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# Common Ownership and Equality of Autonomy

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## **COMMON OWNERSHIP AND EQUALITY OF AUTONOMY**

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## COMMON OWNERSHIP AND EQUALITY OF AUTONOMY

*Anna di Robilant\**

In recent years, common ownership has enjoyed unprecedented favour among policy-makers and citizens in the United States, Canada, and Europe. Conservation land trusts, affordable-housing co-operatives, community gardens, and neighbourhood-managed parks are spreading throughout major cities. Normatively, these common-ownership regimes are seen as yielding a variety of benefits, such as a communitarian ethos in the efficient use of scarce resources, or greater freedom to interact and create in new ways. The design of common-ownership regimes, however, requires difficult trade-offs. Most importantly, successful achievement of the goals of common-ownership regimes requires the limitation of individual co-owners' ability to freely use the common resource, as well as to exit the common-ownership arrangement.

This article makes two contributions. First, at the normative level, it argues that common ownership has the potential to help foster greater "equality of autonomy". By "equality of autonomy", I mean more equitable access to the material and relational means that allow individuals to be autonomous. Second, at the level of design, this article argues that the difficult trade-offs of common-ownership regimes should be dealt with by grounding the commitment to equality of autonomy in the context of specific resources. In some cases, this resource-specific design helps to minimize or avoid difficult trade-offs. In hard cases, where trade-offs cannot be avoided, this article offers arguments for privileging greater equality of autonomy over full negative freedom.

Au cours de ces dernières années, la propriété commune a joui d'un avantage sans précédent auprès des décideurs politiques et des citoyens des États-Unis, du Canada et d'Europe. Le nombre de fiducies de préservation de terrains, de logements abordables, de coopératives, de jardins communaux et de parcs gérés par des quartiers est en croissance dans toutes les grandes villes. D'un point de vue normatif, ces régimes de propriétés communes impliquent de nombreux bénéfices, comme l'esprit communautaire de l'utilisation efficace de ressources peu abondantes, ou la plus grande liberté d'interagir et de créer de façons nouvelles. La conception du régime de propriété commune, cependant, demande des compromis difficiles. Plus important encore, pour atteindre avec succès les objectifs des régimes de propriété commune, il faut limiter la capacité des copropriétaires individuels à utiliser la ressource commune librement ainsi que celle de sortir de l'arrangement de propriété commune.

Cet article a deux rôles. Premièrement, au niveau normatif, il présente l'argument que la propriété commune a le potentiel d'encourager une plus grande «égalité d'autonomie». Par «égalité d'autonomie», je veux dire un accès plus équitable aux moyens relationnels et matériels qui permettent à un individu d'être autonome. Deuxièmement, au niveau de la conception, cet article avance que les compromis difficiles des régimes de propriété commune devraient être gérés en renforçant l'engagement à l'égalité d'autonomie dans le contexte de ressources spécifiques. Dans certains cas, cette conception contextuelle pour les ressources spécifiques aide à minimiser ou éviter de durs compromis. Dans les cas difficiles où les compromis ne peuvent être évités, cet article offre des arguments pour privilégier une plus grande égalité d'autonomie plutôt que des libertés négatives complètes.

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## Introduction

For a long time, common ownership had little appeal in Western liberal democracies. In the collective imagination, common ownership was associated with nightmares of Soviet peasants forced into kolkhozes and deprived of their land, and with homeowners losing their homes to organizations of tenants.<sup>1</sup> Political and legal culture in the United States has been particularly unsympathetic to common ownership. The story of common ownership in America is the story of closing the open, rural landscape of early America.<sup>2</sup> It is the story of courts' reluctance to protect citizens' common rights in tidal water resources.<sup>3</sup> It is the story of the mid-nineteenth-century development of a system of property rights in the California gold mines, earlier treated as a commons.<sup>4</sup> And it is the story of the extraordinary flourish, followed by the failure, of the utopian religious communities committed to communal ownership.<sup>5</sup> The commons were also unpopular among scholars, who were still influenced by pessimistic accounts, such as Hardin's allegory of the "tragedy of the commons"<sup>6</sup> and Demsetz's unidirectional theory of property evolution<sup>7</sup> from the commons to private property regimes.

