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Gregory S. Alexander and Eduardo M Penalver, Property and Community

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Gregory S. Alexander and Eduardo M. Peñalver (eds.), *Property and Community*.
New York: Oxford University Press, 2010. (203 pp.), ISBN 978-0-19-539157-2,
US\$ 45.00.

Reviewed by Charles C. Geisler

Can there be property without community? The authors contributing to this volume, attendees at a 2007 conference on “Property and Instrumentality” at the London School of Economics, uniformly answer in the negative. Still, since the sociality of property dates to the Hohfeldian rights theory of a century ago, why revisit the subject? There are several answers. “Community” is not a unitary construct and individuals participate in several simultaneously; community and property interact in unforeseen and paradoxical ways; and the reverse question (can there be community without property) is of equal interest. The charm of this book lies in the many forms of community it advances and property possibilities it signals. Its failing is that it stops too soon. A synthetic final chapter is sadly absent.

Throughout the book, community is crafted at multiple scales, from small groups to sovereign states. Too often, according to editors Alexander and Peñalver, communities are normative and unproblematic, as formatted by utilitarians or classical liberals. Nevertheless, such ontologies *are* problematic. The book’s authors challenge myths of autonomous individualism and nonrelational property, helping us visualize property-community relations anew. Readers benefit from this exercise in numerous ways, for example in reimagining takings law (Hanoch Dagan’s chapter) and revisiting theories of externalities (Joseph Singer). The thrust of this review lies elsewhere, however.

The book’s real contribution is the plethora of “communities” it identifies and the somewhat unfamiliar property rights that follow. Van der Walt draws attention to subaltern and marginalized groups ignored by the law. He pleads for property theory extending to those who do not own, whose lives are shaped by others’ property, or who are indeed the property of others. Using Holmes’ logic of decentering, he explores marginalized populations in South Africa and elsewhere, convincing readers that “property outlaws” (as coined by Peñalver and Katyal) have much to teach us about property, its constructions, and dynamics. Given his provocative claims, it is a pity that this was not the book’s lead chapter.

“Property outlaws” is also relevant to Nomi May Stolzenberg, whose chapter dwells on the paradoxical relationship of have-nots (diaspora Jews) who become

haves (entitled settlers) on militarily occupied lands in Israel. Here the distinction between center and margins becomes muddled and her reformulated approach to relational property defies anything offered by utilitarians and rationalists. Yet van der Walt's insight is upheld: there can be community without property. Indeed, resistance to property can galvanize identity as fiercely as tenure and entitlement. Stolzenberg invokes adverse possession to explain the property gains of Jewish settlers and other cases of dispossession that spawn possession. Israeli boots on the ground become everyday facts on the ground; necessity begets property in exotic and, eventually, banal forms.

Where, then, might one situate the commons, a marginal community form nested within "state" communities? Here the property plot thickens and deviates from van de Walt's hunches. As Avital Margalit argues, commons can infringe on individual rights (exclusion, discrimination, abuse) and require state adjudication—a paradox for anyone clinging to Hardin's earlier rendition of the commons. The implied point is that only rarely do property beneficiaries exist in a single community. Legal mediations are necessary to balance and buffer the family quarrels in property-community relations that exist in everyday life. Margalit illustrates this and other points using the Israeli *kibbutz*, a selection some might see as an atypical commons. In what sense is this nearly extinct communal form consistent with the limited access and collective private ownership that defines the paradigmatic, post-Hardin commons?

Other chapters engage ephemeral communities and their peculiar property forms. Queuing, as addressed by Kevin Grey, stresses the temporal nature of position and possession, noting that early arrivers exert power over others. Queues easily become a metaphor for the placement advantages enjoyed by early birds to the suburbs, to land reform plots, or to lands by water subject to prior appropriation. Yet they are complicated by other social variables. Temporality mingles with culture (the British tolerate queues, the Chinese do not) and social position (popes and presidents abide few lines). So queues are a microcosm of more complicated, seemingly permanent communities.

A close cousin of the queue is tenancy in rental space, as treated by Joseph Singer here and elsewhere. Would-be tenants queue up, compete for rental space, and have strong but temporary legal standing upon signing a lease. However, together with condominium owners, they are limited by the communities within their building and beyond, both formal and informal. Singer's real point lies at the intersection of norms and law, however. Norms may conform with property rights or, in endless ways, take exception to them, revealing yet more ways that sociality

conditions both propriety and property. This is a contemporary insight as well as a lesson from antiquity. As Alexander and Peñalver remind us (and is echoed extensively in David Lametti's chapter on community and virtue), Aristotle and later Aquinas parted company with Plato on normative theories of community and the purpose of property rules therein.

This is an engaging book, and, though not always straightforward for non-lawyers, deeply relevant to social and behavioral scientists who traffic in property trends and theories. The matrix of what we call community is multi-scalar, interactive, and, as Benedict Anderson noted long ago, subject to evolving imaginaries. The book's sub-text is both valid and valuable: we have only begun to appreciate the rich relationships between community and property.

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