

2000

## The Liberal Commons

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### Recommended Citation

Hanoch Dagan & Michael Heller, *The Liberal Commons*, YALE LAW JOURNAL, VOL. 110, P. 549, 2001; UNIVERSITY OF MICHIGAN JAMES M. OLIN CENTER FOR LAW & ECONOMICS RESEARCH PAPER NO. 00-007; UNIVERSITY OF MICHIGAN PUBLIC LAW & LEGAL THEORY RESEARCH PAPER NO. 00-01 (2000).

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# UNIVERSITY OF MICHIGAN

PUBLIC LAW AND LEGAL THEORY  
RESEARCH PAPER NO. 00-01

JOHN M. OLIN CENTER FOR LAW & ECONOMICS  
RESEARCH PAPER NO. 00-007

## THE LIBERAL COMMONS

Hanoch Dagan & Michael A. Heller

Forthcoming in 110 YALE LAW JOURNAL (2001)



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*Forthcoming in 110 YALE LAW JOURNAL (2001)*

## THE LIBERAL COMMONS

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*September 11, 2000*

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# THE LIBERAL COMMONS

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## ABSTRACT

Must we choose between the benefits of cooperative use of scarce resources and our liberal commitments to autonomy and exit? No. Well-tailored law can mediate between community and liberty, between commons and private property. Our theory of the liberal commons provides a framework to reconcile these seemingly-contradictory moral imperatives and analytic categories. In our definition, an institution succeeds as a liberal commons when it enables a limited group of people to capture the economic and social benefits from cooperation, while also ensuring autonomy to individuals through a secure right to exit. This Article shows how current theories and categories obscure the most difficult tradeoffs in managing commons resources; then details our liberal commons model comprising the decision-making spheres of individual dominion, democratic self-governance, and cooperation-enhancing exit; and finally presents a case study to show how our approach can enrich legal and social inquiry.

THE LIBERAL COMMONS  
*Hanoch Dagan & Michael A. Heller*

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# THE LIBERAL COMMONS

*Hanoch Dagan & Michael A. Heller\**

## INTRODUCTION

Following the Civil War, black Americans began acquiring land in earnest; by the turn of the century almost a million black families owned farms. Since then, black rural landownership has dropped by more than 98 percent and continues in rapid decline – there are now fewer than 5,000 black-operated farms left in America.<sup>1</sup> Scholars have offered partial explanations in the consolidation of inefficient small farms and intense racial discrimination in farm lending. However, even if these factors were set aside, the unintended effects of old-fashioned American property law may have led to the same outcome. Because black farmers often did not make wills, their heirs took the land as co-owners. Over generations, co-owners multiplied, the farms became unmanageable, and the land was partitioned and sold, a seemingly inevitable “tragedy of the commons” in which too many owners waste a common resource.<sup>2</sup> Black rural landownership may seem a dusty topic, peopled with hardscrabble tales of property past. Consider, though, the daunting possibility that property future – think biomedical research, post-apartheid restitution, hybrid residential associations, perhaps cyberspace – may have the same analytic

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<sup>1</sup> See generally U.S. COMM’N ON CIVIL RIGHTS, *THE DECLINE OF BLACK FARMING IN AMERICA* (1982) [hereinafter *BLACK FARMING*]; see also *infra* Part III.A.

<sup>2</sup> Garrett Hardin, *The Tragedy of the Commons*, 162 *SCIENCE* 1243, 1244-45 (1968) (introducing the metaphor); see also *infra* notes 32, 35 (discussing antecedents). Note that, following conventional definitions, we distinguish “open access,” a losing game in which anyone may use a resource, from “commons property,” which denotes control by a bounded group. See also *infra* page 7 (elaborating this distinction).

structure, be subject to a similar punishing legal regime, and face the same fate as the black rural landowner.

Until now, institutions for common resource management have been analyzed primarily through a familiar utilitarian language mapped onto a standard conceptual map. One school, worrying that rational owners will over-consume commons resources, embraces the Blackstonian image of private property with “sole despotic dominion” at the core.<sup>3</sup> Another school, after showing how small close-knit groups can successfully conserve commons resources if they sharply restrict exit, advocates commons property.<sup>4</sup> For all, the image of tragic outcomes proves an ideal foil, one that implicitly points theorists toward their preferred normative solutions. Privatization seems inevitable for utilitarians with a liberal bent because they believe that locking people together violates a fundamental concern for individual autonomy. By contrast, illiberal communitarian solutions seem relatively attractive to those who are ready to sacrifice individual autonomy for collective goals. While these underlying normative commitments have driven the familiar debate over tragic outcomes, they have never surfaced as the focus for analysis of commons property management.

We argue that the utilitarian vocabulary which focuses solely on economic success and the conceptual binary of private/commons property prove too paltry a framework when utility can not be safely reduced to wealth alone, that is, when the social gains from cooperation are not just fringe benefits, but instead are a major part of what people seek. In many property arrangements – consider, for example, families, partnerships, condominiums, and close corporations – participation may be of the essence, the terms for exit matter, and the calculus of utility must account for incommensurable goals. Here, the underlying normative commitments that animate the “tragedy of the commons” debate render invisible the most difficult trade-offs and unintentionally freeze legal

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<sup>3</sup> See, e.g., Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 354 (1967). On private property, WILLIAM BLACKSTONE, 2 COMMENTARIES ON THE LAWS OF ENGLAND \*2 (University of Chicago ed., 1979) (1765-69); see also Carol M. Rose, *The Several Futures of Property: Of Cyberspace and Folk Tales, Emissions Trades and Ecosystems*, 83 MINN. L. REV. 129, 150-51 (1998) (discussing this image of private property).

<sup>4</sup> See, e.g., ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 35-36 (1990); Margaret A. McKean, *Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management*, 4 J. THEORETICAL POL. 247, 261-62 (1992); William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335, 1343-44 (1991).

imagination and innovation.<sup>5</sup> A better approach focuses analysis more directly on the competing normative goals and doubts their inevitable friction.

We contest communitarian claims that elevate illiberal commons property and too quickly jettison individual autonomy; equally, we dispute privatizers who assert an exclusive preference for old-fashioned private property and who disparage cooperation. There is no neutral, pre-political tragedy of the commons: the metaphor itself assumes either anarchy (no law) or hostile law. Rightly considered, the problem of managing commons resources concerns not only *tragic outcomes*, but also *tragic choices*: are we doomed to choose between our liberal commitments and the economic and social benefits available in a commons? No. Law can mediate liberty and community.

For many resources, the most appealing ownership structure proves to be a participatory commons regime that also allows members the freedom to come and go. We call this structure a “liberal commons” – an ideal type of ownership distinct from both private and commons property, but that draws elements from each. A legal regime qualifies as a liberal commons when it enables a limited group of owners to capture the economic and social benefits from cooperative use of a scarce resource, while also ensuring autonomy to individual members who retain a secure right to exit. Constructing a successful liberal commons is indeed a challenge, but it is not an inherently contradictory or practically unattainable one.<sup>6</sup> Ours is a strong claim: creating legal regimes supportive of liberal commons goals reframes and ultimately dissolves the tragedy of the commons, one of the core dilemmas for legal theory.

The liberal commons construct should prove useful because it does not simply revisit ongoing liberty/community and private/commons debates; instead it reorganizes them altogether around a richer set of questions and answers. On the questions front, we expand the evaluative prism from a sole focus on economic success to a broader view that explicitly includes the liberal value of

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<sup>5</sup> Cf. FELIX S. COHEN, *Transcendental Nonsense and the Functional Approach*, in THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN 33 (Lucy Kramer Cohen ed., 1960) (showing how legal conceptualism blocks ethical and empirical inquiry and shields the status quo from normative re-examination); Robert Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 413, 418-21 (David Kairys ed., 1982) (Law is one of many “clusters of belief,” “which are profoundly paralysis-inducing because they make it so hard for people . . . even to *imagine* that life could be different and better.”).

<sup>6</sup> As Michael Walzer notes, “If we want the mutual reinforcements of community and individuality to serve a common interest, we will have to act politically to make them effective. They require certain background or framing conditions that can only be provided by state action.” MICHAEL WALZER, ON TOLERATION 111 (1997).

exit as well as non-economic goals of common resource management, such as intrinsic good of interpersonal cooperation. Here, the liberal commons framework offers a consistent analytic language engaging precisely the widely-shared values that animate our most important institutions. On the answers front, an attractive feature of our approach is that it bounds the range of solutions consonant with liberal commons values: our normative umbrella, while capacious, is not unlimited. Across the wide variety of existing institutions where it may be deployed, the liberal commons construct often yields persuasive arguments for legal reform.

Legal regimes which account for a substantial and increasing share of social life – again, consider marital property, condominiums, partnerships, and close corporations – can be structured as liberal commons forms. With changing times, people are creating pervasive, though unremarked, variations on the theme of a liberal commons. When well-tailored, these institutions can encourage people voluntarily to come together to create limited-access and limited-purpose communities dedicated to shared management of a scarce resource. They can offer internal governance mechanisms to facilitate participatory cooperation and the peaceable joint creation of wealth, while simultaneously limiting minority oppression and allowing exit.

The goals of this Article are to advance a theory of the liberal commons and to demonstrate its usefulness. *Part I* introduces the problem of tragic choice. Relying on the private/commons dichotomy, theorists have chosen between liberal or communitarian solutions to commons tragedy. Because they overlooked the liberal commons synthesis, they missed how law can shift debate in a happier direction. *Part II* proposes a theory of the liberal commons that dissolves the problem of tragic choice. We explore the widely-shared, often-buried, and potentially-competing goals that law must reconcile when people want to cooperate but fear abuse; then discuss the background role that law plays in guiding human behavior; and finally set out the three spheres of decision-making that characterize the general form of the liberal commons solution – the spheres of individual dominion, democratic self-governance, and cooperation-enhancing exit. *Part III* rewards the reader's patience with legal theory by bringing the liberal commons down to earth. The example of declining black landownership helps reveal the animating spirit of the American law of co-ownership, an area of law that systematically thwarts cooperation. Current law fails them, and us, because it lacks the three features of a liberal commons, features that other developed legal systems can model. While a liberal commons

solution may be too late for black farmers, their example can still catalyze useful reforms.

Can a liberal legal regime facilitate economically and socially productive use of scarce resources in a crowded world, where people want or need to work together but worry that others may take advantage of them? A theory of the liberal commons begins to provide an answer.

## I. TRAGIC CHOICE IN PROPERTY THEORY

Most lawyers, economists, and other social scientists learn of the “tragedy of the commons” in the first weeks of school,<sup>7</sup> all are taught that commons property is the axiomatic example of a prisoner’s dilemma.<sup>8</sup> The usual economics-oriented reaction has been to build from tragedy to private property; political theorists, by contrast, often solve tragedy by focusing on thickly-textured norms and the bonds of close-knit community. Neither camp gives much focused attention to the role of law or to any values other than economic success measured along a single metric. This Part shows how the existing conceptual map pushes theorists into these dichotomous approaches and renders invisible some of the most challenging dilemmas that underlie management of commons resources.

### A. *A Typology of Property Forms*

1. *The Standard Conceptual Map.* – Commons property takes its place alongside private property and state property as part of the well-worn trilogy of ownership forms that constitute the conceptual apparatus of property law.<sup>9</sup> These three species of property are generally understood as ideal types,

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<sup>7</sup> See, e.g., JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 40-59 (4<sup>th</sup> ed. 1998).

<sup>8</sup> See, e.g., DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, GAME THEORY AND THE LAW 34 (1994); AVINASH K. DIXIT & BARRY J. NALEBUFF, THINKING STRATEGICALLY 347-49 (1991).

<sup>9</sup> On the limitations imposed by the standard conceptual map, see generally Michael A. Heller, *The Dynamic Analytics of Property Law*, 3 THEORETICAL INQUIRIES IN LAW (forthcoming, 2001). For the familiar definitions, see JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY (1988); Frank I. Michelman, *Ethics, Economics and the Law of Property*, in NOMOS XXIV: ETHICS, ECONOMICS AND THE LAW 3, 5-6 (J. Roland Pennock & John W. Chapman eds., 1980); Duncan Kennedy & Frank I. Michelman, *Are Property and*  
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never present in pure form on the ground, but always available to channel the justificatory and normative debates that are of ultimate interest to legal theorists and reformers.<sup>10</sup> The process of working from idealized types pervades property theory stretching back past Locke's discussion of ownership and forward to modern images of the commons.

The trilogy is so entrenched as to seem almost natural, beyond serious contestation or elaboration. Even to suggest tinkering raises a red flag for legal theorists.<sup>11</sup> Nevertheless, the ground is shifting under these old categories to the point that they divert us from seeing new problems and opportunities. Before showing how modern theorists have crafted a crabbed version of the commons, we set commons property in its familiar habitat, nestled alongside private property and state property.

*a. Private Property.* Private property is a difficult idea to pin down precisely, its boundaries always fray at the edges. However, for property theorists, and, even more so, for ordinary lay folk,<sup>12</sup> the term seems reasonably coherent and capable of simple definition. For example, Jeremy Waldron defines private property, "around the idea that contested resources are to be regarded as separate objects each assigned to the decisional authority of some particular individual (or family or firm)."<sup>13</sup> This simple definition can be multiplied many times over, but all such definitions partake of and help keep current William Blackstone's oft-repeated definition of private property as, "that sole

<sup>9</sup>(...continued)

*Contract Efficient?* 8 HOFSTRA L. REV. 711 (1980).

<sup>10</sup> For example, Frank Michelman states, "We need some reasonably clear conceptions of regimes that are decidedly *not* [private property], with which [private property] can be compared." Michelman, *supra* note 9, at 5.

<sup>11</sup> See, e.g., Lawrence C. Becker, *Too Much Property*, 21 PHIL. & PUB. AFFAIRS 196, 197-98 (1992). But even Becker concedes, "we would lose a great deal of clarity and rigor if [the conceptual apparatus] were ignored." *Id.* at 198.

<sup>12</sup> BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 116-18 (1977) (exploring the lay view of property).

<sup>13</sup> Jeremy Waldron, *Property Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 6 (Dennis Patterson ed., 1999). Frank Michelman focuses attention his definition on rules for initial acquisition and reassignment. He focuses particularly the idea of sole ownership defined to mean, "the rules must allow that at least some objects of utility or desire can be fully owned by just one person," and freedom of transfer to mean "owners are immune from involuntary deprivation or modification of their ownership rights and empowered to transfer their rights to others at will, in whole or in part." Michelman, *supra* note 9, at 4-5.

and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.”<sup>14</sup> The image of sole dominion has never adequately described any real world property ownership (as even Blackstone recognized).<sup>15</sup> Nevertheless, his image rings through the ages and continues to serve as a focal point for thinking about property, even as people trade old-fashioned private property for the novel property arrangements that we call the liberal commons.

*b. Commons Property.* Some theorists define commons property as a regime in which every individual may use an object of property and no individual has the right to stop someone else from using the object.<sup>16</sup> Commentators have repeatedly noted that this standard definition obscures an important distinction between commons property and open access.<sup>17</sup> Open access (or anarchy or no law) is “a scheme of universally distributed, all-encompassing privilege.”<sup>18</sup> In contrast, commons property designates resources that are owned or controlled by a *finite* number of people who manage the resource together and exclude outsiders,<sup>19</sup> what Carol Rose calls “commons on the inside, property on the outside.”<sup>20</sup> This important distinction notwithstanding,

<sup>14</sup> 2 BLACKSTONE, COMMENTARIES \*2; see also JOHN LOCKE, TWO TREATISES OF GOVERNMENT, BOOK II, Ch. V (*Of Property*) (P. Laslett rev. ed., 1963) (3d ed. 1698).

<sup>15</sup> 3 BLACKSTONE, COMMENTARIES \*212-15; Carol M. Rose, *Canons of Property Talk, or, Blackstone's Anxieties*, 108 YALE L.J. 601 (1998); Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1362 n.237 (1993).

<sup>16</sup> Thus, Frank Michelman defines a commons property regime as one where “there are never any exclusionary rights. All is privilege. People are legally free to do as they wish, and are able to do, with whatever objects (conceivably including persons) are in the [commons].” Michelman, *supra* note 9, at 5.

<sup>17</sup> See JAMES ACHESON, THE LOBSTER GANGS OF MAINE 142-144 (1988); OSTROM, *supra* note 4, at 48, 222 n.23; GLENN G. STEVENSON, COMMON PROPERTY ECONOMICS: A GENERAL THEORY AND LAND USE APPLICATIONS 8-10, 39-40 (1991); Ellickson, *supra* note 15, at 1322; Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 3 n.4.

<sup>18</sup> Michelman, *supra* note 9, at 5 (discussing commons property).

<sup>19</sup> OSTROM, *supra* note 4, at 48, 222 n.23.

<sup>20</sup> Carol M. Rose, *Property in the Global Environmental Commons: Comparing Newfangled Tradeable Rights to Old-fashioned Common Property Regimes* 5 (draft on file with authors, April 1999). In other words, despite the similarities between open access and commons property (multiple users and the resulting collective action difficulties), commons property is also characterized by an important feature similar to private

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the image of open access still comprises the core understanding of commons property, at least in Anglo-American jurisprudence. As in the open access case, common property owners are often imagined to be entitled to unregulated use of the commons resource and entitled to a governance regime in which no control on resource use – no management or investment decision – can be imposed on any single commoner absent that individual's consent.

*c. State Property.* State property, also called collective property, has been equally central to standard narratives of property.<sup>21</sup> As Waldron notes, state property can be defined as a property regime in which, “[i]n principle, material resources are answerable to the needs and purposes of society as a whole, whatever they are and however they are determined, rather than to the needs and purposes of particular individuals considered on their own.”<sup>22</sup> Thus, a state property regime is similar to commons property in that no individual stands in a specially privileged position with regard to any resource, but it is distinguished from commons property because the state has a special status or distinct interest.<sup>23</sup> Although, initially, state property was considered the main rival of private property,<sup>24</sup> it has become a less and less important category, particularly since state socialism fell and privatization has prevailed more and

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<sup>20</sup>(...continued)

ownership: in both cases the users' group is strictly defined. See STEVENSON, *supra* note 7, at 57; Ellickson, *supra* note 15, at 1322.

<sup>21</sup> See, e.g., Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986).

<sup>22</sup> WALDRON, *supra* note 9, at 40 & n.30.

<sup>23</sup> WALDRON, *supra* note 9, at 41. Additionally, state property is not just a special case of a private property regime, where the state just acts as another private owner. Instead, at a theoretical level, the state is somehow expressing the collective interest in determining how a state property resource is to be used. The collective, represented usually by the state, holds all rights of exclusion and is the unitary locus of decision-making regarding use of resources. So, a subsidiary set of questions needs to be answered to specify fully a state property regime, including what is the “collective interest” and what procedures will be used to apply that conception to a particular resource. *Id.*

<sup>24</sup> Indeed, part of the political science literature on the commons has come as a response to this “false dichotomy.” See OSTROM, *supra* note 4, at 8-11; Bonnie J. McCay & James M. Acheson, *Human Ecology and the Commons*, in THE QUESTION OF THE COMMONS: THE CULTURE AND ECOLOGY OF COMMUNAL RESOURCES 1, 7, 9, 13 (Bonnie J. McCay & James M. Acheson eds., 1987).

more in theoretical and policy debates.<sup>25</sup> Hence, the trilogy of property forms often reduces down in practice to a dichotomy of private or commons.<sup>26</sup>

2. *Focusing the Debate.* – The familiar conceptual map has limited debate in three distinct ways.<sup>27</sup> First, as Heller has shown, the categorization is incomplete, and adding *new types* such as anticommons property may help make visible previously overlooked problems.<sup>28</sup> Second, as Dagan has argued, the *existing categories*, such as “private property” may themselves be renegotiated and a richer, alternative conception developed.<sup>29</sup> Third, and the focus of this work, we show that there is significant analytic and normative traction to be gained from *synthesizing features* of existing types, private and commons, to create vigorous hybrids including the liberal commons.<sup>30</sup> There is

<sup>25</sup> To be sure, private property systems do contain, and it seems must contain, public elements, typically organized as state property, such as highways, streets and public parks. See Ellickson, *supra* note 15, at 1381 & n.342, 1397 n.413 (noting scale and inevitability of public space in cities); Rose, *supra* note 21 (discussing the effect of state property in enhancing community wealth as well as sociability). Even Soviet socialist law allowed certain items as “personal property” approximating private property but with limits on commercial use. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 627-29 (1998). Few contemporary theorists now advocate expanding state property to other resources which cannot be characterized as public goods.

<sup>26</sup> See, e.g., YORAM BARZEL, *ECONOMIC ANALYSIS OF PROPERTY RIGHTS* 71 (1997) (the standard economic analysis of property has “tended to classify ownership status into the categories all and none, the latter being termed ‘commons property’ – property that has no restrictions put on its use.”).

<sup>27</sup> See generally Heller, *supra* note 9 (elaborating this argument).

<sup>28</sup> Heller’s image of anticommons property, and the tragedy that can ensue, shows how breaking out of the old trilogy can crystalize emerging property relations that otherwise remain invisible. See Heller, *supra* note 25, at 621 (discussing privatization of state property in post-socialist economies); Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 290 SCIENCE 698, 698 (1998) (showing how efforts to spur private investment in the biomedical research can have paradoxical results).

<sup>29</sup> See Hanoch Dagan, *The Distributive Foundation of Corrective Justice*, 98 MICH. L. REV. 138, 149 (1999). Dagan advocates a progressive conception of private property, that incorporates our commitments to social responsibility and to equality. See Hanoch Dagan, *Takings and Distributive Justice*, 85 VA. L. REV. 741, 772-773, 779-781, 791-792 (1999); Hanoch Dagan, *Just Compensation, Incentives, and Social Meanings*, 99 MICH. L. REV. (forthcoming 2000).

<sup>30</sup> See Carol Rose, *Left Brain, Right Brain and History in the New Law and*  
(continued...)

a subtle distinction to be made here: our new construct is intended to reflect a *distinct ideal type* of ownership, one intended to operate at the same level of analysis as private or commons property; it does not refer to the *opportunistic mix* of private and commons elements that typically appears in any particularized resource management regime.<sup>31</sup>

The seemingly immutable opposition of private and commons blinkers us from imagining hybrid legislative and judicial solutions; it presents the tragic but false choice of privatizing a resource or locking people together. Our liberal commons ideal type offers an analytic tool that deliberately elides the familiar legal opposition of private and commons, as well as the more fundamental normative orientation towards liberty or community.

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<sup>30</sup>(...continued)

*Economics of Property*, OR. L. REV. (forthcoming 2000) (manuscript on file with authors) (discussing “limited commons property” hybrids).

<sup>31</sup> Bob Ellickson suggests two relevant types of organizational diversity, two manifestations of “the eclecticism of land regimes:” either variations in the “initial bundles of rights and transfer rules” or opportunistic mixtures of public and private ownership. See Ellickson, *supra* note 15, at 1387-88. The liberal commons construct relates only to the former type. For an example of the other type, consider Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131, 131 (2000) (discussing the medieval open-field system as a “semicommons:” a resource “owned and used in common for one major purpose, but, with respect to some other major purpose, individual economic units . . . have property rights to separate pieces of the commons”).

### B. Commons Tragedy as Privatization Foil

1. *From Demsetz . . .* – Echoing a familiar Aristotelian theme,<sup>32</sup> the conventional wisdom for many social scientists is that commons property generally leads to tragedy.<sup>33</sup> This claim – a truism of first-year law classes – is usually introduced as one of the strongest justifications for the institution of private property.<sup>34</sup> Although Garrett Hardin coined the term “the tragedy of the

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<sup>32</sup> See ARISTOTLE, *THE POLITICS*, Bk. II (H. Rackham, trans., 1932). A classic passage is:

Property that is common to the greatest number of owners receives the least attention; men care most for their private possessions, and for what they own in common less, or only so far as it falls to their own individual share; for in addition to the other reasons, they think less of it on the ground that someone else is thinking about it.

