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Where Is Property? Some Thoughts on the Theoretical Implications of *Daniels v Scribante*

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ABSTRACT: The theoretical implications of the Constitutional Court's decision in *Daniels v Scribante* are analysed in this article. With reference to Jane Baron's theory of the contested commitments of property, it considers the place of property, or ownership, in resolving property disputes in the new constitutional dispensation. The starting point of a dispute involving property is important in the sense that it may determine the potential outcome, or remedy that is awarded, in any particular dispute. Placing property at the centre, or at the heart of any dispute that may involve property, can in certain circumstances go against the constitutional aspirations of healing the divisions of the past and building a society based on fundamental values, such as human dignity. With reference to the arguments of progressive theorists, it is argued that the Constitutional Court in *Daniels* placed property on the fringes; indicating that property owners may have to sacrifice more in protecting the rights of non-owners. Therefore, the *Daniels* decision is an important decision for our evolving understanding of the place of property in democratic South Africa.

KEYWORDS: property theory, constitutional law, evolving understanding of property

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I INTRODUCTION

Jane Baron contrasts two stories that define the work of various theorists who think about the role of property law in society.[1] She explains that the first proposition arises from the approach of information theorists[2] who contend that our property law system is slow to change. In Baron's words, the view of information theorists can be explained as follows:

> Our property system … has existed for a very long time, so long that we have not really noticed it. While it may seem restricting, it advances freedom. The limited forms the system permits can be combined in a wide variety of ways to achieve almost any desired end. The system has not changed much, and it does not need to change much. This is why legislative reforms are superior to judicial reforms: when we need them, as with condos and time-shares, we will get them, but otherwise change will largely be rationed, ensuring that the system will be largely stable.[3]

In contrast, progressive theorists[4] depict a system that changes continuously as follows:

> [P]roperty has changed over time, and it will (and should) continue to change. It has always limited owners' freedom to protect the interests of others, and there is nothing wrong with that, for human flourishing, virtue, freedom, and the like require sacrifice. Legislative change is good, but so are judicial changes. The only important question is whether we have the right quality of social relations, and if we do not, then property rights must be adjusted.[5]

These narratives, which Baron describes as 'commitments' depict different (and indeed contested) ideas about the role that property law plays in organising human behaviour and social life. Baron concludes that '[s]ince we care about how property works, we need to attend to these contested commitments and the choices they require us to make.'[6] The underlying tension about how property law works in the process of ordering social relationships to a large extent informs the way we choose to protect property rights — or, stated differently, the remedies used to protect rights in property. The descriptive point encapsulated in this tension is that where you begin inevitably determines the outcome you will achieve. It is interesting to think about whether the push-pull effects of these contested commitments to property are valuable in understanding why litigants choose (and why courts grant) certain remedies in any given situation. The aim of this article is to shed some light on the question of whether the contested commitments to property law as indicated by Jane Baron can be used to explain the outcome of the Constitutional Court's decision in *Daniels v Scribante and Another*, which concerned the question whether an occupier is entitled to effect improvements to property to ensure habitability with dignity, even in the case where the owner refuses to give permission for such improvements.[7] In a very real sense, *Daniels* shows that the contested commitments to the role of property law can essentially determine the outcome in a particular case. It was clear from the *Daniels* decision that the Court was not wholly focussed on placing 'property' or 'ownership' at the heart of the decision of whether Ms Daniels could affect improvements to the occupied property. If the decision had been primarily about property in circumstances in which a discussion of ownership had been allowed to dominate the question about the

1 J Baron 'Contested Commitments of Property' (2010) 61 *Hastings Law Journal* 917.
2 For a discussion of a theory of property based on the need for information, see Baron ibid at 924–927.
3 Ibid at 960–961.
4 For a discussion of progressive theories of property, see ibid at 927–932.
5 Ibid at 961.
6 Ibid at 966.
7 (CCT50/16) [2017] ZACC 13, 2017 (4) SA 341 (CC) ('*Daniels*').

limits of what an occupier can do in relation to the owner's property, the outcome of the case may have been completely different. Consequently, the case is an embodiment of a particular theoretical approach to property law, one which places property law at the fringes where values such as human dignity are at stake. This clearly indicates a tendency towards favouring the ideals advanced by progressive theorists, which will be the focus throughout the paper.

Although the judgment deals with a number of aspects broader than private property law, such as constitutional law, constitutional property law and land reform, the decision is also important from a private property law perspective and deserves further discussion in this regard. Very importantly, the decision brings to the fore a really important aspect crucial to the understanding of property law in the new constitutional dispensation, namely the fact that the nature and concept of ownership of property must be understood and explained within a historical context that requires 'honest and deep recognition of past injustice[s]'[8] and a deep sense of acceptance of the mandate for constitutional change. No doubt discussions of this judgment will still make their appearances in law journals by academic authors focussing on the implications of the decision on many different areas of the law.[9] Our particular interest in the *Daniels* judgment is that it marks an important turning point for the discussion about post-apartheid property law. Albeit that the question that we would like to address in this article is a modest one, it is complex. Where is property in light of the *Daniels* decision? More specifically, what does the *Daniels* decision tell us about the place of property law in the new constitutional dispensation, and do the contested commitments to property (as initially advanced by Baron) inform the outcome in this particular judgment? In this regard, a number of theoretical perspectives are put forward to show the importance of reflecting on the appropriate starting point when engaging with property disputes in the constitutional era.

On a theoretical level, the judgment (especially Froneman J's judgment) certainly forces one to engage with a number of important questions about the nature and concept of ownership within a particular legal system in light of the constitutional mandate to heal the divisions of the past, and to establish a society based on human dignity, equality and freedom.[10] The case highlights pertinently that the essence of ownership, in the sense of what an owner can (or cannot do) in relation to property, is challenged if one of these aforementioned rights or values is at stake. In this regard, it is important to take cognisance of the starting points from which one begins to resolve disputes of this nature. The contested commitments to property law become valuable in understanding why courts reach the decisions they do. It is also important to begin finding theoretical frameworks that help guide theorists in reconceptualising a vocabulary for

[8] Ibid at para 115 in Froneman J's judgment.

[9] See for instance IM Rautenbach 'Sosiale Regte en Private Pligte — Huisvesting op Plase' (2017) 14 *Litnet Akademies* (focussing on the positive obligations of landowners); EJ Marais & G Muller 'The Right of an ESTA Occupier to Make Improvements without an Owner's Permission after *Daniels*: *Quo vadis* Statutory Interpretation and Development of the Common Law' (2018) 135 *South African Law Journal* (suggesting that an expanded understanding of the categories of lawful occupiers permitted to make improvements without the owner's consent would have been more appropriate); D Davis 'The Right of an ESTA Occupier to Make Improvements without an Owner's Permission after *Daniels*: A Different Perspective' (2019) 136 *South African Law Journal*. In this respect, it should be noted that the case potentially raises ancillary questions about the remedial choice between striking ESTA down; or providing an alternative remedy in the particular case. Marais & Muller, for instance suggest that the common law of unjustified enrichment (as developed) could have provided an alternative remedy to Ms Daniels. However, as Davis rightfully points out, the remedy will essentially depend on how the case is brought. Davis (2019) (this note above) at 431–432.

[10] See Preamble and s 1 of the Constitution of South Africa, 1996.

property law under the current constitutional dispensation, and the *Daniels* decision presents an opportunity to start thinking about what such a new vocabulary might entail.

