Facilitating the Commons Inside Out

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Abstract

Commons property is a true challenge to the law, especially in a legal context that respects individual mobility, which is key to freedom and autonomy. While a tragedy of the commons is not inevitable, the sustainability – let alone flourishing – of the commons is far from obvious either. But the rewards of the latter trajectory are critical: a successful commons property can generate significant economic benefits, due to its intrinsic advantages of economies of scale, risk-spreading, specialization, and synergy. These benefits multiply in the context of social commons property regimes that function as the loci and engines of meaningful interpersonal relationships; indeed, they at times even become constitutive elements of commoners’ identities. This Essay explores examples of governance mechanisms for the collective management of resources as well as tax tools for collective production that can support the success of these social commons property regimes. These legal devices, which set (respectively) the internal rules of the game and provide external incentives, both counter the potentially destructive dynamics of the commons property and help preserve the noncommodified aspects of its owners’ community.
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Commons property is a true challenge to the law, especially in a legal context that respects individual mobility, which is key to freedom and autonomy. While a tragedy of the commons is not inevitable, the sustainability—let alone flourishing—of the commons is far from obvious either. But the rewards of the latter trajectory are critical: a successful commons property can generate significant economic benefits, due to its intrinsic advantages of economies of scale, risk-spreading, specialization, and synergy. These benefits multiply in the context of social commons property regimes that function as the loci and engines of meaningful interpersonal relationships; indeed, they at times even become constitutive elements of commoners’ identities. This Essay explores examples of governance mechanisms for the collective management of resources as well as tax tools for collective production that can support the success of these social commons property regimes. These legal devices, which set (respectively) the internal rules of the game and provide external incentives, both counter the potentially destructive dynamics of the commons property and help preserve the noncommodified aspects of its owners’ community.

THE CHALLENGE

A familiar property tale depicts the commons as an impossible regime or, more precisely, as one that inevitably fails, at least once demand pressures on the resource are high enough. Yet this proposition is refuted in Governing the Commons, Elinor Ostrom’s definitive synthesis of case-studies of well-functioning commons property regimes. Ostrom demonstrates that resources that are owned or controlled by a finite number of people who manage them together and exclude outsiders are not doomed to tragedy. Governing the Commons further distills the institutional arrangements that distinguish

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1 See Garrett Hardin, The Tragedy of the Commons, 162 SCI. 1243 (1968). See also, e.g., Harold Demsetz, Toward a Theory of Property Rights, 57 AM. ECON. REV. 347 (1967).
between cases of long-enduring commons and cases of failures and fragilities.\textsuperscript{2} If there is a tragedy of the commons, then, it cannot be about supposedly inevitable tragic outcomes of commons property.

As the theory of \textit{The Liberal Commons} demonstrates,\textsuperscript{3} the putative tragedy lies in the common presupposition of both foes of the commons (typically neoclassical economic-legal theorists) and friends (typically political scientists and some new institutional economists) that commoners’ cooperation and success are not possible without strong limitations on exit. This implies a choice – and certainly a tragic one – between the economic and social benefits to be derived from a commons and the most fundamental liberal commitment to individual autonomy. But even this dilemma is not inevitable. A strong right of exit indeed exacerbates the incentives for opportunistic behavior commons property seems to invite; yet if the law is properly guided by the liberal commons model, it can dissolve this tragedy and enable commoners to capture the economic and social benefits from cooperative use of a scarce resource, without sacrificing the commitment to free exit.

This Essay focuses on a challenge peculiar to commons property in land. Our starting point is the observation made in this symposium’s framing paper, of a growing “trend towards increased commodification” of land that ill-fits “the needs of the rural and urban poor in developing regions.”\textsuperscript{4} Accordingly, we discuss cases in which land is not only an economic asset but also a locus of community or rather the medium (amongst others) by which a group of users constitutes itself as a community. In these cases, cooperation is a good, in and of itself, in addition to being an important facilitator of economic success. This means that owners in such a group share a joint commitment and may even perceive themselves as members of a “plural subject.”\textsuperscript{5} Commons settings are particularly suitable for furthering such close (even intimate) interpersonal relationships because certain tasks, like the common management of a given resource, serve as an opportunity to enrich and solidify the interpersonal capital that grows from cooperation,

\begin{itemize}
  \item \textsuperscript{2} See Elinor Ostrom, \textit{Governing the Commons: The Evolution of Institutions for Collective Action} (1990). See also Elinor Ostrom, \textit{Community and the Endogenous Solution of Commons Problems}, 4 J. THEORETICAL POL. 343, 347-50 (1992) (even heterogeneous sets of individuals may overcome the commons difficulties with the help of proper institutional innovation and design, such as the ones Olstrom identifies, although if they do not develop shared values, they will eventually fail).
  \item \textsuperscript{4} B. Rajagopal & Olivier De Schutter, \textit{Property From Below: Rethinking Use of Land and Related Natural Resource} (unpublished manuscript).
  \item \textsuperscript{5} Margaret Gilbert, \textit{Living Together: Rationality, Sociality, and Obligation} 2, 8 (1996).
\end{itemize}
support, trust, and mutual responsibility.\textsuperscript{6} In some settings, such as certain religious, ideological, and cultural communities, the commons resource may even constitute (or lie at) the center of a way of life that profoundly affects the commoners’ self-identity.\textsuperscript{7}

