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Poirier, Property, and Community: Reflections on Marc. R. Poirier (1952–2015)

Ngai Pindell*

To my mind, Marc R. Poirier was deeply invested in exploring how individuals discover and rediscover their identity and how property relationships foster, or frustrate, this process. He believed, as do I, that property law plays a fundamental role in shaping the structural conditions that so profoundly influence our personal development and our imagination for reform.

He had a remarkable intellectual gift that sustained an expansive philosophical, legal, and rhetorical inquiry into the “why” of property issues, environmental issues, and issues of sexual identity. This expansive inquiry was matched by a focused, penetrating, and unblunted analysis of the issue at hand. He was uncommonly adept at articulating what was truly consequential and significant about a law, a movement, or a point of view. He was skilled with words—and would describe with penetrating clarity how a legal concept could be meaningful and “remarkably heterogenous,” which is

* Text of a speech presented as part of the Tribute to Marc Poirier: Property, Identity, and Inclusion at the Association of Law, Property, and Society (“ALPS”) 2016 Annual Meeting at Queen’s University Belfast on May 20, 2016 by Ngai Pindell, Vice Provost of Faculty Affairs and International Gaming Institute Professor of Law, University of Nevada, Las Vegas. I have made minor edits for publication and thank Emily Dyer for her excellent research assistance.

Marc-speak for “not so meaningful.”¹ I will add more context to “remarkably heterogenous” later in this essay.²

Central to Marc’s exploration of identity was emphasizing the importance of place—a place to be, to dwell, and to be present. In several pieces, he describes this place as having a room of one’s own.³ It comes up in his *One L in a Different Voice* essay as he yearns for a place to be Marc, and to explore his intellectual and personal life.⁴ It comes up again in his writing on homelessness and about people who live in informal property regimes.⁵ But Marc being Marc, he pushed relentlessly on this point—Why is it important to have a room of one’s own? What is its meaning to him? To Americans? To progressive property scholars? To Brazilians?

I mention the latter group because Marc and I have had our most scholarly conversations about Brazil and concepts of a right to housing, a *Right to the City*,⁶ the social function of property, and homelessness. I will use these topics to frame my comments. And though there is much overlap among these topics, each have distinct components that many friends and colleagues of Marc have written persuasively and passionately about.

In 2006, I wrote an article called *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*.⁷ In 2013,

¹ Marc R. Poirier, *Brazilian Regularization of Title in Light of Moradia, Compared to the United States’ Understandings of Homeownership and Homelessness*, 44 U. MIAMI INTER-AM. L. REV. 259, 277 (2013) [hereinafter *Brazilian Regularization*].

² See *infra* text accompanying note 30.

³ *Brazilian Regularization*, *supra* note 1, at 288.

⁴ Marc R. Poirier, *One L in a Different Voice: Becoming a Gay Male Feminist at Harvard Law School*, 78 UMKC L. REV. 1063, 1070 (2010).

⁵ *Brazilian Regularization*, *supra* note 1, at 288.

⁶ See Ngai Pindell, *Finding a Right to the City: Exploring Property and Community in Brazil and in the United States*, 39 VAND. J. TRANSNAT’L L. 435 (2006).

⁷ *Id.*

Marc wrote a better essay, *Brazilian Regularization of Title in Light of Moradia, Compared to the United States' Understandings of Homeownership and Homelessness*.⁸ In this essay, Marc did what Marc did best—take an important but somewhat unclear concept, explore its lived meaning on the ground, and draw nuanced conclusions about what it was and, equally important, what it was not (at least not yet). And he would do this in three key moves: (1) explain the property concept with reference to its lived meaning; (2) exhaustively describe the relevant law at the local, state, and national level; and (3) engage a community of property scholars to decipher what was really going on and to help us better interrogate our own assumptions about what was going on.

Marc never lost sight of the centrality of property law in how people understand themselves among *communities*—in their homes and within cities, in their intimate associations, and as part of the built and natural environment. The following pages illustrate briefly Marc's analysis of property and community in Brazil.

I. Move 1: What is the Context on the Ground? What Does the Concept Mean to the People Affected By It?

Marc visited Rio in 2010 for a one-week long study trip to compare a program of regularization of title in Brazil with conversations surrounding homelessness and homeownership in the United States.⁹ This on the ground research mirrored the approach he took to other scholarly projects.¹⁰ He talked to professors, economists,

⁸ *Brazilian Regularization*, *supra* note 1, at 259.

⁹ *Id.* at 260.