In recent years, however, common ownership has enjoyed unprecedented favour. The limitations of zoning, taxation, and other public land-use control measures as means for regulation and redistribution have induced policy-makers and citizens to turn to a long-neglected private law tool, common property, with new interest.<sup>8</sup> Community land trusts have

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<sup>1</sup> See e.g. Samuel Kucherov, "Property in the Soviet Union" (1962) 11:3 Am J Comp L 376 at 376-78.

<sup>2</sup> See e.g. Eric T Freyfogle, *On Private Property: Finding Common Ground on the Ownership of Land* (Boston: Beacon Press, 2007) at 29-31.

<sup>3</sup> See e.g. Lynda L Butler, "The Commons Concept: An Historical Concept with Modern Relevance" (1982) 23:4 Wm & Mary L Rev 835.

<sup>4</sup> See Andrea G McDowell, "From Commons to Claims: Property Rights in the California Gold Rush" (2002) 14:1 Yale JL & Human 1.

<sup>5</sup> See e.g. Carol Weisbrod, *The Boundaries of Utopia* (New York: Pantheon Books, 1980).

<sup>6</sup> Garrett Hardin, "The Tragedy of the Commons", *Science* 162:3859 (13 December 1968) 1243.

<sup>7</sup> Harold Demsetz, "Toward a Theory of Property Rights" (1967) 57:2 Am Econ Rev 347.

<sup>8</sup> For example, organizers of the *Harvard Law Review's* 2011-12 symposium on "The New Private Law" note that "[s]ince the rise of Legal Realism and the modern administrative state, the standard academic supposition in this country has been that 'all law is public law,' and that any use of the category of private law is unhelpful or pernicious. 'The New Private Law' argues that while the Realist critique of private law has been richly generative, it has also caused us to lose sight of entire domains of law and legal study" (Harvard Law Review, *2011-12 Symposium: The New Private Law* (21 October

experimented with distributing the costs and benefits of land development through common ownership rather than through taxation. Conservation land trusts rely on common-ownership schemes to preserve open space or protect ecological resources. Affordable-housing co-operatives are increasingly seen as successful means for making good-quality affordable housing available to medium- and low-income buyers. Community gardens and neighbourhood-managed parks, where groups of private citizens reclaim vacant urban open spaces as commons, are spreading in US cities.

Scholars have also dropped their “tragic” views. An “antitragedy” view first emerged among political scientists, ecologists, and anthropologists, who argued that Hardin’s thesis lacked “historical, theoretical, or cultural veracity.”<sup>9</sup> Antitragedy views have now become popular among property scholars as well. Numerous antitragedy articles have appeared in law reviews.<sup>10</sup> The 2011 edition of the Common Core of European Private Law conference was called Commons Core,<sup>11</sup> and the famous Max Planck Institute has established a department devoted to the research on collective goods.<sup>12</sup> Among supranational decision makers, “the [World] Bank is also deeply engaged in, and on the cutting edge of, commons discourse.”<sup>13</sup>

That common ownership is in vogue in some circles does not prove that it is the only or the best form of ownership. Contrary to what some might suggest, however, this article argues that common property is much more than a passing fancy. It addresses the questions of why and when common ownership is a good option.

In the new commons discourse, common-ownership regimes hold out the promise of realizing a variety of desirable values: democratic and responsible management of natural resources; participatory production of diverse cultural artifacts and information; and efficient use of scarce resources when changes in prices or transaction costs make private proper-

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2011), online: Harvard Law Review <[http://www.harvardlawreview.org/issues///\\_8348.php](http://www.harvardlawreview.org/issues///_8348.php)>).

<sup>9</sup> Michael Goldman, “Customs in Common: The Epistemic World of the Commons Scholars” (1997) 26:1 *Theory and Society* 1 at 4.

<sup>10</sup> See e.g. Hanoch Dagan & Michael A Heller, “The Liberal Commons” (2001) 110:4 *Yale LJ* 549.

<sup>11</sup> See the conference program: Ugo Mattei & Mauro Bussani, eds, *The Common Core of European Private Law 17<sup>th</sup> General Meeting: The Commons Core* (Turin: International University College of Turin, 2011), online: The Common Core of European Private Law <[http://www.common-core.org/doc/meeting\\_17\\_brochure\\_V05.pdf](http://www.common-core.org/doc/meeting_17_brochure_V05.pdf)>.