In what follows, we will explore some of the legal devices that can support the success of these predominantly social liberal commons. We do not disregard the significance of the economic gains from cooperation (notably, economies of scale and risk-spreading), nor do we marginalize the value of individual autonomy within such communities. Rather, we acknowledge – in line with the liberal commons model – that efficiency and autonomy are both valuable and can significantly add to the social benefits of the commons. (Economic success tends to strengthen trust and mutual responsibility; a liberal right to exit ensures that members’ self-identification with the community does not erase their individual identity.) We therefore take the injunction of productivity and the commitment to free exit as side constraints and investigate the means by which the law can – within these constraints – best contribute to the flourishing of such communities and to the noncommodified aspect of the commons.

Fostering predominantly social liberal commons is a complex and ambitious mission. It requires attention to the material incentives necessary to counter the potentially destructive dynamics of the commons. But at the same time, it entails resisting a conceptualization of the interactions between the community and its members – as well as amongst the members \textit{inter se} – as market transactions. “The norms structuring market relations,” explains Elizabeth Anderson, “have five features that express the attitudes surrounding use ...: they are impersonal, egoistic, exclusive, want-regarding, and oriented to ‘exit’ rather than ‘voice’.\textsuperscript{8} These norms are crucial for “the production, circulation, and valuation of economic goods,” and furthermore, they “embody the economic ideal of freedom.”\textsuperscript{9} But their imperialistic tendencies threaten to undermine the other-regarding nature of vital non-market domains, such as intimate relations, professionalism, and politics.\textsuperscript{10} In our non-ideal world, where complete noncommodification is often harmful, preserving the intrinsic good of these non-market domains often requires mixed or hybrid


\textsuperscript{8} See ELIZABETH ANDERSON, VALUE IN ETHICS AND ECONOMICS 145 (1993).

\textsuperscript{9} Id.

\textsuperscript{10} See generally ANDERSON, supra note 9; MARGARET JANE RADIN, CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS AND OTHER THINGS (1996).
strategies such as incomplete commodification, where commodified and noncommodified understandings coexist.\textsuperscript{11}

The law can support the governance of the commons and the commoners’ collective activities and help preserve their noncommodified features by both setting the internal rules of the game and providing external incentives, notably through the way these activities are taxed. We do not purport to cover here the entire array of devices that could be suited to this task. Rather, we present certain examples of governance mechanisms for the collective management of resources and of tax tools for collective production. Many of the details we provide may be specific to the particular legal contexts in which they function (the Continental legal regimes of co-ownership and the unique tax regime governing the collective kibbutz communities in Israel); and we do not mean to imply that they should be simply cut and pasted into other contexts. We do believe, however, that they can illustrate the significant role the law plays in constituting viable social liberal commons and the arsenal of devices at the law’s disposal to facilitate their flourishing.

\textbf{GOVERNANCE}

The name of the game in any successful liberal commons regime – the precondition to generating the economic and social gains of cooperation – is (partial) realignment of the parties’ interests. This is a challenging task in a liberal environment given the (justified) availability of exit, which exacerbates the parties’ vulnerability and thereby threatens the possibility of trust and reciprocity. To contend with this challenge, social liberal commons contain – as the liberal commons theory prescribes – a governance regime for decisions regarding consumption and investment, management, and allocation. These governance regimes are complex and include three types of techniques for partially realigning stakeholders’ interests: internalizing externalities around individual use and investment decisions; democratizing a set of fundamental management decisions by shifting authority from individual to group control; and de-escalating tensions around entry and exit.\textsuperscript{12}

The multiplicity of mechanisms available for each of these three tasks is neither chaotic nor unprincipled. Rather, the particular property configuration that serves as the default for the property institution at hand is, by and large, aligned with the underlying

\textsuperscript{11} See RADIN, supra note 10, ch.7. For other non-binary mechanisms along the market -non-market spectrum, see Talia Fisher & Tsilly Dagan, Rights for Sale, 96 MINN. L. REV. 90 (2011) (arguing that the binary choice between alienability and inalienability is over-simplistic and presenting a detailed framework of intermediate alienability techniques, thereby exposing the modularity of alienability and facilitating creative ways for its use to promote a wide array of normative goals).

