Law and the Urban Commons

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What do we mean from a legal point of view when we refer to the urban commons or characterize the city as a "commons?" I have written for the past 10 years about the idea of the urban commons[1] and, most recently, with my coauthor Christian Iaione about the idea of the city itself as a commons.[2] But the commons is not a simple concept in American law nor in American legal theory as it relates to property and resources that can be owned or managed collectively. We have many kinds of property arrangements in the law—jointly owned property, group owned property, publicly owned property, and property that is not owned but held in trust for a public purpose. Some of these forms of property are referred to as "common" property (to refer to property co-owned by a group of individuals), for example, and some referred to as simply a "commons" (to indicate property or a resource that is not owned by anyone but rather is maintained in stewardship on behalf of the public or some group of the public). In addition, even within the category of "commons," there are completely open access commons as well as more limited, user managed commons. Thus, to ask what it is we mean by the urban commons is to beg the question as a legal and policy matter, as well as to invite a bit of confusion both in legal theory and in practice.

One way to think about the commons is to think of it as the residual category of property that is neither privately owned nor state owned.[3] In this traditional sense, commons property is something in which everyone has rights of inclusion and no one has rights of exclusion. Indeed, this is the idea behind Garret Hardin's classic Tragedy of the Commons[4] in which "freedom in the commons" brings "ruin to all." Unlimited access to shared resources inevitably leads to overconsumption and complete destruction of the resource. Hardin's Tragedy occurs in the context of the quintessential open access commons—a pasture in which each herdsman is motivated by self-interest to continue adding cattle for grazing the land until the combined actions of the herdsmen results in overgrazing, depleting the shared resource for all. Traditionally, this kind of open access commons describes the natural world, the resources to which we all have access and can use or consume—including air, water, land, forests, and the like. These resources are open, often exhaustible, and thus are vulnerable to the tragedy of the commons.

One way that the law has protected natural resources from overconsumption or exploitation (from either state or private interests) is to allow them to be held in trust, or stewardship, by the state as a means to sustain the resource for future generations. Many years ago Joseph Sax, a renowned professor of environmental law, revived an ancient Roman law concept, the public trust, in which title to natural resources is vested in the state to hold in perpetuity for the public.[5] Sax is famous for establishing the "public trust doctrine" in American law which typically applies to ecologically sensitive lakes, beaches, rivers, forests, and wetlands. The public trust doctrine ensures that the public can access these common resources, and that such resources are sustained for use by future generations. The doctrine also gives legal "standing" to any member of the public to bring a lawsuit to prevent the government—the manager of the trust—from selling off or exploiting the resource for commercial profit or for strictly private gain. Sax argued that, in this sense, the most important aspect of the public trust doctrine is that it is an "instrument for democratization"— it allows for direct citizen participation over common resources and it holds the government accountable to the public in managing those resources.

Notably, the public trust doctrine's origins were not only in the protection of natural resources, but also in their urban equivalents—city streets, public squares, roadways and the like. Courts routinely protected shared urban resources against the pressure to legislatively appropriate or devote them to nonpublic purposes during an era of intense industrialization.[6] Thus, in the 19th century, either as a matter of statute or common law, courts allowed some urban resources to be protected under the public trust doctrine, with strict limits on its alienation and use for purposes other than those which were open and accessible to the public.[7] The public trust doctrine has since been limited by American courts and no longer routinely applies to city streets or public squares. Although there remain a small number of state courts that explicitly protect large urban parks under the public trust doctrine, courts no longer prohibit always the development or sale of public resources by the state even when the state appears to be acting in ways that benefit private developers, as in allowing

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56 Sheila Foster, The City as an Ecological Space: Social Capital and Land Use, 82 NOTRE DAME L. REV. 527 (2006-2007), at 532; Sheila Foster, Collective Action and the Urban Commons, 58 NOTRE DAME L. REV 57.

