore' (in HLA Hart's words which Dagan borrows) of balancing the interest in self-determination of the person being accommodated against the interest of the person doing the accommodating.[10] Dagan stresses that this calculus must heed rule of law values—the need for clear guidance for citizens and officials deciding how to act.[11]

Dagan believes his autonomy calculus can explain why an innkeeper, carrier, or provider of other services may owe a duty to admit all comers. Indeed, he believes such a duty is a 'straightforward entailment' of his theory.[12] On one side of the autonomy ledger—the customer's side—a denial of service will tend to undermine their self-determination, since the relevant services are associated with 'social and economic opportunities crucial for personal development'.[13] On the other side of the ledger—the service provider's side—the constraint on self-determination seems relatively small. An unqualified right to exclude others from one's property might be needed to protect the autonomy of, say, a homeowner. A person's home is bound up with their sense of personhood.[14] It is a key component of their overall life story. 'By contrast', Dagan claims, 'commercial businesses are typically held purely instrumentally by their owners, which are frequently corporations'.[15] Hence 'the personhood value' of this kind of property, and the impact on the autonomy of the owner who is required to admit all comers, is much lower.[16]

THE LAW

A full appraisal of the relative merits of these rival theoretical accounts would require us to understand the various areas of law that address the power to turn away customers,

8 Eg *LT* 126.
9 Eg *LT* 127. Dagan's preferred label, 'relational justice', does not distinguish his from other contemporary and historical theories of relational justice—not least the Kantian theory.
10 *LT* 128-29.
11 *LT* 129.
12 *LT* 132.
13 *Ibid.*
14 *LT* 133.
15 *Ibid.*
16 *Ibid.*

in different common law jurisdictions. Unfortunately, as Dagan notes, this law is murky, contested, and variable.[17] But it may help to imagine a spectrum of possible views of the law with something like the following poles.

A narrow view of the law would take as its starting point a general rule that property owners and businesses have a right to exclude or refuse to deal with potential customers, and indeed to do so arbitrarily.[18] Yet, it must be recognised that this general rule is subject to some exceptions. One traditional common law exception, of course, is the so-called 'common callings'—business which cannot refuse to serve customers without good reason. What businesses, then, amount to 'common callings'? On a narrow view, only three ancient professions associated with what we would today call the travel industry: innkeepers, common carriers, and farriers.[19] The general right to exclude is also of course qualified by legislation—not least, anti-discrimination statutes that prevent owners turning others away on the basis of factors such as sex, race, or disability. Constitutional and administrative law requires publicly constituted bodies to exercise their powers to exclude non-arbitrarily. In some jurisdictions, a similar treatment is extended to private owners of quasi-public spaces such as the shopping mall owner who controls the modern equivalent of the town square.[20]

At the other end of the spectrum, a very broad view of the law—which Dagan approves— is advanced by Joseph William Singer.[21] On this view a 'common calling', at least traditionally, was any enterprise that held itself out as ready to serve all comers.[22] On this view, the duty to serve is owed not just by certain ancient travel professionals but by a very wide range of businesses, and indeed by charities and other institutions. Unfortunately, Singer admits, in many jurisdictions this broad approach was cut back in in the nineteenth and twentieth centuries, in no small part due to two pernicious ideological influences.[23] First, a new politico-legal philosophy ('Classical Legal Thought') that emphasised a strong conception of individual freedom or autonomy, and viewed business owners as entitled to exclude whomever they wished. Second, racism. Under these influences, according to Singer, courts held that certain businesses, such as entertainment venues, were exempt from the obligations of the classic common callings. Courts in the American South reached even more reactionary results in the name of Jim Crow. Fortunately, in more recent times, at least some jurisdictions have begun to rehabilitate the broad traditional common law approach.[24]

17 *LT* 131-32.

18 Kevin Gray and Susan Francis Gray, 'Civil Rights, Civil Wrongs, and Quasi-Public Space' (1999) 1 *European Human Rights Law Review* 46, 52-55; *Preddy v Bull* [2013] 1 WLR 3741, 3744 (Hale B) ('The general rule is that suppliers of goods and services are allowed to pick and choose their customers.').

19 Joseph Singer, 'No Right to Exclude' (1996) 90 *Northwestern University Law Review* 1283, 1321-22. Even some of those businesses are exempted in some jurisdictions today. Eg Railways Act 1993 (UK) s 123 ('No person shall be regarded as a common carrier by railway.')

20 But in England see *CIN Properties v Rawlins* [1995] 2 EGLR 130.

21 *LT* 131-32.

22 Singer (n 19), especially 1303-31.

23 *Ibid,* 1390-1410.

24 *Ibid*, 1412ff.