\textsuperscript{12} This paragraph and the two following ones draw heavily on Hanoch Dagan & Michael A. Heller, Conflicts in Property, 6 THEORETICAL INQ. L. 197 (2005).
“character” of that institution. Thus, in predominantly economic property institutions, the law tends to conceptualize the parties as “absentee investors,” interested in maximizing their profits with minimal daily involvement. Concerns about potential conflicts of interest in the sphere of individual consumption and investment decisions – that is, about how to internalize costs of over-use and under-investment – are therefore typically allayed by limiting individual access to the resource. Potential conflicts of interest in the sphere of democratizing management decisions, in turn, are likely to be mediated by setting hierarchical and formal procedures. And in the sphere of de-escalating tensions during transactions, there is little internal control, because market transactions provide ample policing against the external effects of stakeholders’ decisions.

Our focus lies elsewhere, of course: in predominantly social liberal commons. With these property institutions, stakeholders are increasingly understood – by themselves and by others – to be active participants in a joint endeavor, members in a purposive community. Thus, concerns about over-use and under-investment can no longer be alleviated by limiting access. The law must instead detail a sphere of “individual dominion” – a realm of decisions regarding consumption and investment that a member can make on her own. In this realm, the potential abuses of over-use and under-investment would be regulated directly by setting accounting rules that protect against such opportunism. Furthermore, in the sphere of more fundamental managerial decisions, hierarchies – at least in liberal legal environments – are unacceptable. Where the economic aspect of the joint resource is tangential to its role as a focal point of a community’s self-identification, participatory procedures are warranted. The closer a property institution is to the social pole, the greater the emphasis on voice – the more likely, in other words, that we will find a republican governance regime in which joint management is not only a means to the end of maximizing yield, but also a forum and medium of community-building. Finally, in predominantly social types of property institutions, the market does not provide sufficient protection against the external effects of stakeholders’ transactional decisions. The more social the institution, the greater the risk of opportunistic exit and entry. Accordingly, the more social the institution, the more collective control we see over exit and entry. Supporting predominantly social property institutions requires legal mechanisms that police opportunistic exit and preempt opportunistic entrants.

To demonstrate these features, we turn now to a brief survey of the main rules of co-ownership in Continental legal systems, focusing specifically on the German tradition.

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(Germany, Austria, Switzerland, and, in this context, Israel\(^{14}\)), which is particularly supportive of social liberal commons.

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Consider the three basic rules of Continental systems regarding individual dominion. The first rule relates to the concern of over-use, which can be triggered by the dynamics of the commons. Certain commons property regimes can, and often do, create detailed regulations restricting and channeling use, tailored to the specific resource and its particular environmental, economic, and social circumstances, and imposing corresponding escalating punishments.\(^{15}\) Formal law, however, is less likely to provide a successful default regime of direct regulation that is sufficiently contextual and dynamic. And indeed, a more effective legal intervention is to address over-use indirectly,\(^{16}\) by prescribing – as the Continental traditions do – that every commoner is liable to the other commoners for the fair market value of every use calculated pro rata (that is, according to ownership share).\(^{17}\)

Supplementing this is another rule in the Continental tradition, which prohibits, as in common law systems, a co-owner from making use of the resource in a way that interferes with its reasonable use by other co-owners.\(^{18}\) The salient difference is in the details of the implementation of this vague (and, therefore, mostly inspirational) prohibition specifically when joint use is impossible or unreasonable. The approach German law takes is supportive of the liberal commons: use by one co-owner is permitted only when it does not interfere with a similar use (even if not actual) by other co-owners.\(^{19}\) This rule encourages the parties in such circumstances to reach a cooperative

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\(^{14}\) Although in many respects, Israel is usually considered a common-law jurisdiction, the Israel Land Law is part of a codification that was heavily influenced by the Continental tradition. See Yoram Shachar, History and Sources of Israeli Law, in INTRODUCTION TO THE LAW OF ISRAEL 1, 5-6 (Amos Shapira & Karen C. DeWitt-Arar eds., 1995).

\(^{15}\) See OSTROM, supra note 2, at 71-74, 94-100; Margaret A. McKean, Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management, 4 J. THEORETICAL POL. 247, 256, 272-75 (1992).

\(^{16}\) See Dagan & Heller, supra note 3, at 583-84.


\(^{18}\) See § 828 ABGB (Aus.); CODE CIVIL [C. CIV.] art. 815-9 (Fr.); § 743 Nr. 2 BGB (F.R.G.); Israel Land Law § 31(a)(1); see also L.A. CIV. CODE ANN. art. 802.