2 Sheila Foster and Christian Iaione, The City as a Commons, 34 yale l. & pol'y rev 81 (2016).

58 Michael Heller, The Dynamic Analytics of Property Law, Theoretical Inquiries in Law 2.1 (2001)

4 Garret Hardin, 162 The Tragedy of the Commons, Science, 3859, 1243-1248 (1968) at 1244.

5 Joseph L. Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 MICH. L. REV. 471 (1970).

6 See, e.g., Molly Selvin, This Tender And Delicate Business: The Public Trust Doctrine In American Law And Economic Policy, 1789-1920 (Harold Hyman et al. eds., 1987)

7 Ivan Kaplan, Does the Privatization of Publicly Owned Infrastructure Implicate the Public Trust Doctrine? Illinois Central and the Chicago Parking Meter Concession Agreement, 7 NW. J. L. & SOC. POL'Y 136, 148-55 (2012)

large scale development in parks and other open public spaces.[8] Most modern courts and commentators consider the public trust doctrine to be effectively limited to protecting natural resources having some nexus or connection with navigable waters.

Nevertheless, one of the practical tools that has emerged out of the long history of applying the public trust doctrine to both natural and urban resources is the practice of putting shared resources into a "land trust." Both in the U.S. and in other parts of the world, private nonprofit organizations establish *conservation land trusts* for national and regional parks, and other exhaustible natural resources, to preserve them for long-term sustainability. Much like the public trust doctrine, conservation land trusts protect vulnerable natural resources from being overexploited by commercial or market interests. Similarly, in the urban context, *community land trusts* (CLTs) are often established to manage urban land for long-term accessibility and affordability. Community land trusts separate land ownership from land use. In the land trust model, the land itself is considered the common resource and access to it is controlled through leasing the land while maintaining restrictions on the land's use. The CLT thus acts as the permanent steward of the land and the land is utilized through long-term leases which provide for affordable housing, parks or recreational amenities, commercial space, or other uses responsive to the needs of the surrounding community. CLTs effectively take the land off the private speculative market, preventing the land from being sold to the highest bidder and instead utilized to meet the needs of the surrounding communities.

Legal scholars also distinguish between "open access" and "limited-access" commons. In contrast to the quintessential open access commons—a resource into which everyone can gain entrance and no one is excluded—there are also shared, common resources open only to a limited group of users. The primary examples of these kinds of limited access commons in the U.S. are referred to as "common interest communities"—such as condominium complexes or gated communities. In exchange for their association dues, owners in these common interest communities have access to shared common facilities—such as roads, streets, parks and other amenities. The rules of the community can be highly restrictive and are administered by the owners of the residential community or their elected representatives. These often resemble a traditional "commons on the inside" but "private property on the outside."[9] In other words, limited access commons are "open" for those who purchase property or property rights in the community. The purchase of property (e.g. a condominium or house in a gated community) is what grants these owners shared usage rights in the common resources of the community. At the same time, these shared resources are "closed" to non-owners, who can be completely excluded from community and its resources. In American law, the right to exclude is the *sine qua non* of private property rights. In most respects these "common" property arrangements follow the logic of, and operate like, private property by endowing collective owners with full rights of exclusion.

The other type of limited access commons are user-managed natural resources, as in the groundbreaking work of Elinor Ostrom[10], in which she identified groups of users able to cooperate to create and enforce rules for utilizing and sharing resources—such as grazing land, fisheries, forests and irrigation waters—without privatizing the resource. Because users establish rules for use of the resource and there exist membership constraints, these are limited access commons. However, unlike "common interest communities," none of these resources nor their management involve any kind of private property. They are not owned in any way by private individuals and thus there is no strong right of exclusion. These Ostrom commons institutions manage natural resources that are in fact not owned by anyone, and are in a real sense open and accessible, but are managed by a group of users who decide on the rules of usage. As such, these Ostrom limited access commons are distinguishable from collectively or commonly held private property regimes in which individuals have ownership rights (and thus rights of exclusion) in the collectively managed resource.