With this background in mind, Part 11 of this article begins the quest for finding a new theoretical framework by unpacking the idea of the contested commitments to property law and locating the information theorists and progressive theorists at two (presumably opposite) ends of a continuum. We do this with the aim of determining whether this can provide insights into the *Daniels* decision. Part III will follow with an indepth exposition of the facts of *Daniels* in order to show how the outcome of this judgment could only have been achieved with due appreciation for the particular starting point from which the judgment began. In this third part of the article, we also provide some thoughts on the impact of the decision on the presumptive power of property that has dominated the discussion around ownership of property in the past.[11] These thoughts about power of property will provide a platform for our argument about the theoretical implications of the *Daniels* judgment, which we will discuss in Part IV of the article.

Pierre de Vos sees the *Daniels* judgment as forcing us to think about property more in terms of relationships, rather than in exclusionary terms — the latter of which focuses on exclusion as the most important characteristic of property.[12] In this respect, the judgment potentially underscores the importance of understanding the fact that the specific theoretical point of departure (or starting point) essentially determines the outcome or remedy in a particular case. This starting point needs to be evaluated from various theoretical perspectives regarding the nature, meaning and role of property and property law in society. In this reason, Jane Baron's contrast between information and progressive theorists provides an appropriate way of thinking about property law, especially in light of the question of where the outcome in *Daniels* can be plotted in the context of this continuum. The discussions about the relational (or shared) nature of property, as advanced by Rashmi Dyal-Chand in her arguments in favour of *Property sharing*, provide another interesting theoretical perspective to the conclusions in *Daniels*.[13] What is clear is that a different approach to property — an approach that recognises property on the fringes of society in instances where other non-property (constitutional) rights are at stake — may be the appropriate theoretical framework for understanding property law in a transformative constitutional setting. This insight is made by relying on the seminal contributions of Joseph William Singer in *The Edges of the Field*[14] and the late André van der Walt in *Property in the Margins*[15] (and his later refinement of the arguments developed in that book, in an article entitled *The Modest Systemic Status of Property Rights*).[16] We use these theoretical points of departure to start engaging with the outcome in *Daniels*, especially

[11] The authors are of the view that the presumptive power of property — that essentially favours ownership as the apex right — *still* dominates property law thinking. The arguments made by the owner in the *Daniels* case are arguably evidence of exactly this thinking. However, the authors do acknowledge the strides that have already been made in recognising rights that are worthy of protection even in contradiction to ownership. A noteworthy example in this respect would be the denial of the owner's right to evict if it would not be just and equitable to grant an eviction order.

[12] Available at https://www.dailymaverick.co.za/opinionista/2017-05-18-concourt-judgment-explicitly-links-access-to-land-and-housing-with-the-protection-of-dignity/#.WZrdO-QUm4Q.

[13] R Dyal-Chand 'Sharing the Cathedral' (2013) 46 *Connecticut Law Review* 647.

[14] J Singer *The Edges of the Field* (2000).

[15] AJ van der Walt *Property in the Margins* (2009).

[16] AJ van der Walt 'The Modest Systemic Status of Property Rights' (2014) 1 *Journal of Law, Property and Society* 15.

the question of how a particular theoretical vantage point determines a particular outcome. Thereafter, the final section of the article, part V, will discuss more conclusively why it is important, in light of *Daniels*,[17] to reflect on the starting points when it comes to vindicating property rights, and how this impacts on the outcome or the remedy that is awarded. Arguably, reflecting on a particular starting point may open up possibilities to reconceptualise property relations and provide a richer, more nuanced vocabulary, and ultimately assist in creating a more equal distribution of property rights in society.

II THE CONTESTED COMMITMENTS TO PROPERTY

Jane Baron presents two schools of thought about property law. One difference between the theories is that '[i]n one view, property is already working well enough as a social ordering device; [and] in the other, the quality of the existing social order must be continually and directly challenged.'[18] This section will discuss some of the basic tenets of each theory with the hope of determining whether these contested commitments to property law offer some guidance on the theoretical implications of the *Daniels* decision.

Information theorists are focused on standardised signals that indicate inclusion and exclusion.[19] These signals create a clear, relatively simple property system that provides indicators to all around about how to behave in respect of the property of another. The premise behind information theory is that property law needs to communicate information to others and it consequently indicates to potential violators what they may and may not do in relation to property. The system needs to be clear and simple, by recognising a small number of standardised forms of property in which rights are subject to revision only by agreement.[20] In terms of this theoretical vantage point, property law (and by implication its remedial options) is essentially formalistic and has clear boundaries.

[17] Part V below.

[18] Baron (note 1 above) at 923.

[19] Baron (note 1 above) at 918. See, specifically, TW Merrill & HE Smith 'What Happened to Property in Law and Economics?' (2001) 111 *Yale Law Review* 357; HE Smith 'The Language of Property: Form, Context and Audience' (2003) 55 *Stanford Law Review* 1105; JE Penner *The Idea of Property* (1997) 68; TW Merrill 'Property and the Right to Exclude' (1998) 77 *Nebraska Law Review* 730; TW Merrill & HE Smith 'The Morality of Property' (2007) 48 *William & Mary Law Review* 1857; HE Smith 'Property and Property Rules' (2004) 79 *New York University Law Review* 1719.

[20] This function of property law is the basis for the recognition of the *numerus clausus* principle. It serves as a mechanism to standardise property and reduce information gathering. See TW Merril & HE Smith 'Optimal Standardization in the Law of Property: The *Numerus Clausus* Principle' (2000) 110 *Yale Law Review* 1; HE Smith 'Intellectual Property as Property: Delineating Entitlements in Information' (2007) 116 *Yale Law Review* 1742; HE Smith 'Property as the Law of Things' (2012) 125 *Harvard Law Review* 1693.

For progressive theorists,[21] property law has the capacity to promote a number of values, and the basis for property law underlies the values that property potentially serves. If one focuses on only what the law is, one will fail to account for the underlying networks of social relationships that work to create and sustain the law. It is on this basis that Laura Underkuffler explains that '[s]ingle-minded focus on "what the law is" will miss the underlying networks of social relations that work to create and sustain that law'.[22] Progressive theorists therefore suggest that we must be provoked to question — and perhaps subvert — the presumed neutrality and acontextuality of the law by incorporating certain values. Although different progressive theorists focus on different values, the basic premise of the movement remains the same. Gregory Alexander contends that the basic tenet is the flourishing of humanity;[23] while Eduardo Peñalver draws on human flourishing, but focuses specifically on a virtue theory of land use.[24] Joseph Singer suggests a democratic model of property law,[25] and Underkuffler has unpacked Sarah Keenan's notion of subversive property as a means to unsettle the seemingly neutral nature of property law.[26] Jedediah Purdy's work in relation to freedom and property could also fit in with the ideals of the movement,[27] and interestingly, Rashmi Dyal-Chand argues that if the focus in property disputes is more on outcomes than on exclusion; and property law may have the potential to address acute problems of fairness and distributive justice to a much greater extent than it currently does.[28] All these authors would agree that property law has the capacity to promote a number of values, and all these theorists submit that although the right to exclude is intuitively appealing as a foundational core of property law, the institution of property law should be more concerned with (re)constructing social relations.[29] Therefore, according to progressive scholars, the right to exclude cannot (and should not) form the basis upon which

[21] For the moment we mention only the academic authors who have explicitly associated themselves with this movement in the Progressive Property Statement and further authors specifically mentioned in the article, although there have been a number of authors who have in the meantime either explicitly or implicitly associated themselves with the ideals of the movement. The initial signatories to the Progressive Property Statement were GS Alexander, EM Peñalver, JW Singer and LS Underkuffler. Jane Baron includes Jedediah Purdy as part of the movement for his work in relation to freedom and property, which according to Baron fits in with the ideals of the movement. The group of Progressive Property scholars who meet each year seems to have changed since the initial statement was signed and therefore it is difficult to incorporate an extensive discussion of how the movement has evolved over the years. This section focuses on establishing the basic premise of the movement (especially in light of the founders of the movement and their work in advancing the ideals of the movement). We do however posit the work of Rashmi Dyal-Chand, especially her interest-outcome model on the basis of sharing, as an example of another author whose work fits in with the ideals of the Progressive Property movement, albeit not expressly.