\(^{19}\) See Gerd-Hinrich Langhein, [Commentary], in J. VON STUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH 135 (Norbert Horn ed., 13th ed. 1996). For the diametrically opposite American rule, which the text implicitly criticizes, see Dagan & Heller, supra note 3, at 611.
and efficient solution (such as rental to a third party), rather than engaging in a strategic game where each co-owner seeks the right to exclude the others.\textsuperscript{20}

The flip-side of over-use is under-investment, which the structure of the commons seems to invite due to the potential for free-riding. To address this issue, German and Israeli law allow a commoner who invests in the maintenance and management of the commons resource to claim immediate pro rata contribution from each of the other commoners but disallow recovery for improvements\textsuperscript{21} (whose value is less clearly shared by all commoners\textsuperscript{22}). This relatively broad provision for immediate reimbursement for noncontestable (reasonable) collective goods bestowed upon the land – the second basic rule of Continental co-ownership law in the sphere of individual dominion – discourages the sort of under-investment that can undermine the success of any commons and demoralize any community.\textsuperscript{23} Furthermore, such a regime of immediate contribution – as opposed to a regime that prescribes contribution only upon partition\textsuperscript{24} – assumes that dissolution is not a satisfying first or best solution but should be a last resort solution.

Thirdly, the legal regimes in the Continental tradition distribute the net fruits and revenues of the commons property on the basis of the commoners’ shares in that property. Moreover, even where these revenues are not produced by all the commoners but by one (or a few) of them, the laboring commoner does not get to keep the net profits in their entirety. Rather, in addition to fair market value for the use of their shares, the other commoners receive at least a slice of the generated net profits.\textsuperscript{25} Adopting this rule

\textsuperscript{20} If joint use is impossible, the disposition of the property is determined by agreement of all the commoners; if this is impossible too, a majority vote can determine the use of the property, and compensation for the benefits of this use must be paid to the nonusing owners, § 745 BGB. Swiss law is similar in this regard. \textit{Arthur Meier-Hayoz, Das Eigentum [Property Rights], in 4 Berner Kommentar: Das Sachenrecht} 447-50 (1966).

\textsuperscript{21} For Germany, see § 748 BGB, \textit{translated in The German Civil Code} 122 (Ian S. Forrester et al. trans., 1975), which states, “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.” \textit{See also} Langhein, \textit{supra} note 19, at 219 (indicating that there is no compensation for improvements). This rule also holds in Israel, Israel Land Law § 32.

\textsuperscript{22} \textit{See} Dagan & Heller, \textit{supra} note 3, at 587-88.


\textsuperscript{24} As American law by and large provides. \textit{See} Dagan & Heller, \textit{supra} note 3, at 612.

represents a preference for ameliorating over-use and for inculcating a sense of community over policing against under-investment.26

At first glance, these three rules may seem frustratingly impractical because of their high administrative costs. But a more charitable reading suggests that these accounting mechanisms are not intended to serve commoners on a daily basis. Commoners are generally unlikely to resort to these legal devices – as opposed to informal social norms of rough mental accounting – on a regular basis and not only because it would be costly: rather, people often perceive recourse to law as unnecessary, unneighborly, and even hostile in ongoing relationships of cooperative interaction, mutual trust, and group solidarity.27 The role anticipated for the Continental co-ownership doctrines is quite different. They are supposed to function in the background of the parties’ relationship and intended to supply a formal “safety net” against the excessive exploitation of any one party by another if the commons breaks down. In this way, the mere existence of these rules allows commoners, without taking prohibitive individual risks, to enjoy the benefits of trusting one another.28 And just as trust secures success, so does success reinforce trust – a virtuous circle in which trust, as Philip Pettit claims, “builds on trust” and can “grow with use.”29

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While rules regarding individual use and investment decisions are not trivial, the more significant way in which Germanic legal regimes support the commons lies in their architecture of group self-governance. These systems allow majority rule a wide jurisdiction and reserve a relatively small domain for unanimity. German law, for example, allows for majority rule in decisions “corresponding to the character of the common object” and requires unanimity only for “essential alteration[s] of the object.”30

Majority rule is key to curbing holdouts and anticommons tragedy as well as to helping commoners capture the economic and social benefits of a viable commons. Such a democratic regime gives the group the power to attune the management and use of the commons resource to changing environmental, economic, and social circumstances. It

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30 § 745 BGB. See similarly § 833-35 ABGB (Aus.); ZGB art. 647 (Swit.z.); SBIRKA ZAKONU [SB.] art. 139 (Czech Rep.); ASTIKOS KODIX arts. 789, 792-93 (Greece); POLGARI TORVENYKONYV [PTK.] arts. 140, 144 (Hung.); CODICE CIVILE arts. 1105-06, 1108 (Italy); MINF arts. 251, 252 (Japan); Israel Land Law § 30.
also ensures voice for each individual commoner, encouraging commoners to opt for voice first and use exit as only a final recourse; this facilitates group deliberation, which is a means of socialization and cultivating collective commitments. These cooperation-enhancing qualities produce a relatively broad majority-rule jurisdiction. Theoretically, majority rule should be available for decisions that tend to increase the size of the pie, and unanimity ought to be required only to protect against the risk of minority exploitation, namely: when decisions merely redistribute within a same-sized pie. The more restrictive threshold of the German tradition, which rests on the founding commoners’ expectations as to how the property will be used, could reflect caution over possible court error as to the utility of conflicting uses in complicated disputes.31