<sup>12</sup> Online: The Max Planck Institute for Research on Collective Goods <<http://www.coll.mpg.de/>>.

<sup>13</sup> Goldman, *supra* note 9 at 7.

ty inefficient.<sup>14</sup> The idea that common ownership could deliver greater economic equality, however, has been largely absent from this new commons discourse. This is a puzzling absence: the word “commons” has always had “a special resonance in political theory,” embedded with themes of “equality and inclusiveness”.<sup>15</sup> Further, with Occupy Wall Street in the headlines and statistics showing that twenty per cent of Americans control about eighty-five per cent of American wealth, the concern for equality is gaining centrality in the public discourse.<sup>16</sup>

This article argues that common ownership has the potential to help foster greater “equality of autonomy”, by which I mean more equitable access to the material and relational means that allow individuals to be autonomous. I turn, for inspiration, to late nineteenth-century Europe, where policy-makers and law professors revised earlier, pessimistic ideas about the inevitable failure of common ownership and instead debated its potential. Their debate stands as a rare moment when conservatives and progressives alike talked about property law in a new way—as a means of equalizing, rather than maximizing, the enjoyment of autonomy. They set aside the focus on protecting the individual owner’s autonomy that had characterized property debates since the Enlightenment and the rise of liberalism. Instead, they privileged the idea that collective landownership could make the autonomy that derives from owning land available on a more equal basis.<sup>17</sup>

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<sup>14</sup> See the literature discussed in Part I, below.

<sup>15</sup> Wendy J Gordon, “Discipline and Nourish: On Constructing Commons” (2010) 95:4 Cornell L Rev 733 at 754. From Karl Marx’s *Rheinische Zeitung* articles on the debates on the law on thefts of wood before the Rhineland Assembly (Karl Marx, “Third Article: Debates on the Law on Thefts of Wood”, translated by Clemens Dutt in *Karl Marx Frederick Engels: Collected Works* (New York: International Publishers, 1975) vol 1) to E.P. Thompson’s work on the “moral economy” of the English crowd in the eighteenth century (*Customs in Common* (New York: New Press, 1993) ch IV), the commons have been seen as providing the poor with access to necessities or a little surplus income.

<sup>16</sup> See G William Domhoff, “Power in America: Wealth, Income, and Power” (October 2012), online: Who Rules America? <<http://www2.ucsc.edu/whorulesamerica/power/wealth.html>>. See also Michael I Norton & Dan Ariely, “Building a Better America—One Wealth Quintile at a Time” (2011) 6:1 Perspectives on Psychological Science 9 at 11, figure 2.

<sup>17</sup> A terminological premise is needed. I will use the term “collective ownership” when discussing the European nineteenth-century debate and “common ownership” when referring to present debates. European jurists talked about “collective ownership” and distinguished it from simple co-ownership. Co-ownership, or *communio*, was the concept that European continental jurists had traditionally used to deal with proprietary situations involving more than one owner. The form of collective ownership that French and Italian scholars sought to restore and expand in the late nineteenth century differed from co-ownership in three respects. To start with, in co-ownership each co-owner’s right was seen as analogous to that of an individual owner and was described through

The notion of equality of autonomy that I propose differs from conventional arguments about the autonomy afforded by property rights in two respects. First, I suggest a different notion of autonomy. The autonomy that most advocates of full property rights have in mind is “negative freedom”, that is, the absence of external restraints imposed by the state or voluntarily placed by others.<sup>18</sup> By contrast, the autonomy that common ownership fosters is a “thicker” or multi-dimensional type of autonomy,