¹⁰ For example, Marc visited New Orleans to lead a course on the Deep Water oil spill.

policymakers, and favela residents. Favela residents live without formal property protections.¹¹ They are squatter communities, often on public land, and favela residents number in the millions throughout Brazil, with about one million in Rio.¹² A regularization program would provide legal title to residents but at not insignificant cost: an expensive registration fee and an obligation to pay taxes.¹³ Considering these costs, Marc wondered why a favela resident would want to pursue regularization?¹⁴

An afternoon panel provided an answer. Responding to questions about whether he was concerned about the potential loss of his property through failure to pay fees, taxes, or utility bills, a favela resident insisted that “it was most important to him to acquire the status of owner and to secure a ‘place on the map.’”¹⁵ Other favela residents in the room agreed:

They explained that in fact many *favelas*, those located on government land, did not appear on certain official maps at all, for they had been built on what was still officially public forest land; that the concern of the [favela] resident was in part about acquiring an increased ability to negotiate for social services such as utilities, sanitation, transportation, and police protection, based on the newly confirmed ownership status; that these were all part of *moradia*, roughly translated as a right to housing, shelter, or dwelling [but also often translated as more than habitation but also access to a basket

¹¹ *Brazilian Regularization*, *supra* note 1, at 267–71.

¹² *Id.* at 264, 267.

¹³ *Id.* at 268.

¹⁴ See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* (2000), for additional discussions of issues around regularization, or legalization of title.

¹⁵ *Brazilian Regularization*, *supra* note 1, at 268.

of social services we typically see in planned communities]; and that this in turn was part of a right to the city and of citizenship.¹⁶

This conversation changed his view. He began the day thinking that a regularization program would be similar in “cultural significance” to a transition from renter to homeowner in American culture with its attendant access to middle class benefits.¹⁷ Instead, he wrote:

I did not expect to encounter so much emphasis on connection, community, and a large and unfamiliar constellation of attributes associated with the right to *moradia*, nor such an emphasis on citizenship linked to an ability to dwell securely in a place.¹⁸

....

The two conversations, morning and afternoon, resonated with one another, and suggested to me that the assumptions I as an American brought to the relationship of property, place, community, and citizenship needed to be reexamined in light of what seemed to be a different way of understanding what it means to own property (land) in a troubled and marginal community.¹⁹

After better understanding the feelings of favela residents around connection and community, Marc then expanded on the interconnections between individuals and their community that legal property ownership facilitates.²⁰ He examined the limitations of the popular U.S. rhetoric around homelessness (focusing on individual

¹⁶ *Id.* at 268–69.

¹⁷ *Id.* at 269.

¹⁸ *Id.*

¹⁹ *Id.* at 270.

²⁰ *Id.* at 283.

rights like shelter, privacy, connection to services, and individual responsibility) as well as Jane Baron's critique of this approach and its absence of a consideration of the role of property and its connecting, socializing, and citizenship functions.²¹ He wrote: "She is correct. Baron could go further, though. To my mind, the issue is not 'no property' as such, but having no place to dwell, to take root."²² Finally, he compared characteristics of Brazil and of the United States that influence the pace and scope of land reform: different historical development, the visibility of favela communities in Rio, and the stickiness of the classical liberal view of property in the United States. Ownership does not mean the same in the United States as it does in Brazil.²³

II. Move 2: Describe the Relevant Law at the Local, State, and National Level

Marc was always very careful to explore multiple legal and policy approaches to try to understand the law and policy at hand. In his *Brazilian Regularization* article, he neatly laid out what the right to the city means in Brazil and how it has been incorporated into the Brazilian legal system through a 2001 federal City Statute and World Charter on the Right to the City.²⁴ The legal reforms also led to several institutional reforms and initiatives.²⁵

The social function of property is one component of this Brazilian regime and it offers an opportunity to see Marc at his best describing

²¹ *Id.* at 263; see Jane B. Baron, *Homelessness as a Property Problem*, 36 URB. LAW. 273 (2004).

²² *Brazilian Regularization*, *supra* note 1, at 263.

²³ *Id.* at 260–62.

²⁴ *Id.* at 273.

²⁵ *Id.* at 273–76.

the coherence – and lack thereof – of the idea.²⁶ He was frank and incisive. He began a paragraph describing the concept generously but skeptically: “The contours of the doctrine of the social function of property are nebulous, especially if one tries to generalize across countries and time periods.”²⁷ That seemed a fair, broad topic sentence and summary of the state of affairs. He went on to connect the social function of property to scholars in the United States writing to the use of property to promote human flourishing – Colin Crawford, Gregory Alexander, Eduardo Penalver, and others.²⁸ He wrote: “The concepts of human flourishing articulated by these authorities are very open-ended and context-specific, but nonetheless do provide, as they are implemented over time in specific contexts, some kind of guiding principle or direction.”²⁹ Perhaps there is a glimmer of hope! Though sometimes “nebulous,” “open ended,” and “context specific,” at least study of the social function of property has gained some traction with several notable scholars in the United States exploring the connection between property and human flourishing.