[22] LS Underkuffler 'Subversive Property' (2016) *New England Law Review* 295, 301.

[23] GS Alexander 'Social Obligation Norm in American Property Law' (2009) 94 *Cornell Law Review* 745.

[24] EM Peñalver 'Land Virtues' (2009) 94 *Cornell Law Review* 821.

[25] JW Singer 'Democratic Estates: Property Law in a Free and Democratic Society' (2009) 94 *Cornell Law Review* 1009.

[26] Underkuffler (2016) (note 22 above) 295. See also LS Underkuffler *The Idea of Property: Its Meaning and Power* (2003).

[27] J Purdy 'A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates (2005) 72 *University* of *Chicago Law Review* 1237.

[28] Dyal-Chand (note 13 above) at 647.

[29] See further JA Lovett 'Progressive Property in Action: The Land Reform (Scotland) Act 2003' (2011) 89 *Nebraska Law Review* 739; TM Mulvaney 'Progressive Property Moving Forward' (2014) 5 *California Law Review* 349–373; AJ van der Walt 'Sharing Servitudes' (2015) 4 *European Property Law Journal* 162; JA Lovett 'Precarious Possession' (2017) 77 *Louisiana Law Review* 618.

property law aims to resolve disputes, and it certainly cannot form the basis for designing a property institution.

In the end, information theorists and progressive theorists use different metaphors to represent their commitments. Information theorists, on the one hand, employ the metaphor of the machine. Property law is seen as a machine that has produced a good-enough social ordering and information theorists are interested in how the machine works. For progressive theorists, on the other hand, property is seen as a conversation, which involves continual questioning about whether the property law system is in fact good enough.

These contested theories depict very different ideas of the role that property law plays in organising human behaviour and social life. It is clear that each theoretical vantage point can have an impact on the remedies that the legal system adopts to maintain its property regime. The push-pull effects of these contested commitments to property are certainly valuable in understanding why certain remedies are granted in any given situation. Laura Underkuffler makes the same point when she shows that the conception of property one chooses will have a determinative outcome on whether individual property claims win or lose when confronted with conflicting public interests.[30] For that realisation it is necessary to take a step back and see the bigger picture. *Daniels* presents an interesting example of the correlation between the theoretical vantage point, or the point from which one begins as shown by Baron, and the remedial response to that theoretical vantage point. But, only if you really look. It is not self-evident, but it is there. If *Daniels* had, for instance, been made out to be a case of ownership and exclusion (in line with the emphasis placed by information theorists), instead of interpreting the provisions of ESTA in line with the Constitution (and the extent to which that interpretation impacts on the reordering of the social relations between the owner and the vulnerable occupier, which is very much in tune with progressive scholarship), the outcome may have been very different. In the sections that follow, we will attempt to unravel what can be deduced from the outcome in *Daniels*. In order to do that, it is firstly necessary to set out the facts of the decision briefly.

III A SYNOPSIS OF *DANIELS V SCRIBANTE*

Daniels v Scribante concerns an occupier's right to make improvements under the Extension of Security of Tenure Act 62 of 1997 (ESTA). The decision consists of a majority judgment written by Madlanga J. Froneman J, Cameron J, Jafta J and Zondo J concurred with the finding of the first judgment, although each of the justices wrote separate judgments. Each of the judgments will be discussed to the extent that they provide some insight into understanding property in the post-apartheid constitutional dispensation, and very importantly, whether the different judgments provide indications of underlying contested commitments to property.

The case dealt with an application by Ms Daniels, an 'occupier' in terms of ESTA, to effect certain improvements to the property in which she and her three minor children lived. The dwelling was owned by the second respondent, Chardonne Properties CC, and the farm was managed by the first respondent, Mr Scribante. Mr Scribante was classified as the 'person in charge of land' for purposes of s 1 of ESTA, and was therefore the person who, at all relevant

[30] Underkuffler (2003) (note 26 above) at 5. She also mentions that 'the conception of property one chooses can influence our awareness of property's social context, our idealized notions of the relationship between the individual and collective life.'

times, was able to provide the necessary consent for the improvements to be effected to the dwelling. Such consent was, however, explicitly denied by Mr Scribante.

The applicant had lived on the farm for sixteen years with her three minor children. The first respondent had neglected to maintain the dwelling in which the applicant resided and she had previously approached the Stellenbosch Magistrate's Court for a declaratory order to force the respondent to maintain the house. That order was granted by the court and the first respondent had complied with the order. The improvements effected in terms of that order were purely for maintenance-orientated purposes[31] and the applicant sought to effect certain (further) improvements to make the dwelling more habitable. These included levelling the floors, establishing an in-house system of running water with a basin, another window in the house, and paving parts of the surrounding areas of the house. Both parties were in agreement that the improvements that the applicant sought to effect in terms of the present application were not luxurious, but were basic human amenities.[32] It was therefore accepted that the current dwelling would not accord with the standard of human dignity as required by the Constitution.[33] Although Ms Daniels was willing to pay for the improvements herself, the first respondent refused to grant consent for the further improvements to be made. When the applicant subsequently began effecting the improvements, the respondents demanded that the building work cease since they had not given consent for the improvements to be made.

Ms Daniels approached the Stellenbosch Magistrate's Court for an order declaring that she was entitled to make the improvements. She relied on certain provisions of ESTA, specifically ss 5, 6 and 13 of the Act, to argue that the right to make improvements to the property is included under the right to reside in terms of ESTA. Her application was unsuccessful in the Stellenbosch Magistrate's Court. In the absence of a clear provision in ESTA that provides for a right to make the improvements, Ms Daniels was also unable to convince the Land Claims Court that she had such a right. Both the Land Claims Court and the Supreme Court of Appeal denied leave to appeal and, consequently, she sought leave to appeal to the Constitutional Court. The Constitutional Court granted leave to appeal on the basis that it would be in the interest of justice to hear the appeal since the matter raised important constitutional issues.[34] The pertinent question before the Constitutional Court was whether Ms Daniels was entitled to make the requested improvements without the owner's consent so that she could reside in a dwelling that complied with the standard of human dignity required by the Constitution.

Madlanga J, writing the majority judgment, began by questioning whether ESTA provides for a right to effect improvements on the land of another. In this regard, the Court provided a lengthy discussion of the actual wording of ESTA, but, more importantly, the historical context that gave rise to the need for the enactment of this piece of legislation. The Court set out this historical perspective in order to provide the context to establish whether the occupier's right to reside under ESTA included the right to make improvements to the dwelling.[35] Crucially, the respondents asserted that the actual wording of s 6 of ESTA does not explicitly (and actually) provide for a right to effect improvements. In this regard, the Court conceded that 'it is so that

[31] The order in the Stellenbosch Magistrate's Court was specifically for the repair and maintenance of the roof and electricity supply. *Daniels* (note 7 above) at para 6.