*Id.* at Ch. 1, § 10 (Bekker § 1261b30-35). Also consider:

[R]egulations for the common ownership of property would give more causes for discontent; for if both in the enjoyment of the produce and in the work of production they prove not equal but unequal, complaints are bound to arise between those who enjoy or take much but work little and those who take less but work more. And in general to live together and share all our human affairs is difficult, and especially to share such things as these [farms and produce].

*Id.* at Ch. 2, § 2-3 (Bekker § 1263a10-17).

<sup>33</sup> Much of the influential recent thinking on property rights has come from divergent camps of economists – such as Demsetz, Alchian, North, and others – who have extrapolated from the historical experience of Western European and American capitalism. For a sampling of classics, see, e.g., DOUGLASS C. NORTH & ROBERT P. THOMAS, *THE RISE OF THE WESTERN WORLD: A NEW ECONOMIC HISTORY* (1973); Armen Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777 (1972); Armen Alchian & Harold Demsetz, *The Property Rights Paradigm*, 33 *J. ECON. HISTORY* 16 (1973); BARZEL, *supra* note 8; Demsetz *supra* note 3; Eiric G. Furubotn & Svetozar Pejovich, *Property Rights and Economic Theory*, 10 *J. ECON. LIT.* 1137 (1972); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and the Ownership Structure*, 3 *J. FIN. ECON.* 305 (1976); Svetozar Pejovich, *Towards an Economic Theory of the Creation of Property Rights*, 30 *REV. SOC. ECON.* 309 (1972).

<sup>34</sup> See, e.g., GOTTFRIED DIETZE, *IN DEFENSE OF PRIVATE PROPERTY* 9 (1995, 1963) (“[T]he institution of private property has been defended on the grounds of justice, freedom, progress, peace, and happiness. . . . Common Ownership, although enjoying temporary vogues, has been rejected as utopian, as incompatible with the good of society and the individual, as productive of quarrels, as retarding development, as restraining freedom, as arbitrary and unjust.”).

commons,”<sup>35</sup> Harold Demsetz was the first theorist to conduct a cost-benefit analysis that aims systematically to establish the long-run superiority of private property over commons property.<sup>36</sup>

Demsetz discussed three types of costs from commons property regimes: increased negotiating costs because of holdouts; increased policing or monitoring costs; and the difficulties of too high a discount rate, so that commoners do not fully internalize the interests of future generations.<sup>37</sup> Private property, he claimed, generally solves these problems by concentrating costs and benefits on owners, thus creating incentives to more efficient utilization of resources.<sup>38</sup> Demsetz was fully aware that these costs will not disappear in a

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<sup>35</sup> See Hardin, *supra* note 2. Before Hardin, H. Scott Gordon identified the tragedy without so labeling it. H. Scott Gordon, *The Economic Theory of a Common-Property Resource: The Fishery*, 62 J. POL. ECON. 124 (1954). Hardin claimed that rational co-owners are bound to under-invest in the common resource, while over-exploiting it. Hardin, *supra* note 2, at 1244-45. But he never considered the costs of any other legal arrangement, in particular the establishment and maintenance of a private property regime. As Michael Taylor points out, “Every solution, every combination of property rights and controls, has its costs. Private property rights are not costlessly created, modified, and enforced; state regulation does not come free; and both may have effects which it is impossible to cost. What solution is best must surely depend to some extent on the relative costs of the possible solutions. Hardin ignores them.” Michael Taylor, *The Economics and Politics of Property Rights and Common Pool Resources*, 32 NAT. RES. J. 633, 635 (1992).

<sup>36</sup> See generally Demsetz, *supra* note 3.

<sup>37</sup> *Id.* at 354-56. The difficulties of free riders for collective action has been recognized by jurists much before the recent law-and-economics scholarship, as the following Jewish law example demonstrates. Rabbi Yair Hayyim Bachrach of Germany (d. 1701) addressed the validity of a stipulation in a contract between some members of a community and an expert in shofar (ram’s horn) blowing, according to which the ritual service is to be performed only in the name of the paying members of the community. In his opinion, R. Bachrach noted that the stipulation should apparently be classified as the type in which “one benefits and the other sustains no loss” (pareto-superiority in modern language), a type to which the applicable Jewish law rule was “exemption,” that is, the stipulation could not operate to deprive non-paying members from the spiritual benefits of the contract. But R. Bachrach was also attentive to the detrimental incentive effects (free-riding) of applying the exemption rule in these circumstances. His result seems unavoidable: the contracting members were indeed allowed to restrict the group of spiritual beneficiaries of the shofar blowing to themselves only. R. Hayyim Yair Bachrach, *Responsa Havat Yair*, Resp. 186.

<sup>38</sup> Demsetz, *supra* note 3, at 356-57.

private property regime, but he insisted that they will be dramatically reduced.<sup>39</sup> His account includes also an evolutionary story that explains how private property rights develop to internalize these externalities when pressure increases on use of a resource.<sup>40</sup> The evolutionary part of his celebrated contribution has been rightly criticized, and the problem remains a puzzle.<sup>41</sup> But Demsetz's first proposition, that private property is more cost-beneficial once demand pressures are high enough, remains the conventional wisdom.

2. . . . *To Recent Law-and-Economics.* – Over the years, Demsetz's account has been somewhat refined. Terry Anderson and P. J. Hill offer a more rigorous account of the benefits and costs of private property rights definition and enforcement activity.<sup>42</sup> Variables such as the crime rate, population density, cultural and ethical attitudes, and the pre-existing "rules of the game" of the

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<sup>39</sup> *Id.* at 356.

<sup>40</sup> *Id.* at 350-53. Private property rights "arise when it becomes economic for those affected by externalities to internalize benefits and costs." *Id.* at 354. *See also* Hardin, *supra* note 1, at 1245.

<sup>41</sup> *See* James E. Krier, *The Tragedy of the Commons, Part 2*, 15 HARV. J.L. & PUB. POL'Y 324, 336-38 & n.44 (1992) (arguing that both Hardin and Demsetz end up begging the same question, assuming the same problem away, implicitly arguing that a community plagued by non-cooperation can improve its condition by cooperating); *see also* DUKEMINIER & KRIER, *supra* note 7, at 59, 6; Carol M. Rose, *Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory*, 2 YALE J. LAW & HUMAN. 37 (1990). As Jim Krier reports to the authors, Demsetz has replied to the many criticisms of his theory by saying, "That's why I called it *Toward a Theory of Property Rights.*"

<sup>42</sup> *See* Terry L. Anderson & P. J. Hill, *The Evolution of Property Rights: A Study of the American West*, 18 J. LAW & ECON. 163 (1975). They argue that increasing levels of definition and enforcement activity lead to benefits because of the increased probability that people will be able to appropriate an asset's worth. To elaborate, the benefit from property rights definition depends upon the value of the asset and the degree to which the activity ensures that the value will be captured by the owner. Any change in the price of the well-defined and enforced bundle of rights changes the return on resources devoted to property rights questions. Furthermore, any increase in the productivity of a definition and enforcement activity will shift the marginal benefit curve outward. An increase in the probability of loss of an asset will usually result in an increase in the productivity of property rights activity and thus will result in such a shift. Marginal benefits are also likely a declining function as definition and enforcement activity increases (for reasons similar to the declining marginal physical product of any input in general). Conversely, the marginal costs of property rights reorganization are increasing because of the opportunity cost of resources used in property rights definition activities. *Id.*; *see also* Smith, *supra* note 31, at 164 (making a similar claim).

institutional structure, affect the probability of securing benefits from better-defined property rights. Anything that reduces the quantity of resources or lowers their opportunity cost – such as changes in technology, in resource endowments, or in the scale of operation – will affect marginal costs. The equilibrium level of property rights definition and enforcement activity occurs where marginal benefit and cost curves intersect. Anderson and Hill argue that the contingency of factors influencing costs and benefits explains why we observe varying degrees of definition and enforcement activity and thus varying degrees of property arrangements covering the spectrum from commons to private. But, their model does not dispute Demsetz's most fundamental claim: that increasing demand requires a move away from commons property toward private property. Commons property may be temporarily efficient, but in time, as the demand for scarce resources inevitably increases, privatization prevails.<sup>43</sup>

Robert Ellickson refines the cost-benefit analysis further, but implicitly still shares in the fundamental claim regarding the demise of commons property.<sup>44</sup> Ellickson distinguishes among the advantages of individual ownership in what he terms “small” “medium” and “large” events, each with rather different cost-benefit analyses.<sup>45</sup> He acknowledges the possible merits of commons property only regarding one category, that of large events. Group ownership of land can sometimes be advantageous, he explains, because of “increasing returns to scale and the desirability of spreading risks.”<sup>46</sup> But the examples he gives for cases in

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<sup>43</sup> See also JAMES E. PENNER, *THE IDEA OF PROPERTY IN LAW* 69 (1997) (arguing that “although in some situations commons work,” scarcity generally “gives rise to conflict,” and thus “the general point” – the “obvious solution” – is “to link rights of use with rights of exclusion,” namely: private property).

<sup>44</sup> See generally Ellickson, *supra* note 15.

<sup>45</sup> Respecting small events, Ellickson identifies three basic reasons for the relative efficiency of individual private property in terms of monitoring costs: self-control by one person is simpler than the multi-person coordination entailed by intra-group monitoring; detecting a trespasser is less demanding than evaluating the conduct of persons otherwise privileged to use a resource; and policing boundaries or carrying out other monitoring functions is easier for an individual landowner, who will be more highly motivated than a member of a commons group. Likewise, Ellickson identifies three advantages of individual ownership with regard to medium events: excessive dependence of coordination through large-numbered transactions can be avoided; cooperation becomes more probable because of relatively multiplex relationships among neighbors; and dispute settlement arising out of medium events can be relegated to those persons most likely to be informed about the controversy. *Id.* at 1327-33.

<sup>46</sup> *Id.* at 1332.

which economies of scale and risk-spreading favor commons property – three pioneer settlements in the 17<sup>th</sup> and 19<sup>th</sup> centuries<sup>47</sup> – are indeed exotic and almost idiosyncratic, especially from the perspective of a modern market economy.

Only a few economics-oriented authors have challenged Demsetz's underlying proposition, the most prominent of whom is Barry Field.<sup>48</sup> Field's insight derives from recent research in European social history which strongly suggests that communal agricultural property may have been antedated by a system that was more individualistic, carried out on small, individual fields rather than in communal lots. Hence, Field suggests that property rights economists need to explain two opposite changes using just one causal factor: they need to show how population growth in one period could produce a shift from individual to common tenures, and later produce a shift from commons to individual property. Field suggests that plausible circumstances could be identified where developmental pressures encourage greater use of common, rather than individual property.<sup>49</sup> His analysis generates some indeterminacy in the economic inevitability of shifting to private property with increasing pressure on a resource. While a challenge to the conventional economic wisdom, Field's move is only a first step for our purposes.

To develop a theory of a liberal commons, we must consider the possibility of successful management of commons resources not as an intermediate condition but as an end state, and we must learn the prerequisites

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<sup>47</sup> *Id.* at 1335-41.

<sup>48</sup> Barry C. Field, *The Evolution of Property Rights*, 42 KYKLOS 319 (1989).

<sup>49</sup> *Id.* at 319-20, 328. To see why, consider the impact of increases in demand on the costs and benefits of establishing and maintaining a private property regime. As Demsetz claimed, the increasing value of output justifies some additional costs in creating and maintaining a system of private property; the higher returns possible in a system of private property justify the accompanying increase in exclusion costs. Field insists, however, that this analysis is incomplete because it takes exclusion costs as given. But the effectiveness of resources devoted to exclusion depends on the incentives that exist for encroachment, which are related to the derived value of the resource. If the resource has no value, there would be little incentive to encroach, and thus it would be relatively easy to exclude, other things equal. So an increase in value of output could be expected to increase the incentive for encroachment, which implies that additional resources are required to achieve the same effective level of exclusion that pertained before. If this effect is particularly strong, it may overcome the effect identified by Demsetz and lead to commons property as the ultimate outcome. *See also id.* at 329 (demonstrating similar ambiguous effects with respect to population growth).

for such success. Hardin, Demsetz, Anderson & Hill, Ellickson, and many others, have helped to establish a sense of the inevitability of privatization and the necessary failure of commons ownership. The economic literature takes us only so far in countering that sentiment; political theorists push the debate further, perhaps too far in the other direction.

### C. Commons Tragedy as Communitarian Foil

In sharp contrast to the role commons property plays in neoclassical economic-legal theory, many political scientists (and some new institutional economists) have come to celebrate another version of commons property.<sup>50</sup> Political theorists have supplied a wealth of case studies of well-functioning commons property regimes around the globe, thus demonstrating empirically the falsity of claims (or assumptions) that commons property regimes are bound to generate tragic outcomes, defined in terms of wasted resources.<sup>51</sup> They teach that neither privatization nor regulation are the only ways to conserve scarce resources and manage them productively.<sup>52</sup> However, these accounts also show – albeit often implicitly – that commons success stories typically compromise individuals’ right to exit, and therefore they do not do much to help establish our claims for a liberal commons.

1. *From Taylor . . .* – A recent debate between two leading scholars of this group – Michael Taylor and Elinor Ostrom – illustrates our arguments. Taylor believes that “community with mutual vulnerability is what endows some groups with the means to regulate their commons endogenously.”<sup>53</sup> For him, a community is a more-or-less stable set of members with some shared beliefs,

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<sup>50</sup> One focal point for this group of scholars appears to be the International Association for the Study of Commons Property (IASCP), which holds an annual convention drawing hundreds. See McKean, *supra* note 4, at 249 n.4 (noting the IASCP).

<sup>51</sup> Of course, there are also numerous counter-examples, where locking people together to manage a resource has disastrous effects. To give one particularly poignant example, consider American policy toward Native American landholdings which has led to a classic tragedy of the anticommons. See Michael A. Heller, *Boundaries of Private Property*, 108 YALE L.J. 1163, 1213-17 (1999) (discussing the consequences of federal allotment policy which prohibited alienation, yet did not provide any collective governance mechanism for managing land resources).

<sup>52</sup> See, e.g., McCay & Acheson, *supra* note 24, at 1, 7, 9, 13.

<sup>53</sup> Sarah Singleton & Michael Taylor, *Common Property, Collective Action and Community*, 4 J. THEO. POL. 309, 311 (1992).

including normative beliefs and preferences beyond those constituting their collective action problem, who expect to continue interacting with one another for some time to come and whose relations are direct (unmediated by third parties) and multiplex (concerning a range of issues on which there can be give and take). Stable membership, continuing interaction, and direct and multiplex relationships, Taylor explains, all make mutual monitoring easy and cheap.

The success of commons property, in other words, comes exclusively from factors within the group and is premised on the group's social cohesion. Therefore, Taylor concludes, success also depends on a lack of great economic or social differences among the community members. Differences in income, wealth or class positions or in ethnicity, race, caste, language or religion weaken or undermine his conditions for community and thus threaten the success of commons property.<sup>54</sup>

2. . . . *To Ostrom.* – Ostrom claims, correctly in our view, that Taylor's story relegates the commons to a marginal status in contemporary circumstances, irrelevant for larger, heterogeneous, and changing sets of individuals.<sup>55</sup> Ostrom represents for us another genre of commons theorists who are more useful for our purposes. Strong community, she claims, is neither sufficient nor *ex ante* necessary for solving resource dilemmas in commons property. Even heterogeneous sets of individuals may overcome the commons difficulties with the help of proper institutional innovation and design, although if they do not develop shared values, they will eventually fail.<sup>56</sup> Ostrom studies institutional arrangements that help groups break out of the commons trap. Thus, in her celebrated book, *Governing the Commons*, she demonstrates how these

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<sup>54</sup> See MICHAEL TAYLOR, *COMMUNITY, A NARCHY, AND LIBERTY* 104-29 (1982); Singleton & Taylor, *supra* note 53, at 316.

<sup>55</sup> See Elinor Ostrom, *Community and the Endogenous Solution of Common Problems*, 4 J. THEO. POL. 343, 347 (1992). See also Fred P. Bosselman, *Replaying the Tragedy of the Commons*, 13 YALE J. REG. 391, 399-400 (1996) (reviewing OSTROM, *supra* note 4).

<sup>56</sup> Ostrom, *supra* note 55, at 347-50. See also, e.g., Lawrence Taylor, "The River Would Run Red with Blood": *Community and Common Property in an Irish Fishing Settlement*, in THE QUESTION OF THE COMMONS, *supra* note 24, at 290, 305-06 (distinguishing between "traditional communities" that understand collective ownership as natural, rather than derived from discrete decisions to cooperate, and "contractual communities" whose conceptions of community and common property have more specific origins; noting that contractual communities frequently manage common resources through institutions and may be "equally 'close-knit'".)

arrangements may distinguish between cases of long-enduring commons and cases of failures and fragilities.<sup>57</sup>

Any attempt to devise a theory of the liberal commons must take account of Ostrom's design principles. Before doing so, however, an important question of relevance arises from her work. Notwithstanding her opposition to Taylor's extreme communitarianism, Ostrom's genre also implies an important illiberal component which she does not confront because of her exclusive focus on rebutting the neoclassical economists' "tragic outcome" story. Ostrom's success stories, as well as most others reported in the literature, include limitations on alienability. In the purest case, there is no market in which rights to the commons can be bought, leased or exchanged. Rights are conferred only on a particular class of eligible persons and may not be transferred to persons outside of that class. In a few systems, the sale of shares is allowed, but only to other eligible users of the commons, never to outsiders. These inalienabilities strengthen the bonds among co-owners and reinforce their rights in the commons, thus facilitating their cooperation.<sup>58</sup>

Ostrom and her allies do not even consider that the price of their commons successes – which require locking people together in static communities – may be too high, particularly for those who place a high value on individual liberty. If commons property can succeed only by giving up the right to exit, a liberal commons is indeed an oxymoron. While not liberalism's sole characteristic nor a goal beyond compromise, exit is nevertheless a crucial liberal value. Exit enables individuals independently to choose the groups to which they belong and to remain in them from free choice. Exit allows individuals geographical, social, professional, political and familial mobility. These mobilities and the existence of "open boundaries" are important prerequisites for the freedom to strive to promote one's own happiness. A free society perceives limitations on exit with suspicion and attempts to minimize them. Our theory of a liberal commons cannot just adopt the findings of these political scientists,

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<sup>57</sup> OSTROM, *supra* note 4, at 58-102, 143-81; *see also* Field, *supra* note 48, at 321, 335, 337. Field argues that both the exclusion of non-commoners (the costs of private property) and the transactions among commoners (the costs of commons property) – are carried out by the collectivity. Thus, "we can look on political innovations as also having a distinct role to play in determining efficient property institutions in a society." *Id.* More specifically, innovations in institutions of internal common governance may facilitate commons property, whereas innovations in the institutions of boundary maintenance and exclusion support private property.

<sup>58</sup> *See* McKean, *supra* note 4, at 261-62.

although we will, to be sure, make extensive use of them. Rather, we must show that ownership and management of commons resources is not doomed to tragedy as the neoclassical economists might suggest, nor its successes limited to illiberal environments as the political theorists might imply.

## II. A THEORY OF THE LIBERAL COMMONS

We must show that a liberal commons offers something people want, that existing legal regimes can be modified in realistic ways that would get us there, and that the resulting commons property institutions can be, at the same time, both liberal and prosperous. The first section explores the goals that a liberal commons must achieve: preserving exit while promoting the economic and social gains from cooperation. While these goals may appear to conflict, law can mediate them, but only if law is understood to operate as a set of background norms, a safety net that can catalyze trust in daily interactions. No individual legal rule matters so much as the tone they collectively convey, that the law smiles on trust and cooperation. The second section sets out the core of our theory, the three spheres of action that any legal regime must adopt to achieve liberal commons goals. These three features – the sphere of individual dominion, the sphere of democratic-self-governance, and the sphere of cooperation-enhancing exit – comprise what we call the general form of the liberal commons.

### *A. Identifying the Goals*

We focus here on what may be called “meso” or mid-level goals, those that are intrinsic to the general liberal commons form and that are amenable to law reform. Application of the liberal commons form to any particular institution, such as the family, condos, or close corporations, would require considering two other levels of normative goals. First, there may be “micro” nuanced values that inhere in the particular institution being considered for reform in a liberal commons direction. For example, any application of our theory to marital property must account for deep cultural concerns with the ultimate collective goods of marriage, such as intimacy, caring and commitment, and self-identification.<sup>59</sup> Adapting the general liberal commons form to the marital context may require some fine-tuning that would allow the accommodation of these

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<sup>59</sup> See Hanoch Dagan, Abigail V. Carter & Carolyn J. Frantz, *A Theory of Marital Property* (draft on file with authors).

values. Other liberal commons settings, like condominiums and close corporations, may require responding to widely-held values particular to these settings. Second, there may be “macro” social commitments that transcend the liberal commons form but necessarily inform analysis of all such institutions. For example, concern for non-subordination of women in families and non-exclusion of minorities in condominiums will necessarily refine analyses of those institutions.<sup>60</sup> These macro values may be so widely-shared and deeply-held as to justify their imposition in a particular liberal commons form even when they differ from or perhaps conflict with the micro values of that form. Considered together, these three levels of values – micro, meso, and macro – can help account for existing institutions for common resource management in their best light, and therefore also to point towards normatively attractive reforms.<sup>61</sup> In this section, we focus only on meso goals, those that attach to the general form of the liberal commons.

*I. Preserving Exit. –*

*a. Why Exit Matters.* Exit is a bedrock liberal value, an essential element of a liberal commons, and a core term of art in political and legal theory. As defined by Albert O. Hirschman,<sup>62</sup> exit means “voluntarily leaving the effective jurisdiction of the group,”<sup>63</sup> whether that group is a nation, firm, or other type of organization. Exit stands for the right to withdraw or refuse to engage; the ability to dissociate, to cut oneself out of a relationship with other persons.<sup>64</sup> At the minimum, exit serves a protective function: “If the group harms the interests of the member as the member sees them, then leaving is a form of a self-defense.”<sup>65</sup> Note that the protective function of exit also has an important *ex ante* incentive effect on group behavior: “[t]he possibility of exit may itself make

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<sup>60</sup> See respectively *id.* and Michael A. Heller & Roderick M. Hills, *Condos Without Tears* (draft on file with authors); see also *infra* note 87 and accompanying text (discussing anti-discrimination principle as limit on associational preferences of groups).

<sup>61</sup> See RONALD DWORKIN, *LAW’S EMPIRE* 52-53, 164-258 (1986) (developing this interpretive method).

<sup>62</sup> ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY* (1970).

<sup>63</sup> See Leslie Green, *Rights of Exit*, 4 *LEGAL THEORY* 165, 171 (1998); see also *id.* at 177 (stating that “the core right of exit” is “the claim right that others not prevent one from leaving the jurisdiction of the group”).

<sup>64</sup> See HIRSCHMAN, *supra* note 62, at 19-21.

<sup>65</sup> Green, *supra* note 63, at 171.

the group responsive to the interests of its members.’<sup>66</sup> In addition to its intrinsic importance, the group’s responsiveness is instrumentally important. The threat of exit is often one of the prominent mechanisms of disciplining social organizations and optimizing the use of the common resource.<sup>67</sup>

The multiple functions of exit matter to liberals because they “enhance the capacity for a self-directed life, including the capacity to form, revise, and pursue our ends.”<sup>68</sup> Generally, liberals are committed to “open boundaries,” that is, to the idea that people should be able to leave the groups with which they choose to associate (and sometimes they should also be able to abandon even their own current identities).<sup>69</sup> In some accounts, liberalism may even be *defined* as a theory that adopts, justifies, and applies a strong commitment to geographical, social, familial, and political mobility – all in the name of promoting the individual freedom necessary to secure one’s own personal happiness.<sup>70</sup> No doubt, a moderate restraint on exit – either an exit tax or departure delay, for example – need not be considered offensive to liberalism. Indeed, consistent with liberal convictions, such soft constraints may well be necessary to ensure that the decision to leave is informed (not hasty and ignorant) and sincere (not opportunistic).<sup>71</sup> But a regime that makes exit impractical through outright prohibitions or *via* rules that *de facto* prohibit exit (including rules that impose *prohibitive* exit costs) or unreasonably delay exit, is incompatible with the most fundamental liberal tenets.<sup>72</sup> Exit restraints that just treat individuals instrumentally cannot be legitimate features of a liberal commons.