But then he pulled the rug from underneath us. He further considered the scholarly conversation in the United States around the social function of property, including a 2011 Fordham Law School symposium,³⁰ and concluded that the literature was “remarkably heterogenous.”³¹ (This was not a complement.) Moreover, he wondered in a footnote whether the social function of property doctrine

²⁶ *Id.* at 276, 293–95.

²⁷ *Id.* at 276.

²⁸ *Id.*

²⁹ *Id.*

³⁰ Most of the papers were published in Symposium, *The Social Function of Property: A Comparative Perspective*, 80 *FORDHAM L. REV.* 1003, 1003–217 (2011).

³¹ *Brazilian Regularization*, *supra* note 1, at 276–77.

actually meant much of anything at all.³² He concluded that “[t]here is little predictable content *ex ante* and in the abstract in the notion of the social function of property.”³³ The best we can do is to collect a number of specific examples, in context, as general guidance on the use of property to promote human flourishing.³⁴ In the United States, these examples (and theorists like Joseph Singer, Gregory Alexander, Laura Underkuffler, and Eduardo Peñalver)³⁵ operate against a still dominant classical liberal property background.³⁶

To put it mildly, he was not effusive in his praise of the social function of property and the work it might do in the United States. He was honest in his appraisal and, I suspect, correct. But he was far from dismissive of the social function of property project noting that the dominant individualistic approach to homeownership and homelessness must be critically examined, if only to preserve serious consideration of alternative property arrangements.³⁷

III. Community of Property Scholars

Marc was generous with his time reading other scholars’ work, making insightful comments, and including their work in his own. In the one paper discussed in this essay, he cites to professors Tim Mulvaney, Audrey McFarlane, Rashmi Dyal-Chand, Jim Kelly, John

³² *Id.* at 277 n.92.

³³ *Id.* at 294.

³⁴ *Id.*

³⁵ *See, e.g.*, Gregory S. Alexander, Eduardo Peñalver, Joseph William Singer, & Laura Underkuffler, *A Statement of Progressive Property*, 94 CORNELL L. REV. 743 (2009); Gregory Alexander, *Property & Propriety*, 77 NEB. L. REV. 667 (1998); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821 (2009); Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988); Laura Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127 (1990).

³⁶ *Brazilian Regularization*, *supra* note 1, at 295.

³⁷ *Id.* at 311.

Lovett, myself and others who attended this conference.³⁸ As he tried to wrestle through vague ideas of a social function of property, he included the rest of us in the conversation – in the room itself and on paper – and allowed us to think with him and understand our own work better.

Marc would have loved this gathering in Belfast. There have been so many examples of property scholars working broadly and in specific context to breathe life and meaning into the social obligations that accompany property relationships. For example, Bernadette Atuahene explored the dignity claims of squatters in Detroit;³⁹ Thomas Mitchell argued that property law ought to recognize the humanity of disadvantaged populations and he showed that the law *can* be changed to do so (discussing heirs property and partition), though he reminded us that the pace of reform can be glacially slow;⁴⁰ and Lisa Alexander discussed zoning for micro housing as local expressions of a potential right to housing.⁴¹ Marc Roark explored waste and identity as different lenses to view and talk about homelessness⁴² and several speakers spoke about the strengths and challenges of informal property communities around the world.

³⁸ *Id.* at 259.

³⁹ Bernadette Atuahene, Association of Law, Property, and Society 2016 Annual Meeting at Queen's University Belfast: Dignity Takings and Dignity Restoration: Creating a New Socio-Legal Approach to Understanding Involuntary Property Loss and the Remedies Required (May 21, 2016).

⁴⁰ Thomas Mitchell, Association of Law, Property, and Society 2016 Annual Meeting at Queen's University Belfast: Sentimental, Cultural, and Historical Value of African-American Owned Land (May 20, 2016).

⁴¹ Lisa T. Alexander, Association of Law, Property, and Society 2016 Annual Meeting at Queen's University Belfast: Bringing Home the Right to Housing (May 20, 2016).

⁴² Marc Roark, Association of Law, Property, and Society 2016 Annual Meeting at Queen's University Belfast: Waste and Identity (May 20, 2016).

The favorite word I have heard during this conference to describe Mark is that he was effervescent. Marc was a storyteller. He told personal stories, other people's stories, community stories, and recognized the importance of storytelling in our published work. He was gregarious, always ready with a bear hug and a hearty hello. He was large in personality and size—I always had to stand on my tiptoes to hug him. I don't think he noticed but if he did, he never let on. I have very much appreciated the chance to reflect on Marc's impact on property scholarship and on us as scholars and people. I am heartened and encouraged to see his work reflected in so much that we do here, and I look forward to seeing how we develop these ideas in ALPS conferences in the future.