[32] Ibid at para 7.

[33] Ibid.

[34] Ibid at para 12. The Court mentioned ss 25(6) and 26 of the Constitution as being the provisions implicated in this regard.

[35] Ibid at para 26.

s 6 has no provision that explicitly says an occupier has a right to make improvements meant to bring her or his dwelling to a standard suitable for human habitation'.[36] Madlanga J sought to determine whether the right under s 6 of ESTA could nonetheless be interpreted to include a right to make improvements even if the section did not explicitly mention it.

Madlanga J stressed that the provision in question should not be read too narrowly. The context sketched by the Court earlier in terms of the purpose of ESTA was specifically done to emphasise that occupiers enjoy fundamental rights, including human dignity.[37] Madlanga J, in fact, recognised that the two constitutional rights implicated in this judgment were the right to security of tenure (in s 25[6]) and the right to human dignity (in s 10).[38] If an interpretation of s 6 of ESTA in line with the suggestion of the first respondent were to be adopted, it would mean that the provision would allow for a right that is devoid of substance, and which would infringe on s 5 of ESTA. In this regard, the Court mentioned that it was questionable whether an occupier who lives in a dwelling that is in a deplorable state could be said to 'reside' in that property. The Court refused to accept such an interpretation of the provision and concluded that like 'the notion of "reside", security of tenure must mean that the dwelling has to be habitable'.[39] If this meant that improvements were necessary to reach a certain level of habitability were required, the Court was willing to accept that the provisions of ESTA allowed for that.[40] Therefore, the right to effect improvements actually stems from a purposive interpretation of ESTA and therefore no issues of separation of powers are implicated if a court orders that such improvements may or should in fact be made where the legislation does not explicitly provide for it.[41]

[36] Ibid at para 27.

[37] Ibid at paras 13–23.

[38] Ibid at para 25. Human dignity is both a value (ss 1, 7(1), 36, 39 of the Constitution) and an entrenched human right in s 10 of the Constitution. In *Dawood & Another v Minister of Home Affairs & Others; Shalabi & Another v Minister of Home Affairs & Others; Thomas & Another v Minister of Home Affairs & Others* (CCT35/99) [2000] ZACC 8, 2000 (3) SA 936 (CC) ('*Dawood*') at para 35, the Constitutional Court stated that human dignity is 'a value that informs the interpretation of many, possibly all, other rights.' In *Dawood*, O' Regan showed how human dignity as a right has a residual (or secondary) role to play in cases where a breach of a more specific right, such as the right not be subjected to slavery, has been breached. O'Regan J argued that it is only where no other specific right in the Bill of Rights is applicable, that reliance on the right to human dignity would be appropriate. However, as H Botha 'Human Dignity in Comparative Perspective' 2009 (20) *Stellenbosch Law Review* 198 points out, the Court has 'not been entirely consistent' in its approach. For instance, in the subsequent decision of *Teddy Bear Clinic for Abused Children & Another v Minister of Justice* a*nd Constitutional Development & Another* (CCT 12/13) [2013] ZACC 35, 2014 (2) SA 168 (CC) Kampepe J found that the impugned legislation constituted a violation of the right to human dignity (at para 58), *as well as* the right to privacy (at para 64) and the best interest of the child (at para 79). Although Madlanga J in the *Daniels* decision referred to both the right to security of tenure and the right to human dignity, it appears that the right to security of tenure was in the end the primary right upon which this decision was based, and that human dignity informed the understanding that right. A similar position to that of Madlanga J in *Daniels* was adopted by the Constitutional Court in *Khosa & Others v Minister of Social Development & Others, Mahlaule & Another v Minister of Social Development* (CCT 13/03, CCT 12/03) [2004] ZACC 11*;* 2004 (6) SA 505 (CC). See H Botha 'Human Dignity in Comparative Perspective' 2009 (20) *Stellenbosch Law Review* 171; A Barak *Human Dignity* (2015) 243–279.

[39] *Daniels* (note 7 above) at para 32 (footnotes omitted from original text).

[40] Ibid at paras 33–36. The respondents also argued that if the Court allows the applicant to make certain improvements to the dwelling, such an order would indirectly amount to the placing of a positive obligation on the owner (as a private person) to ensure that the rights in the Bill of Rights (specifically s 25(6) in this case) are given effect to. The Court dealt with this issue in paras 37–58.

[41] Ibid at paras 51–57.

The Court proceeded to question whether the consent of the owner was required to effect the improvements, and concluded that the owner's consent was not a prerequisite for the making of such improvements.[42] Although the consent of owner, or person in charge, was not required to make the improvements, the Court reiterated that the owner could not be completely disregarded in the process of making the improvements. Meaningful engagement was required between the owner or person in charge and the occupier to help balance out the conflicting interests.[43] If problems were to arise during the process of meaningful engagement, a court order would be required to resolve the dispute. In the end, the Court concluded that the applicant was entitled to effect certain improvements to the property and made specific reference to aspects that would have to be resolved during the meaningful engagement stage.[44]

Froneman J, who wrote a concurring judgment in English and Afrikaans, explained that this case highlighted the fact that South Africa has a long way to go before the ideals of the Constitution are realised. The improvements Ms Daniels sought to effect in this case were, as Froneman J stated, 'basic things'.[45] In this regard, Froneman J emphasised that '[t]here is no reason to continue countenancing the continuation of inhuman and undignified living on farms any more' because there is a constitutional mandate to heal the divisions of the past.[46] Very concretely, this requires that 'where the privileged among us are used to reasonable housing, access to water, and electricity, there is no justification for denying it to others who do not yet have it'.[47] This requires reconceptualising a different idea of ownership of property.

The respondent's point of departure as far as this matter was concerned pivoted, according to Froneman J, on the absolutist idea of ownership of property, one that cannot fully be sustained in the South African context. Such a viewpoint is often used to avoid the consequences of constitutional values and therefore Froneman J attempted to debunk the absolutist notion of ownership. He did so by placing the particular context within which such a notion was appropriate, namely within a particular period in the history of Europe. This way of thinking of ownership ultimately endorses a hierarchical approach in property law, where ownership is seen as the pinnacle of all rights, and all other rights are subordinate to ownership. Froneman J then proceeded to highlight why such an approach to (or conception of) ownership is not feasible under the Constitution with reference to the seminal case of *Port Elizabeth Municipality v Various Occupiers*.[48] In *Port Elizabeth Municipality*, the Court stressed the specific role that courts play in ensuring that opposing claims are balanced out in a just manner, based on the interests involved in the specific case and the facts present in the particular matter. The point is that ownership has a social dimension to it — what Froneman J called the 'social boundedness of property'[49] — that cannot be ignored. For this point of view Froneman J relied on the work of André van der Walt to show that absolutism of property and hierarchy of rights in effect

[42] Ibid at para 60.
[43] Ibid at para 62. In para 64, the Court explained why meaningful engagement in this context was important.
[44] Ibid at para 71.
[45] Ibid at para 112.
[46] Ibid at para 132.
[47] Ibid at para 132.
[48] (CCT 53/03) [2004] ZACC 7, 2005 (1) SA 217 (CC) ('*Port Elizabeth Municipality*').
[49] *Daniels* (note 7 above) at para 135.

perpetuate existing inequalities to the extent that they stand in the way of transformation.[50] This requires rectifying historical injustices, but also looking forward to ensure that occupiers are able to live a dignified life irrespective of the race of the particular occupier or the owner.

