Introduction

This issue of *Theoretical Inquiries in Law* aims to explore the complex relationship between community and property. Each of these notions is central to multiple problems of law, society, political theory and economics; the articles in this issue engage a variety of contexts in which the two concepts intersect.

These intersections encompass the following (overlapping) themes: (a) property regimes and institutions in which assets are held by multiple individuals; (b) interactions between property law and community viability (the former affecting the latter), and between property law and informal community norms (the latter informing the former); (c) tensions between absolute, individualistic conceptions of property and more complex, limited characterizations thereof; and (d) consequences of community-oriented social and political theory for issues of distributive justice.

In such contexts and others, community and property may seem to be polar opposites — particularly since paradigmatically community stands for collectivism, while property represents individualism. And yet, as the following review of the issue's articles suggests, this typology is far from complete: community may be exclusive; property institutions and property theory may be inclusive, or community-oriented; property may benefit (or even be vital to) community, and community, with its attendant institutions and social consequences, provides crucial inputs into property law and property theory. Thus, the projects undertaken in this issue imply that community and property are each indispensible to concerns of the other — that often, the two concepts must be employed in concert.

The issue opens with Henry E. Smith's account of the relationship between property law and community custom, which utilizes the information-cost perspective familiar from the author's earlier work. Smith suggests that all else being equal, customs that are demanding from an informational standpoint require an audience with a high degree of shared knowledge; the law can exploit customs familiar to a wide audience relatively easily, whereas customs that vary by community may require processing by non-expert outsiders (like government officials). Smith argues that this tradeoff helps explain when courts are receptive to incorporating custom into the law, as well as the process by which they eliminate the need for contextual knowledge in the application of customs.

Amnon Lehavi scrutinizes the implications of property law for the viability

and sustainability of community. To this end, he offers a taxonomy of three varieties of territorial communities — intentional, planned, and spontaneous — and suggests that the different attributes of each entail divergent property-law needs. Lehavi argues that property law can offer each kind of community tailwind, headwind, or (near) zero-wind, and thus plays a dramatic role in establishing, destroying, or maintaining community.

Abraham Bell and Gideon Parchomovsky address the processes by which property assets shift along the continuum between private property and more community-oriented property — commons, or "open access." Against the backdrop of classic works by Harold Demsetz and Barry Field, which introduced the idea of transaction costs and management costs as evolutionary pressures, Bell and Parchomovsky elucidate such shifts in terms of their own theory of property, in which property is understood to be shaped by three dimensions: the number of owners, the scope of the owners' dominion, and asset configuration. From this perspective, the authors argue that evolutionary pressures often cause property rights to be adjusted into intermediate positions on the continuum described above, with the result being complex solutions rather than the clear-cut opposition between "private property" and "commons."

David Schorr offers a history of William Blackstone's characterization of property as "sole and despotic dominion." Schorr demonstrates the stark contrast between this phrase and Blackstone's own exposition of the property law of England at his time, replete as it was with complex and community-oriented property rights, and offers tentative guesses as to why Blackstone would provide such a definition. He then describes how and when exclusive dominion as a model for property came to be associated with Blackstone, hypothesizing that both supporters and opponents of the exclusive-dominion approach have valued the archaic pedigree Blackstone confers upon it. Underlying the foregoing projects is the conviction that community and property have always been (and must be) intertwined.

Gregory S. Alexander and Eduardo M. Peñalver explore the implications of a "thick" theory of community for property law and distributive justice. Unlike the conceptions of community employed by prominent contemporary approaches to property theory, such as law and economics and liberal contractarianism, the conception offered by Alexander and Peñalver focuses on the mutual dependence between individual and community, as a key component of the notion of "human flourishing" that the authors place at the foundation of their conception of justice. This perspective, the authors argue, both provides a normative basis for redistribution and has consequences for property law doctrine, as demonstrated in U.S. and South African case law.

Jeremy Waldron's point of departure is the insight that both community

and property are exclusionary concepts, excluding those who have no community and those who have no property, respectively. Waldron argues that certain municipal schemes for the regulation of public places, ostensibly motivated by warm, inclusive communitarian ideals, in fact preserve the closed and exclusive character of community. Exploiting a false assumption of reciprocation, according to which if I exclude someone from my property he probably has somewhere else of his own to go to, these schemes regulate homeless people out of public places, and thus out of community. Waldron's analysis uncovers the process by which the logic of private property and the logic of community in tandem "protect" privileged groups and separate them from those who are less fortunate.

J.E. Penner argues provocatively that community and property cannot "work together" to generate positive social and political outcomes. Penner suggests that the concept of distributive justice (as employed, for example, by John Rawls) is an instance of "property fetishism" — the distortion of value that results from the reification of individualistic notions of property, compounded by the application of this conception to all social interaction. Working from a Hegelian perspective, Penner contends that social justice requires that people not be "socially excluded" — i.e., that each individual be afforded participation in the social and cultural enterprise; and that such participation cannot be "distributed." Thus, as far as social justice is concerned, property institutions are accorded a secondary role in Penner's scheme.

Avital Margalit looks into a particular kind of community — the community of football fans. Fans devote much of their lives to their clubs, and a community of fans, Margalit argues, makes up a constitutive element of its club; it should therefore be accorded some protection from the perilous (to fans) decisions a club's management may make, especially in the commercialized, transnational world of modern football. To this end, Margalit introduces the concept of "property as belonging," suggesting that fans' interests should be protected as property rights, and analyzes various means toward such protection, particularly through formal "voice" — since for true fans, "exit" is not an option.

Joshua Getzler explores the theoretical implications of plural ownership, inspired by Frederic William Maitland's notion of the dual nature of common ownership — as an aggregation of the owners' wills on the one hand, and an independent legal entity on the other. Getzler's analysis encompasses single and multipartite funds, Roman and English law, and specific models of plural ownership such as the condominium and the trust fund. Ultimately, Getzler argues that the individualistic and the communitarian theories of plural

ownership can coexist, for individuals may rationally choose to exercise their individualism within the constraints of independent group entities.

Finally, Stephen R. Munzer's article examines issues of community and property in the context of biotechnological assets. Drawing on examples such as Community Patent Review, the efforts of a community of genetic disease patients to obtain a patent, and the emerging field of synthetic biology, Munzer argues for several theses, which together imply links between (scientific and nonscientific) communities and scientific knowledge. And, as if encompassing the spirit of this issue of *Theoretical Inquiries in Law* in microcosm, Munzer's theses and projects point to some of the myriad ways in which property law and property institutions can interact with various forms of community.

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The Associate and Assistant Editors