The critical virtues that exit enhances help to explain its status throughout liberal legal regimes.<sup>73</sup> Despite the tide of fundamentalism in parts of the world,

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<sup>66</sup> *Id.* at 171.

<sup>67</sup> See HIRSCHMAN, *supra* note 62, at 22-25.

<sup>68</sup> Green, *supra* note 63, at 176.

<sup>69</sup> See Michael Walzer, *The Communitarian Critique of Liberalism*, 18 POL. THEORY 6, 11-12, 15-16 (1990).

<sup>70</sup> *Id.* at 21.

<sup>71</sup> We develop this point *infra* at Section II.B.3.

<sup>72</sup> See Mark D. Rosen, *The Outer Limits of Community Self-Governance in Residential Associations, Municipalities, and Indian Country: A Liberal Theory*, 84 VA. L. REV. 1053, 1099-1101, 1126-27 (1998).

<sup>73</sup> Admittedly, this is not the only justification for these inalienabilities. Another important justification comes from efficiency. See Heller, *supra* note 51, at 1199-1201 (continued...)

certain rights of exit – such as the right to emigrate from one’s homeland and the right to divorce – are increasingly considered basic human rights which are, as such, inalienable and non-waiveable.<sup>74</sup> Closer to our discussion here, property law is generally suspicious of restraints on alienation, even consensual restraints that limit mobility respecting any particular resource.<sup>75</sup> Often, statutes prohibit and courts invalidate outright restraints on alienability; with more moderate restraints, courts may impose time limits, or otherwise protect an individual’s right to exit.<sup>76</sup> People generally do not perceive interference with restrictions on alienability to be unwarranted intrusion into freedom of contract; rather the interference protects against agreements that undermine a key purpose of contractual freedom, that is, securing individual autonomy.<sup>77</sup>

We can safely sidestep ongoing disputes among liberal theorists regarding the precise role of exit, such as whether exit is, by itself, a sufficient

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<sup>73</sup>(...continued)

(discussing role of restrictions on restraint on alienability); *see also* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1111-15 (1972) (discussing the inefficiency of restraints on alienation but also suggesting “instances, perhaps many, in which economic efficiency is more closely approximated by such limitations”); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985) (accepting that “unencumbered market trades are desirable unless we can locate a valid reason for their restriction” while broadening the range of efficient restrictions on alienability from the Calabresi & Melamed model); Richard A. Epstein, *Why Restrain Alienation?*, 85 COLUM. L. REV. 970, 971-72 (1985) (setting out the efficiency argument for alienation, and arguing against restraints on alienation to achieve distributional goals).

<sup>74</sup> *See, e.g.*, Universal Declaration of Human Rights, arts. 13, 16, U.N.G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (Dec. 10, 1948).

<sup>75</sup> *See*, Heller, *supra* note 51, at 1199.

<sup>76</sup> *Id.*

<sup>77</sup> On contractual freedom and individual autonomy, *see* CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 7-17 (1981). To be sure, liberalism is also committed to favoring contractual freedom to craft whatever restraints people agree to abide. But one can and should distinguish ordinary contracts – where liberal values do not reject strong lock-ins – from property arrangements that encompass much more of an individual’s resources and social life. Regarding these latter arrangements, we insist that a liberal commitment to choice can not be exhausted by an initial election of an illiberal exit rule. Limiting people’s ability to waive their exit rights, in this context, is based only in part on a response to rationality-deficiencies, such as excessive optimism and lack of foresight. Also, perhaps even primarily, these limits are premised on the commitment to a conception of individual liberty that puts a high value on people’s ability to “re-invent themselves.”

condition to preserve individual autonomy.<sup>78</sup> For our purposes, we assert only the modest, and we think uncontroversial, proposition that some strong version of exit is a fundamental, core right in any theory worth labeling as liberal.<sup>79</sup> As we see it, exit enables individuals to determine their own group associations and to remain in the groups they choose out of their free choice only. In short, the possibility of exit allows individuals the mobility which is a prerequisite for liberty.

*b. Is Entry Like Exit?* Is free entry the mirror image of free exit, and as such also a core element of the liberal commons? Only to a limited extent. Liberals, in other words, are not, and should not be, concerned with every limitation on entry. Liberals who are committed to pluralism and diversity<sup>80</sup> and who recognize of the significance of culture and community to personal identity,<sup>81</sup> must be careful not to condemn or criticize every homogeneous community and every exclusionary practice.<sup>82</sup> Rather, they must acknowledge that commitment to the permeability of groups should not lead one excessively to undermine the stability of groups' constituents and their common purpose, or to too harsh a treatment of any preferential treatment accorded insiders.<sup>83</sup> Accordingly, insofar as we are concerned with groups which only partially cover their members' associational world (as is almost always the case today), we have no difficulty in accepting that exclusion of bad cooperators is a paramount concern of any successful commons, and that limitations of entry which help preserve some parochial interests can be instrumental to the success of liberal commons

<sup>78</sup> Compare Chandran Kukathas, *Are There Any Cultural Rights?*, in THE RIGHTS OF MINORITY CULTURES 238 (Will Kymlicka ed., 1995), with Green, *supra* note 63 (arguing that exit is not sufficient to secure individual autonomy in groups).

<sup>79</sup> Recall also that even aside from liberal theory, exit is a value with many virtues, including, but not limited to, serving as a disciplinary limit on organizations

<sup>80</sup> See, e.g., ISAIAH BERLIN, *The Pursuit of the Ideal*, in THE CROOKED TIMBER OF HUMANITY: CHAPTERS IN THE HISTORY OF IDEAS 1 (Henry Hardy ed., 1991); JOHN KEKES, *MORALITY OF PLURALISM* (1993); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

<sup>81</sup> See, e.g., JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 155-74 (1994); Chaim Gans, *Freedom and Identity in Liberal Nationalism* (unpublished manuscript on file with authors).

<sup>82</sup> See Roderick M. Hills, *You Say You Want a Revolution? The Case Against the Transformation of Culture Through Antidiscrimination Laws*, 95 MICH. L. REV. 1588, Pt. I (1997).

<sup>83</sup> See Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1375 (1994) (arguing that, within limits, we should approve the way residential associations "allow individuals with common preferences to gravitate to a common location where they can pursue their conception of the good life").

regimes.<sup>84</sup> As Michael Walzer puts it, “we need to sustain and enhance associational ties, even if these ties connect some of us to some others and not to everyone else.”<sup>85</sup>

Although a liberal theory does not require free entry, we think that there are two extreme types of entry limitations so troublesome that a regime allowing either cannot truthfully embody the constellation of values generally considered to constitute liberalism. First, there are cases in which a limitation of entry so sweepingly restricts alienability that it is practically tantamount to a substantial limitation on exit. In these cases, the liberal commitment to free exit, rather than the more tempered commitment to free entry, condemns the limitation. Second, some exclusionary practices and criteria – for example, a systematic exclusion by communities of a majority group that is based on prejudice respecting issues like race, ethnicity, religion, or sexual preference – may well infringe upon fundamental liberal values of equal concern and respect.<sup>86</sup> Delineating the scope of such prohibited classifications, as well as of any surrogates of such classifications that should be likewise prohibited, is an important and complex task, but well outside the scope of our project.<sup>87</sup> For our purposes here it is enough to state that a liberal commons must always be careful not to cross the fine line between permitted homogeneity of purpose and prohibited discriminatory exclusion.

## 2. Promoting Cooperation. –

*a. Maximizing Economic Gains.* So, one goal of a liberal commons is to preserve the virtues that come from exit; the other goal is to achieve the economic and social gains possible from cooperation. On the economic side, several types of efficiency gain may be available from joint management and pooling resources in a commons, for example economies of scale and risk-

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<sup>84</sup> See, e.g., Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and the Community*, 75 CORNELL L. REV. 1, 50-53 (1989).

<sup>85</sup> WALZER, *supra* note 6, at 105.

<sup>86</sup> See Alexander, *supra* note 84, at 38, 54-55; see, e.g., *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding that court enforcement of a racially restrictive housing covenant violates the equal protection clause).

<sup>87</sup> Developing this point are Hills, *supra* note 82, at 1592-1614, and Gillette, *supra* note 83, at 1397-99; see also Alexander, *supra* note 84, at 56-61 (advocating a legal regime of open-ended standards for governing the question of the limits of group autonomy, in order to “create opportunities for those inside and those outside to engage each other in dialogue”); see generally Rosen, *supra* note 72 (suggesting the outer limits of community self-governance that may entailed by John Rawls’ *Political Liberalism*).

spreading.<sup>88</sup> The familiar economic approach acknowledges that in evaluating “whether the resources are common pool or amenable to privatization, particular natural resources configurations, technological constraints, and transaction costs may make commons property a superior solution to private property.”<sup>89</sup> Thus, with landownership, larger parcels may be preferred over small ones: in the agricultural context, larger parcels may economize on fencing and cultivation costs (especially where specialized equipment is available);<sup>90</sup> in urban contexts, larger parcels may allow construction of more valuable projects. And where a number of people own land together, they may be able to divide the risks of ownership. Because most people are risk-averse, risk-spreading through common ownership may be efficiency-enhancing, as for example, with land holdings that represent a large and otherwise undiversifiable part of individual wealth.

*b. Recognizing Social Value.* Alongside potential efficiency gains, people could prefer cooperation simply to receive the benefits of working together, of taking part in successful collective enterprise.<sup>91</sup> Cooperation, in other words, is a good, in and of itself, in addition to its importance in facilitating economic success. People value interpersonal relationships – they form associations and take part in collective enterprises – not only for instrumental reasons as a means to some independently specified end: “We human beings are social creatures, and creatures with values. Among the things that we value are our relations with each other.”<sup>92</sup>

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<sup>88</sup> See Ellickson, *supra* note 15, at 1332-44.

<sup>89</sup> STEVENSON, *supra* note 17, at 70.

<sup>90</sup> See, e.g., Abhijit V. Banerjee, *Land Reforms: Prospects and Strategies 2* (Conference Paper, Annual World Bank Conference on Development Economics, Washington D.C.; and MIT Department of Economics Working Paper No. 99-24).

<sup>91</sup> See JON ELSTER, *THE CEMENT OF SOCIETY: A STUDY OF SOCIAL ORDER* 187 (1989) (arguing that successful collective action is produced by a “*mix of motivations* – selfish and normative, rational and irrational. . . . Motivations that taken separately would not get collective action off the ground may interact, snowball and build upon each other so that the whole exceeds the sum of its parts.”). Carol Rose helpfully suggests that our emphasis on the social value of cooperation can be re-framed in terms of the synergistic (rather than merely aggregative) benefits of cooperation.

<sup>92</sup> See Samuel Scheffler, *Relationships and Responsibilities*, 26 PHIL. & PUB. AFF. 189 (1997). In a similar vein, Walzer notes, “Individuals are stronger, more confident, more savvy, when they are participants in a common life, when they are responsible to and for other people.” W ALZER, *supra* note 6, at 104.

Our relationships with our spouses, children, friends, neighbors, fellow-workers, and other types of commoners have intrinsic value that people often strive to promote.<sup>93</sup> Liberal commons settings are particularly suitable for furthering these social relationships because certain tasks – like the common management of a given resource – are an opportunity to enrich and solidify the interpersonal capital that grows from cooperation and support, trust and mutual responsibility.<sup>94</sup> Indeed, in some settings, such as in marriage and in some religions and cultural communities, the commons resource may even form the center of a way of life that profoundly affects the commoners' self-identity.<sup>95</sup>

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<sup>93</sup> See, e.g., Ellickson, *supra* note 15, at , 1345, 1395 (noting that companionship and the solidification of “mutual-aid relationships” are potential benefits of living in a multi-member household, and pointing out to satisfaction of “living in a social environment that is consistent with [one’s] ideology”); Simon, *supra* note 4, at 1364 (praising cooperative housing as “creat[ing] a fairly strong form of interdependence, as well as opportunities for collective action”); Henry Hansmann, *When Does Worker Ownership Work? ESOPs, Law Firms, Codetermination, and Economic Democracy*, 99 YALE L.J. 1749, 1769-70 (1990) (concluding that worker ownership may bring non-economic benefits: the satisfaction of engaging in a communal activity; a strengthened psychological worker-firm relationship that reduces the potentially unpleasant adversarial nature and conflict of interest that inheres in this relationship; the psychological benefit of control over resources; and training for democratic participation that may benefit society generally as well as the workers themselves).

<sup>94</sup> See Alexander, *supra* note 84, at 26, 41-42 (pointing out to the intrinsic good of the experience of belonging which is based on a shared good or a shared resource); *cf.* PENNER, *supra* note 43, at 181 (arguing that exclusive use – the core feature of private property – suits an impersonal social situation). See also Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1515-16 (2000) (arguing that joining forces with others in achieving a common goal, conditional on the others’ willingness to do the same, creates a collective agent or plural subject, entitling each member to refer to them all as “we;” thus, such common tasks enable people to “make claims upon one another in the name of what we are supposed to be doing”).

<sup>95</sup> See Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 635, 637 (1980); Jeremy Waldron, *Superseding Historic Injustice*, 103 ETHICS 4, 19-20 (1992). See also, e.g., ANDREW GRAY, *INDIGENOUS RIGHTS AND DEVELOPMENT: SELF-DETERMINATION IN AN AMAZONIAN COMMUNITY* 109, 111 (1997) (describing the close identification of land and other resources with individuals and groups among the Arakmbut of the southeastern Peruvian rainforest); Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS AND ENT. L.J. 194 (2000) (“The group product in the indigenous society is the medium through which all tribal members, living, dead and unborn, speak their voice and become a part of the tribal way.”)

*c. Reconciling Economic and Social Values.* In many liberal commons contexts, economic gains and social values tend to reinforce one another. Interpersonal capital facilitates trust which, in turn, gives rise to economic success. And economic success tends to strengthen trust and mutual responsibility. But we can imagine contexts in which the imperatives of economic success and social cohesion conflict. Any liberal commons must pay *some* attention to both fronts. Both are intrinsically valuable and thus should not be abandoned. Furthermore, either total economic failure or the collapse of social cohesion will effectively end cooperative resource management and likely yield a tragic outcome.

But beyond this modest imperative, we do not attempt to come up with any general formula for solving such conflicts. It would be incredible to suggest that the relative importance of economic success and of social cohesion is constant over the vast realms of life – from families to close corporations – in which liberal commons regimes may be established. Rather, we believe that setting the balance between these two happy outcomes of cooperation – to the extent that they are in conflict – must be context-dependent. There are realms of life in which the commoners' economic success is likely to play a rather major role (a close corporation may be an example) and there are others (say, the family) in which a significant degree of inefficiency may be a tolerable price for securing the social goods of cooperation.

3. *Do Exit and Cooperation Conflict?* – The two goals of the liberal commons – preserving autonomy through exit and achieving the economic and social gains from cooperation – may work at cross purposes. This simple, troubling observation lies at the core of the “tragedy of the commons” metaphor. The ownership and management of commons resources may exemplify the most familiar of all collective action problems,<sup>96</sup> one often formalized as a multi-person prisoner's dilemma with an incentive structure facilitating non-cooperative behavior and generating tragic outcomes.<sup>97</sup> If the story stopped there, this first cut would be rather disappointing because there would be no way people could

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<sup>96</sup> Collective action is a generic term describing the difficulty faced by a group of self-interested individuals where the promotion of their self-interest requires cooperation. Even if they all agree on both their collective purpose and the best means to promote it, they will still face difficulties in achieving it, since for each and every one of them the individual interest supersedes their collective good. See MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 2, 7-8, 10-11, 16, 21, 51, 60-61 (2d ed. 1971).

<sup>97</sup> See, e.g., OSTROM, *supra* note 4, at 3-5; STEVENSON, *supra* note 7, at 20-27.

reach the economic and social gains potentially available from pooling resources in a commons.

However, where people have repeat dealings – typically the case with relationships among commoners – cooperation does prove possible, even likely. As Robert Axelrod famously demonstrated with his Tit-for-Tat strategy, people may cooperate even with prisoner’s dilemma incentives (and without side communication) once their interactions are turned into an indefinite game. Axelrod defines his strategy to require “avoidance of unnecessary conflict by cooperating as long as the other player cooperates, provocability in the face of an uncalled-for defection by the other, forgiveness after responding to a provocation, and clarity of behavior so that the other player can adapt to your pattern of action.”<sup>98</sup> As Axelrod explains, this happy result “requires that individuals have a sufficiently large chance to meet again so that they have a stake in their future interaction.”<sup>99</sup> The ability to remember and retaliate makes non-cooperative moves individually counter-productive, and thus may induce self-interested cooperation, even in a commons.<sup>100</sup>

But this happy scenario may, in turn, pose a stumbling block for our theory. Previous commentators noted that for cooperative results to emerge, the game must repeat indefinitely.<sup>101</sup> A repeated interaction with a finite ending may still yield tragedy, because each participant knows that the last move will resemble a one-shot prisoner’s dilemma in which defection is the dominant strategy. Knowing that others will defect on their last move creates a domino effect through earlier interactions, so that defection becomes the dominant strategy for everyone from the outset.<sup>102</sup>

Consider how a strong right of exit affects the likelihood of an efficient commons, at least within the artificial world of game theory (assuming, for the

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<sup>98</sup> ROBERT AXELROD, *THE EVOLUTION OF COOPERATION* 20 (1984).

<sup>99</sup> *Id.* at 174.

<sup>100</sup> *See id.* at 126-132; *see also* RUSSELL HARDIN, *COLLECTIVE ACTION* 145-50, 164-67 (1983) (“[P]layers may rationally cooperate in iterated Prisoner’s Dilemmas.”)

<sup>101</sup> *See* ANTHONY DE JASEY, *SOCIAL CONTRACT, FREE RIDE: A STUDY OF THE PUBLIC GOODS PROBLEM* 63-66 (1990); Rose, *supra* note 41, at 51 n.49.

<sup>102</sup> *See, e.g.*, R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS* 94-102 (1957). For certain (partial) solutions, *see* HARDIN, *supra* note 100, at 173-87, 211-13 (suggesting ways in which varied, but overlapping, interactions can provide opportunities for meaningful sanctions, the knowledge necessary to cooperate, and a rough simulation of an infinitely iterated Prisoner’s Dilemma game).

moment, voracious, unsocialized commoners).<sup>103</sup> Strong exit allows each commoner an unwaivable right to leave the commons at any moment. But each commoner also knows that others can also leave at any moment, raising a serious concern for those who want to stay put. The stay-putters worry what may happen between the moment the foot-out-the-door folks decide to leave and the moment they actually exit. During the interim, the stay-putters may continue to cooperate, but the foot-out-the-door folks are now playing a transitory and short-lived game. The stay-putters may worry that, during the interim period, which can happen at any time, the foot-out-the-door folks will take advantage of them, either by over-exploiting or under-investing in the commons resource.

Still, in many contexts, unilateral uncertainty regarding when others might leave need not frustrate cooperation.<sup>104</sup> Vigilant commoners can react to non-cooperative moves by retaliating promptly, thus limiting the risk of exploitation and making cooperation stable. Two features of long-term cooperation in managing commons resources make vigilant retaliation an unsatisfying response for our purposes. First, the benefits to commoners can vary substantially from time to time. Therefore, each potential stay-putter may suspect that the others will defect precisely when their private benefits are particularly high. If defection at any given moment proves more advantageous than continuous cooperation, then the possibility of retaliating later can not mitigate the harm that foot-out-the-door folks can inflict with well-timed defections. Not wanting to be a sucker, stay-putters may behave as if they too are foot-out-the-door folks.<sup>105</sup>

There is another, more prosaic reason why strong exit threatens commons prosperity. Commoners may have independent or exogenous reasons to exit; they may leave because of familial, professional, or other reasons that have nothing to do with timing advantageous defection. But after they decide to leave for such reasons, the erstwhile stay-putters now have a strong incentive to

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<sup>103</sup> By itself, a commitment to exit does not yet challenge the desirability of common ownership. On the contrary, insofar as common ownership can be freed from the risks of Hardian tragedy and become beneficial to the actors involved, its facilitation rather enriches the variety of choices available to people and allows them benefits they perhaps could not have obtained absent such an alternative.

<sup>104</sup> For instance, in the antitrust context, collusive agreements can be stable. See RICHARD A. POSNER & FRANK H. EASTERBROOK, ANTITRUST 336-38 (2d ed. 1981).

<sup>105</sup> Players in long but transitory games, that is, where all parties know the end point, may be less prone to defecting, because the symmetry of information somewhat eases the fear of exploitation. *Id.*

behave like foot-out-the-door folks in timing their intended exit.<sup>106</sup> And the others, more precisely, every commoner, face again the same troubling question: why restrain yourself now if your commoners may choose their moment to take the most and run? Even prompt retaliation may not solve the challenge that strong rights of exit pose to efficient use of a commons.

A theory of a liberal commons requires two elements: strong (but not unlimited) exit and the possibility of realizing economic and social gains from shared use of scarce resources. But simple game theory reasoning helps formalize the familiar intuition that these elements may work at cross-purposes. The structure of commons interactions offers only partial solutions to the threat posed by exit. If so, then an efficient, liberal commons may not be a realistic possibility. How can law resolve the seeming impasse?

4. *Putting Law in Its Place.* –

a. *Law as Safety Net That Catalyzes Trust.* Consider for a moment the seeming paradox that an efficient liberal regime of private property is itself, oddly, a type of commons held together by virtue of the law's facilitation.<sup>107</sup> By constraining individual opportunism, law proves effective as one mode of social organization that helps overcome collective action problems inherent in creating and maintaining private property. Using law to build an efficient liberal commons is not so different.

To start, we join with commons property scholars who have shown so persuasively how political and social institutions can affect the costs and benefits facing commons owners in their attempts to organize themselves.<sup>108</sup> They show how “generalized institutional-choice and conflict-resolution” mechanisms together with “substantial local autonomy” can facilitate and sustain commons property regimes.<sup>109</sup> After getting to this point, however, the existing literature

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<sup>106</sup> Notice the difference between the two reasons why exit threatens successful commons property. The first reason requires a unique payoff structure in which the variations between gains in different times are so great that defection destabilizes cooperation. The second applies more broadly. If exit at a time between now and a given moment in the future is imposed (due to those external reasons), the domino effect applies, and the party who is about to leave is likely to exploit her superior information.

<sup>107</sup> See Rose, *supra* note 41, at 50-51; see also TAYLOR, *supra* note 54, at 44-48 (characterizing the features of law that provide security of property as a public good).

<sup>108</sup> See OSTROM, *supra* note 4, at 190, 212.

<sup>109</sup> *Id.* at 212.

invariably compromises exit.<sup>110</sup> Committed, as we believe most people in our polity are, to the fundamental right of exit, our path leads instead through the thicket of law towards a theory of a liberal commons. Law can serve two functions: to provide the infrastructure of liberal commons institutions and to supply anti-opportunistic devices that reassure prospective commoners that they will not be abused for cooperating. By adopting a straightforward collection of substantive and procedural rules, liberal commons forms can encourage prosperity and cooperation without unnecessarily sacrificing exit.

