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INTRODUCTORY ESSAY

Property in the sharing economy: paradox, disruption, and institutional design

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Abstract

This special issue aims to unravel the deeply intertwined dialectics between property and sharing. We do so by examining the paradoxes thrown up as legal forms of property interact with the emergent economic activity of sharing, and investigating how these may be resolved by designing institutional frameworks to better align their values. These paradoxes are sometimes productive, driving property and sharing forward to produce new configurations of use and privilege; sometimes disruptive, as sharing throws new light on how property orders economic and social relations by pushing against the boundaries of established property forms. But they are always revealing.

Keywords: Property Law; Socio-legal studies; Sharing economy; Marketing and Digital Economy

While much has been written about the impact of the ‘sharing economy’ on property rights, it has tended to produce a somewhat simplistic view that this new economy offers the prospect of a freely available selection of material resources accessible on-demand, which can fundamentally change our relationship with resources (see Botsman and Rogers 2011; Perzanowski and Schultz 2017; Rifkin 2001). While this reality is seemingly created by the proliferation of businesses and community initiatives engaged in providing such resources, much of the writing on this subject regards law and property rights as external constraints that stymie innovation (Cohen and Sundararajan 2015), or as institutional forms that will inevitably be changed by the new Zeitgeist. This has created a blind spot as commentators focus on the manifestations of sharing rather than on its infrastructure, which are both the material and the legal practices that make sharing what it is. Despite the apparent differences between commercial programs and grassroots communities, these movements share the commonality of embodying an emergent property practice, one that is characterised by use, participation and mutuality rather than the more familiar property concepts of exclusion, rights and individual autonomy. That sharing activities involve fundamentally similar practices yet present such divergent manifestations hints at the existence of a paradox at the heart of the practice.

That sharing practices exhibit both market and communal tendencies is but one example of its sometimes contradictory nature. Others that have been documented include the position of platform workers as both independent entrepreneurs and as precarious gig workers (Ravenelle 2017) and the patterns of distinction that arise in gratuitous communal sharing, which is ostensibly open and inclusive (Schor et al 2016). Sharing is clearly rife with contradictions; however, there has been little attempt to analyse its structural aspects, in particular the structure of property rights, forms and practices that enable sharing to proceed while simultaneously constraining its limits.

1 The project

This Special Issue aims to unravel the deeply intertwined dialectics between property and sharing. We do so by examining the paradoxes that occur as legal forms of property interact with the emergent economic activity of sharing and by investigating how these paradoxes may be resolved by designing institutional frameworks that better align the values of these paradoxes. These paradoxes are also sometimes productive and drive property and sharing forward to produce new configurations of use and privilege; sometimes they are disruptive, as sharing throws new light on how property configures economic and social relations by pushing against the boundaries of established property forms. But paradoxes are always revealing.

1.1 Property: exclusion, social relations and economic activity

Property underpins the investigations in this Special Issue, which are broadly situated within the 'progressive property' tradition in seeing property as a platform for realising different socio-economic relations among persons and with regard to things (Alexander 2012; Penalver 2005; Singer 2000;Underkuffler 2003). This approach to property seeks to push back against the still-dominant view that property – more specifically, ownership – is about exclusion and how property promotes certain economic and social values for owners (Dagan and Heller 2001; Katz 2008; Merrill 1998; Penner 1997).

The property as exclusion thesis comes in many forms, but they all, to some extent, invoke visions of property as a means of guaranteeing self-sufficiency, isolation and individualism. Property is a way of withdrawing from the normative and economic demands of community (Dagan and Heller 2001). And insofar as property denotes control over economically significant resources, it is also a way of guaranteeing economic self-sufficiency to individuals as well as enabling those individuals to make productive and efficient use of their resources. The essays in this collection all seek to problematise some aspects of this dominant thesis.

Some proponents of exclusion justify it from an economic perspective, emphasising the need to delineate clear spheres of control and management over resources as being imperative to efficient and productive use of those resources (Nozick 1974; Waldron 1988). The ability of owners to determine unilaterally what can be done with their property, what uses it can be put to, and who may or may not access it leads to the most efficient outcome, assuming that owners are rational economic actors who seek to maximise their property (Demsetz 1967). Excluding others from one's property is necessary to achieve this outcome, as doing so internalizes the relevant benefits and costs of property holding and enables the owner to make rational decisions (Coase 2013; Demsetz 2002). However, this claim of ownership's superior efficiency as a mode of resource governance does not necessarily succeed in every context (Cohen 1995; Zhu 2020). The relatively blunt, bright and clear line of exclusion created by ownership is also justified by its informational efficiency (Merrill and Smith, 2001): it is a cheap and effective way of demarcating the initial boundaries of control over resources, which can then be subjected to the logics of economic choice. But it also omits many forms of production, such as care work, that are necessary to maintain and reproduce the circulation of value (Federici 2004) and that ought to be recognised in the design of institutions and calculations of utility (Morgan this issue).

