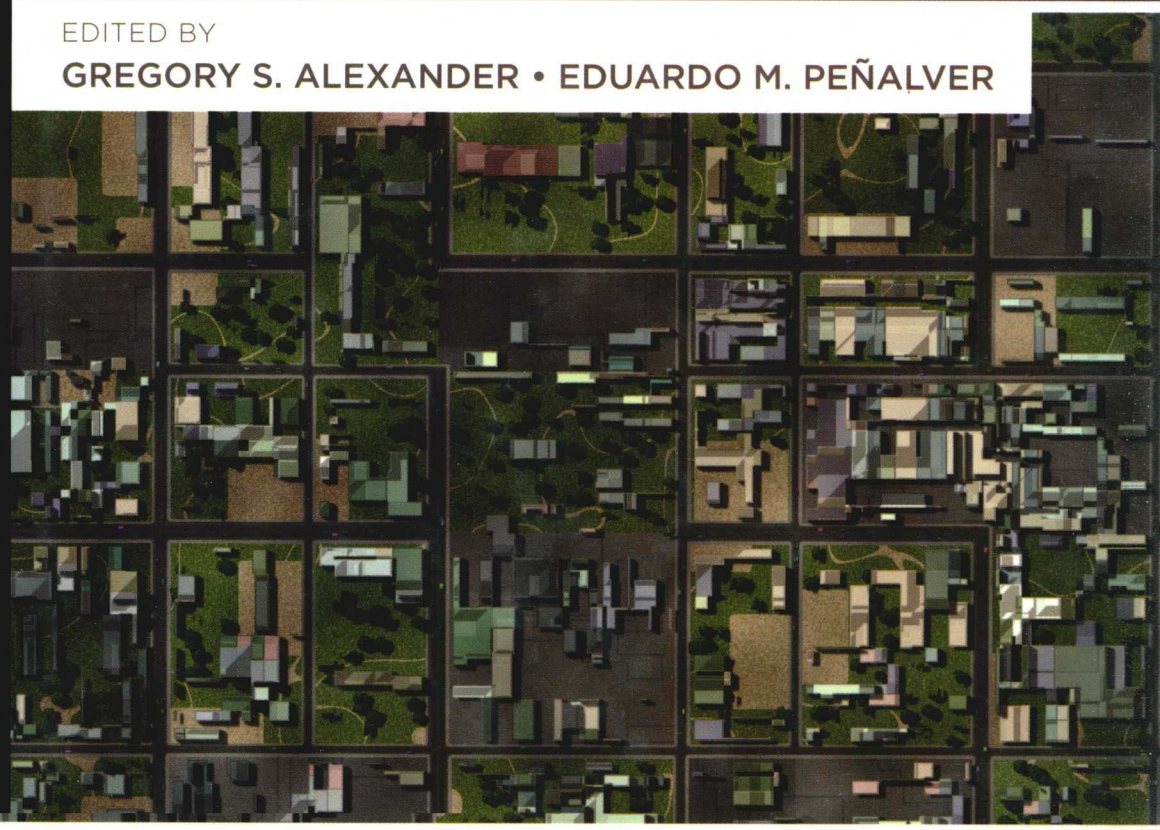
PROPERTY AND COMMUNITY

EDITED BY

GREGORY S. ALEXANDER • EDUARDO M. PEÑALVER



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The genesis of this book was a conference on "Property and Instrumentality," held at the London School of Economics Faculty of Law, July 20–21, 2007, and jointly sponsored by Cornell Law School and the LSE Faculty of Law. The co-organizers of the conference were Gregory S. Alexander (Cornell) and Alain Pottage (LSE).

The papers delivered at the conference, while uniformly stimulating and excellent, turned out to pursue two disparate topics. One was the relationship between property and governance; the other was property's relationships with community in its various meanings. After the conference, when the space between these two core topics had become clear, the conference co-organizers, who had originally planned to publish a single volume based on the all of the papers, realized that the better strategy was to publish two separate volumes focused on each of the two topics, recognizing that this artificial separation would mean sacrificing to a certain extent the conversation that all of the papers had with each other. This book, then, represents the community dimension, as it were, of that memorable conference.

We wish to thank both Cornell Law School and the LSE Faculty of Law for their support, including generous financial support and, in the case of LSE, for very congenial space and helpful logistical support for the conference. In particular, we wish to single out Deans Stewart Schwab and Hugh Collins for their personal support and encouragement for the enterprise. Finally, we wish to offer special thanks to Alain Pottage, without whose intelligence, imagination, and enthusiasm neither the conference nor this book would have come to fruition. Working with him was an honor and a pure pleasure.