Law should be understood to work as a set of *background* rules, always in operation, but seldom overtly manifest in the daily life of commons resource management.<sup>111</sup> Formal law is often not powerful enough, by itself, directly to establish the trust, cooperation, and mutual reliance any successful commons requires for the day-to-day routines of self-governance. Commoners generally will not deploy law on a regular basis with each other, partly because people often perceive recourse to law as unnecessary, unneighborly, even hostile in ongoing relationships of trust and cooperation.<sup>112</sup> The routine operation of a commons resource and the day-to-day cooperation among the commoners are directly governed usually through informal, social interactions – perhaps law-like in their own right – but not by formal legal rules.<sup>113</sup> Social norms and other modes of social organization and structure, but not formal law, govern most daily interactions.

With that caveat, well-designed background legal rules are nevertheless crucial for the success of any liberal commons. As we discussed above, the right of exit poses a fundamental challenge to commons success: for many resources, the unilateral right to leave may invite opportunistic behavior and lead people to

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<sup>110</sup> See sources discussed *supra* at Section I.C.

<sup>111</sup> The background trust-building role we envision for law, as stated in the text, can only be postulated here. It is quite another project to address the under-theorized understanding of the way law generally (and not only law regarding common ownership) affects people's everyday life and constrains or enables their decision-making. Rick Lempert suggests imagining this background role as analogous to virus-checking software on a computer.

<sup>112</sup> See ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES 60-64, 69, 76, 274 (1991); ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 157 (1993); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1285-87, 1294-95 (1998).

<sup>113</sup> See generally Symposium, *Law, Economics, and Norms*, 144 U. PA. L. REV. 1643 (1996).

be on their guard, distrustful, and overly quick to retaliate. The background rules we propose can temper these instincts primarily by creating a formal “safety net” that enables commoners to gain the benefits that flow from trusting one another, but without taking prohibitive individual risks. The simple existence of well-crafted background rules, rather than their daily invocation, facilitates commoners’ efforts to establish and maintain liberal commons property.

While commoners are unlikely to bother learning the rules of (low visibility) law, their ignorance of the law does not excuse its modest but important role. The myriad details of the law do not matter individually, but rather jointly because together they suggest to people an animating spirit of that body of law. For law to affect behavior, we do not assume widespread knowledge of any doctrinal detail, only that people generally believe that if things turn ugly, the law will serve as one form of social organization that protects them against extreme abuse and exploitation.

More precisely, the constellation of background rules that should govern a liberal commons must minimize incentives to abuse the inter-personal trust and cooperation necessary for success. Thus, liberal commons property forms can enable individuals safely to enter into relationships of mutual reliance that they may otherwise perceive as too risky. In an imperfect world, where we can never absolutely trust one another, background legal rules can function as one effective social organizational form that reinforces each commoner’s trust in others and willingness to cooperate without focusing on the grave vulnerability such trust can engender.<sup>114</sup> By generating the so-called social capital of shared norms, trust reduces the costs of monitoring and sanctioning activities.<sup>115</sup>

Background law that catalyzes trust is, for us, one essential *substitute* for restrictions on exit that can also make commons ownership work efficiently.

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<sup>114</sup> See H.L.A. HART, *THE CONCEPT OF LAW* 193 (1961); HARDIN, *supra* note 27, at 185-86 (“[T]he possibility of sanction is valuable for letting the well-intentioned, who do not require sanctions, risk being cooperative on the secure knowledge that those with whom they come to interact are similarly well-intentioned.”); Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, in *LIBERAL RIGHTS* 370, 373-74, 376, 385, 387 (1993); Carol M. Rose, *Trust as the Mirror of Betrayal*, 75 B.U. L. REV. 531, 537-38, 540-41, 546, 550 (1995); Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code’s Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765, 1793-94 (1996) (“[T]he transactor may find it desirable to include terms in the contract that are the best terms if the other transactor turns out to be untrustworthy, while making extralegal commitments, many of which will, over time, ripen into self-enforcing agreements, that will govern the relationship if the other party turns out to be trustworthy.”).

<sup>115</sup> See OSTROM, *supra* note 4, at 36.

Building trust is a precondition, but also an outcome. Just as trust secures success, so success reinforces trust – a virtuous circle where trust, as Philip Pettit claims, “builds on trust” and may “grow with use.”<sup>116</sup>

*b. The Penalty Default Alternative.* – Consider for a moment one possible objection to using law as a safety net and catalyst: facilitative default rules could be, in the long run, counterproductive.<sup>117</sup> According to this view, by making cooperation relatively risk-free, facilitative default rules could induce cooperators into making sub-optimal investments in screening other potential cooperators and in learning how to cooperate better among themselves. Restated, the law should have no strong reason to promote ownership and management of commons resources unless the commoners could agree up front on their governance structure, without the assistance of legal mediation. If they could not agree on initial terms, it is unlikely they could agree on much else, and therefore it would be better *ex ante* if potential cooperators did not invest in a cooperative scheme which would be doomed to fail, in any event.<sup>118</sup> This objection is pertinent for us because we argue that liberal commons success must rely primarily on the parties’ ability to cooperate without the daily summons of legal rules. If this claim is right, then penalty default rules – rules that make trust and reliance risky absent an explicit *ex ante* agreement regarding the terms of cooperation – are better than the facilitative regime we advocate.<sup>119</sup>

But insofar as common ownership is concerned, the penalty default objection is probably wrong, and the contextual tradeoff between facilitating cooperation and encouraging caution in entering into cooperation leads us to prefer the facilitative regime. To see why, consider the way these two competing regimes affect the behavior of ordinary, “mid-level” cooperators, the overwhelming majority who must be the main target of a legal regime that

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<sup>116</sup> Philip Pettit, *The Cunning of Trust*, 24 PHIL. & PUB. AFF. 202, 207, 209-10 (1995).

<sup>117</sup> We are grateful to our colleague Jim Krier for challenging us on this front and helping us respond to this challenge.

<sup>118</sup> See James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 464, 478 (1995); see also Smith, *supra* note 31, at 167 (making a similar claim).

<sup>119</sup> On penalty default rules, see Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (“[P]enalty defaults are purposefully set at what the parties would not want – in order to encourage the parties to reveal information to each other or to third parties”).

purports to encourage liberal commons property.<sup>120</sup> Given that “learning to cooperate better” is itself a (second-order) collective good for the commoners,<sup>121</sup> it is difficult to see how a regime of penalty default rules would ever generate happy outcomes, rather it would exacerbate the downward circle of distrust. On the other hand, even a facilitative regime actually does not guarantee risk-free cooperation because law is always imperfect and must always be invoked by an injured party.<sup>122</sup> Thus, the cost for cooperation of a facilitative regime – in terms of under-investment in caution and in self-education – is smaller than the penalty default objection assumes and is, in any event, outweighed by the benefit of allowing mid-level cooperators to “play the game” at all.

In all, we view the role of law as constrained, but indispensable. If the goals of a liberal commons are to be achieved, law can play no more, but no less, than a background function, by serving to catalyze and protect the trust that governs day-to-day cooperation. With this understanding of the goals of the liberal commons, and the proper role of law, we now turn to the core of our theory.

### *B. The Three Spheres of a Liberal Commons*

When people trade their precious, if illusory, “sole despotic dominion” for a share in a liberal commons regime, what do they get? First, they generally retain the ability to make certain autonomous decisions regarding use of the commons resource, what we call the “sphere of individual dominion.” Second, they gain a voice, along with their fellow commoners, in collective decision-making regarding use of the resource, the feature we call the “sphere of democratic self-governance.” And, third, they retain the secure right to exit if

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<sup>120</sup> A regime that encourages ownership and management of commons resources must focus on its effects mainly on mid-level cooperators because especially-good-cooperators may well succeed in effectively working together irrespective of the legal regime and uniquely-bad-cooperators would fail in any event. (Further, insofar as for mid-level cooperators cooperation is itself a reward, but for bad cooperators it isn't, the latter are unlikely to bid as high as the former to join.) The only important prescription regarding bad cooperators is that the law should allow – maybe even encourage – the others to exclude them. As the text below explains, this can be done without adopting a regime of penalty default rules.

<sup>121</sup> See Krier, *supra* note 41, at 337-39.

<sup>122</sup> See Rose, *supra* note 114, at 554-56.

they are dissatisfied or are no longer interested in cooperating, but a right modified to respect certain community concerns, what we call “the sphere of cooperation-enhancing exit.” These three features – the spheres of individual dominion, democratic self-governance, and cooperation-enhancing exit – comprise the ideal-typical or general form of any liberal commons.

It is the necessary confluence of these three features that the liberal commons form highlights and the existing private/commons and liberty/community binaries hide. No real-world institution incorporates all these features; rather we see approximations, more or less well-adapted to the liberal commons goals of promoting the gains from cooperation while securing the benefits flowing from strong exit.<sup>123</sup>

1. *The Sphere of Individual Dominion.* – In one sense or another, all three features of the liberal commons, elaborated in the following pages, are aimed at facilitating trust and cooperation (strengthening social values) and generating prosperous use (maximizing economic gain). For methodological reasons, we start with the most elementary background rules; describing a set of default rules that govern the domain of individual action. These rules seek to ensure that individual use of the commons resource does not yield tragic outcomes. More particularly, these rules counter three forms of inefficient behavior regarding commons resources: (1) over-use, (2) under-investment, and (3) wasteful struggles regarding the fruits and revenues that a commons may produce. Together, these rules govern the sphere of autonomous decision-making reserved to each commoner; the actions he or she may take without seeking permission from fellow commoners. These rules apply only absent a majority decision, and are thus intentionally minimalist in their scope and aspiration.

We assume that the commons’ democratic self-governance institutions, discussed in our next section, generate more refined injunctions for beneficial use, and that the default rules we describe here apply only to relatively marginal issues, which do not justify or require the invocation of collective decision-

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<sup>123</sup> Recall that to be usefully analyzed in the liberal commons framework, an institution must be one in which the calculus of utility comprises incommensurable goals, participation is of the essence, and the terms for exit matter. *See supra* page 2. These admittance criteria circumscribe the problems which any liberal commons form must solve and hence correspond with the three spheres we discuss in the text. The first sphere allows some divergence between individual and social use; the second sphere promotes participation; the third sphere protects liberty.

making. It is nonetheless important to appreciate the way even these rules can facilitate trust, cooperation, and efficiency.

*a. Policing Over-Use.* Let us start with mechanisms that protect against over-use (leaving aside non-legal modes of social organization that may accomplish similar ends). We see two, complementary approaches to intervention: first, *directly regulating* commoners' behavior through broad but vague default rules, and second, *indirectly encouraging* proper cost internalization by establishing tough default rules that give commoners the confidence to trust each other in daily interactions.<sup>124</sup>

1. Direct Regulation. Successful commons property regimes often create detailed, explicit regulations restricting and channeling use. To ensure people take appropriate care in exploiting the commons environment, such rules typically are designed to be easily enforceable, for example, by imposing escalating punishments.<sup>125</sup> Furthermore, these regulations tend to be cautious with regard to current exploitation of the commons resource.<sup>126</sup> Conservative limits on exploitation may impose some current efficiency costs, but nevertheless result in overall efficiency gains. By shifting commoners' discount rates so that future returns become more valuable, these rules make continuous cooperation more attractive now.

These two injunctions – escalating punishments and conservative consumption – require detailed regulation. However, the more tailored these rules are to specific resources, the less likely they often are to serve as a default legal regime. If a default legal regime aims to regulate activity directly, the best it can do is to handle a wide range of resources tolerably well. For example, direct regulation can set general standards of reasonable use, such as a rule restricting each commoner to uses that accord with the others' expectations, and then leave the door open to local adjustments the parties may make to tailor resource use to their specific circumstances. Usually, the default rule of the direct approach involves ratifying existing uses as a baseline and enjoining creation of major barriers to reasonable new uses. Given the inescapable vagueness of such default rules, they will not likely be effective anti-opportunistic devices of the sort we seek.

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<sup>124</sup> As an aside, the success of the medieval open-field system seems due, in part, to communal regulation of the fields' use according to the two forms we explore in the text below. Cf. Smith, *supra* note 31, at 132, 136-37.

<sup>125</sup> OSTROM, *supra* note 4, at 18-20, 73-76; McKean, *supra* note 4, at 272-75.

<sup>126</sup> McKean, *supra* note 4, at 272-75.

2. Indirect Encouragement. To be effective, the operative background rules that prevent over-exploitation must be sharper and more precise; in particular, they must guarantee that if trust collapses, then the costs of each commoner's use will be properly internalized, neutralizing *ex ante* the incentives for over-use. One plausible rule can be simply stated: *every commoner is liable to the others for the fair market value of every use calculated pro rata* (that is, according to ownership share).

We say this rule is plausible, but its usefulness depends on the context. Fair market value liability may not necessarily suffice to deter excessive use, especially in cases where the visibility of exploitation efforts is low. There, potential violators can count on some measure of under-enforcement. They may reasonably expect some probability that deviance will not be spotted if monitoring is relaxed, as we expect it to be, until a major deviance is spotted. Also, evidentiary problems may arise because earlier excess uses may be harder and more costly to identify, a cost aggravated if catching extreme exploiters also requires settling the accounts of other, lesser extreme exploiters. In contexts where the under-deterrence concern is significant, a more stringent remedy may be better tailored to achieve liberal commons goals, especially where even low-level exploitation is intolerable. Such a remedy could be based on the violator's gain, that is, the fruits and benefits derived from overuse of the commons. Removing *ex post* the possibility of profit from detected infringements makes overuse somewhat less valuable *ex ante* and thus may more effectively deter violations.<sup>127</sup>

On its face, the fair market liability formula we propose, or its plausible alternatives, may seem impractical because calculating the liabilities for overuse would impose high administrative costs. But recall that we intend this rule to work in the background; we doubt if parties in a well-functioning commons would routinely turn to such strict accounting rules. Commoners would likely perceive a cold accounting for each use (or for each investment) to be inappropriate in an ongoing relationship of cooperative interaction, mutual trust,

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<sup>127</sup> See HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 18 (1997). To be sure, even with this remedy there is still a chance that the infringement will go undetected or that the other commoners will fail to pursue their claim, which makes the violator's expected gain greater than zero. Nevertheless, the recovery of the violator's gains makes the detection of infringements – even of past infringements – relatively more worthwhile to the other commoners. *See id.*

and group solidarity.<sup>128</sup> Rather we expect to find, following Robert Ellickson's account, that daily interactions would be governed by a more informal, rough mental account of outstanding credits and debits.<sup>129</sup> So long as the aggregate account is not radically unbalanced and future interactions can provide adequate opportunities for evening up, commoners may not be concerned if particular sub-accounts are not balanced.<sup>130</sup>

So, the precise accounting mechanism we suggest is not intended to serve the commoners on a daily basis. Its purpose and method is different, consistent with our view of the trust-catalyzing role of law. Such a rule assures each commoner that even if the commons breaks down, no party will be too vulnerable to another's exploitation. By assuring enforcement of a precise accounting if the commons fails, the law can enable owners to trust one another and to rely on each other's cooperation in the meanwhile.<sup>131</sup> This trust, to be sure, is not completely cost-free from the commoners' perspective. Invoking the anti-opportunism mechanism requires the commoners to invest some amount in monitoring each other. Law can facilitate the parties' trust, but it cannot – and probably should not – entirely displace the need for some caution against trusting others too much.<sup>132</sup> This indirect legal mechanism, even if imperfect, plays its role by relaxing the parties' own monitoring reflexes, by making monitoring cheaper, and by lessening too-quick resort to formal law, the types of actions that cause others to become suspicious, which in turn undermines trust and cooperation.<sup>133</sup>

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<sup>128</sup> ELLICKSON, *supra* note 112, at 234-36.

<sup>129</sup> *Id.* at 56; *See also* Bernstein, *supra* note 114, at 1765-68 (arguing that trade association members rely on informal accounting during ongoing dealing, strict legal accounting during end game).

<sup>130</sup> ELLICKSON, *supra* note 112, at 56.

<sup>131</sup> *See* Omri Ben-Shahar, *Rights Eroding From Past Breach*, 1 AMER. L. & ECON. REV. 190 (2000). *But see* McKean, *supra* note 4, at 273-74 (arguing that successful systems “betray an intense concern with . . . bookkeeping to keep track of contributions and withdrawals from the commons”).

<sup>132</sup> Rose, *supra* note 114, at 555.

<sup>133</sup> *Id.* at 556-57. There is another possible objection to the accounting mechanism we propose: our mechanism can never be perfect – and thus the over-use aspect of the tragedy of the commons can never be fully overcome – because potential defectors will always be able to get away with their opportunism if they overuse or damage the common resource in unobservable or unverifiable ways. *Cf.* Alan Schwartz, *Relational Contracts*

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*b. Preventing Under-Investment.* Anti-opportunistic mechanisms regarding the parties' investment decisions are the mirror-image of "anti-overuse" rules. Investment in a commons can be a public good with respect to other commoners. Hence, it invites free-riding: individuals may refuse to pay their share, motivated solely by the expectation that others' efforts will generate the same good free of charge (or more cheaply).<sup>134</sup> Free-riding can generate under-investment that would harm any commons, and would demoralize any community.<sup>135</sup> Therefore, unsurprisingly, well-functioning commons property regimes set norms that require commoners to contribute their proportional share for necessary services invested the commons.<sup>136</sup>

1. Preservation. A default legal regime seeking to facilitate liberal commons success should formalize investment-protection norms through a rule stating, first, that any commoner may unilaterally undertake any investment – even if not urgent and with no requirement of the other commoners' prior approval – reasonably required to prevent harm to the resource and to protect the commoners' continued ownership or possession, and, second, *the investing party should be entitled to an immediate pro rata contribution from each one of the other commoners.*

The rule protects a cooperating commoner from the others' possible opportunism by insuring that parties who invest today will not be exploited

<sup>133</sup>(...continued)

*in the Courts: An Analysis of Incomplete Agreements and Judicial Strategies*, 21 J. LEGAL STUD. 271, 279-80 (1992) (discussing the distinction between observable and verifiable information). This critique postulates that there are many acts of individual commoners that would be impossible – or, more likely, too costly – to observe or to prove in court (even if observed). The critique further implies that a regime of private property (the sole owner case) is free from this difficulty. We do not dispute that commons property regimes face the difficulty of unobservable or unverifiable infringements. See Ellickson, *supra* note 15, at 1329 (comparing the effectiveness of barking dogs as boundary-infringement device with the difficulty of designing commons shirking-detection mechanisms). But this difficulty is *not* wholly absent with private property, trespassing must be policed and licensees monitored. Therefore, if – or, better, in those cases where – the default rules we propose can overcome the difficulties of collective action in controlling over-use by way of observable and verifiable acts, the liberal commons is not different, in this respect, from "Blackstonian" private property.

<sup>134</sup> See Richard Arneson, *The Principle of Fairness and Free-Rider Problems*, 92 ETHICS 616, 621 (1982).

<sup>135</sup> Arneson, *supra* note 134, at 622.

<sup>136</sup> Ostrom, *supra* note 4, at 49; McKean, *supra* note 4, at 266-67; ELLICKSON, *supra* note 112, at 71-75, 275.

tomorrow. Like anti-overuse rules, our rule here serves a protective function, to encourage parties to give cooperation a chance. The rule would be too cumbersome to invoke on a daily basis, so such ongoing accounting would be handled through the ordinary informal norms that we usually see. Given the possibility of disputes regarding which preservation measures are “reasonably required” along with concern that some commoners may lack immediate ability to contribute, the law can back the contribution rule we propose with various structural devices, such as insurance-like funds collected in advance that provide some assurance of payment when disputes arise.

The investment-protection regime, like its anti-overuse complement (and for the same reasons elaborated above), is supposed to function as a background norm in the parties’ relationship, so its mere existence simultaneously encourages efficient levels of investment (by inducing investments that would have otherwise been too risky, too open to free-riding) and inculcates productive trust among commoners.

2. Improvements. In designing a *liberal* commons, we should be cautious to limit any contribution obligation.<sup>137</sup> The obligation should not refrain from including expenses aimed at preserving the commons as a whole. But improvements may be different, though we recognize that the line between improvements and simple preservation is murky. Still, to the extent they can be adequately defined, improvements are more likely to deviate from the parties’ original understanding of their common endeavor, so we cannot be sure that commoners who refuse to participate are trying to free ride, rather than expressing their own subjective preferences and genuine valuations.<sup>138</sup> Including improvements in a broad right of contribution could offend the notion of

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<sup>137</sup> See generally Hanoch Dagan & James J. White, *Governments, Citizens, and Injurious Industries*, 75 NYU L. REV. 354, 385-90 (2000) (discussing restitutionary liability for unilateral conferral of unsolicited benefits).

<sup>138</sup> As Saul Levmore explains, individual valuations are idiosyncratic because they depend on varying abilities to pay for a good and on personal tastes. Levmore gives three exceptions where the phenomenon of subjective devaluation would not occur: (1) the recipient has infinite wealth; (2) the recipient is a profit-making enterprise where subjective preferences have little role; or (3) the non-bargained benefit is easily translated into wealth. Unless those exceptions apply, one cannot easily refute the recipient’s claim that the recipient preferred to invest money in the acquisition of some other benefit more clearly to the recipient’s liking. See Saul Levmore, *Explaining Restitution*, 71 VA. L. REV. 65, 74-79 (1985).

individual choice inherent in a liberal commons.<sup>139</sup> Such considerations seem to us to justify postponing any right to contribution respecting improvements only until exit, in particular exit that liquidates the commons and resolves concerns arising from conflicting subjective valuations.<sup>140</sup>

To be sure, these “anti-underinvestment” rules are very minimalist and, if applied broadly, rather crude and sub-optimal. Thus, on the one hand, improvements may be part of the parties’ original understanding. And even where they were not foreseen, improvements may be, in some cases, the most beneficial course of action (for example investing in insurance now may be more efficient than covering uninsured liabilities later). Similarly, on the other hand, there are cases in which even repair is a losing proposition; some resources are best left to deteriorate.<sup>141</sup>

These defects of our default rules would be fatal if they were intended to apply to a wide range of investment decisions. However, recall that these rules apply only in the sphere of individual dominion, that is, absent a majority decision on preservation or investment. They constitute the (limited) realm of action in which any single commoner can act on behalf of the group. Given that a more ambitious regime regarding of investments and improvements is well within the sphere of democratic decision-making we propose, it is reasonable to restrict the realm of individual choice only to undisputed investments.<sup>142</sup> Crude

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<sup>139</sup> For the proposition that awarding restitution for unsolicited benefits in cases of subjective valuation insults the liberal commitment for individual free choice, see PETER BIRKS, AN INTRODUCTION TO THE LAW OF RESTITUTION 109-10, 228 (paperback ed. with revisions, 1989); DAN B. DOBBS, LAW OF REMEDIES Vol. I § 4.9(2) (2d ed. 1993); John D. McCamus, *The Self-Serving Intermeddler and the Law of Restitution*, 16 OSGOODE L. REV. 515, 520 (1978); Mitchell McInnes, *Incontrovertible Benefits in the S. Ct. of Canada; Peel (Regional Municipality) v. Canada; Peel (Regional Municipality) v. Ontario*, 23 CAN. BUS. L.J. 122, 123, 128 (1994).

<sup>140</sup> See Levmore, *supra* note 138, at 78 (“In partition the property is generally reduced to monetary terms, often by sale. . . . The recipient, whose share of the improvement’s value is deducted from his share of the property’s total value, cannot claim to have been forced to purchase a good that he does not value, because he has received in partition the monetary value of his share of the improvement.”)

<sup>141</sup> See Merritt Fox & Michael A. Heller, *Corporate Governance Lessons From Russian Enterprise Fiascoes*, N.Y.U. L. REV. (forthcoming, 2000) (explaining how non-preservation can be efficient and giving colorful examples of value-destroying Russian enterprises).

<sup>142</sup> In other words, until the community can reach some agreement on how risk-averse they are going to be, our rules should assume that they are maximally risk-averse, so that  
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as it is, the preservation-improvement divide seems good enough given its limited task.