The distinction between "open" and "limited" access commons does obscure the fact that there are very few "open access" commons which exist today. The reality is that very few natural or urban resources are truly open in the sense that their use is unmanaged, unrestricted or unregulated. Many natural resources—the air, the water, national parks, etc.—are regulated by national and subnational environmental legislation and regulation which control and limit their access and use by a range of public and private actors. Environmental regulations control how much and what kind of pollution can be released into the natural environment. Similarly, urban land, streets, roads, infrastructure and other shared resources are heavily regulated by planning, zoning, and building regulations that control the location, density and kind of uses allowed. Even city parks and urban plazas and squares are regulated by rules limiting or controlling the uses allowed in them. Many cities even prohibit the homeless and other undesirable populations from using park benches and highway underpasses for sleeping and other activities.[11]

If completely open, unrestricted commons no longer (or rarely) exist anymore, how do we identify the contemporary commons as a matter of law (and legal theory)? Increasingly, legal scholars across the world (and some courts and legislatures) locate the commons even in heavily regulated spaces, public institutions, vacant and abandoned land or structures, and in privately owned but accessible resources that are customarily used by the public. These resources are more akin to what some scholars call "constructed" commons in the sense that "their creation, existence,

8 See e.g., Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1053-54 (N.Y. 2001)

9 Carol M. Rose, The Several Futures of Property: Of Cyberspace and Folk Tales, Emission Trades and Ecosystems, 83 Minnesota Law Review 129 (1988)

10 Elinor Ostrom , Governing the commons, Cambridge University Press (1990).

11 Tobe v. City of Santa Ana, 9 Cal. 4th 1069, 892 P.2d 1145 (1995) (California Supreme Court validating as constitutional "anti-camping" law which prohibits sleeping or occupying public land within the city).

operation and persistence are matters not of pure accident or random chance, but instead of emergent social process and institutional design."[1] In constructing an urban commons, the institutional arrangement consists of some combination of law, social norms, customs, and formal instrumentalities and agreements. Commentators and scholars describe the process of constructing these institutional arrangements as "commoning," a powerful dynamic process that brings together a wide spectrum of agents that work together to co-design the governance of urban resources.[2] What emerges from this collaborative process is not only collaborative management of particular urban resources, but also the co-production or co-generation of community services at the city and neighborhood level. The recognition of the built environment as constituting a variety of urban commons is designed to open up access to, and to generate, essential resources for urban residents as well as to institutionalize the sharing of those resources.[3]

Urban commons thus resemble less the open grazing field depicted in Garret Hardin's "tragedy of the commons" and more of what property scholar Carol Rose refers to as the "comedy of the commons."[4] Instead of the potential for overconsumption and ruin, there exists instead the potential for solidarity and the generative potential of the urban commons to create other goods that sustain communities. Rose found that some British courts considered as "inherently public property" even privately owned resources where the public customarily used the space or land for gatherings or other activities valued by the community. These courts vested in the "unorganized" public the right to use property, or rather to open it up or keep it open and accessible, even over the private landowner's objection. Rather than tragedy in these spaces, we are more likely to find "comedy"—that is, the "more the merrier" is a better description of high consumption activities in the urban commons. The more that people come together to interact, the more they "reinforce the solidarity and well-being of the whole community." As she points out, the vesting of property rights by British courts in the "unorganized public" rather than in a "governmentally-organized public" also suggests the means by which a commons may be self-managed by groups of the public who use it and depend on it, as an alternative to exclusive ownership by either individuals or exclusive management by governments.