Froneman J pointed out that Madlanga J's judgment in essence shows that the protection of ownership cannot be accepted without recognising the injustices of the past. An ahistorical explanation of ownership devoid of recognition of historical injustice cannot be supported because that would entrench the inhumane indignity with which Ms Daniels had had to live over the past sixteen years.[51] Froneman J was also not convinced that the law and economic arguments would succeed in this context because protecting ownership in favour of personal autonomy and economic freedom can be questioned in the South African context, which requires the same 'dignity' for all.[52] On the basis of the reasoning set out above, Froneman J concurred with the finding of Madlanga J's majority judgment, which ordered that Ms Daniels is entitled to effect improvements to the dwellings to bring the home to a habitable state.

Cameron J also wrote a separate judgment in which he concurred with the reasoning and conclusion reached by Madlanga J in the majority judgment. Cameron J, however, cautioned against the first judgment (Madlanga J) and the second judgment (Froneman J) insofar as both those judgments were, according to him, partial and incomplete.[53] Jafta J (with Nkabinde J concurring) in turn, agreed with the finding of the majority judgment, but disagreed with the question of whether the Constitution imposes positive obligations on private persons.[54] Madlanga J held that just because a positive obligation *may* be enforced on a private party in very particular circumstances should not prevent a finding that would allow Ms Daniels occupation with dignity. Jafta J reasoned that although certain provisions in the Bill of Rights do apply horizontally in terms of s 8(2) of the Constitution, this does not imply that a positive obligation can be placed on private persons.[55] In other words, certain provisions in the Bill of Rights are enforceable against the state *and* a private individual, but that does not necessarily mean that a private individual (like the owner) could be saddled with a positive obligation to give effect to the right.[56] This point was, however, purely academic as Ms Daniels agreed to pay for the improvements and that obligation did not — in this particular case — rest on the owner. The judgment of Zondo J also concurred with the first judgment, and Zondo J agreed that considerations of justice and equity require that the applicant be allowed to effect the improvements to the dwelling.[57]

[50] Sources referred to: AJ van der Walt & P Dhliwayo 'The Notion of Absolute and Exclusive Ownership: A Doctrinal Analysis' (2017) 134 *South African Law Journal* 34; AJ van der Walt *Property and Constitution* (2012); AJ van der Walt 'Transformative Constitutionalism and the Development of South African Property Law (Part 2)' (2006) *Tydskrift vir die Suid-Afrikaanse Reg* 1; AJ van der Walt 'Resisting orthodoxy — Again: Thoughts on the development of post-apartheid South African law' (2002) 17 *South African Public Law* 258; AJ van der Walt 'Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law' (1995) 11 *South African Journal of Human Rights* 169.

[51] *Daniels* (note 7 above) at 143.

[52] Ibid at para 143.

[53] Ibid at paras 148, 153.

[54] Ibid at para 156.

[55] Ibid at para 156.

[56] Ibid at paras 157–158. See further below at s 4.

[57] Ibid at para 217.

IV THEORETICAL IMPLICATIONS OF *DANIELS*: WHERE IS PROPERTY?

A Introduction

A lot has been written in the media about this decision, especially about its impact and reach. Schindlers (attorneys, conveyancers and notaries) explain that this decision —

> 'has set a precedent for people who were previously disadvantaged and are living on another's property as occupiers in terms of ESTA to be able to effect improvements to their dwellings to bring them in line with conditions that are conducive to human dignity. In the event that the owner of the property refuses [sic] to the improvements and there is no amicable solution, the court should still be approached before anything further is done.[58]

Pierre de Vos writes that this judgment has 'considerable rhetorical power to address a modest aspect' of the legacy of 'dispossession from land of black people by white people'. He goes on to explain that although the judgment may not actually have any immediate distributional effects, 'it contains important jurisprudence which social justice lawyers will be able to use in other cases to change the way we think of land and land ownership in South Africa. The judgment calls on us to think of land in terms of relationships, rather [than] purely in terms of rights that owners can enforce to exclude others from using land for any purpose.'[59] In light of these statements, it is clear that it is necessary to consider the impact of this judgment on property law.[60]

Although the ultimate finding of the Court allows Ms Daniels to effect basic improvements to the dwelling without the landowners consent, and may in that regard be considered far-reaching, it is possible to identify at least two reasons why the impact is not as far reaching as many may assert. Firstly, if one for a moment turns to the impact of the outcome for the owner, it is important to note the following: Ms Daniels was willing to pay for the improvements herself, and the burden for the payment and effecting of the improvements did not fall on the owner in this specific case. This means that the owner simply had to allow Ms Daniels to make the improvements; the owner did not have to pay for such improvements. In this respect, this was certainly an easier case in terms of ownership of property. A harder case would be one in which the argument rested on an owner's obligation to bring the dwellings to a habitable state. Therefore, the question of whether the owner has (or can have) a positive obligation to bring the dwellings to a habitable state was not answered (at least not directly as necessitated by the

[58] Available at http://www.schindlers.co.za/2017/daniels-v-scribante-and-another-2017-zacc-13/.

[59] Available at https://www.dailymaverick.co.za/opinionista/2017-05-18-concourt-judgment-explicitly-links-access-to-land-and-housing-with-the-protection-of-dignity/#.WZrdO-QUm4Q.

[60] In an academic article, Marais & Muller (note 9 above) at 783 argue that the Court's reliance on ESTA (specifically s 5(c)) of the Act), results in what the author's call a 'strained' interpretation of the Act. They find it difficult to see that s 5(c) of the Act in fact allows for an occupier to effect improvements to the dwelling to bring it to the standard of habitability. On this basis, the authors argue that a more appropriate result would have been to rely on the law of unjustified enrichment (which would have to be developed) to allow for an expansion of the categories of lawful occupiers to improve land without a landowner's consent. Developing the common law in this regard to provide Ms Daniels with the relief she sought in these circumstances would not require the 'strained' interpretation of the Act as advanced by Muller & Marais. It would also be in line with the authors' argument in favour of principles of subsidiarity. For criticism of Muller & Marais, see Davis (note 9 above). Davis raises some important questions about statutory interpretation in a constitutional democracy (note 9 above at 429) and the importance of appreciating the relief that a claimant seeks on the basis of a very specific cause of action (note 9 above at 431).

facts of the case).[61] The Constitutional Court has been clear that although private parties bear negative obligations not to interfere with the current enjoyment of socio-economic rights, the primary positive obligation in realising socio-economic rights rests on the state.[62] In that sense, the conclusion is that *Daniels* is context specific, and it does not (necessarily) imply an overall positive obligation on owners to ensure that occupiers inhabit dwellings that are in a habitable state. As much was confirmed in a subsequent Constitutional Court decision, namely *Baron and Others v Claytile (Pty) Ltd and Another*,[63] where the Court stated that a positive obligation *may* be imposed on a private landowner (in this case to provide suitable alternative accommodation) *only* in truly exceptional circumstances taking into account the specific context, and by having regard to all relevant circumstances.[64]

The second reason for being a bit more hesitant in terms of the overall impact of this judgment is that the owner had conceded that the dwelling was not fit for human habitation.[65] Therefore, the outcome in *Daniels* does not warrant the overall conclusion that owners who make their properties available for others to inhabit, like tenants or usufructuaries, will always be required to accept that the inhabitants are able to make improvements without the consent of the owner. Although the outcome could probably be extended to tenants and usufructuaries who wish to improve the dwelling of the owner, it will only be possible in instances where the dwellings do not meet a standard of habitability, which would have to be determined in each case as no common standard of habitability exists across different categories of inhabitants. If the owner concedes that the dwelling is not fit for human habitation, or the applicant can prove that work needs to be done to bring the home to a habitable state, *Daniels* may provide authority for the inhabitant (being an occupier, tenant or usufructuary) to effect the

[61] For a recent account on private duties in relation to the *Daniels* decision, see Rautenbach (note 9 above) at 959.