They have been influenced in part by anti-discrimination statutes, and related constitutional protections, which in America have generated a swathe of jurisprudence known as 'public accommodations'. In 1982 a judge of the Supreme Court of New Jersey could famously declare:

> [W]hen property owners open their premises to the general public in the pursuit of their own property interests, they have no right to exclude people unreasonably. On the contrary, they have a duty not to act in an arbitrary or discriminatory manner toward persons who come on their premises. That duty applies not only to common carriers, innkeepers, owners of gasoline service stations, or to private hospitals, but to all property owners who open their premises to the public. Property owners have no legitimate interest in unreasonably excluding particular members of the public when they open their premises for public use.[25]

This is hardly the place to argue for any particular legal position on the spectrum whose poles I have just sketched. Accordingly, I will focus here on the three businesses that, most seem to agree, fall within the core of the old common law approach to the 'common callings': innkeepers, common carriers, and farriers. Anyone developing a legal theory applicable to the common law must address these businesses, at least. Furthermore, I will focus on the businesses' traditional common law duties, rather than on their statutory or constitutional law duties, such as those appearing in modern anti-discrimination statutes. It may be that the different bodies of law have quite different rationales.

CAN KANTIANS ACCOUNT FOR THE COMMON CALLINGS?

The common callings are not treated in any extensive published writings by those private law theorists who advocate the Kantian conception of independence. But at least two broad argumentative strategies would seem to be available. Both can be glimpsed in an outstanding recent paper, advancing a Kantian account of the duties of states to admit non-citizens, by Aravind Ganesh.[26]

One strategy would develop the core Kantian idea of independence. One might suppose that if innkeepers, carriers, and so on could arbitrarily refuse to assist potential customers, this would generate a systematic form of dependence. Potential guests and travellers would be in a systematically vulnerable position, given the potentially dire consequences of exclusion. (In the extreme case, the annihilation of their very existence as a purposive being.) Correlatively, owners of the relevant businesses would tend to wield great power.

Among other difficulties, I suggest, this strategy will have trouble picking out the correct classes of individuals who owe, and are owed, a duty to assist. Consider first

25 *Uston v Resorts International Hotel* (1982) 445 A2d 370, 375 (casino excludes card counter).

26 '*Wirtbarkeit*: Cosmopolitan Right and Innkeeping' (2018) 24 *Legal Theory* 159.

who owes the duty. Why should innkeepers and carriers owe it, but not other private individuals who may likewise be in a position to help the vulnerable? Such as travellers on the road, who may be well placed to help strangers in trouble; or homeowners, who can alleviate (or exploit) their neighbours' suffering. Next consider who is owed the duty. It is unclear why a duty to assist should be owed, for example, by innkeepers to *all* of their potential guests—some of whom may not greatly depend on inns for shelter, food, or other amenities. For instance, guests who live in the same town as the inn and so have other readily available sources of accommodation.[27]

Another argumentative strategy would focus on the arguably *public* character of the common callings. These businesses exercise functions that are important for the bonum publicum and so they might be characterised as public or quasi-public. If so, the principles governing interactions between *private* individuals should presumably not apply. Public institutions are presumably not just independent, but obliged to serve the public good.

This strategy, too, may have difficulty picking out the classes of persons who owe and are owed the duty to assist. But I want to focus on another related difficulty. I doubt this strategy can explain the precise *character* of the duty that is owed. Let us grant that a farrier, for example, is a sort of public institution, obliged to serve the public good by doing work for any person who turns up at her premises at a reasonable hour. Still, one might wonder, why is the farrier obliged to serve the public good only *by shoeing horses*, and not in other ways—for example, by providing nutritious meals, or financial advice, or civics lessons? I suggest that the notion of a 'public' institution and the 'public good' cannot, in themselves (without supplementation by other more determinate ideas) explain the particular character of the obligation here.

CAN DAGAN ACCOUNT FOR THE COMMON CALLINGS?

I will now suggest that Dagan's account of the common callings faces similar difficulties. But first I want to quibble with some of his terminology. Dagan says that each person must accommodate each other's 'self-determination', aka their 'self-authorship', aka their 'autonomy'. Arguably those terms are not entirely apt. When I arrive at your inn, and you, the innkeeper, have to accommodate me, you are not just obliged to help me realise some plan of mine that is about *me*. Such as a plan I might have along the lines of, 'I want a bed for the night and a hot meal'. If that kind of plan were all you had to accommodate, you could do so by pointing me towards a rival inn across the road. But that is not the law.[28] You have to let me stay at *your* inn. You have to accommodate my plan to participate in a certain sort of *relationship*

27 Singer (n 19) 1322 claims 'the nineteenth century case law generally requires inns to serve local customers as well as travellers'.