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the idea of a share. In collective ownership, by contrast, an organic group of owners exercised a unitary right, unsusceptible to being quantified by shares. Second, while co-ownership was a temporary condition, in that each co-owner could, at any moment, ask for the partition, collective ownership was not temporary and could not be divided upon request by a group member. Finally, while in the case of co-ownership, each co-owner could freely transfer her share, in collective ownership, the pool of potential transferees was variously limited. For a discussion of condominium and collective ownership, see Francesco Filomusi-Guelfi, *Enciclopedia Giuridica* [Legal Encyclopedia], 5th ed (Naples: N Jovene, 1907) at 245-53. As for the present debate in the United States, while to be technically precise, ownership regimes can be arranged along a spectrum ranging from open access to individually owned private property, most literature uses, for the sake of simplicity, “commons” or “common ownership”. Among those who classify property regimes on the basis of the number of owners, Margaret McKean distinguishes between (a) unowned or open-access property, where “no one has rights and ... no potential user can be excluded,” for example the high seas or unclaimed lands; (b) public property—property “held in trust for the public by the state, to which the general public ... has access,” for example, national parks; (c) state property—the “exclusive ... and therefore private ... property of government bodies,” for example, government offices; (d) jointly owned private property, where “co-owners may sell their shares at will without consulting the other co-owners,” for example some agricultural co-ops, business partnerships, or joint stock corporations; (e) common property where “all co-owners may simultaneously agree to sell by an agreed-upon voting rule but individual co-owners can sell, trade or lease their shares ... only in accordance with very stringent rules laid down by the group”; (f) individually owned private property (Margaret A McKean, “Success on the Commons: A Comparative Examination of Institutions for Common Property Resource Management” (1992) 4:3 *Journal of Theoretical Politics* 247 at 250-52). Stephen Munzer provides a somewhat different classification, distinguishing between (a) open access: “anyone may come in and take out units of the resource, but no person has an exclusive right to sell or manage the resource,” for example, a fishery; (b) common property: the co-owners “individually have rights of entry and withdrawal and collectively have rights to manage or sell the resource and to exclude nonmembers”; (c) semicommons: “a mix of common and private rights in which each set of rights has a significant impact on the other”; (d) anticommons: “an asset from which each person has a ... [right] to exclude” and no one, a right “to use without permission of others” (Stephen R Munzer, “Commons, Anticommons, and Community in Biotechnological Assets” (2009) 10:1 *Theor Inq L* 271 at 273).

<sup>18</sup> See John Christman, *The Myth of Property: Toward an Egalitarian Theory of Ownership* (New York: Oxford University Press, 1994) at 68-70 [Christman, *Myth of Property*]. Christman notes that arguments defending (liberal) ownership on the basis of liberty rest on a negative notion of liberty as “the relative absence of external physical restraints that prevent agents from acting on their actual desires” (*ibid* at 68). On the cognitive conditions for autonomy (i.e., for individual desires to count as autonomously chosen), see *ibid* at 162-66.

one that many have proposed in recent debates within liberalism.<sup>19</sup> It involves the availability of means that enable individuals to be autonomous.<sup>20</sup> Autonomy requires, along with negative freedom, positive freedom, that is, the basic material resources (a home, food, education) that enable us to have a meaningful set of options.<sup>21</sup> Further, to be autonomous, we need the ability to communicate and debate ideas in order to make, and take responsibility for, choices that we feel are authentically “our own”.<sup>22</sup> Second, I am concerned with patterns of distribution of autonomy. If this thicker autonomy is important for human flourishing, then it should be distributed more equally.

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- <sup>19</sup> The idea of equality of autonomy that I propose is grounded in the concept of value pluralism. For a discussion of value pluralism in property law, see Gregory S Alexander, “Pluralism and Property” (2011) 80:3 *Fordham L Rev* 1017 (pluralists hold that “there may be multiple values that are equally valid and equally fundamental and that these values sometimes conflict with each other” at 1020). Alexander distinguishes between different forms of pluralism. “Foundational pluralism” holds that “pluralism exists all the way down to the most basic level so that there is no single value by which we can judge the goodness of all other values” (*ibid* at 1021). “Normative pluralism” holds that “[t]here is a plurality of good-transmitters, or value-bearers, but only one foundational good that they all bear. Thus, one may think that aggregate well-being is the foundational intrinsic good but also believe that there are many bearers of well-being” (*ibid* [footnote omitted]). Using Alexander’s typology of pluralisms, the notion of autonomy that I propose is grounded in normative pluralism: there is one good—autonomy—and several good transmitters—negative freedom, positive freedom, and relational autonomy.
- <sup>20</sup> On the multi-dimensionality of “real” or “thick” freedom, see memorandum from Talha Syed to Anna di Robilant, “Equality of What?: The Key Options” [nd] [Syed, “Equality of What?”]. See also John Christman & Joel Anderson, “Introduction” in John Christman & Joel Anderson, eds, *Autonomy and the Challenges to Liberalism: New Essays* (Cambridge, UK: Cambridge University Press, 2005) 1 [Christman & Anderson, “Introduction”; Christman & Anderson, *Challenges to Liberalism*].
- <sup>21</sup> See Christman, *Myth of Property*, *supra* note 18 at 162-74. Christman argues that one must have the “minimal ability to consider options, gather information, and reason normally. ... Therefore, one must have access to education, health care, and welfare conditions (such as housing)” (*ibid* at 163). He continues: “In addition, it must be the case that a person’s living conditions are such that she is able to turn her attention to the variety of choices and opportunities that are relevant to her self-development,” meaning that she is “not constantly straining with other elements of one’s survival,” such as “minimal housing and welfare needs” (*ibid*). See also Joel Anderson & Axel Honneth, “Autonomy, Vulnerability, Recognition, and Justice” in Christman & Anderson, *Challenges to Liberalism*, *supra* note 20, 127. Anderson and Honneth suggest that, for individuals to be autonomous, we need to minimize their vulnerabilities, hence the emphasis on equality and access to participation in the relations of recognition through which individuals acquire autonomy.
- <sup>22</sup> See e.g. John Christman, *The Politics of Persons: Individual Autonomy and Socio-historical Selves* (Cambridge, UK: Cambridge University Press, 2009) ch 8 [Christman, *Politics of Persons*].