*c. Sharing Fruits and Revenues.* Finally, we take up the problem of distributing the products of a commons in a manner that *ex ante* encourages their production. A basic principle that complies with the injunctions against over-use and under-investment is that fruits and revenues should be distributed proportionally to each commoner's ownership share.<sup>143</sup> But what should be the rule where the revenues or fruits are not produced by all the commoners, rather by one (or a few) of them? How divide up fruits and revenues when a commoner makes an autonomous decision to use the commons resource?

Three solutions come to mind as default rules. One rule would allow the laboring commoner to keep the entire net profit after paying the others the fair market value for use of their shares. A second, diametrically opposed possibility is to give the laboring commoner only a fair market return and distribute the remaining net profits among all commoners (including the laborer) according to their respective ownership shares. Or, an intermediate possibility would be to allow the laborer to capture fair market value and the proportional share of net profits attributable to the laborer, with all commoners (including the laborer) splitting the remaining surplus.<sup>144</sup>

We see no general way to decide among these approaches. To the extent we are concerned mostly with policing against under-investment, the first

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<sup>142</sup>(...continued)

individual investment is reimbursable only when can be characterized as being about protections against erosion, mainly because in this case there is unlikely to be differences in subjective valuations.

<sup>143</sup> Such is indeed the practice of successful commons regimes. See McKean, *supra* note 4, at 264-65.

<sup>144</sup> Assume, for example, that there are two commoners, that the fair market value of the use of the resource as a whole (say, a parcel of land) is 40, that the fair market value of the pertinent work is 10, and that the net profits (after deduction of all the expenses involved including the fair market value of the laborer's work) is 100. The first option would give the passive commoner 20 (50% of the fair market value of the parcel's use), and leave the laborer 80. The second rule would give both parties 50 (so that the laborer does not get any special benefit excepting the 10 fair market value directly attributable to her work). The third rule would allocate 20% of the net profits to "work" and 80% to "land," thus allowing the passive commoner to receive 40 (50% of what has been allocated to "land") and the laborer 60 (50% of what has been allocated to "land" as well as that part of the net profits which has been allocated to "work").

rule seems preferable to the second (and, to a lesser degree, the third).<sup>145</sup> But, as we indicated above, the second rule performs best in ameliorating over-use. Also, by extending the jurisdiction of group decision-making to include the labor that any member invests in the commons property, the second rule seems better designed to inculcate the sense of common undertaking crucial for well-functioning commons. While choosing among these choices requires the sort of context-dependent analysis attentive to micro and macro values we discussed earlier, all the choices can fall within the range bounded by the liberal commons framework.

2. *The Sphere of Democratic Self-Governance.* –

a. *The Virtues of Mobilizing Voice.* So far, we have focused on mechanisms that counteract the potentially devastating effects that individual autonomy may have on the efficiency – even the viability – of commons property. At a minimum, within a sphere of individual dominion, owners can benefit from the commons resource. Now we become more ambitious and explore affirmative ways to support the commoners' cooperation, starting with possible rules for democratic self-governance. These rules can help potential commoners capture both the economic benefits that a viable commons engenders (pooling, joint management, risk-spreading) and the social gratifications it generates (the psychological rewards of belonging, membership, and collective action). Recall that in many circumstances the economic and the social goods are intimately related because efficiency, trust, and cooperation tend to be mutually reinforcing.

Our prescriptions draw on findings from social science studies of successful, though illiberal, commons. These studies suggest to us that democratic self-governance with a large role for majority rule is preferable to unanimity rules. By requiring complete agreement on management issues and by emboldening holdouts, unanimity rules may lead to anticommons tragedy, that is, mutual vetoes that waste a resource through underuse.<sup>146</sup> We believe a regime of direct democracy – appropriately modified to work in our liberal framework – would best serve the individual and the group in managing a commons resource

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<sup>145</sup> See Lawrence Berger, *An Analysis of the Economic Relationship Between Cotenants*, 21 ARIZ. L. REV. 1015, 1021-22 (1979) (describing the first rule as “clearly aimed at the reward of the [the owner’s] present efforts in maximizing the utility of the land”); Robert P. Merges & Lawrence A. Locke, *Co-Ownership of Patents: A Comparative and Economic View*, 72 J. PATENT & TRADEMARK OFF. SOC’Y. 586, 595-96 (1990) (preferring the first rule for co-ownership of patents for similar reasons).

<sup>146</sup> See Heller, *supra* note 25, at 621-26 (explaining how anticommons tragedy operates).

in a way that maximizes efficient use and enriches social relationships. Our regime gives voice to each individual commoner and gives the commoners as a group the power to tailor management and use of the commons resource to changing environmental, economic, and social circumstances.

The mechanisms we propose amplify each commoner's ability to change commons management from within. Resorting to "voice," rather than immediately moving to "exit," requires disgruntled parties to have some measure of loyalty toward their fellow commoners.<sup>147</sup> However, the predisposition to loyalty is not sufficient absent structural arrangements that facilitate effective voice.<sup>148</sup> As Hirschman explains, "the decision whether to exit will often be taken *in light of the prospects of the effective use of voice*."<sup>149</sup> Furthermore, he notes that, "voice is essentially an *art* constantly evolving in new directions."<sup>150</sup> Therefore, so long as strong exit is possible – and we insist that it always be possible – exit proves an easy response to dissatisfaction, and it tends to dominate voice.<sup>151</sup> A default regime of democratic self-governance that promotes participation is required to direct commoners to opt for voice first and to use exit only as a last resort.

Voice is an important medium for community-building. Deliberation over daily decisions concerning the management of the commons resource affords commoners an opportunity to engage in dialogue. In this dialogue, the commoners may attempt to synthesize their divergent experiences and preferences while reaching a collective decision.<sup>152</sup> Such experience is a means of socialization, one that helps refine the commoners' values and inculcates collective commitments. Thus, the sphere of democratic self-governance is significant not only because it may result instrumentally in more efficient decisions. It is also important to inculcate the non-economic goal of cooperation, enriching the commoners' interpersonal relationships and solidifying their interpersonal

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<sup>147</sup> See HIRSCHMAN, *supra* note 62, at 77 (Loyalty makes exit less likely and increases the likelihood of voice).

<sup>148</sup> See *id.* at 82 ("While loyalty postpones exit, its very existence is predicated on the possibility of exit.").

<sup>149</sup> *Id.* at 37.

<sup>150</sup> *Id.* at 43.

<sup>151</sup> See *id.* at 36-43.

<sup>152</sup> Cf. Jeremy Waldron, *Legislators' Intentions and Unintentional Legislation*, in LAW AND INTERPRETATION: ESSAYS IN LEGAL PHILOSOPHY 329, 346-48 (Andrei Marmor ed., 1995).

capital. Democratic self-governance requires attention to both jurisdictional boundary norms and procedural rules.

*b. Jurisdictional Boundary Norms.* Successful commons regimes, Ostrom reports, are characterized by “collective-choice arrangements” that allow most individuals affected by the operational rules to “participate in modifying the operational rules.”<sup>153</sup> These arrangements allow that “the individuals who directly interact with one another and with the physical world can modify the rules over time so as to better fit them to the specific circumstances of their setting.”<sup>154</sup>

Applying Ostrom’s prescription within a legal regime for a *liberal* commons is not easy. In particular, difficult decisions arise respecting how to determine the boundaries of group jurisdiction, that is, the scope of decisions governed by a democratic governance regime. On one side, the need for dynamic management and the problem of anticommons tragedy, both point toward a relatively broad majority-rule jurisdiction. Broad majority-rule jurisdiction also seems to correspond well within a social context of trust and cooperation, one that understands the group, rather than its individual members, as the ultimate owner of the commons resource. On the other side, however, a liberal commons – like liberal regimes generally – must be aware of the risks of majority rule and set jurisdictional boundaries that mitigate these risks. Majority rule easily turns into minority exploitation. And the risk of minority exploitation tends, as we have seen, to frustrate *ab initio* the possibility of trust and cooperation and instead to make exit the commoner’s dominant route to protecting autonomy. Therefore, a grant of broad jurisdictional scope to the majority must be limited by protections against abuses arising from broad jurisdiction.

These two guidelines may seem vague and contradictory, but we think that they can be reasonably clarified. The goal is to prescribe jurisdictional boundaries that would minimize conflict between majority and minority interests.<sup>155</sup> One approach could be to allow majority rule in a broad realm of management and investment decisions – including giving the majority the power

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<sup>153</sup> See OSTROM, *supra* note 4, at 93.

<sup>154</sup> *Id.*

<sup>155</sup> These boundaries have been extensively debated in many contexts, such as procedures for granting variances from public zoning schemes, for judicial review of decisions by residential associations, or in decision rules in partnerships or close corporations. See, e.g., *Nahrstedt v. Lakeside Village Condominium Ass’n*, 8 Cal. 4<sup>th</sup> 361 (CA Sup. Ct. 1984); Restatement (Third) of Servitudes §§ 3.8 (C.D. No. 8, 1997) (discussing standards of judicial review of condominium association decisions).

to lease or mortgage the commons resource or to make extensive and substantial investments (or to decide upon divestment) – so long as the majority focuses on increasing the size of the collective utility pie. Such an increase in the majority power, however, increases the risk they will exploit the minority, so we would also prescribe sharper limits on majority sovereignty whenever decisions are more easily characterized as redistributive, particularly when they shift utility from the minority to the majority.

A knotty problem arises in evaluating the validity of a majority decision to leave the commons resource unused. What counts as the baseline of use or non-use is a difficult question that has been extensively debated in the nuisance, takings, and land use literatures, and will not be recapitulated here.<sup>156</sup> However, in most cases, a decision to stop using the commons can reasonably be deemed outside the domain of the majority rule, because it does not usually maximize the commoners' utility, and is likely to be a strategically motivated move to impair the minority's welfare expectations. A distributive intention to freeze the minority out should render the majority's decision illegitimate, thus the application of majority decision-making there would be invalid. But a majority may be able to redeem its non-use decision if they can show utility-maximizing reasons.

In many cases, a utility-maximizing reason could be based on an efficiency calculus, such as a showing that there exist market conditions under which current use would generate losses, or a demonstration that a "time-out" is economically useful for paying off debts and searching for alternative low cost uses.<sup>157</sup> Efficiency, to be sure, should not be the only consideration that can legitimate majority decisions. Other utility-maximizing considerations – such as environmental conservation, or a simple preference for realizing revenue later, or different levels of risk tolerance – can also render majority decisions legitimate. But making an efficiency showing suggests, at least to a point, that the majority decision is not motivated by strategic exploitation of the minority. Judges or arbiters may be able to improve on an efficiency analysis by also evaluating evidence more directly related to commoners' subjective utility functions. Judgments about subjective utility are bound to require complicated assessments because utility is both wealth-dependent and taste-dependent. But messy as

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<sup>156</sup> See, e.g., Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1196-97 (1967); Michael A. Heller & James E. Krier, *Deterrence and Distribution in the Law of Takings*, 112 HARV. L. REV. 997, 1011-12 (1999).

<sup>157</sup> Furthermore, it may well be that in such a case it is the minority's insistence to continue an inefficient (and positively harmful) use which is strategic.

these judgements are, they are no different from myriad other legal rules that invoke – usually implicitly – utilitarian balancing.

Finally, we do not privilege the founding commoners' original intent regarding the majority's decision-making jurisdiction (unless, obviously, such intent has been enshrined by certain constitutional agreements). Success in the liberal commons context – as with private and commons property – requires dynamic adjustments to changing circumstances. Hence, there is an inevitable risk that the preferences of the collectivity would, at some point, substantially shift away from those of certain minority members.<sup>158</sup> As long as the minority has not been exploited – in other words, absent prohibited redistributive motivations or consequences – and given the minority's ability to exit, we do not think that a liberal commons should incorporate any conservative bias.

*c. Procedural Norms.* Margaret McKean provides a rich account of procedural norms for democratic self-governance. In successful commons regimes, she reports, commoners convene regularly in a deliberative body to make decisions about opening and closing the commons, set harvest dates, decide rules governing the commons, and also adjudicate conflicts among themselves.<sup>159</sup> These bodies, as she describes them, seem to operate typically along republican democratic lines.<sup>160</sup> Not only is power decentralized so that there is no hierarchy separating “leadership” (even if elected) from “citizens,”<sup>161</sup> but also there often appears to be significant emphasis on collective deliberation. To ensure adherence to the decisions the group adopts, deliberative bodies pay attention to the views of *all* eligible users of the commons.<sup>162</sup> Although formally majoritarian, these bodies in practice usually foster consensual decision-

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<sup>158</sup> See also Gillette, *supra* note 83, at 1425.

<sup>159</sup> See McKean, *supra* note 4, at 258-59. These bodies had reasons to convene other than management of the commons. As McKean explains, this made management more efficient by lessening the transaction costs of assembling for these purposes. See *id.* at 260.

<sup>160</sup> See generally Symposium, *The Republican Civic Tradition*, 97 YALE L.J. 1591 (1988).

<sup>161</sup> See Ellickson, *supra* note 15, at 1350.

<sup>162</sup> See McKean, *supra* note 4, at 260-61. As McKean explains, “[d]isgruntled violators...could begin to free-ride... or to shirk... if they felt that the maintenance of the commons was no longer in their interest because the rules were unfair. And they could free-ride as individuals even if they could not overcome the collective action dilemma in order to demand changes in governance of the commons.” See *id.*

making.<sup>163</sup> Democratic governance operates as a background rule, while daily decision-making in the absence of deeply-held dissent is governed by a social norm of unanimity. This background/operational split legitimates and promotes consensus but does not create a formal anticommons structure, with its attendant tragedy.

Republican democratic governance can only be viable in social environments characterized by trust and cooperation. In other settings, such as the paradigm of a public corporation, republicanism may be both unnecessary and too costly. A hierarchical governance structure with formal *indirect* democracy may better facilitate the parties' collective action.<sup>164</sup> But notice again, that direct governance in the appropriate social context is more likely to develop the trust and cooperation it requires and to facilitate and encourage members' participation. Participatory democracy can intensify the parties' inter-personal relations; so republicanism, with its attendant limitation on the size of the commoners' group, is an important institutional mechanism for community-building. Inter-personal relations and community, in turn, reinforce trust and facilitate cooperation.

These lessons can be incorporated into a legal regime of a liberal commons. Along with recourse to majority rule rather than to administration by elected officials, a liberal commons regime committed to republican democratic governance would require prescriptions respecting disclosure, consultation, and fair hearing. Before majorities act, they should disclose relevant facts that arguably justify the proposed action and make room for open discussion by dissenting parties in a forum where all sides must listen to opponents' views and give reasons for their stances. Finally, minority complaints of due process deprivations or substantive exploitation should be capable of triggering mediation or judicial intervention.

These mechanisms significantly facilitate successful liberal commons property. Procedural safeguards calm parties' concern that others will maneuver behind their backs. They recruit the judiciary to support the parties' cooperation by serving as a forum for dispute resolution that can "provide solutions that

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<sup>163</sup> See *id.* at 261.

<sup>164</sup> See Henry Hansmann, *Condominium and Cooperative Housing: Transactional Efficiency, Tax Subsidies, and Tenure Choice*, 20 J. LEGAL. STUD. 25, 34-36 (1991) (describing how landlords, contracting separately with each tenant, may be better able to maximize aggregate tenant preferences than cooperatives or condominiums).

permit [them] to end their quarrels and to get on with their lives.”<sup>165</sup> And where no such reconciliation is possible, a court can be advised to order dissolution of the commons, because for hostile parties ownership and managements of commons resources is bound to yield tragedy. Finally, the requirement of open-minded consultation – although difficult to enforce because the majority can often carry it out in a purely superficial way – facilitates republican social norms because it provides commoners with standards and guides for conduct and judgment they each can expect the others will generally follow in a social context generally governed by cooperation and mutual trust.<sup>166</sup>

*d. Promoting Tailor-Made Adjustments.* The rules we have discussed so far provide a starting point for people who inadvertently become commoners and for those who would voluntarily become commoners if they did not have to incur the costs of custom-tailoring their default legal regime through contract. But for commoners who can bear some contracting costs, background rules supporting freedom of contract can provide another, simple method of legal facilitation for a successful commons.

To prosper, the commoners must be relatively free from the authority of outside bodies in managing the commons, a freedom McKean calls “independent jurisdiction.”<sup>167</sup> Providing “substantial local autonomy”<sup>168</sup> is an easy, but crucially important, way to supplement the more active methods of commons property facilitation we have already discussed. The web of default background rules – significant up to a point – cannot by its nature be sufficient for every case of commons property, because each resource carries unique features.

Therefore, alongside with the law’s active support for commons property via anti-opportunistic and institution-building rules, the law should also offer what may be called passive support, that is, the law should reflect a liberal approach respecting the content of any private “constitutional arrangements” commoners may wish to adopt. So long as exit is appropriately preserved (within the limits

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<sup>165</sup> Steven D. Smith, *Reductionism in Legal Thought*, 91 COLUM. L. REV. 68, 71 (1991) (discussing the dispute resolution function of law).

<sup>166</sup> Cf. HART, *supra* note 114, at 79-88 (discussing law as a source of reasons for action); James A. Henderson, Jr. & Richard N. Pearson, *Implementing Federal Environmental Policies: The Limits of Aspirational Commands*, 78 COLUM. L. REV. 1429 (1978) (describing the difficulty of controlling behavior through “aspirational commands” from legislatures or courts).

<sup>167</sup> See McKean, *supra* note 4, at 259.

<sup>168</sup> OSTROM, *supra* note 4, at 212.

set below), and provided third parties are not injured,<sup>169</sup> then the law should allow people to agree *ex ante* on whatever constitutional arrangements they prefer respecting rights and obligations regarding the resource, its management and use, or rules for dissolution. By adding a liberal approach to contracting, people can tailor their default rules so that they are ever more responsive to particular resource needs, technological changes, and evolving local norms.<sup>170</sup>

3. *The Sphere of Cooperation-Enhancing Exit.* –

a. *The Many Faces of Exit.* Appropriate mechanisms of anti-opportunistic guarantees and democratic self-governance begin to move ownership and management of commons resources away from its mythological tragic predicament; well-calibrated cooperation-enhancing exit completes the story. Unlike commons success stories that sacrifice exit to build community, a *liberal* commons preserves a commitment to individual exit. Indefinite restrictions of exit cannot be legitimized in a liberal commons.

Exit, however, is not a unitary concept, although it is frequently and mistakenly treated as such. Sometimes, freedom to alienate one's share is sufficient to protect exit; other times, nothing short of dissolution will do – dissolution rules include, to name a few examples, partition in co-ownership law, divorce in family law, termination of trusts or partnerships, and liquidation of corporations. Furthermore, for both alienation and dissolution, there exists a range of liberal commons mechanisms that serve community-preserving functions without substantially compromising liberal commitments. These mechanisms help insure that the exiter's decision is informed (not hasty and ignorant) and sincere (not opportunistic), thus refining the class of protected exit-decisions from a liberal standpoint. These mechanisms also help craft the right to exit consistent with preserving cooperation.

b. *Restraints Can Enhance Cooperation.* Just like rules governing daily life in a commons, exit rules do not serve as operative regulatory norms. But they can serve, like in the spheres of individual dominion and democratic self-governance, as background rules whose mere existence protects the commoners from defection, abuse of trust, and exploitation. If so, cooperation-promoting exit rules may be tuned so they contribute to common ownership

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<sup>169</sup> Where land is at issue, one such possible limitation from negative externalities can derive from the prescriptions set out by land-use law regarding parcels' minimal size and width of a parcel. See Heller, *supra* note 51, at 1173-74.

<sup>170</sup> Private constitutions raise several questions that cannot be properly addressed here, regarding both the outer limits of freedom of contract (especially in contexts that may raise concerns of systematic exploitation) and the possibility of unwritten constitutions.

success, and maybe even support its establishment *ex ante*. To function as anti-opportunistic mechanisms, alienation and dissolution rules should safeguard commoners from unjust deprivation of utility by other commoners.<sup>171</sup> Hence, these rules should contain an injunction against redistribution, ensuring a scrupulous allotment of the resource or its worth corresponding to the parties' initial (and subsequent) investments.

Liberal commons settings include forms where the initial entry can range along a spectrum from involuntary to voluntary. For example, the classic involuntary forms are when heirs inherit property or when neighbors are locked into a riparian regime for stream use. By contrast, voluntary forms include any time people choose to enter into a property institution such as a marriage or condominium. Cooperation-enhancing limitations on exit become increasingly problematic when entry is involuntary because it infringes more severely upon individual freedom of choice. As we shift along the spectrum towards voluntary entry, more intrusive cooperation-enhancing limitations on exit may nevertheless be consistent with liberal values.<sup>172</sup>

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<sup>171</sup> Cf. Green, *supra* note 63, at 178-79 (discussing "principles of justice in dissolution, conditioned by the legitimate expectations of the member"). Attempts to unjustly deprive others can be initiated either by the majority or by the minority (or one individual commoner). In the former case, preventing unjust deprivation not only serves as an anti-opportunistic device, but also is crucial to securing practical (and not merely theoretical) exit. *See id.* In the latter case, preventing unjust deprivation safeguards against independent exploiters who want to take the money and run.

<sup>172</sup> Several readers have suggested to us that the voluntary/involuntary divide is more fundamental even than we believe. They argue that the *ex ante* expected level of cooperation among involuntary commoners is much lower than that of voluntary commoners. They deduce from this reasonable premise that involuntary forms of commons should not presumptively include our ambitious apparatus for supporting cooperation. Instead, one should expect cooperation to fail, and let failure take its course without intervention. They also deduce, on the other end of the spectrum, by analogy to contract theory, that if people enter freely, law should not be concerned with arrangements that severely curtail exit. In this account, we are committing a sort of "exit-fetishism." Cf. Scott & Scott, *supra* note 112, at 1233, 1245-47 (by elevating the freedom to renege on a promise, no-fault divorce undermines cooperation and inadequately protects asymmetric and specialized investment in the relationship).

Although we agree that involuntary commoners are likely to be less inclined towards pursuing cooperative goals, we disagree with both deductions readers have drawn. As to involuntary commoners, our point is not to *force* cooperation, but to *support* it if they want to give it a chance. Preserving exit in such cases ensures that our apparatus does not coerce, but facilitates an otherwise remote likelihood of cooperation. Indeed, if failure is  
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Similarly, liberal commons settings include forms in which the “intensity” of membership ranges along a spectrum from limited to comprehensive. Thus, there are some forms – such as close corporations and condominiums – where the common interest is relatively limited, so that the commoners preserve many other areas of individual control. Other forms are more comprehensive or inclusive – think of marriage – so that the sharing covers significant aspects of the commoners’ lives. Cooperation-enhancing limitations on exit become increasingly problematic when membership is inclusive (like with involuntary forms above) because it infringes more severely upon individual freedom of choice. As we shift along the spectrum back towards limited intensity, more and more intrusive cooperation-enhancing limitations on exit may nevertheless be consistent with liberal values.

*c. Alienation v. Dissolution.* When is dissolution even necessary to preserve liberal exit, that is, when is a right of alienation not enough? Another way of posing the problem is to ask when should a departing individual be able to break up the commons? For some liberal commons forms, such as the condominium or perhaps the cooperative, sale may be a sufficient protection for liberal exit, and the repertoire of alienation restraints we discuss below is enough to protect cooperation values. In these cases, particularly where cooperation is based more on voluntary entry, a liberal commons does not require allowing the possibility of dissolution that has both community-destruction and a private-benefit destruction effects.<sup>173</sup> Often, however, sale does not sufficiently protect exit, because it can be expected to under-value the pro rata ownership share of

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<sup>172</sup>(...continued)

likely *ex ante*, one might understand cooperation, the failure to exit, as an affirmative decision to remain (though, admittedly, a contextual decision not to exit does not require affirmative action and is therefore less weighty perhaps than an initial decision to enter into cooperative resource management). We see no reason to make the choice of cooperation more difficult for initially involuntary commoners by requiring that they exit and reenter to gain the benefit of cooperation-facilitating rules.