Democratic self-governance requires supportive procedural norms, both informal and formal. In successful commons regimes, Margaret McKeen 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 “adjudicate conflicts” amongst themselves. These bodies, as she describes them, seem to operate typically along republican democratic lines. Not only is power decentralized so that there is no hierarchy dividing leadership (even if elected) from “citizens,” but significant emphasis often tends to be placed on collective deliberation. To ensure adherence to the group’s decisions, deliberative bodies take into account the views of all eligible users of the commons. Thus, although formally majoritarian, these bodies usually engage in consensual decisionmaking.32 Democratic governance operates as a background rule, while daily decisionmaking, in the absence of deep 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.33

The Continental co-ownership regimes foster such republican governance of participatory democracy, which is, of course, an important institutional mechanism for community-building. Under German law, for example, each co-owner has the right to “adequate” participation in the decisionmaking process, which includes access to adequate information and a right to adequate consideration of one’s opinion in the process.34 Israeli law requires disclosure and consultation in decisionmaking and that parties engage in the consultation open-mindedly; it further provides that any violation of

31 See Dagan & Heller, supra note 3, at 590-94, 615-16.
33 See Dagan & Heller, supra note 3, at 594.
34 See § 744 Nr. 1 BGB; Langhein, supra note 19, at 163-64; Schmidt, supra note 25, §§ 744, 745 ¶¶ 14-17.
these requirements will render the majority decision void.\textsuperscript{35} These procedural safeguards are significant because they may ease parties’ concern that other co-owners will maneuver behind their backs. To support cooperation amongst parties, the judiciary is further enlisted to resolve disputes by “ provid[ing] solutions that permit [parties] to end their quarrels and to get on with their lives.”\textsuperscript{36} And where no such reconciliation is possible, a court is likely to order dissolution of the commons, because for hostile parties, co-ownership and co-management of commons resources are bound to end in tragedy. Finally, the prescription of open-minded consultation is difficult to enforce because the majority can often adhere in a purely superficial way. Yet it could nonetheless facilitate republican social norms by providing commoners with guidelines for conduct and judgment they each can expect the others to generally follow in a social context governed overall by cooperation and mutual trust.\textsuperscript{37}

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Finally, even rules regarding the end-game of the commons may help ameliorate opportunism, which is – especially where the law is committed, as it should be, to safeguarding every commoner’s right of exit\textsuperscript{38} – the nemesis of successful commons property. One such rule applied in the legal systems we analyze allows for a cooling-off period by enforcing party agreements that restrain exit (both through alienation of one’s share and through partition) for a limited time period. This is generally achieved by only invalidating agreements to restrain alienation if they exceed a set number of years or by subjecting restraint beyond a limited period of time to judicial scrutiny.\textsuperscript{39} A cooling-off period ensures that a decision to exit is informed (rather than emotional) and sincere (rather than strategic). Allowing such temporary restraints on exit can also serve as a catalyst for mutual trust and cooperation. For even relatively brief “grace periods” that delay exit generate an inertia of repeat interactions, which, in turn, leads parties to view

\textsuperscript{35} See respectively Zol Bo Ltd., 37(4) P.D. 737; C.A. 458/82, Vilner v. Golani, 42(1) P.D. 49.


\textsuperscript{37} See Dagan & Heller, supra note 3, at 595.

\textsuperscript{38} On exit and property, see GREGORY S. ALEXANDER & HANOCH DAGAN, PROPERTIES OF PROPERTY 147-53, 158 (2012).

\textsuperscript{39} In Israel, the time limit on agreements restraining alienation is five years, Israel Land Law § 34(b); 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). Many Continental regimes limit agreements to restrain partition to five years, see, e.g., C. CIV. art. 815 (Belg.); C. CIV. art. 815 (Fr.), as does Japan, MINPO art. 256. In Louisiana, parties may agree to restrain alienation and partition for a period of up to fifteen years. LA. REV. STAT. ANN. § 9:1112 (West 1991). Some provisions in the Germanic systems relating to agreements to restrain exit go far too in supporting the flourishing of the commons and threaten the liberal premises upon which desirable commons regimes are based. See Dagan & Heller, supra note 3, at 618-19.
their relationships as though they were of endless or unknown duration and, therefore, to adopt a tit-for-tat strategy that fully “rational” parties would adopt only in indefinite games.40