Common-ownership regimes such as affordable-housing co-operatives and community gardens promote greater equality in the latter two dimensions of autonomy. First, they provide co-owners with a relational network that facilitates “authentic” choices. Second, they are an important item in any package of policy proposals that ensure equality of access to basic resources such as housing or green space, and their related social and health benefits.

The commitment to equality of autonomy also offers guidance regarding the central challenge of common-ownership design: the tension between equality and negative freedom. Can common-ownership regimes be both egalitarian and liberal? In other words, can housing co-operatives or community gardens be effective in advancing greater equality in the material and relational dimensions of autonomy while also fully protecting co-owners’ negative freedom, in particular, their ability to exit common-ownership regimes? For common ownership not to be second-class ownership, individual co-owners need to have negative freedom (i.e., some margin for autonomous-use decisions, as well as the ability to freely exit the common-ownership arrangement). Historical and comparative studies, however, show that the experiments with common ownership that were the most successful in achieving high levels of equality, such as the Israeli kibbutzes or the utopian religious communities in the United States, were so because they limited members’ negative freedom.<sup>23</sup>

This trade-off between negative freedom and equality has been dealt with in one of two ways. Some invoke consent: co-owners have freely consented to limits on use and exit. By contrast, Hanoeh Dagan and Michael Heller have proposed the “liberal commons”, a default regime applicable to a wide set of common-ownership regimes, from marital property to business partnerships, that satisfactorily balance the difficult trade-offs between co-owners’ ability to exit and the egalitarian or relational rewards of common ownership.<sup>24</sup> I argue that neither answer is fully convincing. The former raises difficult questions about the economic and social constraints on consent. The latter fails to discuss the hard cases where trade-offs simply cannot be avoided.

I argue that these conflicts between negative freedom and equality should be dealt with by privileging the commitment to equality of autonomy. The approach that I propose negotiates the difficult trade-offs between greater equality and less negative freedom for co-owners in the con-

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<sup>23</sup> See e.g. Ran Abramitzky, “The Limits of Equality: An Economic Analysis of the Israeli Kibbutz” (2007) 67:2 *The Journal of Economic History* 495; Robert C Ellickson, “Property in Land” (1993) 102:6 *Yale LJ* 1315.

<sup>24</sup> *Supra* note 10.

text of specific resources. It looks at the peculiar characteristics of housing, urban land, or water, and it weighs the plural values and interests they implicate. In some cases, this resource-specific design helps to minimize or avoid difficult trade-offs. In hard cases where trade-offs cannot be avoided, I make arguments for privileging greater equality of positive and relational autonomy over full negative freedom.

This article is structured in three parts. Part I presents the contemporary debate on the commons and illustrates the central dilemmas involved in the design of common-ownership regimes. Part II turns to the European debate of the late nineteenth and mid-twentieth centuries that led to the adoption of the 1894 bill on the reorganization of land collectives in Italy. It argues that, in this latter debate, socialists and conservatives agreed that common ownership could foster greater equality of autonomy. Part III presents arguments for foregrounding a similar idea of equality of autonomy in the current commons debate and discusses the normative and design decisions presented by two common-ownership regimes that have the potential to promote greater equality of autonomy: affordable-housing co-operatives and community gardens.