[62] See especially *Governing Body of the Juma Musjid Primary School & Others v Essay NO & Others* (CCT 29/10) [2011] ZACC 13, 2011 8 BCLR 761 (CC) 54–60. In this decision, the Court held that the primary obligation to provide basic education rests on the state. However, once a private landowner has permitted the state to establish a school on its land, it bears a negative obligation not to unjustifiably interfere with the enjoyment of that right. This decision is a good example of how the Constitutional Court (unlike the high court and the Supreme Court of Appeal) does not summarily admit private interests (right of owner to evict) to trump public interests (right of learners to basic education). See further S Woolman *The Selfless Constitution* (2013) 471–473.

[63] CCT241/16) [2017] ZACC 24, 2017 (5) SA 329 (CC) ('*Baron*'). For an analysis of the *Baron* judgment, see E van der Sijde 'Tenure Security for ESTA Occupiers: Building on the Obiter Remarks in *Baron Claytile Limited*' (2020) 36 *South African Journal of Human Rights* 1–19.

[64] In *Baron*, the Court did not, based on the specific context and having regard to all relevant circumstances, impose a positive obligation on the private landowner to provide suitable alternative accommodation.

[65] *Daniels* (note 7 above) at para 7.

improvements without the owner's consent, provided the inhabitant bears the responsibility of making the improvements himself.[66]

Although the impact of the *Daniels* decision may be limited in the twofold sense mentioned above, what is evident from the judgment is that the proverbial owner standing up against a non-owner, and in most instances winning, is (at the very least) contested — and there is probably no better place to see it than in the context of the ability (or inability) to protect and uphold property rights. There are increasingly more calls for the legitimization of interests that would traditionally never have been upheld against the rights of ownership.[67] This challenges the inclusion/exclusion dichotomy that to a large extent dominates (or at the very least, underpins) the institution of property, and which determines the remedial options that are available to landowners to protect their property interests. Very importantly, this forms the crux of the distinction between the underlying premises of information and progressive theorists. Whereas information theorists focus on the inclusion/exclusion dichotomy as the central feature of a property system, progressive theorists tend to be occupied with values as the basis for understanding property law. In this respect, this outcome in *Daniels* falls squarely in the progressive school of thought.

B Taking a step back: social dimensions, inclusion and exclusion

Froneman J observed in *Daniels* that ownership has a social dimension that cannot be ignored. He referred to this aspect of property law as the 'social boundedness of property',[68] which recognises that ownership in a very real sense perpetuates existing inequalities to the extent that it stands in the way of transformation. A direct correlation exists between the vantage point from which ownership is viewed and the social relationship that ownership either encourages, or perhaps more importantly, discourages. Laura Underkuffler argues that property is more than the rights, privileges and immunities that a person holds; property can be seen as the 'spaces' or networks of relationships that decides inclusion or exclusion and, therefore, establishes the rights that property involves.[69] Joseph Singer similarly points out that property is an 'intensely social institution', which 'implicates social relationships' that are a combination of individualism and communal responsibility.[70] When you see property not just

[66] Given that there is currently no standard by which to judge habitability (some may argue that a second window is not necessary to make the dwelling habitable, but most may agree that installing water would make it habitable), a determination of what would be regarded as habitability cognisant with human rights will most probably involve a judicial process. In this regard, the question of what would be considered 'habitable' is arguably context specific, and no general rule has been established. Interestingly, in the landlord-tenant context, there are some obligations that rest on the landlord to ensure that the premises being let is 'reasonably fit' for the purpose for which it was let. See G Glover *Kerr's Law of Sale and Lease* 4 ed (2014) 382; *Harlin Properties (Pty) Ltd & Another v Los Angeles Hotel (Pty) Ltd* 1962 (3) SA 143 (A) 150. An implied warranty of habitability therefore arguably already exists in the context of landlord and tenant, although that would be based on the lease agreement (whether implicit or express). Therefore, it is not the standard of habitability that is required by the Constitution (or ESTA).

[67] Van der Walt (2014) (note 16 above) at 15–16.

[68] *Daniels* (note 7 above) at para 135.

[69] See Underkuffler (2016) (note 22 above) at 301 where Underkuffler argues that subversive property challenges exist in property relations, because they manifest alternative relations of belonging.

[70] Singer (2000) (note 14 above) at 3.

as an entitlement, but as a system, it becomes important to evaluate the character of the social relationships that are shaped by the system.[71]

The rights of property, when seen as upheld by existing networks of social relations, are vulnerable to the necessarily dynamic nature of those relations. Because of the symbiotic relationship between property and underlying social networks, entrenched property arrangements can be subverted by the assertion of nonconforming identities and expectations.[72] In other words, the mere existence of alternative arrangements challenges the status quo.[73] If we see existing relations of inclusion and exclusion in 'property' terms, we immediately understand their importance. Furthermore, if we see competing relations in those terms, we immediately understand their importance and potential power as well. It is probably in this sense that Froneman J remarked that this case actually illustrates how far South Africa still has to go before the promises of the Constitution are fulfilled.[74] Interestingly, Singer notes that '[o]ur views about minimum standards of decency and the requisites of an economic system compatible with human dignity are crucially influenced by the sources of our ultimate values and beliefs.'[75] In this regard, the resistance against change — in favour of the status quo — is in a certain sense understandable since —

> [p]rotection against change is something for which most human beings, at least in part, yearn. It is a staple of our daily lives that we welcome change that we want, and fiercely resist change that we do not want. The persistence of dominant regimes of inclusion and exclusion are predictable manifestations of these deeper human desires.[76]

It is clear that the existing remedial structures — or institutions — have undergone a substantial change with the introduction of the Constitution. However, the property institution in South African law is still predominantly based on the inclusion and exclusion paradigm and therefore litigants (and courts) struggle to envision a system in which rights other than real rights (especially ownership) should be protected. Even though legislative reform has somewhat shifted our understanding of property relations, the system as a whole is still largely geared towards protecting the status quo. Consequently, it becomes difficult to comprehend the protection of any other interests that can (or should) in the new constitutional dispensation legitimately stand up against ownership. That is, unless you take a step back.

Cases like *Daniels* force us to take that step, and think about the implications of this decision for the question of: Where is property? The judgment may be forcing us to think about property in shared (or sharing) terms as advanced by Rashmi Dyal-Chand. This judgment may also be requiring of us to think about property on the fringes when other non-property (constitutional) rights are at stake as advanced by Singer in *The Edges of the Field* and Van der Walt in *Property in the Margins* (and later in an article entitled *The Modest Systemic Status of Property Rights*). We

[71] Ibid at 21.

[72] Underkuffler explains that in the process of seeking asylum, applicants 'have been forced to pretend that they fit the dominant culture's stereotypes of acceptable human sexuality and national identity. They have been forced to deny the validity of their roots, and the contradictions and complexities that are inherent in human identity.' See Underkuffler (2016) (note 22 above) at 303. There is an underlying rhetoric of inclusion and exclusion — based on a narrative of belonging — that comes out in the asylum example produced by Underkuffler.

[73] Ibid at 302 where Underkuffler provides examples of instances in which subversive property appears in order to unsettle the status quo.

[74] *Daniels* (note 7 above) at para 112.