Ensuring distributive equality upon partition also supports the success of the commons. Legal systems in the Continental tradition use two methods to achieve this goal. The first is scrupulously fair distribution of the value of the property on partition. Thus, where partition in kind – which is generally the preferred form of division41 – applies, each party is ensured its fair share through the mechanism of owelty payments.42 A second mechanism, which is used in German law, is to limit partition in kind to situations in which owners will receive identical value in a physical partition. German law provides further security against unfair distribution of the physical portions by prescribing that following partition, the parts are distributed by lot.43 “Partial partition” is allowed only upon the unanimous consent of the commoners.44 This seemingly harsh requirement is justified because allowing a subset of commoners to carve out a share through physical division absent general consent would likely cause injury to the remaining commoners, who may be left with a larger share of a smaller and less valuable piece of property.45

**TAXATION**

Thus far, we have discussed the internal affairs of the commons and the significant role of the law in providing background rules that protect against opportunism, facilitate cooperation, and entrench norms of interpersonal trust. We now turn to one of the bluntest forms of external incentive that the law can provide: the tax treatment of landed communities. Contrary to its usual depiction in impersonal, business-oriented terms, we

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40 See Dagan & Heller, supra note 3, at 599-600. A more controversial means along somewhat similar lines is the right of first refusal, provided for, for example, under French law and in French-influenced civil codes. See, e.g., C. civ. arts. 814-15 (Fr.); Sb. art. 140 (Czech Rep.). For a preliminary analysis, see Dagan & Heller, supra note 3, at 601.

41 See, e.g., § 843 ABGB (Aust.); Israel Land Law §§ 39, 40, 1959, 23 L.S.I. 288 (1968-1969); ZGB art. 651(2) (Switz.). The preference given to partition in kind usually implies that it applies unless it would seriously compromise the value of the property distributed amongst the parties C.A.1017/97, Riddlevitch v. Moda’i, 52(4) P.D. 625 (Isr.).

42 See C. civ. art. 833 (Belg.); C. civ. art. 830 (Fr.); Israel Land Law § 39(b); ZGB art. 651(3) (Switz.).

43 § 752 BGB.

44 See Langhein, supra note 19, § 749 ¶ 53; Schmidt, supra note 25, § 749 ¶¶ 25-26. For the law in Israel, see C.A. 623/71, Gan-Boaz v. Englander, 27(1) P.D. 334 (Isr.).

45 See Dagan & Heller, supra note 3, at 617-18.
will show that tax can provide incentives that support noncommodified interaction amongst members of such communities.

Income tax is traditionally viewed as a vehicle for collecting and allocating the costs of government in an equitable and efficient manner. But in addition to realizing these goals, tax also reflects, as well as shapes, a particular vision of our personal identities, of our social interactions, and of the communities we belong to.

Consider identity first. Income tax law embodies a particular conception of the self and the social roles of taxpayers in various contexts. When, for example, the law acknowledges some differences amongst taxpayers (e.g., a person’s disability, her childcare expenses, or her support of dependent relatives) while ignoring others, it reinforces a certain conception of a taxpayer and disregards – at times, even undermines – alternative conceptions. In so doing, it draws on some image of an archetypical individual taxpayer while simultaneously participating in its construction. These assumptions are not merely expressive. They entail real-life consequences and, therefore, impact taxpayers’ real-life choices and, indirectly, their perceptions of themselves and others.

Secondly, income taxation plays a unique role in shaping social interactions. To begin with, since tax influences individuals’ choices, when a sufficient amount of taxpayers change their choices, social meanings may change too along with social norms. As a result, tax can also impact the ways in which taxpayers function within their families, communities, and workplaces. Tax may likewise affect the composition, size, and nature of the communities that taxpayers form. A seemingly technical regulation (e.g., disallowing the deduction of commuting expenses) could encourage the formation of communities centered around workplaces rather than, say, family connections. Furthermore, income taxation operates under particular, often implicit assumptions regarding the nature and meaning of the social institutions it impacts. Some of these institutions are integral to a person’s identity: her family, residential community, the philanthropic institutions she contributes to, and communities she belongs to. Guided by these assumptions, tax law, whether explicitly or implicitly, is engaged in shaping these social institutions and structures. Not only does it provide economic incentives (positive and negative) in relation to particular social ideas, actions, and behaviors, but it also has


48 Thus, for example, not taxing the work of a stay-at-home spouse while disallowing a deduction for hired help creates an incentive for single-earner families and thereby entrenches a certain convention regarding the family. Similarly, disallowing the expenses of disabled individuals or their employers in adapting their workplaces could discourage the inclusion of the disabled in society in general.
an expressive function: it both reflects and molds our perceptions of which behaviors, communities, and interactions are to be considered normative and, therefore, acceptable and which are not (or less so).

Particularly relevant for our purposes is that the way in which tax treats certain networks of support and voluntary schemes of redistribution could determine the level and form of this redistribution, promote some social institutions, and discourage others. Take, for example, the tax treatment of interactions within families: tax often ignores services provided amongst family members and may allow a deduction for the financial support of dependent children, while including in the tax base financial support provided to other relatives (say, support of a disabled relative, which is not deductible).