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INTRODUCTION

GREGORY S. ALEXANDER AND EDUARDO M. PEÑALVER

The relationship between individuals and communities—all manner of communities, but especially the state[1]—is a central preoccupation of property theory. Across a broad range of property thought—from utilitarian to Lockean to Hegelian—scholars have expended enormous efforts explaining what owners can do with their property and the extent to which the community or the state can participate in those decisions. The mountainous literature on the subject of regulatory takings is a testament to scholars' interest in questions concerning the relationship between individuals and community as mediated through property.

The nexus between theories of property and community is perhaps tightest in Hegelian property theory, where property practically stands in the place of the individual herself. Within such a conception, working out the contours of an owner's rights becomes the delineation of the proper relationship between the individual and the community around her. Although the connection is admittedly less direct within other theoretical frameworks, discussions of property rights, from whatever perspective, necessarily reflect ideas about the proper domain and limits of individual and community power.

Property stands so squarely at the intersection between the individual and community because systems of property are always the creation of some community. As property theorists of all stripes have long recognized, "[i]n the world of Robinson Crusoe property rights play no role."[2] Moreover, systems of property have as their subject matter the allocation among community members of rights and duties with respect to resources that human beings need in order to survive and to flourish.[3] These allocative decisions are crucially important both to individuals, owners and nonowners alike, and to the community as a whole. Jeremy Waldron is therefore surely correct when he says that "our interest

1. Our conception of communities is intentionally capacious, embracing the state as well as smaller groups, including families, voluntary associations, and the like. As our discussion below of human flourishing and the social matrices that are necessary for the development of the capabilities that are necessary for human flourishing should make clear, we emphasize the role of small groups, such as families and friends. That said, we also emphasize that the state, which we consider to be a community, plays an important role here as well. *See* Part 3 *infra*.

2. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 347 (1967).

3. *See* Jeremy Waldron, THE RIGHT TO PRIVATE PROPERTY 32 (1988) (describing the problem of "allocation" as the central concern of property law).

in property is effectively an interest in the political and economic structure of society."[4] In other words, whenever we discuss property, we are unavoidably discussing the architecture of community and of the individual's place within it.

Even though the relationship between individuals and community stands at the conceptual center of property theory, the normative theories of community underlying discussions of property are frequently left implicit. This is particularly common in discussions of private ownership, which is to say in most contemporary property scholarship In such discussions, the focus is often fixed firmly on the person of the "owner," and all others reduced to the amorphous category of "nonowner." This way of talking about ownership obscures the possibility that the "community" may have a moral status that is distinct from those of neighboring owners or nonowning individuals.

I. TWO APPROACHES TO PROPERTY AND COMMUNITY

Two approaches dominate discussions about community and property within contemporary property scholarship: law and economics' utilitarian theory and liberal contractarianism. In this introduction, we will briefly describe the contours of these theories, and then, drawing on the papers in this volume, discuss some of their shortcomings. Finally, we will propose some alternative approaches. We do not intend the discussion in this introduction to be comprehensive on any of these scores. Instead, the task we set for ourselves is merely to situate the papers in this volume within a broader conversation about property and community and, hopefully, in the process, to encourage the reader to seek out the richer, fuller discussions contained within the individual papers.

A. Utilitarian Theory

Utilitarian theory, of which normative law and economics is perhaps the most prominent contemporary exemplar, has as its ultimate aim the maximization of aggregate welfare, understood most commonly as the satisfaction of individual preferences. Utilitarian analysis of community is refracted through this maximizing lens. Although theorists have approached the deceptively simple goal of welfare maximization through a variety of strategies, three broadly shared features of the utilitarian analysis of community are particularly significant for our purposes: the centrality of the individual within utilitarian calculus; the contractarian tendencies that this methodological individualism engenders; and, finally, utilitarian discussions of the appropriate boundaries of community.

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4. *Id* at 328

Within normative economic theory, individual preferences are the sole source and measure of value. Economic theories, of course, differ widely in terms of how they go about measuring those preferences, but they all share this fundamental focus.[5] Utilitarian theories typically have little to say, however, about how individuals come to have the preferences they do, generally treating their preferences as exogenous, or given, when in reality they often respond to the very distributive questions with which economists concern themselves.[6]

The result of this constellation of commitments is to instrumentalize the utilitarian account of community. Within utilitarian theory, community is only valuable insofar as it contributes to the satisfaction of some individual's preferences. Conversely, community or sociality is never, for the economic theorist, an end in itself.