28 *Constantine v Imperial Hotels* [1944] 1 KB 693 (owner of two Bloomsbury hotels rejects Black patron from one but accommodates him in the other).

with you. Thus, it is arguably misleading to talk of you accommodating my *self*-determination, *self*-authorship, or *auto*nomy. This is not me authoring my own life; we are jointly authoring a common story.[29]

Now let us turn to my main worry about Dagan's account. Will it, like the Kantian account, have difficulty picking out: 1) the class of persons who owe a duty to assist, 2) the class of persons to whom that duty is owed, and 3) the character of the duty? The first of these issues is less obviously problematic for Dagan. On his view, *all persons* owe at least some duties to accommodate each other, and so he would presumably say that travellers on the road, neighbours, etc should owe duties to assist. Of course, this view is at odds with the common law as we know it, which does not generally require strangers or even neighbours actively to help each other (with some exceptions). But Dagan, unlike the Kantians, is happy to say the common law is wrong.[30]

What about the second issue: who is owed the relevant duty? Dagan seems to believe he can explain why inns, for example, owe duties to serve *all* of their potential customers, including those who may not be especially necessitous, such as local residents. Some of his remarks suggest that an innkeeper who turned away a local with readily available alternative options may 'disrespect [their] self-determination'.[31] Even though that is true, I suspect the impact on the customer's autonomy would sometimes be outweighed, on Dagan's calculus, by the impact on the innkeeper's. (For instance, where a local guest who unexpectedly presents themselves at an inn is turned away because the owner would rather spend quality time with his children or pursue some other important personal project.) But perhaps one can manipulate the calculus to produce the desired results.

Finally, then, can Dagan explain the peculiar character of the duty to assist? To recall the difficulty, let us imagine you are strolling down the road in some country that observes the 'good old common law'. You can walk into an inn and demand a meal and a room, or into a railway station to buy a ticket for a train to the next town, or into a farrier's workshop and ask her to shoe your horse. However: you cannot demand that the innkeeper transport you to the next town. Nor can you require the railway yard's ironworkers to shoe your horse. Nor can you expect a farrier to serve you a hot dinner and give you a room for the night. Moreover, neither the innkeeper, the carrier, nor the farrier is obliged to assist you in other ways—say, by helping you draft an epic poem about your life story. Thus, there appears to be a crucial limitation on the character of the duty to assist. Each business must accommodate customers *only* by providing the goods, services, or facilities that businesses of that type hold themselves out as providing.[32]

29 I do not produce a true *auto*biography if I enlist you to help write it.

30 *LT* 17.

31 *LT* 125.

32 'What the duty typically establishes are fair terms of interaction in and around one sphere of action, applying to a particular context or event … .' *LT* 129.

To explain this crucial limitation on the character of the duty, Dagan must invoke his autonomy calculus. It seems unlikely to produce the right results. Consider first the customer's side of the ledger. Customers' self-determination would surely be enhanced, their life plans better accomplished, if they could be carried to their destinations by innkeepers, have their horseshoes repaired by railway workers, or in a pinch, bed down for the night above foundries. Or, indeed, have various other helpful services provided by those businesses. Next, consider the service-provider's side of the ledger. It will often be fairly easy to provide the relevant form of accommodation, if the provider has the necessary equipment and available workforce. Moreover, doing so would not seem to impinge greatly on the providers' self-determination—at least, that is, if we accept Dagan's claim that these businesses are 'typically held purely instrumentally' by their owners (which, after all, are often corporations), and so the 'personhood value' of their control over their property is diminished. Of course, there are also rule of law values at stake here: providers must be able to execute their business plans without too much unexpected disruption. But that concern could be addressed by putting clear rules on the books specifying the relevant duties.

Perhaps Dagan's calculus can still be manipulated to produce the right results. Even if that is so, one might be tempted to look for a more straightforward explanation of the crucial limitation we have identified on the character of the duty to accommodate. Isn't there a simpler answer to the question of why an innkeeper is obliged only to keep inn, a farrier to farrier, and a carrier to carry? An answer that doesn't require us to carry out any 'unexciting yet indispensable' chore involving the complicated calibration of two parties' respective autonomy interests?[33]

A more straightforward explanation might begin with a thought along these lines. The reason the innkeeper has to keep inn is just because he is an innkeeper.[34] The reason the railway has to run trains is just because it is a railway. And so on. This thought invokes a relatively 'thick' conception of a certain calling.[35] The conception has both a 'descriptive' element, describing what it is that a certain kind of service provider does, and a 'normative' element, asserting that a member of the relevant kind ought to do those things. An innkeeper—or at least a *true* innkeeper, a *real* innkeeper—is the kind of person who does, and should, provide room and board to all comers.