The analysis below illustrates this powerful (but too often ignored or marginalized) function of tax law. Our particular interest is tax policy’s interaction with communities, specifically the noncommodified aspect that makes a subset of communities particularly unique. We will focus on three core contexts where we find tax law’s intervention particularly significant: One, tax law can provide incentives or disincentives for the actual formation of certain communities. Secondly, it affects also the division of labor between the state and communities in bearing responsibility for the social safety net and redistribution in general, thereby shaping members’ allegiance to their communities and their sense of belonging and solidarity. Thirdly, and most relevant to our discussion, tax law participates in constituting the distinction between market and non-market interactions (both in society at large and within communities) by targeting certain income-producing activities and veering away from non-market interactions (for example, the non-taxation of imputed income, gifts, and housework).49

Just as the Continental law of co-ownership was our test case for how supportive governance mechanisms can facilitate the commons, the unique taxing regime applied to the Israeli kibbutz is the test case in our inquiry into the impact of a supportive taxation regime. The kibbutz is – or at least used to be predominantly50 – a community governed by the maxim “from each according to his ability, to each according to his needs.” Kibbutz members hold and manage jointly all property (means of production, housing, and other consumer durables), and its benefits are distributed equally, with no direct link between the work an individual performs or any other contribution she makes to


50 In recent years, many kibbutzim have undergone a transformation to become “renewing kibbutzim,” which apply a differential wages system. This system links members’ economic contribution to the kibbutz “common” coffers to the remuneration they receive from the kibbutz. This is supplemented by what is known as a “community tax,” whereby kibbutz members who earn relatively higher wages contribute a portion of their salary to the funding of, primarily, communal services and the kibbutz’s mutual aid obligations. For a discussion of the tax implications of this intermediate form of community, see id.
communal life and the distributed benefits. Private property holding is generally prohibited, and all income, including the salaries of members who work outside the kibbutz, goes into the common purse. At the same time, there is collective provision of members’ needs (such as food, clothing, housing, education, and health), through either the services of other kibbutz members or a collective system of production and consumption. This constitutes what is known as the “mutual guarantee” amongst all kibbutz members. Thus, what could be interpreted in any other context as a series of quid-pro-quo barter transactions amongst the kibbutz members is a set of non-market interactions in the kibbutz context, given its ethos of equality, fraternity, and mutual assistance.51

In its divergence from the surrounding environment, the kibbutz in its traditional form presented a challenge to the state’s income taxation regime. Should tax law support these unique features of the kibbutz by setting a separate taxing regime for the kibbutz? How should tax law treat interactions amongst kibbutz members? And should it allow for – perhaps even encourage – its private scheme of redistribution?

* * *

Because goods and services are distributed amongst the kibbutz members as per their needs and in accordance with the kibbutz’s financial capacities, the services kibbutz members receive from the community are not, almost by definition, remuneration for the services they provide (or vice versa). But whereas the kibbutz is clearly not a framework of strictly commercial relationships, it is also no stranger to the material realm: from its inception, the kibbutz constituted the main economic framework for meeting its members’ material needs. In recognizing this uniqueness, the Israeli tax system has traditionally accorded special treatment to kibbutzim: it taxes kibbutz business activities (e.g., agriculture, industrial enterprises, and tourism), but refrains from taxing services provided by members to other members, at either the kibbutz level or individual member level. In fact, kibbutz members are not taxed at all. The kibbutz is the only entity taxed, although its liability is determined according to its individual members’ tax rates.

Under this system, there are two stages to calculating the kibbutz-level tax. The first stage involves the calculation of the kibbutz’s income, as an independent entity, from all branches of its business activities, including the income of members who work outside the kibbutz. In the second stage, the (theoretical) tax liability of members for their allocated income is calculated by attributing to them equal shares of the kibbutz’s taxable income. At this stage, the credits, personal deductions, and other individual member benefits are also taken into account in the tax liability calculation. Members, however, do not actually bear this tax liability personally, but rather, the kibbutz pays the aggregate of

51 See Dagan & Margalit, supra note 49.
taxes calculated for its members. Thus, the kibbutz is essentially taxed as an upside-down, flow-through entity, where the entity, rather than its members, is taxed.52

Three prominent features emerge in this taxation system: the kibbutz is treated as a unique type of incorporation; economic interactions within the kibbutz are not classified as (taxable) transactions; and there is equal attribution of the kibbutz income amongst its members. All three of these features both acknowledge and facilitate the exceptional nature of the traditional kibbutz.