Other exclusion theories focus more on the social aspects of property and on the non-economic values it promotes, whereby the ability to exclude others from property protects the owner's autonomy, sovereignty and independence. To exercise autonomy and be the author of their own lives, people must be able to resist pressures from both the state and others in society who seek conformance or otherwise erase the claims to individuality and freedom (Nozick 1974). Property is an integral element in protecting this capacity for autonomy property gives owners a means of determining their lives free from the choices of others (Ripstein 2009). It secures independence by allowing owners to exit a community if they do not agree with the values of that community (Dagan and Heller 2001). However, it does so selectively: property gives independence to some (owners) but subjugates others (non-owners) to the hierarchy of property rights and curtails their ability to exercise autonomy and freedom (Kreiczer-Levy this issue). This selective exclusion is especially problematic, given that race differentiates how effectively individuals can capture or propertise valuable resources (Dyal-Chand this issue). More empirically, consumers' patterns of and attitudes towards property usage are highly heterogenous even across a single platform, thus suggesting that the boundaries of legal forms such as ownership are far from determinative of actual property norms and practices (Guyader 2018).

In challenging the 'property as exclusion view' and the economic and social practices that this view claims that property supports, we integrate two lines of scholarship: (1) property is formative of economic relations, an idea most associated with institutional economics; (2) property reflects choices on social values and ways of life, a claim favoured by 'progressive' property theorists.

The notion that property rights help to constitute the conditions necessary for economic activity to take place, although seemingly obvious, is relatively marginalised in both the legal and the economic literature. Nonetheless, some prominent scholars are examining how property laws determine the socio-economic relations on which to draw as precedents (Coase 2013; Marx 1887; Pistor 2019). Property forms are integral to realising certain forms of economic relations. As the above analysis of exclusionary theories of property shows, the infrastructures of ownership and private property feed directly into the system of rational market transactions. Property does not simply facilitate but also enables economic realities in a way that renders the form of property purposeful. Thus, property is not a neutral 'bundle of rights' that can be used to organise different economic activities to equal effect (Penner 1997). Rather, it is a purposive infrastructure that must be consciously and deliberately designed. It must also be designed with the explicit aim of promoting alternative forms of economic practices if we are to realise alternative goals for property, including how resources can be used and managed (Morgan this issue; Zhu this issue).

In contrast to how exclusion theorists view property, progressive property theorists generally view property as a forum for contesting socio-economic claims. In the latter's view, property is far more nuanced than exclusion theorists' view: property allows people to buy into a community or a value and cement their commitment to a group (Penalver 2005). It enables humans to flourish – but as part of a community rather than in isolated ownership (Alexander 2018). This does not mean that the boundaries of property rights do not exist or are not relevant; rather, these boundaries serve as positions from which to contest and negotiate (Blomley 2016). Hence the relative power and hierarchy of property rights can make a real difference to a person's capacity to use property to achieve social and economic goals, whether that be buying into a community and its associated benefits or being locked into a community and prevented from realising different forms of self (Kreiczer-Levy 2019). Property rights also structure social relations and affect the negotiations over entitlements in society (Singer 2000; Underkuffler 2003). These relations are inflected through social factors such as race, which are used to police the boundaries of property and to enable people to capitalise economically on their membership in privileged communities to the detriment of excluded, often non-white groups (Schor and Attwood-Charles 2017).

1.2 The paradoxical relationship between property and sharing

The divergent concepts of property analysed above lead to the second thematic investigation of this Special Issue: specifically, the idea that the sharing economy complicates the established distinctions between property as exclusion and property as community by recombining the two in novel form of economic and social property practices. The boundaries of the 'sharing economy' remain deeply contested, however. Commentators use neologisms that emphasise the aspect that they consider to be significant, whether that be the 'peer-to-peer economy' (Sundararajan 2016), the 'gig economy' (Schor 2016), or 'collaborative consumption' (Botsman and Rogers 2011; Guyader 2018). There are also just as many typologies depending on how analytical distinctions are drawn, but no typology can fully capture the heterogeneity of sharing activities. In this collection, Guyader and Kreiczer-Levy lay out typologies that focus on collaborative consumption and access, respectively, and the other essays draw variously on these conceptions in delineating their field of inquiry.