On the second deduction, recall our distinction between ordinary contracts and property arrangements, discussed *supra* note 77. For ordinary contracts, liberal values do not reject strong lock-ins. But property arrangements that encompass much more of an individual’s resources and social life are different. Regarding these latter arrangements – our sole focus here – a liberal commitment to choice can not reasonably be exhausted by an initial election of an illiberal exit rule.

<sup>173</sup> The private-benefit destruction effect may arise in cases where one (or some) of the commoners developed private benefits related to her share in the commons (benefits that are not shared by everyone or not shared equally).

the exiter. This undervaluation is increasingly likely and significant as the non-economic benefits of cooperation, and the role of participatory management, become more central to the commons resource, such as in many cases of commons resource management.

*d. Three Mechanisms.*

*1. Cooling Off Periods.* An unlimited right to exit can threaten cooperation and efficiency by generating a domino effect, a problem especially severe because of the asymmetrical information inherent in the decision to exit. Insights from cognitive psychology help refine this seemingly unequivocal conclusion. In game-theoretic terms, they teach us that when people repeat interactions, they typically may come to view their relationship as if it were of endless or unknown duration, a conception that can lead them to switch to voluntary cooperation. Even when the horizon is definite, cooperation may be possible so long as the horizon is distant enough. The domino effect, with defection as a dominant strategy, operates only for certain short time horizon games.<sup>174</sup>

The cognitive psychology finding suggests that law can provide a useful role in facilitating cooperation and efficiency by allowing *temporary* restraints on exit. Limited restraints on alienation and on rights to call for dissolution can help create a brief “grace period” that may be enough to lead to mutual long-term cooperation. This marginal compromise on exit, allowing parties to lock themselves in a commons for a time, may help lead them to adopt a strategy of Tit-for-Tat which fully “rational” parties would adopt only in indefinite games. And once cooperation begins, it will arguably yield social and efficiency gains that would, as we have seen, support the parties’ continued trust and cooperation. Hence, tweaking exit may turn the tide against the pessimistic scenario of the tragedy of the commons and build momentum towards the types of successful cooperation that can carry the day.<sup>175</sup>

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<sup>174</sup> See MARTIN J. OSBORNE & ARIEL RUBINSTEIN, A COURSE IN GAME THEORY § 8.2 (1994). As an aside, recall that in all these cases, the norms of well-socialized commoners can override law-created incentives.

<sup>175</sup> Cf. Scott & Scott, *supra* note 112, at 1283 (a cooling-off period “reduces the risk of asymmetric investment” by reducing the risk of strategic exits or threats of exit, and encourages the parties to invest in the relationship even where the expected reciprocity is long-term). Some may object to our reliance on people’s irrationality as a means for driving the right outcome, suggesting that our solution offends transparency, which is another important liberal value, and – even more importantly – is disrespectful of people. But both  
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In most, if not all, cases, a cooling off period corresponds to, rather than undermine, our liberal commitments, because it helps ensure a decision to exit that is informed and sincere. A cooling off period gives more time for the benefits of cooperation to be perceived and allows transitory emotions to cool. Even if at the end exit still occurs, the cooling off period allows a departing exploiter – namely: an insincere exiter – to be more readily caught and compelled to disgorge unjust profits.

2. *Exit Taxes.* If prohibitive, exit taxes are incompatible with our liberal commitments, in part because they can thwart the desires of commoners who want to flee majority exploitation. But if reasonable, exit taxes can serve as an important cooperation-enhancing device, as well as ensure that the exiter's decision is informed and sincere. The dividing line between the prohibitive and the reasonable is imprecise, but by no means arbitrary. Exit taxes are reasonable and thus legitimate if they serve either a protective function or a deterrence function, but only up to a point.

As a protective device, exit taxes ensure that people will not decide to exit too casually and help protect innocent commoners from the potential harm caused by one member's exit. In this role, exit taxes should monetize the destructive effects of exit, targeting, in the alienation example, the costs of recruitment and socialization of a replacement commoner who can effectively replace the exiter (including the associated monitoring costs), and in the dissolution case ameliorating the costs of community break-up.

As a deterrence device, exit taxes should set a limit on incentives to defect, thus deterring opportunistic departure.<sup>176</sup> In this context, an arguably appropriate measure (balancing administrative costs against potential under-deterrence) is the present value of the benefits to the exiter that the commoners

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<sup>175</sup>(...continued)

of these objections must be wrong. People's cognitive biases do not necessarily disappear if they are exposed, and thus there is no need to conceal the law's reliance on these failures. Further, there is no reason to think of such deviations from the rational-actor model in derogatory terms. Some of the most rewarding goods of life cannot and should not be reduced to the market rationality. See generally ANDERSON, *supra* note 112, ch. 7 (discussing the ethical limitations of market rationality).

<sup>176</sup> One concern with exit taxes is that, by increasing the incentive needed before exit becomes rational, they may induce opportunists to exploit even more to justify their costs on exit. If so, then exit taxes would not ameliorate, but rather exacerbate exploitation. But by pushing potential such exploiters to being so greedy, exit taxes can also significantly increase the likelihood of detection. This effect is likely to (at least) counterbalance the concern of exacerbating exploitation.

conferred assuming that the exiter would remain in a long-term relationship with the commons resource.<sup>177</sup> Restitution of such non-cash benefits does not violate liberal commitments to free choice if, but only if, these benefits were willingly accepted by the member, or can be easily reduced into wealth.<sup>178</sup>

A problem may arise even if exit taxes are appropriately set to address either the protective or deterrence functions. A correctly set exit tax may nevertheless have the effect of practically locking members into their current communities. In such case, there is an unavoidable choice between the commitment to enhance cooperation and the liberal value of preserving exit. We would lean towards a more cautious attitude, by which we mean one that requires both justification under the protective or deterrence rationales *and* assurance that members can leave.<sup>179</sup>

3. *Rights of First Refusal.* Rights of first refusal may represent another modest limitation on exit aimed at facilitating cooperation.<sup>180</sup> For alienation, such rights target the commoners' often reasonable concern regarding the possibility of undesirable entrants.<sup>181</sup> Rights of first refusal allow the group some degree of control over the identity of future transferees of the current commoners. More importantly, these rights provide a mechanism for preventing the entry of non-

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<sup>177</sup> See generally Hanoch Dagan, *Encroachments: Between Private and Public*, in THE COMPARATIVE LAW OF UNJUSTIFIED ENRICHMENT (David Johnston & Reinhard Zimmermann eds., forthcoming 2000) (arguing that restitution of benefits is the appropriate measure for deterring infringements).

<sup>178</sup> See Dagan & White, *supra* note 137, at 387-89; *contra* Rosen, *supra* note 72, at 1101. Rosen's only stipulation on this matter is that, "Rules requiring disgorgement of particular economic benefits allocated to the community member on the assumption that he or she would be a lifetime member should be presumptively valid to the extent such provisions do not make exit an impossibility." *Id.* Our approach above is more careful about autonomy.

<sup>179</sup> Ideally, exit taxes should be calibrated in utility terms, which requires that they take into account wealth disparities. In some settings this fine-tuning may prove, however, to be too cumbersome from an administrative standpoint.

<sup>180</sup> The conventional wisdom has long been that these rights have, at most, a minimal effect on property value because they do not impede alienation. See, e.g., 3 ERIC MILLS HOLMES, CORBIN ON CONTRACTS § 11.3, at 484-85 (Joseph M. Perillo ed., rev. ed. 1996). Recent work, though, suggests that, because of high search and negotiation costs of bidding on unique property subject to first refusal rights, alienation (and hence owner exit) may be significantly burdened. See David I. Walker, *Rethinking Rights of First Refusal*, 5 STAN. J. LAW, BUS. & FIN. (forthcoming 2000).

<sup>181</sup> See McKean, *supra* note 4, at 263 (noting that successful commons regimes tend to have careful eligibility screening for individual households).

cooperative parties as well as for preventing exploitation by exiters who may be motivated either by spite or by the possibility of side payments from remaining members to ensure cooperative replacements.

Regarding dissolution, rights of first refusal may be an effective means of preserving community where a subset of members resist breaking up the community and are willing to buy out the party seeking exit. To preserve exit, given such a buy-out right, the price should be set according to the fair market value of the exiter's share (minus the exit taxes, if they apply) if the commons resource were dissolved.<sup>182</sup>

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The three spheres of a liberal commons work together, as Figure 1, below, summarizes. The sphere of individual dominion provides anti-opportunism mechanisms that can yield economic and social gains over private property. The sphere of democratic self-governance can make voice effective by facilitating trust and participation, thus allowing dynamic, satisfying, and prosperous management of the commons resource. Finally, well-calibrated cooperation-enhancing exit can build momentum for continuity in communities while preserving individual autonomy. At least in theory. The next Part examines whether the liberal commons template helps understand one case study in law and practice.

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<sup>182</sup> As an aside, rights of first refusal may raise issues of discrimination, when existing insiders restrict entry, but these issues are better policed through familiar anti-discrimination mechanisms we discussed above.

FIGURE 1: *A Theory of The Liberal Commons*

<i>A. Identifying the Goals</i>	
<i>1. Preserving the Liberal Value of Exit</i>	Recognize the link between exit and autonomy
	Accept reasonable limits on entry
<i>2. Achieving Gains From Cooperation</i>	Maximize economic gains from pooling
	Strengthen the social values from cooperation
	Make context-dependent tradeoffs in cases of conflict
<i>3. Using Law as Safety Net To Catalyze Trust</i>	Recognize the limits of direct legal control
	Deploy law to strengthen social norms
<i>B. The Three Spheres of a Liberal Commons</i>	
<i>1. The Sphere of Individual Dominion</i>	Create defaults that deter opportunistic over-use
	Avoid free-riding and under-investment
	Encourage fair division of fruits and revenues
<i>2. The Sphere of Democratic Self-Governance</i>	Police jurisdictional boundaries
	Build procedures that facilitate voice
	Promote tailor-made, resource-specific adjustments
<i>3. The Sphere of Cooperation-Enhancing Exit</i>	Deter opportunistic destruction of the commons
	Allow limited community interventions to exit

### III. TRAGIC CHOICE IN AMERICAN CO-OWNERSHIP

Modern property law is a story of introducing and refining new liberal commons types, from versions of the close corporation to the condominium all the way to the law of marital property, with each variant spelling out default settings for the three spheres of action, and then encouraging experimentation and custom-tailoring. Even old-fashioned law has pockets of highly articulated

solutions to the problems of shared ownership, usually regimes addressed to particular natural resources, such as riparian law regarding running water, or unitization rules for oil fields.<sup>183</sup> While our future work will show how the liberal commons helps make sense of numerous legal institutions,<sup>184</sup> here we explore a fraught story drawn from old-fashioned default rules, rules that have proven poorly tailored to liberal commons goals.

The hostile default American law of co-ownership invites tragedy: it undermines cooperation even when co-owners seek to work together, encourages distrust and mis-use that may delay or even prevent use of emerging resources, and, more generally, imposes enduring losses whenever strategic behaviors or transaction costs deter people from voluntarily adopting a more-tailored liberal commons form. We force people to choose between laboriously contracting for their own liberal commons or suffering under existing background rules that encourage conflict, mismanagement, and division. Property law can do better.

The decline in black rural landownership detailed in the first section forms the backdrop for our case study. The second section shows that the American law of co-ownership incorporates choices in each sphere of action that disfavor effective commons ownership. For each choice the American law makes, we counterpose choices made by other developed legal systems that are more supportive of liberal commons goals. Seen from this global perspective, the American system is an outlier on a spectrum. The decline in black landownership that has frequently been understood as an inevitable result of the workings of ownership and management of commons resources, may instead be, in some part, the contingent result of discrete legal choices.

### *A. The Disappearance of Black Rural Landowners*

As an initial caveat, this section does not make any of several possible claims regarding declining black farmland ownership. First, we do not claim, or believe, that the law of co-ownership accounts, in a strong sense, for declining black ownership rates. Rather, we suspect that in a regression analysis, farm size

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<sup>183</sup> These default forms include not only co-ownership, but also, for example, riparian ownership for neighbors along running streams. JOHN E. CRIBBET & CORWIN W. JOHNSON, PRINCIPLES OF THE LAW OF PROPERTY 407 (3d ed. 1989).

<sup>184</sup> The next two articles in this series will be Dagan, et. al, *supra* note 59 and Heller & Hills, *supra* note 60.

would explain statistically most of the decline: similar-sized white-owned farms and solely-owned black farms have also largely disappeared. Second, and related, we do not claim that comprehensive reform of co-ownership law if made in previous generations would have operated directly to preserve black farms. The effects of poverty and race discrimination have been such that black farmers would likely have been done out their land (by loan sharks and other scam artists) even if the law of co-ownership were more favorable. Third, we do not claim that any individual legal change makes a difference for potential black farmers. Given our view of how law operates to affect behavior, farmers are unlikely to act on, or even be aware of, any discrete law reform.

Instead, we raise the black land case in a more tentative spirit, meant to illustrate how the liberal commons approach helps frame new questions, provoke research, and suggest attractive reforms. The case study provides a backdrop for, and gives some texture to the evaluation of, the law reforms we discuss in the following section. While no individual law reform seems likely to have mattered in this example, collectively the package of reforms we propose may have made some difference. Had the law been supportive of cooperation in the spirit of the liberal commons, its behavioral and expressive effects might have helped in changing the outcome for at least some black farm families, those who wanted to maintain their farms but were driven off by the unintended consequences of bad law.

1. *The Rise and Fall of Heir Property.* – Consider a common tale of commons property: in 1887, John Brown, a black man, bought 80 acres of land in Rankin County, Mississippi; in 1935, he died intestate, leaving his wife and children as heirs who in turn also died intestate, leaving the land to their children and grandchildren.<sup>185</sup> One of these grandchildren, Willie Brown, began consolidating ownership in the land by buying the interests of five of John's nine children: Frances, Minnie, Adda, Joe, and Lizzie. By the time Willie died, he had accumulated an undivided 41/72nd interest, which he left to his wife Ruth. In 1978, Ruth filed for partition in kind of the farm, asking that her interest be physically separated from the remainder held by sixty-six other Brown heirs,

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<sup>185</sup> See THE EMERGENCY LAND FUND, THE IMPACT OF HEIR PROPERTY ON BLACK RURAL LAND TENURE IN THE SOUTHEASTERN REGION OF THE UNITED STATES 283-286 (1984) [hereinafter HEIR PROPERTY]. See generally, Thomas W. Mitchell, *From Reconstruction to Deconstruction: Undermining Black Landownership, Political Independence and Community Through Partition Sales of Tenancies in Common* (Unpublished LL.M. thesis, University of Wisconsin, 1999) (manuscript on file with authors) (discussing role of partition sales in declining black farmland ownership and collecting sources).

whose interests ranged from 1/18th down to 1/19,440th of the farm.<sup>186</sup> The court, however, ordered the land partitioned by sale with the proceeds divided among the heirs.<sup>187</sup> At the sale, a white-owned lumber company outbid Ruth.<sup>188</sup> Ruth got some cash, more than she was willing or able to pay, but less perhaps than she would have demanded to compensate her for the farm's subjective value, for its role in preserving her family's cohesion and traditions. Just after the Civil War, when John Brown bought his 80 acres, black landownership in America began a steep rise. Nearly a century later, Ruth Brown lost her family land and black landownership has nearly disappeared.

The uprooting of landed heirs is an oft-repeated tale in black America, particularly in the rural south.<sup>189</sup> From 1920 to 1978, the number of black-operated farms in the US dropped 94 percent from almost 1 million to just over 5,000; by comparison, white-operated farms dropped 56 percent from about 5.5 million to 2.4 million.<sup>190</sup> In absolute terms, there are fewer than 18,000 black farmers in America today, less than 1 percent of American farmers, and blacks continue to abandon farms at a rate three times that of whites.<sup>191</sup> Why? Leave aside racial discrimination and wealth effects for the moment, factors that matter in this story and to which we will return.<sup>192</sup> Some scholarly explanations for the

<sup>186</sup> HEIR PROPERTY, *supra* note 185, at 284-86 (listing heirs' interests and reproducing the Brown family tree).

<sup>187</sup> *Id.* at 283.

<sup>188</sup> *Id.*

<sup>189</sup> See BLACK FARMING, *supra* note 1, at 45. 85 percent of all black farmers are concentrated in the south, but they are rare even there, totaling only about 6 percent of southern farmers. *Id.*

<sup>190</sup> See *id.* at 2-3. More precisely, between 1959 and 1969, the number of black commercial farm operators declined by 84 percent by contrast with a 26 percent decline in the white farm population. See *id.*, at 40. Between 1970 and 1980, the black farm population dropped 65 percent, compared with a 22 percent among whites. See *id.*, at 44. For state-by-state data on declining black landownership, see US. DEPARTMENT OF COMMERCE, OFFICE OF MINORITY BUSINESS ENTERPRISE, LAND AND MINORITY ENTERPRISE: THE CRISIS AND THE OPPORTUNITY, (June 30, 1976). For a county-by-county breakdown of black landownership in the south, see ROBERT S. BROWNE, ONLY SIX MILLION ACRES: THE DECLINE OF BLACK OWNED LAND IN THE RURAL SOUTH App. Q-W (1973).

<sup>191</sup> 15,000 Black Farmers File Claims in Racial Settlement, NYT, Sept. 21, 1999, at A25 [hereinafter *Settlement*]; see also, BLACK FARMING, *supra* note 1, at 44 (Of America's six million farm residents in 1982, 4 percent were black.).

<sup>192</sup> *Settlement*, *supra* note 191, 203, at A25 (discussing decades of routine  
(continued...))

precipitous decline of black landownership have focused on the role of partition sales, which are the background legal mechanism governing disposition of co-owned land in the Brown family saga.<sup>193</sup> Over a quarter of remaining black-owned land in the southeast is now “heir property” averaging eight co-owners, five of whom live outside the southeast.<sup>194</sup> By 1986, “more Mississippi land [was] owned by blacks in Chicago than by blacks in Mississippi.”<sup>195</sup> As one study concludes, partition laws, “are unquestionably the judicial method by which most heir property is lost.”<sup>196</sup>

Heir property is just co-owned property arguably rendered ungovernable because of repeated rounds of intestate succession, a particular issue for southern rural black landowners with “superstitions about making wills,”<sup>197</sup> but no desire to have their family farmland broken up or sold. In general, when a landowner dies intestate (that is, without a will), the heirs at law receive fractional undivided interests in the land. For example, each of John Brown’s nine children received a 1/9th undivided interest in the 80 acres. Often, this first generation of heirs successfully manages their parents’ property, but second and third generations multiply quickly and prove less and less able collectively to cope.<sup>198</sup>

Over time, practical problems become unresolvable. Under the American law of co-ownership, unless fractional owners unanimously consent, the underlying land cannot practically be managed in any useful way, nor can it be mortgaged, nor can any discrete fraction of the land be sold. Without effective democratic self-governance mechanisms for co-owned property, “heir property is rarely improved or developed, due to the threat of partition sales and the difficulty of obtaining credit on partial interests in the property. ‘In fact, a third

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<sup>192</sup>(...continued)

discrimination by the Agriculture Department in denying crucial loans to black farmers).

<sup>193</sup> See, e.g., HEIR PROPERTY, *supra* note 185, at 282; Mitchell, *supra* note 185, at 4-7.

<sup>194</sup> HEIR PROPERTY, *supra* note 185, at 62.

<sup>195</sup> Ward Sinclair, *Black Farmers: A Dying Minority*, WASH POST, Feb. 18, 1986, at A1.

<sup>196</sup> HEIR PROPERTY, *supra* note 185, at 282.

<sup>197</sup> Joseph Brooks, *The Emergency Land Fund: A Rural Land Retention and Development Model in THE BLACK RURAL LANDOWNER – ENDANGERED SPECIES* 117, 121 (1979).

<sup>198</sup> See HEIR PROPERTY, *supra* note 185, at 282-83; see generally BROWNE, *supra* note 190, at 54. Governance difficulties are compounded because identifying heirs with legal interests becomes a more complex and expensive project with each passing generation. *Id.*

more heir than non-heir property is not being used at all.”<sup>199</sup> Thus, “[t]he sale of the land, usually precipitated by a heir who is more than one generation removed from the originating source, becomes inevitable.”<sup>200</sup>

2. *Community-Destroying Exit.* – What are the paths by which black landownership ends? First, as with the Brown example, resident heirs may bring suit to quiet title intending to acquire ownership in severalty of part of the farm.<sup>201</sup> By seeking a partition in kind, these heirs express their preference to stay on the land and to gain access to mortgages and other ordinary incidents of sole private ownership.<sup>202</sup> Despite the heir’s request, and the law’s nominal preference for partition in kind, courts usually order a partition sale because the number of heirs and limited size of the property makes physical division impracticable.<sup>203</sup> The second, more sinister, path to partition sales originates with non-resident heirs. A non-family member may acquire a distant non-resident heir’s fractional share in a family farm specifically for the purpose of forcing a partition sale at which the outsider can buy the whole tract.<sup>204</sup> Because heir property is very common among rural blacks, “the black community is particularly vulnerable to the unscrupulous partition sale brought about by someone buying out the interest of a single heir and then demanding that the land be sold.”<sup>205</sup>

Partition sales, like foreclosure and tax sales, prove to be poor, often rigged markets with little information and few buyers: “The purchasers at these [partition] and tax sales are almost always white persons, frequently local lawyers or relatives of the local officials, who make it their business to keep abreast of what properties are going to auction and who attend the auctions

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<sup>199</sup> BLACK FARMING, *supra* note 1, at 68.

<sup>200</sup> HEIR PROPERTY, *supra* note 185, at 282-283.

<sup>201</sup> See BROWNE, *supra* note 190, at 54.

<sup>202</sup> As an aside, filing suit often turns out to be a significant strategic error based on the mistaken belief by most southern rural black landowners (according to surveys) that “an heir’s interest cannot be sold without the consent of all the heirs, and that heirs in possession of the land have superior rights to the land.” BLACK FARMING, *supra* note 1, at 69 (reporting survey of black landowners).

<sup>203</sup> Even when partition in kind is possible and perhaps even practical, court favor partition sales. See 4A POWELL ON REAL PROPERTY ¶ 612 (Rohan ed. 1998)[hereinafter POWELL].

<sup>204</sup> See BROWNE, *supra* note 190, at 55.

<sup>205</sup> Brooks, *supra* note 197, at 121.

prepared to buy.”<sup>206</sup> Given wealth disparities, widespread discrimination in access to credit for rural black households, and the ordinary imperfections of these rural auctions, partition sales in practice mean the transfer of the land from resident black heirs with fractional interests to white purchasers who often pay below market value and pay nothing for the farm’s intangible value in preserving family cohesion.<sup>207</sup>

Farming, from all reports, is a chancy business. If cashing out simply improves blacks’ overall position and consolidates economically obsolete farms,<sup>208</sup> then the decline in black landownership may not be a serious problem, notwithstanding the congressional studies<sup>209</sup> and private initiatives<sup>210</sup> concerned with halting this trend. However, declining black landownership also can be traced in part perhaps to the difficulty of governing fractionated land, resulting in partition sales initiated either by resident heirs seeking to improve land management or by non-resident heirs and their purchasers seeking to acquire the whole farm at bargain prices.<sup>211</sup> The hostility of American law towards co-

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<sup>206</sup> See BROWNE, *supra* note 190, at 55. Indeed, these bidders may well be the people who induced the action for partition. *Id.*

<sup>207</sup> Criticizing the prevalence of forced partition sales, one note argues that judges have “misapplied the statutes and allowed private interests to use the statutory process as a land acquisition tool at the expense of cotenant landowners.” John G. Casagrande, Jr., Note, *Acquiring Property Through Forced Partitioning Sales: Abuses and Remedies*, 27 B.C. L. REV. 755, 772 (1986).