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To understand this, consider first the fact that unlike the two-stage taxation system applied to companies or the flow-through taxation of partnerships, kibbutzim are taxed as the sum of all their individual members. Were the kibbutz regarded as just a garden-variety commercial entity, it would be treated as though it purchases services from its members and sells services to member and non-member customers. In traditional tax law, this would yield two levels of taxation: the one at the kibbutz level (taxing income from sale of services and allowing the deduction of purchase costs) and the other at the level of the individual members (taxing income from the sale of their services). However, Israeli tax law does not regard kibbutz members to be employees of the kibbutz, nor the services they receive to be analogous to shareholder or partner profits.

Thus, the kibbutz’s provision of its members’ needs is not deemed income for its members (as either wages or profit distribution), nor is it tax-deductible for the kibbutz. Instead, the incomes of both the kibbutz and its members are taxed jointly at the kibbutz level, as a single unit, much like a family rather than a company. Despite being a corporation, the kibbutz is taxed along with its members at only one level, with the kibbutz paying income tax not only on the profits it makes but also for the value of goods and services it provides to its members.53 Yet in contrast to other flow-through entities (such as partnerships), the taxation is at the corporation level and not the individual level. The applicable tax rates, however, are individual progressive rates rather than corporate rates, and – unlike companies – the kibbutz can enjoy individual member credits and exemptions (e.g., childcare and disability credits and exemptions).

* * *

Abstracted from its communal context, the daily life of the traditional kibbutz is saturated with barters between members. These could be viewed (from a market perspective) as simple “give-and-take” transactions in which the kibbutz functions as a clearinghouse.


Thus, for example, whereas some kibbutz members work at its plant in the manufacture of products to be sold on the market and thereby contribute to the collective income, other members work in the collective kibbutz kitchen preparing and serving meals for all members and thereby provide internal services.

Yet as noted, Israeli tax law has traditionally refrained from taxing such interactions amongst kibbutz members as barter transactions, just as it refrains from taxing, say, the value of services a taxpayer provides to her family members. Not taxing the reciprocal services of kibbutz members – refusing to conceptualize them as the provision of a service for a benefit – reflects and reinforces their understanding as non-market interactions. By the same token, the law ignores the array of mutually provided services through which members’ needs are met, however great they are and irrespective of the extent of their contribution to the collective good.54 Accordingly, when members provide one another with early childhood education, laundry services, kitchen services, gardening, maintenance, and the like, the consumption resulting from these services is not taxed at either the kibbutz level or individual member level.55 And again, not treating these interactions as a complex system of barter transactions – opting instead to take them as part of a cooperative sharing of goods and services based on joint ownership of resources – reflects tax law’s embrace of the kibbutz’s distinctive noncommodified character.

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Lastly, recall that the kibbutz is taxed at the collective tax rate of its members (including progressive taxation and credits) and not the corporate tax rate; thus, the kibbutz is implicitly conceptualized, for tax purposes, as purely the representative of its members. Attributing to the kibbutz the tax benefits for which its individual members are eligible rests on the premise that those individuals share, in equal part, the kibbutz income.56 Although this income is not actually distributed amongst the members, this is no mere legal fiction. Rather, this working assumption accommodates – indeed, even embodies and fosters – the kibbutz’s traditional egalitarian ideology, under which all members have equal rights.


55 This treatment of services provided internally by kibbutz members differs from the treatment of services purchased by the kibbutz from external service providers (which are taxed at the kibbutz level).

56 See Income Tax Circular, supra note 52, § 2.3.1.
CONCLUDING REMARKS

Commons property is a true challenge to the law, especially in a legal context that respects – as we think should be the case – individual mobility, which is key to freedom and autonomy.\(^{57}\) While a tragedy of the commons is not inevitable, the sustainability – let alone flourishing – of the commons is far from obvious. But the rewards of the latter trajectory are critical: a successful commons property can generate significant economic benefits, due to its intrinsic advantages of economies of scale, risk-spreading, specialization, and synergy. These benefits multiply in the context of social commons property regimes that function as the loci and engines of meaningful interpersonal relationships; indeed, they at times even become constitutive elements of commoners’ identities.

For a liberal polity that celebrates autonomy-enhancing choice and is thus committed to structural multiplicity, providing a platform for these types of property institutions is as crucial as cultivating other, more individualistic property institutions, such as the fee simple absolute.\(^{58}\) In contending with the challenge of the commons, particularly the social commons on which we focused here, the law needs to be sensitive to both material incentives and expressive implications of this institution. The two contexts we explored may be localized and their specific features not suited to all cases. Yet we believe that they highlight the range of instruments available to the law in carrying out its task and the subtle ways in which they can be used to assist commoners in overcoming collective action problems, developing trust and social capital, and preserving the integrity of their noncommodified relationships.

\(^{57}\) Mobility, to be sure, challenges many other important features of our collective life as well. See Tsilly Dagan, The Tragic of Choices of Tax Policy in a Globalized Economy, in TAX AND DEVELOPMENT 57 (Yariv Brauner & Miranda Stewart eds., 2013).