The central utilitarian question, then, is whether a particular community or a particular model of community will enhance or diminish individual preference satisfaction. Because the individual is in the best position to know what his preferences are and what sorts of communal attachments will satisfy them, utilitarian theorists of community stress the importance of permitting individuals to choose for themselves the communities into which they will enter.[7]

Perhaps the most interesting and complex discussions of community within utilitarian theory concern the question of what might be termed community ecology. The landscape of options available to individuals as they go about satisfying their preferences may have a significant impact on aggregate welfare. Utilitarians, then, must be concerned about maintaining the sorts of communal landscapes that will be most conducive to maximizing individual preference satisfaction.

The most prominent example of this concern in action is in the body of literature elaborating on and refining the Tiebout hypothesis. According to Charles M. Tiebout, when conditions permit individuals to vote among local communities by selective entrance into or exit from those communities, the relationship between local communities and their potential residents comes to resemble a competitive market in which individual preferences are more likely to be satisfied than in an alternative in which individuals lack the ability

5. *See* Amartya Sen, DEVELOPMENT AS FREEDOM 67–68 (1999).

6. *See* Martha C. Nussbaum, WOMEN AND HUMAN DEVELOPMENT 136–48 (2000). Some economic theorists do favor correcting actual preferences and replacing them in utilitarian calculus with preferences that are idealized in some way. *See, e.g.*, J. C. Harsanyi, RATIONAL BEHAVIOR AND BARGAINING EQUILIBRIUM IN GAMES AND SOCIAL SCIENCES (1977).

7. *See, e.g.*, James M. Buchanan, PROPERTY AS A GUARANTOR OF LIBERTY 16 (1993); Robert C. Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

to "vote with their feet."[8] Although Tiebout was concerned with markets for local government, the same basic argument holds for private communities as well. A landscape in which communities must compete with each other for membership, the argument goes, will be one in which individual preferences are more likely to be satisfied than they would be in a communal landscape in which they had few options from which to choose.[9]

The consequence of this approach for utilitarian discussions of the state is a tendency toward suspicion of state power, insofar as the state is a community that the individual has not chosen.[10] Utilitarian suspicion of state power is likely to be extremely sensitive to the state's scale and context. Based on the Tiebout hypothesis, a utilitarian is likely to subject to a greater degree of scrutiny demands made by large, unchosen communities that are, as a consequence of their unchosen nature, less susceptible to the discipline of competition.

In sum, the utilitarian conception of community is instrumental and procedural. Community is valuable, but not intrinsically so. Rather, it has value only insofar as it contributes to the satisfaction of individual preferences, whatever they might be. The best way to ensure that a community will act so as to satisfy those preferences is to maintain a robust "market" for communities, both public and private, within which individuals are free to enter and exit communities in accordance with their own preferences. Where such a market is absent, or where individual choice is impaired, utilitarian theorists believe, there is a lesser likelihood that communities will act in ways that are welfare-maximizing.

B. Classical Liberal Contractarian Theory

Like the utilitarian, the classical liberal contractarian conception of community begins with the individual. The results of the classical contractarian's analysis end up resembling in many ways the utilitarian discussion of community. The liberal, contractarian discussion of the relationship between individuals and the communities to which they belong begins with the mature individual in an idealized state of maximal negative liberty and with the total absence of involuntary communal commitments or obligations. From this starting point, liberal contractarian theorists typically seek to derive rules for society that preserve as much of this hypothetical state of nature as possible, at least as to the individual's experience of liberty, while permitting everyone to gain from the benefits of community life. They demand that the move from this hypothetical (and idealized)

8. *See* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956); *see also* William A. Fischel, The Homevoter Hypothesis ch. 3 (2001).

9. *See* Fischel, *supra* note 8, at 58–59, 63; Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 710–19 (1973); Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. Chi. L. Rev. 1375, 1388–92 (1994).