[75] Singer (2000) (note 14 above) at 41.

[76] Ibid at 42.

use these works to start engaging with the outcome in *Daniels*, especially in terms of what it means for our understanding of property in the new constitutional dispensation. What is clear is that the Court's outcome is evidently an embodiment of ideals advanced by the progressive theorists.

C Finding a theoretical explanation for the outcome in *Daniels*

In her attempt to rethink the way property law determines outcomes, Rashmi Dyal-Chand argues that '[p]roperty outcomes have the potential to address acute problems of fairness and distributive justice to a much greater extent than they currently do.'[77] The outcome in the *Daniels* decision may well be an embodiment of what Dyal-Chand had in mind. The case was actually about the interpretation of ss 5 and 6 of ESTA. However, the outcome of the case tells an important story of shared property, in some instances directly, but in other places more subtly and less explicitly. In order to see this, it is necessary to concisely unpack the idea of sharing, and then to return to the *Daniels* decision in order to reflect on how the outcome of the decision reveals the notion of sharing. As mentioned, Dyal-Chand's interest-outcome model fits comfortably into a property system as envisioned by progressive scholars. Applying her model to the outcome in *Daniels* clearly shows a property system that favours outcomes that focus on values rather than inclusion and exclusion.

Dyal-Chand argues that in some cases it does not help to make title (or ownership) the decisive factor in establishing the outcome, because, in instances where 'ownership is so determinative of outcome, courts are terribly constrained in the remedies they can provide'.[78] Therefore, Dyal-Chand explains as follows:

> [O]utcomes are [often] tagged to exclusion in the form of blanket property rules and 'keep out' signs … Sharing as an outcome is a powerful means of addressing property inequalities, limiting harmful externalities, preserving efficiency, and harnessing the extraordinary potential of outcomes in property law.[79]

Sharing, in the sense in which Dyal-Chand uses it, is not simply about elevating a non-owner's interest above the owner's right, or even finding exceptions to ownership — it is rather about courts being creative in fashioning remedies that incorporate the idea of sharing rather than the practice of exclusion. Dyal-Chand provides various instances in which the idea of sharing is central to property law, yet ironically the opposite of sharing (namely exclusion) is said to be the thematic foundation of property law.[80] In some cases, exclusion is seen as the defining characteristic of property ownership and the goal of property law is therefore *essentially* to protect ownership by excluding non-owners.[81] In this regard, Muller et al point out:

> This exclusionary approach indicates support for the notion that ownership is the pinnacle of — or the most important right within — a hierarchy of rights, with limited real rights following close at heel. Other rights are understood as being in stages of inferiority to ownership as far as their protection in property law and publicising thereof are concerned. This hierarchical approach to landownership and other rights to land is increasingly coming under scrutiny for failing to provide acceptable solutions to

[77] Dyal-Chand (note 13 above) at 653.
[78] Ibid at 654.
[79] Ibid at 647.
[80] Ibid at 650.
[81] Ibid. See also Penner (note 19 above) at 68–74; Merrill (note 19 above) at 730–731; Merrill & Smith (note 19 above) at 1857; Smith (note 19 above) at 1728.

the increased pressure placed by a proliferation of land reform legislation on the existing registration and land control system in South Africa.[82]

Dyal-Chand argues that sharing exemplifies a broader problem of impoverished outcomes in property law.[83] She makes a theoretical claim by arguing that it matters whether a system of property law is grounded on a sharing model as opposed to a model based on exclusion. If a system of property law is more exclusion-oriented, it will often have the effect that the system is more concerned with asking who has the stronger title, and it becomes difficult to conceive of solutions other than protecting stronger title. Therefore, 'over-reliance on the exclusion model limits our imagination in developing superior outcomes in property disputes that have the potential to protect more legitimate interests in valued resources'.[84]

Dyal-Chand also makes a pragmatic claim in terms of which she contends that there are instances in core doctrinal areas where courts have already shown a tendency towards property sharing. However, in this regard courts lack the 'vocabulary and remedial building blocks to prioritize sharing'[85] as a remedial framework. Therefore, courts instinctively fall back on all-or-nothing solutions grounded on the exclusion model, despite a solution based on sharing being superior both from a fairness and an efficiency perspective.[86] Dyal-Chand therefore attempts to provide a contemporary template for remedies, one that focuses on outcomes rather than title. She cautions that her model does not discard the question of entitlement in its entirety in the sense that the question of who has an entitlement becomes irrelevant, but she argues that the question of entitlement has far greater potential to recognise a broader range of legitimate interests in a property dispute than it currently does.[87] There may thus be reasons other than economic efficiency that motivate people to seek to protect rights or entitlements.[88] The types of interests that she has in mind in this regard include human capabilities, democratic ideals, community norms and cultural values.

There may thus be instances in which a non-owner has a legitimate interest that may justify some degree of access or use (or sharing) where the exclusion paradigm does not provide much assistance in the attempt at finding appropriate remedies.[89] Dyal-Chand therefore foresees that the benefits of a model based on interest-outcome are mostly pragmatic in nature because the reality of allocation of relatively few resources opens up the need for exceptions to core doctrines, balancing tests and implying rights where these were not negotiated.[90] Therefore, theories that are aimed at reducing costs associated with obtaining information to make decisions about property do not always take the various externalities such as distributional injustice into account, whereas the sharing model aims to address equitable outcomes and distributions that are fairer.[91]

[82] G Muller, R Brits, JM Pienaar & ZT Boggenpoel *Silberberg and Schoeman's The Law of Property* (6th ed, 2019) 75.
[83] Dyal-Chand (note 13 above) at 652.
[84] Ibid at 655. Dyal-Chand makes this point by looking at an example in medieval times. With writs the focus was much more on outcome and property use with relatively little attention being paid to formal title.
[85] Ibid at 655.
[86] Ibid.
[87] Ibid at 656.
[88] Ibid at 667–668.
[89] Ibid at 706.
[90] Ibid at 722.
[91] Ibid at 723.

Van der Walt explains that there may be various contexts in which the interest-outcome model may be useful to explain when it may be necessary to adopt or forge new, non-exclusionary remedies that provide a richer array of remedial possibilities than those that currently exist.[92] South African law already provides various instances where non-exclusionary sharing remedies are evident, for instance private law examples where 'considerations of justice and fairness or economic use of land indicate that blunt enforcement of exclusion remedies would be unsuitable and that a viable sharing option is available',[93] or examples in constitutional law where sharing remedies are not inspired by fairness considerations, but rather 'emerge from the promotion of non-property constitutional rights and goals such as equality, dignity or access to housing'.[94]

The *Daniels* judgment was not a case specifically about sharing of property in the sense argued by Dyal-Chand, although, in the end, the *outcome* in *Daniels* was very much about property sharing. The owner was forced to share more of its property than it originally anticipated, or even wished. In line with Dyal-Chand's ideas around sharing, the Court recognised and focused its attention around a legitimate interest on the other side of a property dispute that justified a greater degree of use (or sharing). Therefore, the focus was indirectly on the *use* made of property as opposed to the question of who has title and the consequent ability to exclude others from making decisions about the property. The Court specifically did not make title (or ownership) the decisive factor in the determination of whether the occupiers could make the improvements, because that may have constrained the Court in the remedies it provided. In this sense, in line with the sharing ideal, the Court in *Daniels* was not deliberately searching for opposing rights that are more or less equal to ownership (or that can legitimately stand up against ownership), but the Court was looking for ways in which a non-owner has demonstrated a particular need to share in the owner's property, under the protection of human dignity as given effect to in ESTA.[95] There were therefore legitimate interests on both sides of this property dispute, and the simple determination of who has the strongest title would not have been preferable in determining the outcome in the particular case.