<sup>208</sup> The average commercial black owned farm in the south is 128 acres, while the average white owned farm is 428 acres. BLACK FARMING, *supra* note 1, at 50. “Economies of scale, research and technology, tax benefits, government price and income supports, and commercial lending all militate against the survival of black-operated small farms.” *Id.*

<sup>209</sup> See BLACK FARMING, *supra* note 1; Housing and Community Development Amendments of 1978, Pub. L. No. 95-577, § 509, 92 Stat. 2114.

<sup>210</sup> The most significant private initiative is the Emergency Land Fund, a private, non-profit organization founded in 1971 to counter black land loss. See Brooks, *supra* note 197, at 117.

<sup>211</sup> There are incentives outside of property law that also encourage partition. For example, attorney fee structures often award lawyers 10 percent of the land value on partition sale, but not if the title problem is informally resolved. There are many stories of lawyers who have initiated partition suits for heirs over the objection of the heirs’ families. In one case, a New York heir asked her lawyer to provide deeds to the family property, but the lawyer instead filed an action for sale and partition. When the heir fired the lawyer, the lawyer then found another heir to prosecute the suit. See HEIR PROPERTY, *supra* note 185, at 292-93. Also, the tax system encourages partition sales by favoring wealthy investors  
(continued...)

ownership appears to impose several costs, not only on individual black families, but perhaps on farm communities more broadly.<sup>212</sup>

Landownership provides benefits other than just farm income. Commoners may prefer not to sell because they identify alternative, economic uses or they place a high subjective value on keeping the land in the family. For example, one study of a rural North Carolina community showed how landownership provides reciprocal benefits within black families; older owners can obligate children by allowing them to settle on the land, the children then provide support for the elderly landowner in this residential enclave.<sup>213</sup> By contrast, the study notes, landless elderly people prove less able to mobilize informal support and suffer lower living standards.<sup>214</sup> Along with simple economic reasons, there may also be cognitive framing issues for sales: a farm might stay in the family because they would not be “willing to accept” the market price; but if forced to bid at auction, that same family might only be “willing to pay” a lower amount and thus lose the farm.<sup>215</sup> Finally, when commoners do decide to sell non-economic farms, they only get distressed prices for individual share sales or at partition auctions. They could do better by marketing the property cooperatively, but if the law facilitated cooperation, then they might not want to sell in the first instance.<sup>216</sup>

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<sup>211</sup>(...continued)

who can write off certain losses in ways not available to low or moderate income farmers. See BLACK FARMING, *supra* note 1, at 4.

<sup>212</sup> See, e.g., William E. Nelson, Jr., *Black Rural Land Decline and Political Power*, in Brooks, *supra* note 197, at 83, 93 (“The absence of a viable equity base has been costly to the black community both economically and politically. Black dependency on white economic support has served to rob the black community of its autonomous decision-making potential.”).

<sup>213</sup> See Lisa Groger, *Tied to Each Other Through Ties to the Land: Informal Support of Black Elders in a Southern U.S. Community*, 7 J. CROSS-CULTURAL GERONTOLOGY 205, 205, 210 (1992).

<sup>214</sup> *Id.* at 205, 217; see also Lisa A. Kelly, *Race and Place: Geographic and Transcendent Community in the Post-Shaw Era*, 49 VAND. L. REV. 227, 243 n.56 (1996).

<sup>215</sup> This phenomenon of cognitive psychology was hypothesized by Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979). Later studies confirmed the effect. Loss-aversion may at least partially explain this difference. Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, 59 J. BUS. S251, S258 (1986).

<sup>216</sup> Perhaps locking people together by preventing alienation, the no-exit illiberal (continued...)

We cannot know how much of the sharp decline of black landownership should be attributed to race and class discrimination, or to market forces that make small farms uneconomical. However, it seems plausible that, at least on the margin, some of this decline might have resulted from a particular default legal regime that does not support commons ownership and instead actively undermines any possibility for its success, even when the family deeply desires to continue working together, to keep land in the family, and to give family members a fair share when they leave.

*B. How Law Can Dissolve Tragic Choice*

The American law of co-ownership shrinks from any attempt to facilitate management of co-owned resources. Instead, by providing incentives for mismanagement, the default rules of the common law make the continuing existence of a commons a risky enterprise for commoners (technically, usually co-tenants).<sup>217</sup> Over time and in many ways, the American law of co-ownership dilutes the value of interests in commons property, making them less and less usable for the commoners. Combined, the rules promote under-use, over-use, and under-investment – anything but the actions of an ordinary sole owner managing one’s own property. Given the penalty default legal regime of the common law, the tragedy of the commons turns out to be a self-fulfilling prophecy.

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<sup>216</sup>(...continued)

solution, would have kept some more farms within the family. But such a solution, even if it achieved community-preserving goals, would still be tragic, because it sacrifices each heir’s liberty to exit. Further, we question whether preventing alienability would necessarily achieve even instrumental community-building goals. Consider the disastrous consequences of federal allotment policy for Native Americans which locked people together without providing effective internal self-governance mechanisms. See Heller, *supra* note 51, at 1213-17 (discussing tragedy of the anticommons resulting from these policies).

<sup>217</sup> Co-tenants are those who share land under the common law regime of tenancy in common. Each individual tenant has an interest in the same piece of property that has undivided. Unlike joint tenants, there is no right of survivorship among co-tenants. See DUKEMINIER & KRIER, *supra* note 7, at 321-34. In all states where it existed, the presumption in favor of joint tenancy has been abolished, *id.* at 323, so on death and in the absence of a will, heirs hold property as tenants in common. Abolishing the presumption of joint tenancy, thus, may have had the unintended effect of accelerating fractionation.

By contrast, Continental legal regimes do a better job of supporting the goals of a liberal commons, although some fall short in significant ways. Legal regimes which descend more from the French side of the tradition (i.e., France, Belgium, and the American state of Louisiana) diverge in a few places from those on the German side (i.e., Germany, Austria, Switzerland, and in this context Israel). One of these divergences – the requirement of unanimity in democratic self-governance – marks the French tradition a significantly less supportive than its Germanic counterpart. But viewed broadly, Continental legal systems possess most of the features we identified as supporting the liberal commons: facilitating the flourishing of the common use of property while still allowing meaningful exit. Even those Continental legal systems of the French tradition which carry the uncomfortable baggage of unanimity (creating the conditions for anticommons tragedy), are still considerably more supportive of the liberal commons than the American law. Even England, America's common law parent recently passed a law reform that significantly aligns its law with liberal commons goals.

The differences between the American and Continental laws of co-ownership are quite tedious (and we have relegated some details to footnotes). But, over time, it is just the collective impact of those tedious details (which follow) that shape the norms of communities of co-owners, and tilt co-owners' attempts to cooperate towards success or failure. Whether something more like the Continental law would have made a difference for the black landowner is difficult to guess in retrospect. Perhaps not. And no single change would likely have made any difference. The decline may have been over-determined, with racism in lending and changes in technology dwarfing subtle changes in the formal law. There is no way now to tease out the causal links between formal law and the informal norms and practices among black farm families and surrounding communities.

Nevertheless, the possibility that European farm families can now stay more easily on their land when family members depart, suggests at least a testable proposition. Perhaps, the formal law matters occasionally even in rural farm communities and operates as the liberal commons theory predicts. Whether German farm families respond to supportive co-ownership law (or whether regression modeling would point wholly to government price supports<sup>218</sup>), then becomes an interesting question for fieldwork and empirical testing. For

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<sup>218</sup> See, e.g., Alison Maitland, *Shrewd farmers see the way the wind is blowing*, FIN. TIMES, Mar. 17, 1998, at 2 (discussing German farmers' support for extensive price subsidies).

emerging and “new economy” resources today, perhaps a default co-ownership law supportive of the liberal commons could be even more important in catalyzing a virtuous circle of trust and cooperation.

1. *The Sphere of Individual Dominion.* –  
a. *American Law.*

The common law facilitates a race to over-use; the classic image of a tragedy of the commons. Each commoner is entitled to full possession and, more importantly in most states, can possess and use the commons without paying any rental value to the non-possessors<sup>219</sup> (so long as the non-possessors are not excluded or ousted from possession).<sup>220</sup> These rules provide an incentive for overuse because each commoner must make affirmative uses, or else receive no rents from the resource.<sup>221</sup>

In the farm context, the common law incentives for under-investment are probably much more salient. As an initial matter, the law is relatively receptive to claims for accounting or contribution for payments of taxes, mortgages, and other necessary charges made by one commoner on behalf of the others.<sup>222</sup> But

<sup>219</sup> See DUKEMINIER & KRIER, *supra* note 7 at 351, 51 A.L.R.2d 383 (1952); *cf.* 2 AMERICAN LAW OF PROPERTY 219, at § 6.14, at 57 (A. James Casner ed., 1952) [hereinafter ALP]. There are, however, jurisdictions which have adopted other rules. For example, some jurisdictions have statutes that specifically require tenants in possession to compensate non-possessory commoners for the value, usually calculated as the non-possessing tenant's proportionate share of rent, as if the property were rented to a third party. See Evelyn Alicia Lewis, *Struggling with Quicksand: The Ins and Outs of Commoner Possession Value Liability and a Call for Default Rule Reform*, 1994 WIS. L. REV. 331, 351 (1994); ROGER A. CUNNINGHAM ET. AL, THE LAW OF PROPERTY § 5.18, at 214 (2d ed., 1993) [hereinafter CUNNINGHAM]. Other jurisdictions hold the duty to account applicable whenever a commoner derives any income from the sole possession of the property in the form of rents or otherwise. See *id.* at § 5.18, 213.

<sup>220</sup> See CUNNINGHAM, *supra* note 219, at § 5.18, 211.

<sup>221</sup> In theory, but not in practice, the law of waste might penalize a cotenant for over-use, such as clear-cutting timber from property today if the timber would be more valuable in later years. While the law of waste is designed to avoid property usage that fails to maximize the property's value, the law is sufficiently confused and the penalties sufficiently light that overuse is encouraged. See RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 73 (4<sup>th</sup> ed. 1992). Courts are very divided over the question of whether cutting timber or drilling for oil (activities that on the appropriate scale the law may well want to encourage) constitute waste. See 2 ALP, *supra* note 219, at § 6.15, 65.

<sup>222</sup> See DUKEMINIER & KRIER, *supra* note 7, at 359; 2 ALP, *supra* note 219, at § 6.17, 73-74. Some jurisdictions, however, have adopted a rule that if the tenant who paid taxes is in possession and the value of their use and enjoyment equals or exceeds such payment,

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if one commoner makes necessary repairs without the others' consent, most courts are much less forthcoming, allowing the investing commoner to receive contribution only at partition, or through a setoff in the (rare) case where a court requires an investing commoner to account for rents and profits.<sup>223</sup> This rule has been rationalized as necessary because questions "of how much should be expended on repairs, their character and extent, and whether as a matter of business judgment such expenditures are justified" are too uncertain for the law to settle.<sup>224</sup> Thus, commoners who make repairs take a significant risk that they will not be reimbursed; alternatively, they are led to partition as the only available avenue to recoup their investment expenditures.<sup>225</sup>

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then there is no cause of action for contribution. *See* 2 ALP, *supra* note 219, at § 6.17, 76; DUKEMINIER & KRIER, *supra* note 7, at 359. This modification, however, is itself not uniformly applied. *See* 51 A.L.R.2d., *supra* note 219, at 455-59.

<sup>223</sup> On the complex, conflicting, and multifarious approaches to co-tenants and repairs, consult 2 ALP, *supra* note 219, at § 6.18, 80; CUNNINGHAM, *supra* note 219, at § 5.9, 215; 2 GEORGE E. PALMER, THE LAW OF RESTITUTION § 10.7, 430 (1978); DUKEMINIER & KRIER, *supra* note 7, at 359; Berger, *supra* note 145, at 1019-20; John P. Dawson, *The Self-Serving Intermeddler*, 87 HARV. L. REV. 1409, 1422-23 (1974).

It may appear at first sight that the doctrine of ouster provides a background rule of strict accounting. An action for ejectment restores possession to an ousted plaintiff and awards the plaintiff mesne profits, with an offset for necessary repairs (and perhaps some improvements, if profits are attributable to them). *See* CUNNINGHAM, *supra* note 219, at § 5.8, 212, 214. Ouster, however, requires an express denial of another cotenant's right to entry and possession. The doctrine provides no remedy for a cotenant who is in possession or who is voluntarily not in possession. *See id.*, at § 5.8, 211; 2 ALP, *supra* note 219, at § 6.13, 52-54. Furthermore, there is a presumption that one cotenant's possession (even if sole possession) is not adverse to other cotenants. *See* 7 POWELL, *supra* note 203, at § 50.03(2); 51 A.L.R.2d 388, § 13, at 437 (1957). Thus, ouster doctrine provides a recourse in only a limited set of circumstances and may be costly or difficult to prove even then.

<sup>224</sup> 2 ALP, *supra* note 219, at § 6.17, 78.

<sup>225</sup> To complete the picture, one should mention the common law rules regarding improvements. Co-tenants who make improvements on the property are generally unable to bring an action for contribution, nor are they credited the cost of the improvement in an accounting for rents and profits. *See* 2 ALP, *supra* note 219, at § 6.18, 81; Dawson, *supra* note 223, at 1424. The only recourse available for tenants to recover their investment is partition. *See* Dawson, *supra* note 223, at 1425; DUKEMINIER & KRIER, *supra* note 7, at 360. Nevertheless, even with partition, the valuation of improvements discourages such expenditures. The majority rule is that improving co-tenants are entitled to the lesser of the cost of the improvement or the additional increase in property value. *See* PALMER, *supra*

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*b. Comparative Perspective.* The Continental traditions have desirable rules for discouraging both over-use and under-investment. To avoid over-use, Israel (and Louisiana) make the user liable to the other co-owners for the cost of use.<sup>226</sup> Further, countries in the Continental traditions distribute the net fruits and revenues of the property on the basis of the commoners' shares in the property, thus helping both to discourage overuse and to inculcate a sense of community among the commoners.<sup>227</sup> Likewise, Germany and Israel require immediate reimbursement for expenses reasonably required for maintenance and management of the commons resource, while denying compensation for improvements (whose value is less clearly shared by all commoners).<sup>228</sup> This relatively broad provision for immediate reimbursement for non-contestable (reasonable) collective goods bestowed upon the land discourages the sort of under-investment that can make common ownership inefficient. Furthermore,

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note 223, at § 10.7, 429; 2 ALP, *supra* note 219, at § 6.18, 83. Some courts even say that credits for improvements can only off-set additional moneys owed and cannot be a source of income. See Dawson, *supra* note 223, at 1425-26.

<sup>226</sup> LOUISIANA CIVIL CODE Art. 806; ISRAEL LAND LAW § 33.

<sup>227</sup> Section 35 of the Israel Land Law provides that, "Every joint owner is entitled to a share in the proceeds of the joint property in accordance with his share in the property." In the *Yotzer* case, the court declined to give this passage a narrowing interpretation that would have applied it only to situations in which the proceeds are due to no one owner's labor, or even adopting our complex intermediate approach. C.A. 274/82 *Yotzer v. Yotzer*, P.D. 29(1) 53, 55-56. For similar rules in Germany and Austria see GERMAN CIVIL CODE § 743(1); AUSTRIAN CIVIL CODE Art. 839; Karsten Schmidt, in MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, § 743, 7 (3rd ed. 1997); Langhein, *supra* note 229, at § 743, 10, 11. In a unique case, a German court allocated 100% of profits from advertising to one co-owner of a gable wall who had allowed his side of the wall to be used for these purposes. 43 BGHZ 127, 133-34 (1965). This outcome has been explained by the fact that, although a gable wall is jointly owned, each side is intended to be used exclusively by one owner. See Langhein, *supra* note 229, at § 743, 12.

<sup>228</sup> For Germany, see BGH, WERTPAPIER-MITTEILUNGEN 196-97 (1975), interpreting § 748 of the German Civil Code (Ian S. Forrester, et al., trans., 1975) ("Each participant is bound as against the other participants to bear the burdens of the common object and the costs of maintenance, management, and common use in proportion to his share."); see also Langhein, *supra* note 229, at § 748, 19 (no compensation for improvements). This rule also governs in Israel. See ISRAEL LAND LAW §§ 31, 32. Interestingly, the Swiss law, which generally follows the German Continental tradition, seems more like the American in this aspect, only granting the co-owner the right to "take on his own the necessary steps which have be taken without loss of time in order to preserve the object from imminent or increasing damage." SWISS CIVIL CODE Art. 647.

such a regime of instantaneous contribution assumes that dissolution is not a satisfying first-best solution, but should be indeed a solution of last resort.<sup>229</sup>

2. *The Sphere of Democratic Self-Governance.* –

a. *American Law.* One commentator aptly notes, “co-tenant conflicts are for the most part hidden dramas.”<sup>230</sup> Co-owned property in the American common law is governed by a rule of unanimity – each commoner has veto power over the decisions of the other commoners regarding property management. A leading text notes, “[i]f the co-tenants cannot agree neither law nor equity can settle such difference; nor can they specifically settle how the property shall be used and enjoyed. The law’s remedy in all such cases is

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<sup>229</sup> The Continental tradition also prohibits individuals from making use of the resource in a manner that interferes with the reasonable use of other co-owners. See FRENCH CIVIL CODE Art. 815-9; GERMAN CIVIL CODE § 743(2); AUSTRIAN CIVIL CODE Art. 828; SWISS CIVIL CODE Art. 648 (1); ISRAEL LAND LAW § 31; LOUISIANA CIVIL CODE Art. 802. They employ flexible guidelines to restrict use to what may have reasonably been expected by the other commoners, typically by reference to the nature of the property and its previous uses. Of course, the United States law and other regimes that we generally consider less supportive of the liberal commons also prohibit such interfering use. The salient difference in this area comes in the details of how this prohibition is implemented. Of particular importance is the rule adopted when joint use is impossible or unreasonable. In such a situation, where similar use by both would be impossible, can one party then use the property to the exclusion of the other? As we have seen, American law allows this inconsistent use, encouraging the parties to enter into a strategic game where each seeks to be the one allowed to exclude the others, behavior inconsistent with the idea of productive cooperation. Forbidding such use, on the other hand, encourages the parties to reach a cooperative and efficient solution (such as by rental to a third party). Providing an incentive for such a solution is the supportive approach to take to encouraging a liberal commons. German law provides just such a supportive approach: use by one owner is allowed only when it does not interfere with the use of other owners. See Gerd-Hinrich Langhein, in J. VON STUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH, § 743, 38 (13th ed. 1996). If joint use is impossible, the disposition of the property must be determined by the agreement of all of the commoners; if this is impossible, a majority vote may determine the use of the property and compensation for the benefits of this use must be paid to the non-using owners. See GERMAN CIVIL CODE § 745 (3) 2. Swiss law is similar in this regard. See Arthur Meier-Hayoz, in BERNER KOMMENTAR, vol. IV. 1, Art. 648, 17-23 (Swiss provision). Israeli law is unsettled on this matter, with one Justice favoring the unsupportive American approach and another favoring the supportive rule. See *Vilner v. Golani*, P.D. 42(1) 49. Justice Ben-Porat favors the American approach while Justice Netanyahu favors the supportive approach.

<sup>230</sup> Lewis, *supra* note 219, at 351.

partition.”<sup>231</sup> For example, if differences arise among commoners regarding whether to jointly enter into a transaction – such as borrowing money against the property or leasing it to outsiders – the law does not provide any guidance or facilitation. Absent partition, the veto power each commoner enjoys leads to a tragedy of the anticommons, with wasteful under-use and eventual division as demonstrated by the black landownership saga.

Given these doctrines, it is unsurprising that, “[m]ost lending institutions will not lend money on a partial interest in real property, even if the exact amount of the partial interest is known.”<sup>232</sup> Thus, a commoner can not get a mortgage on an individual fractional interest; and, as a group, unanimity rules prevent commoners from easily combining to get a mortgage on the whole. Without access to finance – a missing market – the sum of the parts proves less than the value of the whole.<sup>233</sup>

*b. Comparative Perspective.* Focusing on the Germanic legal regimes, at the supportive end of the Continental spectrum, the most important way they support the liberal commons, by contrast with the American common law, is by granting a wide jurisdiction for majority rule in the sphere of self-governance, reserving a relatively small sphere for unanimity.<sup>234</sup> However, the threshold German tradition sets between majority rule and unanimity is more restrictive than the threshold our theoretical discussion would suggest. We recommended that majority rule should be available for decisions that tend to increase the size of the pie; and unanimity ought to be required when decisions merely redistribute within a same-sized pie. Instead, Germanic legal systems draw the distinction based on the expectations of the parties. Majority rule is allowed when the decisions do not change the parties’ expectations for how the property will be

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<sup>231</sup> 2 ALP, *supra* note 219, at § 6.18, 78.

<sup>232</sup> HEIR PROPERTY, *supra* note 185, at 306.

<sup>233</sup> The inability of commoners to borrow against the property provides a large incentive for parties to partition.

<sup>234</sup> Not all Continental legal traditions have adopted this supportive rule: in general, those countries who are more closely related to German law have majority rule; while the legal traditions more closely related to France share the less desirable American requirement of unanimity. See FRENCH CIVIL CODE Art. 815-3; BELGIUM CIVIL CODE Art. 577*bis* § 6. See also Louisiana Civil Code, Art. 801, 803; Symeon C. Symeonides & Nicole Duarte Martin, *The New Law of Co-Ownership: A Kommentar*, 68 TUL. L. REV. 69, 131-32 (1993) (preference for partition as the solution where unanimity cannot be reached). As an aside, Kazakhstan also required unanimity as a general rule. KAZAKHSTAN CIVIL CODE §§ 212, 213.

used; unanimity is required for decisions that depart significantly from these expectations.<sup>235</sup>

One may speculate that this rule is based on the concern of risks of courts' errors in complicated disputes as to the utility of conflicting uses. We appreciate this concern. Nevertheless, we believe that adopting such a conservative attitude towards the scope of the majority rule may suffocate the ability of the commons to adapt and grow with changing times. Interestingly enough, Swiss law incorporates our reservation into the expectations-based test by closely scrutinizing the distribution of the benefits of such majority decisions.<sup>236</sup>

Procedural norms of democratic self-governance also distinguish relatively supportive Continental traditions for liberal commons property regimes from the less supportive American law.<sup>237</sup> Both jurisdictional and procedural

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<sup>235</sup> German law itself allows for majority rule for decisions "corresponding to the character of the common object," but requires unanimity for "essential alteration[s] of the object." GERMAN CIVIL CODE, *supra* note 228, at § 745. Israeli law is essentially the same. Israel Land Law § 30(a) (majority rule for "all matters relating to the ordinary manner and use); § 30(c) (unanimity required for other matters); C.A. 810/82 *Zol Bo Ltd. v. Zeida*, P.D. 37(4) 737. Austrian and Swiss law, with minor alterations, have the same system. AUSTRIAN CIVIL CODE Art. 833 (majority rule for ordinary management and use); Art. 834-835 (in the absence of unanimity for significant alterations, dissenters may make specific demands or refer the matter to a judge). SWISS CIVIL CODE Art. 647a-d (majority rule for most administrative acts, useful and necessary repairs); Art. 647e (unanimity required for improvements merely to improve beauty or comfort. Other Continental countries also provide for majority rule in approximately these situations. ITALIAN CIVIL CODE §§ 1105-1106, 1108; GREEK CIVIL CODE Art. 789, 792-93; HUNGARIAN CIVIL CODE §§ 140, 144 (majority for issues "not exceeding standard measures," unanimity for others); CZECH REPUBLIC CIVIL CODE § 139 (majority for all decisions with the ability to appeal to the court to reconsider important decisions); JAPAN CIVIL CODE Art. 251, 252 (majority by value for acts of administration, unanimous for alterations).