10. *See* Gerald E. Frug, *The City as a Legal Concept*, 93 Harv. L. Rev. 1057, 1076 (1980).

situation of isolation and freedom to one of social obligation should be either the result of actual choice or, when an external constraint is imposed, should require that the constraint itself be justified by the need to preserve (or enhance) every individual's enjoyment of liberty.[11]

Randy Barnett's libertarian political theory provides a contemporary illustration of these moves. On the one hand, Barnett praises voluntary associations and welcomes the substantial restrictions they often impose on individual liberty, but he does so only to the extent that joining such associations is in fact voluntarily. "Under conditions of unanimous consent," he argues, "liberty is not inconsistent with both heavy regulation and even the prohibition of otherwise rightful conduct."[12]

Accordingly, like many property libertarians, he celebrates the restraints on individual freedom assumed by those who join private residential communities. At the same time, however, he is extremely suspicious of the state, precisely because he views it as an unchosen community from which exit is extremely costly. "The larger the land area," Barnett observes, "the higher the cost of exit and thus the less meaningful is 'tacit' consent to the jurisdiction of the lawmaking process. Most modern cities are probably too large, but even if they are small enough, states are certainly too large to command meaningful unanimous consent."[13] Consequently, he favors dramatically limiting the power of virtually all territorially defined governments to intrude upon individual liberty. Drawing heavily on Lockean political theory, Barnett argues that the principal purpose of government must be limited to the protection of a constellation of negative individual liberties, such as private property and freedom of contract, the operation of which helps us to preserve the individual liberty present in the prepolitical state of nature.[14]

From where does Barnett derive the content of these negative liberties? From an implicit account of the human person as an uncoerced individual, living free from the constraints of involuntary community life. It is for this reason that Barnett, like other classical liberals, talks about the appropriate terms on which individuals hypothetically "enter" society.[15] One can only "enter" society, even hypothetically, if one was not already there to begin with. Liberal contractarians understand the being who enters into society and trades away her preexisting liberty to be a fully formed, rational, and autonomous individual.[16]

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11. *See* John Locke, Two Treatises of Government Bk. II, §§ 123–31 (Peter Laslett ed., 1988) (1690).

12. *See* Randy E. Barnett, Restoring the Lost Constitution 43 (2004).

13. *Id.*

14. *Id.* at 75.

15. *See id.* at 69–76.

16. *See* 2 Charles Taylor, *Atomism, in* 2 Philosophy and the Human Sciences: Philo-sophical Papers 187, 187–89 (1985).

C. Conclusion

Although these two influential approaches to community differ from each other in important respects, they also share a number of common features. Most importantly, within both theories, the individual stands ontologically prior to the community. Communities are voluntary associations of individuals pursuing "convergent" ends that are themselves independent of the community and rooted in the individual's own preexisting goals and desires. (The exception in this regard is the state, and precisely because the state is not a voluntary community, it is subject to a degree of suspicion and limitation not accorded other communities.) As a result of this basic orientation, both approaches treat the good of the community as derivative of the good of individuals, and therefore as fundamentally instrumental.

Finally, when they turn to exploring the relationship between individuals and their communities, both approaches adopt what amounts to a procedural stance. Utilitarian theories of community do not associate any substantive ends with the maximization of utility. Instead, they focus on the freedom with which individuals may locate, enter, and exit communities and the existence of robust competition among communities for members. Similarly, contractarians do not posit substantive accounts of the proper relationship between individuals and their community. Rather, relying on actual agreements or hypothetical bargains struck in the state of nature or some other such evaluative device, they elaborate procedural norms to adjudicate the demands that communities may make on their members and their members' property.

II. PROBLEMS WITH THE LAW AND ECONOMICS AND CLASSICAL LIBERAL ACCOUNTS OF COMMUNITY

Each of these dominant approaches to understanding the relationship between property and community struggles in its own way to give an adequate account of community life. For starters, the tendency of many law and economics scholars to rely on a rational-actor model of human behavior leads them to predict that individuals will, as far as possible, avoid contributing to cooperative community endeavors when they can instead free-ride on the efforts and sacrifices of others. In practice, this model has proved unable to explain the observed incidence of cooperative participation in community life. More importantly, however, both classical liberal and economic theories of community fail to provide an adequate standpoint from which to criticize oppression or dysfunction within seemingly consensual communal arrangements.

A. Community and the Rational Actor

Although, as we discussed above, the existence of a robust community ecology is important to utilitarian accounts of community, and in particular to the operation

of the Tiebout model, the conception of human behavior that is most frequently employed within the economic analysis of law is ill-suited to sustain such an ecology. The problem arises from the mismatch between the so-called rational actor model of individual decision-making and the demands that all successful communities must be able to place on their members if they are to function effectively. In short, the sort of person that traditional law and economics imagines us to be is not the sort of person who is likely to contribute to the creation of a diverse and vibrant communal landscape.