Another interesting way of considering the theoretical implications of *Daniels* is through the lens of marginality. Van der Walt argues that in the new constitutional dispensation the 'perspective of the outsider, the fringe dweller … the weak and the marginalised'[96] must be taken into consideration. In his book entitled *Property in the Margins*, he argues that in order to solve some problems it is impossible to do so with 'normal legal science', instead it is necessary to solve some problems with 'reference to the actual experiences of those who find themselves on the margins of society and of property distribution patterns.'[97] He makes this suggestion because he maintains that it is only possible to see real and meaningful transformation of property from outside the property paradigm.[98] In this respect, Van der Walt posits that —

> the argument is that what I describe as the property regime, including the current system of property holdings and the rules and practices that entrench and protect them, tends to insulate

[92] Van der Walt (2015) (note 29 above) at 220.

[93] Ibid at 219.

[94] Ibid.

[95] Dyal-Chand (note 13 above) at 652.

[96] AJ van der Walt 'Property and Refusal' in K van Marle ed *Refusal, Transition and Post-apartheid Law* (2009) 39, 54.

[97] Van der Walt (2009) (note 15 above) at 23.

[98] Ibid at 26.

> itself against change (including social and political transformation) through the security- and stability-seeking tendency of tradition and legal culture, including the deep assumptions about security and stability embedded in the rights paradigm.[99]

The goal of Van der Walt's book is therefore to investigate the effects of the rights paradigm on the 'margins of property law and of society, by establishing the actual efficacy and power of reformist or transformative anti-eviction policies and legislation aimed at the protection of marginalised and weak land users and occupiers.'[100] In his essay, entitled *The Modest Systemic Status of Property Rights*, Van der Walt takes the debate of the 'over-inflated perception of property as simple message of keep off further' by arguing 'that the legal protection of property rights in fact plays — and should play — a surprisingly modest systemic role in the law.'[101] He makes the argument in the narrow context in which landowners seek to exclude from their property others who wish to exercise non-commercial rights on land that is either quasi-public or private property with restricted public access.[102] In these contexts he argues it should be determined whether 'it is systemically important to at least consider whether conflicts should not be decided on the basis of non-property rights, even though property rights are affected.'[103]

If one uses this argument to start thinking about the *Daniels* decision, it is important to realise that the outcome of this case was *not* determined with reference to ownership because within the rights paradigm the qualification or exception to ownership would have to be accommodated. Instead, considerations about the type of society we want to live in, one where dignity for all is respected, can be seen as the underlying base from which the case proceeded. This is in line with Jane Baron's conceptualisation of progressive theorists in which '[t]he only important question is whether we have the right quality of social relations and if we do not, then property rights must be adjusted'.[104] In this respect, Froneman J's judgment in *Daniels* probably came closest to explaining the outcome in property terms, as doctrinally acceptable exceptions or developments of the property for the sake of social or political policy reasons.

Interestingly, Singer explains that a problem can arise when a nation's political and moral commitments are in tension, even in contradiction. When one reads *Daniels*, one almost gets this sense of the contradiction that Singer may be eluding to here:

> On one side are claims of property; on the other side are claims of humanity. On one side are claims to rights; on the other side are acknowledgements of responsibilities. On one side are the values of liberty and autonomy; on the other side are values associated with security, social stability, and solidarity.[105]

Singer makes the claim that self-interest means that we can live on our own terms. However, it also has a dark side in the sense that it promotes indifference to the effects of our actions on others.[106] He goes further to argue that we could pay attention to those on the margins, those outside the boundaries, and those on the edges of the field. We could adjudicate the tensions we face between competing interests by developing laws and policies that will spread the wealth more evenly and allow every person to obtain a decent life. The crucial question is: Why should

[99] Ibid at preface vii.
[100] Ibid at preface vii.
[101] Van der Walt (2014) (note 16 above) at 26.
[102] Ibid at 27.
[103] Ibid at 30.
[104] Baron (note 1 above) at 961.
[105] Singer (2000) (note 14 above) at 10.
[106] Ibid at 10–11.

we do this? We should focus, according to Singer, on the importance of human dignity, the sanctity of the individual, because of the maxim that no one is an island.[107] 'If the ability to lead a decent life is important, it is equally important for every person. If property is necessary to obtain the ability to lead a decent life, then, every person must have a realistic opportunity to obtain access to property.'[108] However, because property is essentially exclusionary, protection of the rights of owners may have the effect of leaving others out of the system. Therefore, Singer suggests that unless the government in South Africa can implement policies that spread access to property more widely, the newfound ideals of equality, freedom, and democracy will be fatally undermined. It is essential to shape property institutions so that it is realistically possible for everyone to enter the system and obtain a decent livelihood.[109] When asking the question of what values should inform the property rules and institutions we choose, we should not ignore distributive issues and simply try to maximize the size of the economic pie.[110] This is exactly what the outcome in *Daniels* shows: that '[t]he laws and policies governing and surrounding property must protect established claims while simultaneously ensuring the presence of realistic opportunities for those who have not yet been able to establish property claims.'[111]

V ASSESSMENT: WHERE IS PROPERTY REALLY IN LIGHT OF *DANIELS*?

So, where is property in light of *Daniels v Scribante*? And, perhaps more importantly, what can be expected from property within a constitutional and statutory context after *Daniels*. These questions are important if we are to make sense of property obligations and what parties may be required to 'give' in line with the Constitution. The Court in the subsequent case of *Baron v Claytile* pointed out '[t]his Court has long recognised that complex constitutional matters cannot be approached in a binary, all-or-nothing fashion, but the result is often found on a continuum that reflects the variations in the respective weight of the relevant considerations.'[112] Therefore, the duties that ownership of land — and property law more generally — comes with in the new constitutional dispensation may differ from the obligations that owners may have had in the pre-constitutional context.

Although the statements uttered in *Daniels* relating to property or ownership are not new, they are a reminder of the particular context within which property must be understood in the new constitutional dispensation. In this sense, *Daniels* provided a rich analysis of why parties might be expected (especially private landowners) to 'give' or undertake more than what was initially anticipated in ESTA. It is for the courts to analyse where the duties and responsibilities begin and end, especially within the legislative framework of ESTA. Therefore, *Daniels* provides meaning to the provisions of ESTA, specifically in the context of the meaning of security of tenure. The judgment is also crucial because it tells an important story about what property means (and the appropriate place of property law) in the current constitutional dispensation. Arguably, *Daniels* illustrates quite pertinently that where you begin — in other words, your theoretical vantage point — quite clearly determines the outcome you will achieve. In this regard, the progressive theories of Dyal-Chand, Singer and Van der Walt provide some

[107] Ibid at 36–37.
[108] Ibid at 27.
[109] Ibid at 17.
[110] Ibid at 36.
[111] Ibid at 32.
[112] *Baron & Claytile* (note 63 above) at para 36.

explanation of exactly this point, especially in so far as they relate to the outcome in *Daniels*. *Daniels* shows 'that we, as a society, have simply abandoned traditional notions of property-as-protection in favour of an idea of property that confers much greater collective control.'[113] The case clearly aligns with a property system underpinned by the philosophy of progressive theorists rather than the school of thought advocated by information theorists — a dualism so aptly set out by Jane Baron.

[113] Underkuffler (2016) (note 22 above) at 3.