Mapping property forms and practices onto the sharing economy and vice versa reveals fundamental paradoxes inherent in both. At first glance, the advent of an economy premised upon giving access to privately owned property on an ad hoc yet semi-formal basis would seem to undermine the boundaries of property forms and challenge the idea that property is inherently about exclusion. Instead of exercising their right to exclude others as the primary expression of autonomy, owners of property are voluntarily offering their private property to be used by strangers, often in exchange for monetary compensation but also sometimes on a gratuitous basis. There is potentially an impact on the legal forms of property and on the practices they support, as ownership now means not only exclusive possession and use by the owner, with the occasional sharing between family and friends, but also semi-formal and frequent renting or lending to a succession of strangers. Another consideration is 'psychological ownership', in which values of self and identity are attached to objects of possession (Watkins et al 2016). The stable connection between psychological attachment and property has been used to advocate for strong property protections (Radin 1982). The infrastructure of the sharing economy has expanded the configurations of the property practices that are possible within the confines of current legal forms (ownership, lease and license), as reflected by changing consumption patterns in society (Aloni 2016). By changing the way property is accessed, we also expand the values that we attach to property.

This apparent undermining of the exclusionary dynamics of property should not be overstated, despite what much of the literature on access portending the end of ownership seems to suggest (Botsman and Rogers 2011; Rifkin 2001). Formally, sharing still occurs under the auspices of ownership and private property. Would-be users depend on owners being willing and able to share their resources, and the terms of sharing remain mostly at owners' volition. Sharing thus reinforces the power of ownership by, to a large extent, making access subservient to and dependent upon ownership while simultaneously eroding its strict boundaries of exclusion and its symbolic status as the most desirable property form (Kreiczer-Levy this issue). It also reinforces informal property entitlements because the technological and social processes that facilitate sharing replicate the biases and exclusionary patterns already present in society (Dyal-Chand this issue).

These paradoxes are also reflected in the socio-economic dynamics of sharing, which as an activity thrives on participation, inclusion and openness to drive value production. A predominant discourse in regard to sharing is the pro-social and sometimes anti-market nature of its transactions. This is encouraged not only by proponents of sharing (Botsman and Rogers 2011; Richardson 2015) but also by many of its largest platform providers, who portray their online platforms as communities of like-minded individuals by using emotive slogans (Airbnb's 'Belong Anywhere'), developing their own idiosyncratic vocabulary and otherwise promoting a sense that theirs is a community with shared values and experiences rather than just a marketplace. Yet despite this messaging, many platforms put great effort and attention into engineering the social relations they host in order to maximise their commercial potential (Vallas and Schor 2020). They also reinforce many elements of private property, such as the privatisation of risk through ownership while encouraging owners to open access to their property under the guise of entrepreneurialism (Zhu this issue).

These paradoxes show that sharing is far from being a panacea for the drawbacks of exclusionary property and market exchange. While it can disrupt some undesirable practices such as extracting and preserving value by packaging it as a property right excluded from political and economic contestation, sharing inscribes its own patterns of exclusion. Access and participation cannot by themselves undermine existing structures of wealth and inequality but will combine with property infrastructure to form different transactional patterns that are no less extractive or exclusionary. There is a sense that although sharing has the potential to challenge existing structures, it is constrained to shifting value along established channels, tinkering at the fringes but ultimately reproducing the same patterns of hierarchy and exclusion. To break out of these constraints, reforms to the property infrastructure are required to encourage sharing to move definitively away from existing market economic and exclusionary property practices and embrace more distributed and pluralistic relations.

Towards that end, we propose structures and regulations to negotiate the paradox between sharing and property and to facilitate alternative forms of economic and property practice. Some essays advocate for external regulation of platform practices (Dyal-Chand, this issue) while others propose to use the platform as an organizational tool for instituting alternative property and economic infrastructures (Morgan this issue; Zhu this issue). The solutions and work-arounds we propose are all imaginatively possible within the boundaries of current property institutions, and they have the potential for realising the sharing economy's potential for diversity, mutuality and commoning.

2 The essays

This special issue begins with **Hugo Guyader**'s laying out a typology of the sharing economy space through the matrix of pro-social vs. market logics and exploring the paradox that this produces within collaborative consumption practices. He presents a systematic analysis of the categories of tensions that affect participants at all levels and engage in all manners of collaborative consumption, and in doing so, he puts paid to the simplistic notions that commercial and communal sharing are homogenous and opposing projects. Guyader shows the uneasy negotiation between the pro-social motivations of collaborative consumption and the methods of the sharing economy, which are engineered to produce commercial value. This unease plagues grassroots initiatives as much as profit-driven platforms, as technologically driven efficiency and utilisation of idle capacity clash with the fundamental tenets of creating more social connections and reducing resource consumption.