According to traditional economic accounts, human beings are rational maximizers of self-interest. That is, in making their decisions about what to do and how to act, they ask themselves which course of action is likely to yield the best outcome for *them*. The best outcome for a given individual will be the one that maximizes his net wealth, happiness, or preference satisfaction.

The problem posed to the notion of community by this theory of individual behavior is that (1) successful communities require substantial cooperative effort in order to generate benefits for their members, and (2) the rational actor is not someone who is likely to want to contribute to those efforts. The cooperation that sustains communities demands individual sacrifice, but the rational actor will be the sort of person who sits back and lets others engage in the hard work of cooperating, in the hopes of being able to enjoy the benefits that result for all members of the community. In a society made up of rational actors, we would expect a great deal of free-riding and, as a consequence, a fairly bleak communal landscape as communities struggle to convince (or, if possible, coerce) rational actors not to default on their communal commitments in the hopes that others will pick up the slack.

Some economic theorists have been able to formulate scenarios in which rational actors can predictably generate cooperative outcomes. Perhaps most famously, Robert Axelrod has demonstrated that voluntary cooperation is a possible outcome when self-interested, rational actors employ a tit-for-tat strategy in an iterated prisoner's dilemma game of indefinite duration.[17] Of course, as he concedes, universal defection is also a stable equilibrium in such situations. The emergence of cooperation on his theory is possible, but it is both fragile and uncertain.

As Elinor Ostrom and others have noted, however, actual observations of human behavior in situations where self-dealing might be expected routinely find far more cooperation than the traditional rational actor models, like Axelrod's, predict.[18] For example, experimental economists observing human

17. *See generally* Robert Axelrod, THE EVOLUTION OF COOPERATION (1984).

18. *See* Elinor Ostrom, *A Behavioral Approach to the Rational Choice Theory of Collective Action*, 92 AM. POL. SCI. REV. 1 (1998); Samuel Bowles & Herbert Gintis, *The Evolution of Strong Reciprocity: Cooperation in Heterogenous Populations*, 65 THEORETICAL POPULATION BIOLOGY 17 (2004).

behavior in the laboratory routinely find that people cooperate in one-shot prisoners' dilemma games, notwithstanding the rational actor model's robust theoretical predictions of universal defection. Similarly, in so-called ultimatum games, players routinely make substantial sacrifices in order to punish what they interpret to be unfair behavior by their opponents.[19] Finally, while the rational actor model predicts that mere communication between subjects in a prisoners' dilemma game would have absolutely no impact on subjects' tendencies to cooperate, providing participants with the opportunity to communicate typically yields significantly higher levels of cooperation.[20] The upshot of this research is that human beings, either by nature or nurture, are much more cooperative and more likely to participate in community endeavors than the rational actor model predicts.

The descriptive failures of the rational actor model are not fatal to efforts to formulate a broadly utilitarian analysis of the relationship between property and community. Such descriptive shortcomings can be remedied by turning to more sophisticated behavioral models or a broader conception of the values that self-interested human beings will pursue. And, in recent years, legal economists have taken both tacks. Some, drawing on the work of the new institutional economists, have responded to experimental observations of human altruism to formulate conceptions of human behavior characterized by "bounded self interest" and "bounded rationality." Others have turned to broader definitions of the sort of value that "rational actors" will pursue. One influential account, for example, defines the value rational actors will pursue (almost tautologically) to include anything that a person might desire, in the process recasting seemingly altruistic behavior as (by definition) self-interested efforts to satisfy other-regarding desires.

Even with more sophisticated modeling of what human beings are likely to want, however, the touchstone for normative economic discussions of human beings' communal involvement remains satisfaction of individual desires. In this sense, and as we noted above, utilitarian approaches share much with the classical liberal conception of community, which places voluntary choice at its normative center. A crucial problem with these approaches is that by taking individuals as they find them, they make it extremely difficult to develop a basis from which to criticize the choices people make, particularly when the choices appear to be informed and when the only people harmed by the choices are the choosers themselves.

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19. *See* Ernst Fehr et al., *Strong Reciprocity, Human Cooperation, and the Enforcement of Social Norms*, 13 HUMAN NATURE 1, 10–11 (2002) (summarizing studies of ultimatum game behavior).