In previous work, I identified small- and large-scale urban resources—neighborhood streets, parks, gardens, open space, among other goods—which are being collaboratively managed by groups of heterogeneous users (and other stakeholders), with minimal involvement by the state (local government) and without granting those users private property rights in the resource. These include community gardens or urban farms, business improvement districts (BIDs) and community improvement districts (CIDs), neighborhood park groups and park conservancies, and neighborhood foot patrols. These examples illustrate, much like Elinor Ostrom's work on user-managed natural resources, the possibility and reality of collaborative governed and stewarded urban commons. In her case studies, common resources are managed not by privatizing the resource, nor by public authority monopoly over them. Instead, collaborative governance of common pool resources is designed using a rich mix of "public and private instrumentalities." These can include informal social norms and user-imposed sanctions as well as formal agreements, legislation, or policies enabling and facilitating the process. Ostrom highlights the importance in some contexts of a *nested* governance structure, in which users work cooperatively with government agencies and public officials to design, enforce and monitor the rules needed to manage shared resources. She noted the presence of some larger scale user managed resources, such as groundwater basins, which are nested within existing governance systems yet operate independently of those systems. Such nestedness might in fact be necessary in a complex resource system where large institutions (e.g. city government) govern through interdependencies of smaller units of governance or what she called "microinstitutions."[5]

The emergence of collaboratively managed urban resources demonstrate how local communities can employ a mix of public and private instrumentalities (e.g. legal and governance tools) to create institutions designed to share those resources. As mentioned, the use of community land trusts (CLTs) and other cooperative ownership structures that separate land *ownership* from land *use* transform what might otherwise be a collection of individuals owning property (in the typical cooperative ownership model) to a collaboratively governed shared urban resource regime. CLTs, for instance, are managed by a nonprofit board of directors—usually composed one-third of individuals who occupy the buildings on top of the land, one-third of people who reside within the local area, and one-third of members of the larger public. The CLT board maintains significant control over the property that sits on the land through ground leases. It is through these leases that the CLT can enforce guidelines and limits on how the land is used or developed. CLTs thus act more as land *stewards* than land *owners* and, as such, mimic more closely the kind of Ostrom-like "microinstitutions" that manage complex natural resources. Community land trusts have been used to manage housing, commercial real estate, green space, small businesses, and indeed an entire urban village.[6]

There is, of course, the potential for the "dark side" of these commons governance regimes. In previous writing, I have warned of some problematic institutions, like large (and wealthy) BIDs and Park Conservancies, which raise distributional justice concerns when they entrench

1 Madison, Michael J., Brett M. Frischmann and Katherine J. Strandburg. Constructing Commons in the Cultural Environment, Cornell Law Review 95:657-7 (2010).
2 See e.g. David Bollier & Silke Helfrich, Patterns of Commoning (2015)
3 See e.g. P. Bresnihan & M. Byrne, Escape Into the City: Everyday Practices of Commoning and the Production of Urban Space in Dublin' 47 Antipode 36 (2015); A. Huron, Working with Strangers in Saturated Space: Reclaiming and Maintaining the Urban Commons, 47 Antipode 963 (2015).
4 Carol Rose, The Comedy of the Commons: Commerce, Custom and Inherently Public Property, 53 University of Chicago Law Review 3 (1986).
5 Ostrom, Governing the Commons, 135-136.
6 Dudley Street Neighborhood Initiative is one of the most well-known examples in the U.S. See http://www.dsni.org/dsni-historic-timeline/

existing patterns of spatial and economic inequality. Depending on the legal and governance design, these institutions can also result in ossification of resource use by keeping it too closely managed by a small group of users and making it more difficult in the future to utilize the resource in different ways to meet future public needs. Some practices designed to promote collaborative governance of urban common resources might also lead to the exclusion of marginal individuals and groups from public spaces and from the process of collaborative design and governance. These concerns underscore the importance of keeping commons governance mechanisms flexible and accountable, and of including equity and distributive justice as core commitments within the urban commons framework. In other words, the urban commons must be more than a call for the devolution or decentralization of authority over shared urban resources. It must also stress the importance of commons governance that is accountable to the public and to public values. Moreover, at its core should be a vision to make truly accessible a range of urban assets to a broad class of city residents, particularly those whose needs are underserved by current urban development and revitalization strategies.