## I. The Commons Debate

### A. *Antitragedy Views and the Benefits of Common Ownership*

Antitragedy views have gained wide consensus among legal scholars, triggering the proliferation of a vast commons literature.<sup>25</sup> The debate is multi-faceted. It provides explanations for the frequent reversal of the Demsetzian path from open access to private property rights. It asks which values and goals a commons regime ought to promote and facili-

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<sup>25</sup> See e.g. Stuart Banner, “The Political Function of the Commons: Changing Conceptions of Property and Sovereignty in Missouri, 1750-1850” (1997) 41:1 *Am J Legal Hist* 61; Abraham Bell & Gideon Parchomovsky, “The Evolution of Private and Open Access Property” (2008) 10:1 *Theor Inq L* 77 [Bell & Parchomovsky, “Evolution”]; Anupam Chander & Madhavi Sunder, “The Romance of the Public Domain” (2004) 92:5 *Cal L Rev* 1331; Dagan & Heller, *supra* note 10; Ellickson, *supra* note 23; Daniel Fitzpatrick, “Evolution and Chaos in Property Rights Systems: The Third World Tragedy of Contested Access” (2006) 115:5 *Yale LJ* 996; David D Haddock & Lynne Kiesling, “The Black Death and Property Rights” (2002) 31:2 *J Legal Stud* S545; Saul Levmore, “Two Stories About the Evolution of Property Rights” (2002) 31:2 *J Legal Stud* S421; Thomas W Merrill, “Introduction: The Demsetz Thesis and the Evolution of Property Rights” (2002) 31:2 *J Legal Stud* S331; Carol Rose, “The Comedy of the Commons: Custom, Commerce, and Inherently Public Property” (1986) 53:3 *U Chicago L Rev* 711; Henry E Smith, “Exclusion Versus Governance: Two Strategies for Delineating Property Rights” (2002) 31:2 *J Legal Stud* S453 [Smith, “Exclusion Versus Governance”]; Henry E Smith, “Semicommon Property Rights and Scattering in the Open Fields” (2000) 29:1 *J Legal Stud* 131 [Smith, “Semicommon Property Rights”].

tate. Finally, it considers which legal rules or design principles would best accomplish these goals. Three antitragedy views have emerged, centred on community, freedom, and efficiency.

A prolific strand of scholarship, inspired by Elinor Ostrom's work, points to the communitarian rewards of common ownership.<sup>26</sup> The communitarian view comes in two variants: an "ethno-identitarian" variant and a "civic-republican" one. According to the former, a durable regulatory scheme would have to reflect and strengthen the social identity of a close-knit group with shared beliefs, history, or needs. Examples of these close-knit groups are the "lobster gangs" of Maine, a Swiss alpine community, or the Israeli kibbutz. The ethno-identitarian claim is that the ideological homogeneity and continuing interaction of group members generate governance rules that are conducive to efficient resource management while also rewarding other vital concerns, such as community or equality.<sup>27</sup>

According to the latter, civic-republican view, a well-designed common property regime may create community where community did not previ-

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<sup>26</sup> Ostrom's groundbreaking work has triggered a proliferation of methodologically similar literature. The fundamental research question for Ostrom focuses on the governance of natural resources used by many individuals in common, more precisely "common pool resources" (CPR). Ostrom considered two alternative governance models—state control and privatization—and proposed an alternative theory of self-organizing and self-governing forms of collective action to successfully solve provision problems and appropriation problems. Ostrom examined a variety of case studies of self-governing institutions to understand the design principles that characterize successful, "long-enduring, self-organized, and self-governed CPRs" (Elinor Ostrom, *Governing the Commons: The Evolution of Institutions for Collective Action* (Cambridge, UK: Cambridge University Press, 1990) at 58 [Ostrom, *Governing the Commons*]). See *ibid* at 8-23, 58-101. See also Elinor Ostrom, "Constituting Social Capital and Collective Action" in Robert O Keohane & Elinor Ostrom, eds, *Local Commons and Global Interdependence: Heterogeneity and Cooperation in Two Domains* (London, UK: Sage, 1995) 125 at 151-57.