<sup>236</sup> For instance, if the agreed-upon alteration requires an unfair contribution by one commoner (for example, paying 1/4, but getting 1/10 of the value, etc.) who voted against the contribution, then that commoner must be compensated. SWISS CIVIL CODE Art. 647d.

<sup>237</sup> Germany provides each co-owner a right to "adequate" participation in the decision-making process, which includes access to adequate information, and a right that each co-owner's opinion be taken adequately into account. See GERMAN CIVIL CODE § 744 (1), § 242; Schmidt, *supra* note 227, at §§ 744, 745, 16, Langhein, *supra* note 229, at § 745, 20. In Israel, there are requirements of disclosure and consultation, C.A. 810/82 *Zol Bo Ltd. v. Zeida*, P.D. 37(4) 737, as well as requirements that parties approach the consultation open to suggestions. Violations of these requirements voids the majority decision. See C.A. 458/82 *Vilner v. Golani*, P.D. 42(1) 49.

norms help make the participation in systems of majority governance more meaningful.

3. *The Sphere of Cooperation-Enhancing Exit.* –

a. *American Law.* How to manage the freedom to exit poses a challenge for the liberal commons. In this sphere, the American and Continental laws have substantial overlap, with a mixed record and few cooperation-enhancing mechanisms. For example, both have similar provisions regarding restraints on alienation of co-owned interests, and the choice between partition by sale and partition in kind. In the American law, the limited mechanisms for cooperation-enhancing exit must be voluntarily agreed in advance by the co-owners. For example, agreements by co-owners not to partition are generally enforceable so long as they do not amount to a restraint on alienation and are for a reasonable time (which can turn out to be quite a long period, indeed).<sup>238</sup> On the other hand, the American law disfavors agreements to restrain sale of co-ownership interests,<sup>239</sup> so co-owners are, in general, unable to block sales to outsiders.

Partition is the dominant exit mechanism.<sup>240</sup> Nominally, partition in kind is the preferred common law method,<sup>241</sup> but it is complex to implement when co-owners can not agree voluntarily on division. To even out shares, courts impose equitable adjustments, such as payments of “owelty” or easements among the

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<sup>238</sup> WILLIAM B. STOEBUCK & DALE C. WHITMAN, *THE LAW OF PROPERTY* 216-217 (3d ed. 2000) (noting that typically a reasonable time is defined as being a time within the rule against perpetuities period); CRIBBET & JOHNSON, *supra* note 183, at 114; 2 ALP, *supra* note 219, at § 6.26, 116. The waivability of the right to call for partition proves to be one of the central features that distinguishes co-ownership from condominium law in general. Unlike co-ownership, condominium statutes or agreements prohibit calls by unit owners partition of the co-owned elements; so exit is by sale of the unit only. *See* STOEBUCK & WHITMAN, *id.*, at 181, 217.

<sup>239</sup> *See* STOEBUCK & WHITMAN, *supra* note 238, at 178 & n.19.

<sup>240</sup> But not during the earliest days of the tenancy in common form. *See* CRIBBET & JOHNSON, *supra* note 183, at 127 (noting that at early common law, only coparceners, but not tenants-in-common, had the right to demand partition).

<sup>241</sup> *See* Candace Reid, Note, *Partitions in Kind: A Preference Without Favor*, 7 CARDOZO L. REV. 855, 856 (1986); 2 ALP, *supra* note 219, at § 6.26 114; *Ashley v. Baker*, 867 P.2d 792 (Alaska 1994) (placing financial interests of co-owners at center of decision whether to partition by sale or in kind); *Von Behren v. Oberg*, 902 S.W.2d 338 (MO.1995) (same).

new parcels.<sup>242</sup> Physical division often proves impossible for a minority of the commoners, or significantly diminishes the value of their shares. In most cases now, partition is by sale with the proceeds distributed pro rata according to ownership shares.<sup>243</sup> However, as we have seen, auction sales often result in opportunistic exploitation by one commoner, because the auctions are such poor markets. While the choice between partition in kind and by sale may be complex – driven by “personhood”<sup>244</sup> or utilitarian concerns – neither seems well-tailored by itself to achieving cooperation-enhancing exit.

Some reforms have been attempted. For example, Alabama passed a statute that gave co-owners the right to purchase the interests of the co-owner who petitioned for partition (but this provision was struck down in 1985).<sup>245</sup> Other states allow courts to order a partial partition, thus respecting the desires of those who wish to remain in co-tenancy.<sup>246</sup> Both of these reforms seem aimed at ameliorating the community-destroying effect of the current law of partition. But they are not careful enough about their distributive effects. The former reform offers an even thinner market than does auction sales. The latter – the procedure of “partial partition” – is also problematic. Allowing a subset of the commoners to carve out a share by physical division absent general consent is likely to injure the remaining commoners who may be left with a larger share of a smaller and less valuable piece of property. Hence, both reforms may exacerbate the potential minority oppression of current law and thus paradoxically undermine cooperation.

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<sup>242</sup> STOEBUCK & WHITMAN, *supra* note 238, at 215 (defining owelty); *Eli v. Eli*, 557 N.W.2d (S.D.1997) (remanding for application of rules of owelty and creation of easements to ensure equitable partition in kind).

<sup>243</sup> See POWELL, *supra* note 203, at ¶ 612; STOEBUCK & WHITMAN, *supra* note 238, at 221-224.

<sup>244</sup> See generally DAGAN, *supra* note 127, at 41-47; MARGARET JANE RADIN, *Property and Personhood*, in REINTERPRETING PROPERTY 35 (1993); JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 343-389 (1988). In the recent case of *Eli v. Eli*, 557 N.W.2d 405 (S.D.1997), the court noted how partition in kind should trump monetary considerations especially when “the land in question has descended from generation to generation.” *Id.* at 410.

<sup>245</sup> See Ala. Code § 35-6-100; *Jolly v. Knopf*, 463 So. 2d 150 (Ala.1985) (holding the statute violated equal protection provision of the federal and state constitution).

<sup>246</sup> See, e.g., N.C. Gen. Stat. § 46-16 (1998); Idaho Code § 6-509 (1998); Tenn. Code § 29-27-104 (1998); Utah Code § 78-39-9 (1998).

Perhaps one direction for a more successful reform would be to give commoners supporting and opposing partition a period of time to secure a sale on the open market, with the partition auction as a backstop. Or, adapted from the law of condominiums, co-owners who wish to remain on the land following an auction could be given limited rights of first refusal (also called preemption rights).<sup>247</sup>

*b. Comparative Perspective.* The countries in the Continental tradition generally provide for the right both to alienate one's share in the property and to call for partition of it.<sup>248</sup> Commons success is enhanced, however, by allowing a cooling-off period, namely: enforcing party agreements that restrain exit (both in the sense of alienation of one's share and also in the sense of partition) for a limited time period. This is generally accomplished by declaring the complete invalidity of agreements that exceed a certain number of years, or by subjecting the restraint after a limited period of time to the broad discretion of the court.<sup>249</sup>

Some provisions of the Germanic systems relating to agreements to restrain exit go too far, in our view, in supporting the flourishing of the commons, threatening the liberal premises upon which desirable commons regimes are

<sup>247</sup> See CRIBBET & JOHNSON, *supra* note 183, at 130 (discussing rights of first refusal as a mechanism for condominium owners as a mechanism to preserve community); STOEBUCK & WHITMAN, *supra* note 183, at 123-24, 182, 203 (same).

<sup>248</sup> See, e.g., GERMAN CIVIL CODE § 747 (alienation), § 749 (1) (partition); ISRAEL LAND LAW § 34(a) (alienation), § 37(a) (partition); AUSTRIAN CIVIL CODE Art. 827 (alienation), Art. 830 (partition); SWISS CIVIL CODE Art. 646(3) (alienation); Art. 650(1) (partition); LOUISIANA CIVIL CODE Art. 805 (alienation); FRENCH CIVIL CODE Art. 815 (partition); BELGIUM CIVIL CODE Art. 815 (partition).

The French law allows for a court-ordered delay of the exercise of this right for a maximum of two years if immediate partition would depreciate the value of the property. FRENCH CIVIL CODE Art. 815. If used too frequently, this provision could represent a troubling inroad on the availability of exit. But used sparingly, and for such a limited period, it may be an acceptable compromise between the parties' interests in preserving the value of their property and their right to exit.

Note that countries who did not provide generally for the right to partition without court approval are excluded from this comparative discussion. See *infra* note 254.

<sup>249</sup> In Louisiana, parties may agree to restrain alienation and partition for a period of fifteen years. LA. REV. STAT. 9:1112. In Israel, the time limitation for agreements restraining alienation is five years. Israel Land Law § 34(b). Many Continental regimes limit agreements to restrain partition to five years. BELGIAN CIVIL CODE Art. 815 (5 years); FRENCH CIVIL CODE Art. 815 (5 years). Japan also does so. JAPAN CIVIL CODE Art. 255 (5 years); In Israel, the time limit on agreements restraining partition is left to the discretion of the court – after three years, the court may order partition despite the agreement if the court deems it just to do so. ISRAEL LAND LAW § 37(b).

based. For instance, German law allows agreements to restrain alienation of one's share to last perpetually, not mitigated by the authority of any court to invalidate the agreement,<sup>250</sup> as exists in German partition agreements.<sup>251</sup> The Swiss law places a thirty-year time limit on the validity of agreements to restrain partition, but this time limit is arguably excessive.<sup>252</sup> The only limits Austria places on agreements to restrain partition is termination upon transfer of the property.<sup>253</sup> In their desire to support common ownership, some of the countries in this tradition have failed to adequately provide for the relatively free exit that is essential to the functioning of a liberal commons.<sup>254</sup>

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<sup>250</sup> GERMAN CIVIL CODE § 747 provides the general right to alienate one's share, which may not be excluded by any juristic act, § 137 c.1.

<sup>251</sup> German law allows agreements to restrain partition to remain in force indefinitely, subject to invalidation by the court for "serious cause." GERMAN CIVIL CODE § 749(2). This provision seems to contemplate the possibility of permanent agreements to restrain partition in some circumstances. German Civil Code § 749, 751 (referring to the power to exclude "permanently"). Such restrictions even potentially outlast transfers of the property. GERMAN CIVIL CODE § 751. Although this criteria at first sounds like it may be too rigorous and too great a restraint on exit – a requirement of "serious cause" sounds much more restrictive than the broad discretion sometimes placed in courts to invalidate agreements – there is reason to believe that it is not, in fact, applied so rigidly in Germany. In particular, counterbalancing the concern that such an agreement will unduly burden the parties' ability to exit, is the likelihood that a restraint on partition that lasts for an "unreasonably" long time, along with other causes that approximate concerns about restriction on exit, will count as sufficient "serious cause". See Schmidt, *supra* note 227, at § 749, 8. Other causes for invalidating these agreements include violation of the minority's procedural rights in decision-making or a breakdown in the personal relations of the commoners, Langhein, *supra* note 229, at § 745, 20; Schmidt, *supra* note 227, at § 749, 11 (3rd ed. 1997), and hostility between the commoners such that joint use is impossible. BGH, *in* NEUE JURITSCHER WOCHENSCHRIFT RECHTSPRECHUNGS-REPORT 334, 335 (1995). Conversely, a good opportunity to sell the common property is generally not considered a good cause. See Schmidt, *supra* note 227, at § 749, 11.

<sup>252</sup> SWISS CIVIL CODE Art. 650(2). Hungary is even more protective of exit, disallowing agreements restraining partition altogether. HUNGARIAN CIVIL CODE § 147.

<sup>253</sup> AUSTRIAN CIVIL CODE Art. 831. See also Art. 832 (a third party disposition of property in common can bind the first parties to the disposition, but not their heirs). A similar regime is in place in India, where agreements in perpetuity are allowed, but they have been held not to bind heirs, on the grounds of public policy concerns with alienation of land. SHAMBHUDAS MITRA, MITRA'S CO-OWNERSHIP AND PARTITION 173-174 (1994).

<sup>254</sup> There are, of course, much more extreme examples of sacrificing the "liberal" aspect of the liberal commons by placing serious barriers to exit. For instance, several Middle Eastern countries do not have an express right to partition. In Iran, partition is not  
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How partition is accomplished is also important to support a liberal commons. Countries in the Continental tradition use two ways to pursue the injunction of distributive exactness: scrupulously fair distribution of the value of the property on partition. Like the American law, most favor partition in kind<sup>255</sup> (unless this form of division would seriously compromise the value of the property distributed to the parties<sup>256</sup>). Accordingly, these countries pay careful attention to ensuring that each party gets a fair share using the mechanism of owelty payments.<sup>257</sup> Another approach, used by Germany, is to limit partition in kind to situations where physical partition can lead to distributively exact values going to each owner. Germany provides further security against the possibility that the physical portions will be unfairly divided by prescribing that after division is made, distribution of the parts is made by lot.<sup>258</sup> “Partial partition” is allowed only when the commoners provide unanimous consent.<sup>259</sup>

Our discussion of the advantages and disadvantages of rights of first refusal suggested that providing such a right as a default may benefit a liberal

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<sup>254</sup>(...continued)

available if it leads to a loss in value of the land. IRAN CIVIL CODE Art. 595.1. In Jordan, partition may only be had by means of a petition to the court which, presumably, may be rejected. JORDAN CIVIL CODE § 1040. In Nigeria, as well, partition of jointly owned family land – where “family” appears to be defined quite broadly – is only available for cause, and, when deciding whether or not to partition, the court must consider “the best interest of the family as a whole”. TASLIM OLAWALE ELIAS, NIGERIAN LAND LAW 126-127 (1971).

<sup>255</sup> AUSTRIAN CIVIL CODE Art. 843; SWISS CIVIL CODE Art. 651(3); ISRAEL LAND LAW §§ 39, 40; C.A.1017/97 Ridlevitch v. Moda’i (Israel).

<sup>256</sup> See *supra* note 255. This is also the law in many other countries. See KAZAKHSTAN CIVIL CODE Art. 218; HUNGARIAN CIVIL CODE § 148; CZECH REPUBLIC CIVIL CODE § 142; JAPAN CIVIL CODE Art. 258; VIETNAM CIVIL CODE § 238; MITRA, *supra* note 253, at 375 (India). Interestingly, England effectively has the reverse presumption, where partition by sale is much easier to effect than partition in kind. See *infra* text accompanying note 265.

<sup>257</sup> SWISS CIVIL CODE Art. 651(3); BELGIAN CIVIL CODE Art. 833; ISRAEL LAND LAW § 39(b); FRENCH CIVIL CODE Art. 815. This is also the law in Kazakhstan, KAZAKHSTAN CIVIL CODE § 218(3).

<sup>258</sup> GERMAN CIVIL CODE § 752.

<sup>259</sup> C.A. 623/71 Gan-Boas v. Englander, P.D. 27(1) 334 (Israel). For the law in Germany, see Schmidt, *supra* note 227, at § 749, 25; Langhein, *supra* note 229, at § 749, 53.

commons regime. French law provides for a right of first refusal, as do many other legal systems, although the Germanic countries do not.<sup>260</sup>

4. *A Final Comparison: The British Turn.* – The American law of co-ownership took its lead from the English common law.<sup>261</sup> So, where does England stand? Until recently, the English law was uniquely unsupportive of co-owned property.<sup>262</sup> Not surprisingly, when the American law of co-ownership

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<sup>260</sup> FRENCH CIVIL CODE Art. 815-14. The right of first refusal is relatively common, and appears in many legal systems. KAZAKHSTAN CIVIL CODE Art. 216; CZECH REPUBLIC CIVIL CODE § 140; VIETNAM CIVIL CODE Art. 237; CHINA CIVIL CODE Art. 78 (right of preemption “if all other conditions are equal”); MITRA, *supra* note 253, at 95-97 (India).

<sup>261</sup> To understand the relevant English law, first note some unique structural features of English Land Law. Interests in land are divided into legal interests (strictly speaking, ownership) and equitable interests (strictly speaking, various rights of use and control). English law does not allow for legal interests to take the form of a “tenancy in common” – the type of commons property we are considering here. Law of Property Act of 1925 (LPA), § 1(6). (It does, however, allow for these interests to be held as a joint tenancy, which differs from a tenancy in common mainly in respect to the existence of survivorship rights.) SIR ROBERT MEGARRY & M. P. THOMPSON, MEGARRY’S MANUAL OF THE LAW OF REAL PROPERTY 288 (7<sup>th</sup> ed. 1993); E.H. BURN, CHESHIRE AND BURN’S MODERN LAW OF REAL PROPERTY 225 (15<sup>th</sup> ed. 1994); KEVIN GREY, ELEMENTS OF LAND LAW 512 (2<sup>nd</sup> ed. 1994). Because of this restriction, all commons property must technically be held as equitable interests, and not as legal ownership. Because ownership *is* just a collection of equitable interests – various rights of use and control – the restriction could have been merely formal, for land registration purposes. One person could have owned the legal title but be made powerless regarding equitable interests, and the co-owners could split the equitable rights between them much as they are in other systems. But the formal restriction on legal commons property has had a more profound effect on jointly held equitable interests in property.

<sup>262</sup> In the English system, commons property at law is provided for by means of a trust. The trustees (no more than four, per the Trustee Act of 1925, § 34) are empowered to make decisions about managing and disposing of the property, but are bound by various requirements of consultation and potential judicial overrides. One of the main reasons for requiring that common ownership be in trust was that a small group of trustees were thought more able to facilitate the alienation of the land than a potentially larger group of common owners. And the trust structure did indeed have that effect, particularly regarding alienation. A potential purchaser need not investigate all of the interests in common property, and must only deal with the trustees. MEGARRY & THOMPSON, *supra* note 261, at 291-92. Before 1996, the trust itself was referred to as a “trust for sale” and the trustees were under a statutory duty to sell the property at the earliest convenience. *Id.* at 289. Under the equitable doctrine of conversion, a beneficiary was considered to have an interest only in the proceeds of the sale of the co-owned property, and not the land itself, as equity regarded as done that which ought to be done (in this case, sale). *Id.* at 257-58. Trustees could postpone sale, but only if they all agreed to do so (even one trustee

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was formed, it followed the British preference for ending co-ownership rather than supporting its continuation, even if the two systems did not use the same technical forms.<sup>263</sup> In 1996, however, England passed the Trusts of Land and Appointment of Trustees Act (TLATA), moving England significantly closer to a supportive regime. The details are complex, but, in some ways, the English law now surpasses its American progeny in supporting the goals of a successful liberal commons.<sup>264</sup>

Despite these changes, English law still does not go as far as the Continental systems. To give one example, immediate contribution is not available, even for basic maintenance and other necessary expenses;<sup>265</sup> and as

<sup>262</sup>(...continued)

favoring sale was enough to trigger the duty). *Id.* at 289. Furthermore, alienation of the property was also facilitated by the power of two trustees to validly sell the land to a bona fide purchaser, overreaching the equitable interests of the co-owners of the property. LPA § 2(1)(ii), 27(2). The only major exception to the duty to sell came for property which, like the family home, had a “purpose” other than sale, and this development came rather far along in the history of the law. *See Williams & Glyn’s Bank Ltd. v. Boland* [1981], AC 487; BURN, *supra* note 261, at 236-37. The preference for sale, and the ease with which sale can be accomplished, demonstrates the degree to which the common law considered commons property to be pathological – an arrangement to be ended as quickly as possible.

<sup>263</sup> Interestingly, American law rejected the common law view of the sale of the undivided property as the primary means of ending commons property and instead focused on the right to partition, a much more standard approach globally. Because of its focus on alienating the undivided property, common law actually made it more difficult to obtain partition than its continental counterparts. This effectively results in an incentive to partition by sale (without consent of the parties) rather than in kind. Under the present English law, partition of the property by the trustees requires the consent of all of the beneficiaries, a task much more difficult than eliminating their interests in the co-owned land through sale and then distributing the proceeds. TLATA § 7.

<sup>264</sup> The trust structure has been maintained, but its ingrained preference for sale has been significantly eroded. The automatic duty to sell and the equitable doctrine of conversion have both been abolished. TLATA § 3(3) (abolishing the doctrine of conversion); TLATA § 5(1) (abolishing the duty to sell). And, although two trustees can still sell the property to a bona fide purchaser and thus override the equitable interests of the co-beneficiaries, LPA §§ 2(1)(ii), 27(2); TLATA § 8(2), the co-beneficiaries are now empowered to petition the court to stop such a sale. TLATA § 14. Also, the TLATA adds some procedural norms that enable greater participants by non-trustees, such as the requirement that, if practicable, the beneficiaries of the trust must be consulted and the wishes of the majority followed, at least insofar as these coincide with the general interest of the trust. TLATA § 11.

<sup>265</sup> *Leigh v. Dickeson* [1884-1885] 15 QBD 60. *See also* GREY, *supra* note 261, at 479.

(continued...)

we have argued, delaying such recovery until dissolution increases incentives for ending common ownership. On balance, though, England has moved substantially towards greater support of a liberal commons regime, and has left American law behind.

The American law of co-ownership shows what happens when people are faced with a particularly hostile legal regime, one that assumes shared management can not work, and then interposes law that guarantees failure and partition. It may be too late to reverse the tide for black rural landowners, too few are left, and the legacy of discrimination weighs too heavily. But the lessons of their experience have wide applicability everywhere along the frontiers of property – cyberspace, genetic research, environmental conservation – anywhere people want and need to work together, but each individual reasonably fears exploitation by the others.<sup>266</sup> While the American law of co-ownership now fails, it can do better; the liberal commons points the way.

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<sup>265</sup>(...continued)

To give another example, agreements to restrain partition and alienation are allowed, but only if they are a part of the initial instrument, and the two trustees may override the agreement by selling the land to a bona fide purchaser for value. TLATA § 8. These trustee powers decrease the effectiveness of non-partition and non-alienation agreements as tools to enable long-term cooperation. Also, the trustees themselves must be unanimous in exercising their powers, *Luke v. South Kensington Hotel Co.* [1879], 11 Ch. D. 121, 125, which can make governance of the commons more difficult.

<sup>266</sup> See, e.g., Rochelle Cooper Dreyfuss, *Collaborative Research: Conflicts on Authorship, Ownership, and Accountability* 53 VAND. L. REV. 1162 (2000):

The artist, starving in a garret; the dedicated scientist, experimenting in a garage; the reclusive professor, burning midnight oil in the office – these are becoming endangered species. The creative industries have evolved: collaborative production is replacing individual effort. . . . [Yet,] the intellectual property literature has focused so little on the special problems of collaborative work. . . . Allocating the incidents of ownership is not a part of the "mental furniture" of many collaborators; left on their own, parties can and do run into significant difficulties. . . . Redesigning the intellectual property system to take explicit account of collaborative production would have significant advantages. Well-designed rules reduce transaction costs by functioning as off-the-shelf arrangements or starting points for ex ante negotiations. They also serve ex post, as default rules for situations in which the parties discover that they have omitted key terms from their agreements.

*Id.* at 1162-67. These and similar examples give us confidence that the liberal commons construct will have wide scope for further theoretical development and useful application.

## CODA

Any liberal commons regime must grapple with the three spheres of action necessary to manage a commons resource: the spheres of individual dominion, democratic self-governance, and cooperation-enhancing exit. Only by addressing all three spheres successfully can a liberal commons help people achieve the goals of preserving liberal exit while promoting the economic and social gains from cooperation. Sympathizers of privatization and communitarian approaches have seen conflict where there can be – and in a global perspective, often is – harmony. All have overlooked the facilitative role that law can play in overcoming tragic choice, in particular by using law to help catalyze and inculcate the social norms that make a liberal commons into a viable, indeed ordinary, way to own property. More and more, as “sole despotic dominion” fades from economic life, versions of a liberal commons are becoming the dominant forms of ownership, though a form that has not yet been recognized and studied in a unified way. The metaphor of the “tragedy of the commons” has blocked legal imagination and innovation; beyond tragedy, there are liberal commons solutions.