To address the democratic accountability and distributional problem that is lurking in the background of any conception of the commons, it is important to scale up the idea of the urban commons to the level of the city. In other words, we need to discuss the possibility of governing *the city as commons*. To think about the city as a commons is to think about it both as a shared resource and as a resource that can be managed in a more truly collaborative mode. That the city itself is a shared resource — open and accessible to many types of people—means that it does mimic some of the classic problems of a common pool resource. It is difficult to exclude people from entering it and from consuming its resources, raising the problem of scarcity, congestion and overconsumption. The city is also a resource system that is generative, in that it produces a variety of goods and services for its inhabitants and users. Much like many other kinds of open access resources—fisheries, forests, information, knowledge etc.—the issue is often the scale of production and renewability of the resource. Very few resources are infinite and at some point decisions have to be made as to how and, to whom, to allocate or distribute those resources and what kind of process that entails.

In our work at LabGov (Laboratory for the Governance of the Commons), we prioritize thinking about institutional design questions and processes for scaling up from the urban commons to the city as a commons. To address the democratic accountability and distributional issues, we must think about institutional design processes that are polycentric—in which there are many centers of decision making authority and decision making power is distributed throughout the city and shared to varying degrees with a variety of other actors.[7] This polycentric governance model is based on the idea of *pooling*, referring to a continuous experimentation process that brings together the five actors (public, private, cognitive, social, civic) of the "quintuple helix" for innovation, resulting in peer to peer production of goods, services and places and in the development of forms of "collaborative economy". In this process the State enables collaborative governance mechanisms through its public policies and laws, and facilitates user-generated and user-managed resources by leveraging or transferring its technical, financial, physical resources to allow the urban commons to emerge across the city. A fundamental task confronting the *enabling state* in this model is that it must change local administrative culture and norms. This means that local public authorities must increase local competencies and capabilities to incentivize and coordinate collaborative governance, change the infrastructure of the city (administrative, cognitive/professional, technological, financial, etc.), and design new legal and policy tools to facilitate collaboration and cooperation. Moreover, it is important that public authorities and public officials retain a presence and role for enforcing democratic values and being accountable to larger public interest and goals (distributive equity, transparency, non-discrimination, etc.) even as it facilitates the emergence of urban commons microinstitutions distributed around the city and metropolitan area.

This idea of the city as a commons is motivated by the ongoing experimentation process of establishing Bologna, Italy, as a collaborative city, or "co-city." As part of this process the city of Bologna adopted and implemented a regulation that empowers residents, and others, to collaborate with the city to undertake the "care and regeneration" of the "urban commons" across the city through "collaboration pacts" or agreements. The regulation provides for local authorities to transfer technical and monetary support to reinforce the pacts and contains norms and guidance on the importance of maintaining the inclusiveness and openness of the resource, of proportionality in protecting the public interest, and of directing the use of common resources towards the "differentiated" public. The specific applications of the Bologna regulation are just now undergoing implementation, as the City has recently signed over 250 pacts of collaboration, which are tools of shared governance. The regulation and other city public policies foresee other governance tools inspired by the collaborative and polycentric design principles underlying the Regulation.

The Bologna regulation, and the related co-city protocol, designed by my colleagues at LabGov, are illustrative of the kinds of experimentalist and adaptive policy tools which allow city inhabitants and various actors (i.e., social innovators, local entrepreneurs, civil society organizations, and knowledge institutions willing to work in the general interest) to enter into co-design processes with the public officials and which lead to local polycentric governance of an array of common goods in the city. This process of commons-based experimentalism re-conceptualizes urban governance along the same lines as the right to the city, creating a

7 Ostrom, Vincent, Charles M. Tiebout, and Robert Warren. The Organization of Government in Metropolitan Areas: A Theoretical Inquiry American Political Science Review 55 (4):831–42 (1961, Reprinted McGinnis 1999)

juridical framework for city rights. Through collaborative, polycentric governance–based experiments we can see the right to the city framework be partially realized—e.g., the right to be part of the creation of the city, the right to be part of the decision-making processes shaping the lives of city inhabitants, and the right of inhabitants to shape decisions about the collective resources in which all urban inhabitants have a stake.