Shelly Kreiczer-Levy develops this theme as she expands on the central paradox of the relative power that is inherent within hierarchical property rights and of what that means for the subversive potential of access. She approaches property as a platform for creating social and economic relationships and shows that although access can erode some entrenched dynamics of ownership, it can also engender its own patterns of exclusion and precarity. Kreiczer-Levy uncovers the uneasy dialectical relationship between access and ownership and highlights how the paradox will persist as long as the hierarchical system of property rights remains.

Rashmi Dyal-Chand then explores a particular issue of exclusion on platforms by analysing how whiteness as intellectual property has become an embedded and privileged asset. She discusses how old patterns of racial exclusion are re-enacted in new ways through the increasing use of algorithms that systematically code and embed these patterns by determining the conditions of access on platforms. She reveals how insidious market forces incentivise platforms to further embed these injustices in a bid to benefit from the economic benefits of valorising whiteness. The answer, Dyal-Chand argues, is to de-propertise whiteness by removing the protections of private property from the platform itself, making it subject to the competing entitlements of its users and subjecting it to the same standards of transparency and regulation as public utilities. To effectively rout whiteness as property from platform economies, Dyal-Chand advocates enforcing platforms to optimise for diversity when designing their digital infrastructure and democratising platform governance to ensure diversity.

Sally Zhu continues the conversation on exclusion and platform design by exploring how risk is managed in sharing. She discusses how risk is used as a way of internalising the cost and value of property to ownership in a bid to incentivise efficient use of resources and how the resulting privatisation of risk through property obstructs the efficiencies of sharing by raising the costs of risk management. Zhu argues that mutualising risk by using platforms as organisational mediums can overcome some of the inefficiencies of privatised risk while still maintaining the private ownership basis of sharing.

Finally, **Bronwen Morgan** presents the idea of a nested commons as a principle for designing alternative platforms. She rejects simple binary opposition between market and solidaristic logics that animate sharing, instead focussing on the contested territory in between these binaries and how institutional design is central to shaping the trajectory of any socio-economic project. She presents vignettes of three extant commons-based initiatives that all formally design their platforms with the explicit purpose of promoting pluralistic practices that defy current institutional boundaries. Morgan analyses these initiatives by tracing how embedding institutional rules to positively organise practices around values of platform, place and care contributes to the building of a nested commons wherein the economic sphere is embedded in the social and wherein both are embedded in the ecological, thus realising an ecologically sustainable and socially productive sharing economy.

3 Property designed to be shared

The common themes of access, participation, exclusion and economic innovation that are common across many of the essays should be familiar to those who take an interest in the sharing economy or in property. Here we take these seemingly self-evident concepts and put them through a dialectical process by interrogating the socio-economic practices that constitute them and by examining the interactions among these practices. The warnings by Morgan that formal–legal instrumentalism will promote values favoured by the market and stifle collective endeavours find resonance in the enduring patterns of property-based distinction and exclusion documented by Kreiczer-Levy and Dyal-Chand. The tension among the capitalist incentives that drive both individual and corporate rationality and their expression in an economy that rewards openness and generosity is a thread that runs through the essays by Guyader and Zhu as they try to probe from different angles the limits of the contradiction before it stops being productive and dynamic and leads to the cannibalisation of its own project. What emerges at the end is a much more nuanced and dynamic portrayal of property in the sharing economy, where both bring differing socio-economic practices and, in the case of property, institutional baggage to their interaction.

We have unearthed multiple paradoxes, but has this brought us any closer to defining the fundamental paradox that was hinted at in the beginning, or has this investigation simply muddied the waters further? Moreover, how viable are the institutional reforms proposed, given that we live in a capitalist system structured upon laws of private property and cannot retreat from these everyday economic realities? As to the first question, we do not presume to be so ambitious as to diagnose property as the one element that is capable of explaining the myriad manifestations of sharing. However, it is hoped that through systematic analysis and exploration through the lens of property, we have demonstrated how tensions are present in every aspect and generate dynamism as well as conflict for sharing and property relations.

The second question can be answered only by pointing out that this is an incremental process, especially if the values being promoted, as we are doing, are those of more democratic participation and the distribution of material resources in society. While the proposed reforms are fundamental and ambitious, they can be implemented bottom-up through local initiatives and everyday property practices. At the very least, this Special Issue will highlight how property institutions both help to mould and are affected by economic innovations and also stimulate serious engagement with property in this area of evaluation.

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