A fuller development of this thought might appeal to the customary lore of certain callings and trades. For example, an investigation of the customs of innkeepers might reveal that they have long recognised a duty of hospitality to all comers. Ganesh notes some arresting evidence in this regard. The innkeepers' duty to serve has been, in some times and places,

33 A chore that our predecessors who developed the common law somehow shirked.

34 Bernard Williams, 'Persons, Character, and Morality', in *Moral Luck* (CUP 1981) 18; though see John Gardner, *From Personal Life to Private Law* (OUP 2018) 26-29, 213.

35 Bernard Williams, *Ethics and the Limits of Philosophy* (Fontana 1985).

> symbolised by the traditional ceremony at the dedication of a new hotel or motel of throwing away a key to the inn, thus proclaiming to the world that the door to the hospitality of the inn will never be locked and that all weary travellers will always be welcome.[36]

Now, many legal theorists will feel an urge to go further than this, and explain *why* certain businesses—but not others—owe legally enforceable duties to assist. They will want to know: what makes it the case that such duties are owed by innkeepers, carriers, and farriers—but not by other businesses such as entertainment venues, or indeed homeowners or strangers on the road? I suggest one appropriate response would be to develop a thick account of each of the various institutions or relationships at issue. Doing so might demonstrate that, while some of these institutions or relationships inherently entail duties to assist (eg innkeeper-guest), others do not (eg cabaret-patron, stranger-stranger). Furthermore, we might note that some of these institutions and relationships are more important than others—more significant in the context of our, or our historical predecessors', way of life—and so more likely to attract the attention of our civic authorities.

An explanation that appeals to thick, customary conceptions of certain callings, trades, or relationships might build on two ideas that Dagan sketches elsewhere in his book. First, 'structural pluralism': the notion that there is a 'profound heterogeneity of property types'.[37] The heterogeneous types of land ownership, for example, include 'condos, co-ops, common-interest communities, joint tenancies, leaseholds, and trusts'.[38] Dagan tells us that these property types structure human behaviour and relationships, 'serv[ing] as default frameworks of interpersonal interaction'.[39] Yet, while Dagan's discussion of 'structural pluralism' arguably gestures at the kind of explanation I am proposing, he himself never pursues it. Instead, he quickly returns to his *idée maitresse*, autonomy. He claims the reason we have a menu of heterogeneous property types is to enhance autonomy: to give each individual an extensive range of options to select from when making her life plans.

Second, Dagan sometimes appeals to what he calls 'community', making claims like this:

> Property is frequently a setting for furthering intrinsically valuable interpersonal relationships. Tasks such as sharing in the management of a given resource strengthen and enrich the interpersonal capital that grows from cooperation, support, trust, and mutual responsibility.[40]

In such passages Dagan no longer reductively characterises private law relationships in terms of individuals reciprocally respecting each other's autonomy. He suggests some

36 John Sherry, *The Laws Of Innkeepers* (Cornell UP, 3rd edn 1993) 39; Ganesh (n 27) 168 n41.
37 *LT* 6.
38 *Ibid.*
39 *Ibid.*
40 *LT* 51-52.

relationships are 'intrinsically valuable'—valuable just because of the kinds of relationship they are.[41] This hints that a satisfactory account of the common callings could just elucidate the character of valuable relationships such as innkeeper-guest.

Thus, if Dagan developed his conceptions of 'structural pluralism' and 'community' he might arrive at an alternative view along the lines I have suggested—one that appeals to thick, customary characterisations of certain callings or other institutions or relationships. This alternative view would, of course, be quite different from the one Dagan proposes in chapter five, based on the idea of accommodating individual autonomy. The alternative view is not essentially tied to a conception of the individual person as a sort of agent. Indeed, it is not essentially tied to a conception of the *individual*. Consequently, it is not 'Liberal'—at least in Dagan's sense of that term.[42] Rather, the common callings are revealed to be the 'remnants of a lost continent' of legal ideas that have little to do with individualism or freedom, now largely submerged in the sea of our contemporary liberal assumptions.[43]

41 See too Singer (n 19) 1461.

42 'The core claim of this book is that an analysis of property needs to start from the mainstream liberal tradition of the past century, that is, with a concern for individual autonomy, self-determination, and self-authorship, ensuring to all of us as free and equal individuals the possibility of writing and rewriting our own life stories.' *LT* 1.

43 Amnon Reichman, 'Professional Status and the Freedom to Contract' (2001) 14 *Canadian Journal of Law and Jurisprudence* 79, 90-91.