20. *See* Ostrom, *A Behavioral Approach*, *supra* note 18, at 6–7.

B. Preserving a Critical Standpoint

The utilitarian focus on community as a means to satisfy individual preferences and the classical liberal focus on the voluntary assumption of community life reflect impoverished understandings of the nature and importance of community. The communities in which we find ourselves, often without any meaningful choice on our part, play crucial roles in the formation of our preferences, the extent of our expectations, and the scope of our aspirations. While membership in certain communities can obviously be based upon contract or voluntary agreement, the very possibility of these voluntary associative relationships depends upon our prior and continuing (and frequently involuntary) participation in or exposure to communal institutions that impart to us the information, resources, and capacities necessary to understand and engage in voluntary choice to begin with.

Not only do unchosen communities play a vital role in the formation of our ability to engage in subsequent choosing, there can be little doubt that people's desires, and therefore their choices, are often distorted by experiences of abuse or material deprivation within those communities. As Amartya Sen has put it, "[a] person who is ill-fed, undernourished, unsheltered and ill can still be high up in the scale of happiness or desire-fulfillment if he or she has learned to have 'realistic' desires and to take pleasure in small mercies."[21]

In light of the unreliable guidance desires provide to our normative assessments, it is often the case that seemingly voluntary choices to contribute to or remain in particular communities can be a very poor basis for determining the scope of an individual's social obligations. In order to be able to judge individual preferences and choices as healthy or unhealthy, what we require is an objective account of human well-being.[22] As we will discuss in the next section, although they differ in many of their details, several of the papers in this volume converge in relying on just such an account in formulating their conception of the proper relationship between individuals, their property, and the communities to which they belong (or aspire to belong).

III. ALTERNATIVES TO CLASSICAL LIBERAL AND UTILITARIAN APPROACHES TO PROPERTY AND COMMUNITY

In recent years legal scholars have developed theories of the relationship between property and community that are alternatives to both the utilitarian and classical liberal approaches. Although these theories depart from utilitarianism and classical liberalism in important respects, they share with those traditions certain

21 Amartya Sen, COMMODITIES AND CAPABILITIES 21 (1985)

22 Objectivity here can mean as little as an account of well-being that is not rooted solely in an individual's subjective states

fundamental commitments. First, like classical liberalism and utilitarianism, they start with the individual, taking seriously the individual's moral agency. Second, like those approaches, these alternative theories stress the importance of individual freedom and individual well-being.

Beyond these shared commitments, important differences quickly emerge. Unlike the other approaches, particularly classical liberalism, these alternative theories of property and community view the individual in a social context, not in isolation. That is, these theories take seriously the understanding of human beings as social animals whose very sociality enables their autonomy. They reject the tendency of classical liberal theorists to view the person who enters into society as already a fully formed, rational, and autonomous moral agent. Rather, they regard membership in society as both inherent in the human condition and necessary for the development of moral agency. In his essay in this volume, for example, David Lametti analyzes the social functions that Aristotle and Thomas Aquinas understood as central to the institution of private property.[23] Lametti argues that each of them conceived of private property as promoting virtue and, through the cultivation of virtue, of the common good. For example, he discusses Aristotle's view that ownership of private property fosters virtues, such as liberality and moderation,[24] that the virtue of individuals would enable the city to flourish, and that the city's flourishing would in turn contribute to the flourishing of its citizens.[25]

The relationship between human sociality and property is more implicit in Joseph Singer's "good neighbor" conception of property, according to which property rights are socially situated and defined.[26] Singer understands property rights as inherently relational. Like Lametti's Aristotelian approach, however, Singer's conception rests on a vision of the self as necessarily social rather than isolated or atomistic.

Hanoch Dagan's paper, even more so than Singer's, explicitly situates the self within communities while simultaneously celebrating the affirmative value of liberal autonomy. He rejects the alienated or isolated conception of the self and stresses the fact of membership in communities. Yet he is quick to add that the freedom to join and to exit from multiple communities as one sees fit is necessary for individual autonomy.

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23. *See* David Lametti, *The Objects of Virtue infra.*

24. *Id.*, at 7–8.

25. *Id.*, at 17. ("The virtue in the city is founded on the virtue of individuals and virtue of individuals is based on the virtue of the city. Each forms the other through laws and education, and the actions of virtuous individuals leading to a virtuous state of character aimed at the good.").

26. Singer at 59.