<sup>27</sup> Robert Ellickson defines a close-knit group as "a social entity within which power is broadly dispersed and members have continuing face-to-face interactions with one another. By providing members with both the information and opportunities they need to engage in informal social control, conditions in such groups are conducive to cooperation" (*supra* note 23 at 1320-21). Similarly, Singleton and Taylor argue that groups that manage to solve their collective action problems by themselves are those that have "community". By "community" they mean a group with (1) "some shared beliefs"; (2) a "more-or-less stable set of members ... who expect to continue interacting with one another for some time to come" and whose relations are "direct (unmediated by third parties) and multiplex"; and (3) mutual vulnerability (i.e., each actor "values something which can be contributed or withheld by others in the group and can therefore be used as a sanction against that actor"). Community is undermined or weakened by great social and economic differences among its members such as differences in income, wealth, class position, ethnicity, race, caste, language, or religion: see Sara Singleton & Michael Taylor, "Common Property, Collective Action and Community" (1992) 4:3 *Journal of Theoretical Politics* 309 at 311, 315.

ously exist.<sup>28</sup> Proponents of the civic-republican view argue that the interactive problem solving of successful commons is also at the “core ... of the community development process.”<sup>29</sup> Common ownership delivers the desired outcomes of a civic-republican ethos (i.e., participation, deliberation, knowledge production, and responsibility). While some proponents of this view focus on robust design principles,<sup>30</sup> others excavate historical examples of community building that turned out well.<sup>31</sup>

In contrast to a focus on community, a second strand of commons scholarship sees greater freedom as the reward of common ownership. The idea that open access may yield greater freedom than traditional privatization has been central to the intellectual property debate on the pub-

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<sup>28</sup> The civic-republican view became prominent among legal scholars in the late 1980s, largely due to two articles written by Frank Michelman and Cass Sunstein, respectively. According to Sunstein, the basic republican commitments are to (a) deliberation in government, (b) political equality, (c) universality, and (d) citizenship: see Cass R Sunstein, “Beyond the Republican Revival” (1988) 97:8 Yale LJ 1539 at 1541-42. Both Sunstein and Michelman advocated a modern reconsideration of civic-republican thought. Michelman in particular presented a republican constitutional theory as a potential means to justify a more robust protection of individual rights by the judiciary: see Frank Michelman, “Law’s Republic” (1988) 97:8 Yale LJ 1493. While the heyday of civic republicanism was in the 1980s, it has remained influential in the commons literature.

<sup>29</sup> James A Swaney, “Common Property, Reciprocity, and Community” (1990) 24:2 Journal of Economic Issues 451 at 456.

<sup>30</sup> Elinor Ostrom proposes eight principles of good design: (1) the boundaries of the user group and of the resource are clearly defined; (2) the use rules are appropriate given local conditions; (3) most users can participate in modifying operational rules; (4) monitoring is done by the users themselves or by monitors who are accountable to them; (5) sanctions are graduated and are carried out by other users or officials who are accountable to them, or both; (6) users have easy access to low-cost, local arenas to resolve conflicts among users and officials; (7) users have the right to organize their own solutions, unchallenged by external government authorities; and (8) the institutional mechanism is “organized in multiple layers of nested enterprises” (*Governing the Commons*, *supra* note 26 at 90, table 3.1). See also Elinor Ostrom, “Community and the Endogenous Solution of Commons Problems” (1992) 4:3 Journal of Theoretical Politics 343 at 344-45.

<sup>31</sup> For instance, the chief lesson of the thread of nineteenth-century cases and doctrines of “inherently public property” may be that open access to specific resources, such as roads, waterways, or beaches, is desirable because it fosters socialization and civic education, thereby serving democratic values: see Rose, *supra* note 25 at 778-80. Similarly, a study of the eighteenth- and nineteenth-century common grazing lands of St. Louis suggests that the commons benefited the residents of St. Louis by performing an important political function. Namely, “[i]n a Spanish colonial political system that ... lacked institutions of self-government, the commons provided ... a mechanism enabling the residents to make their own decisions on matters most likely to have an economic effect on them” (Banner, *supra* note 25 at 64).

lic domain. With the advent of the “networked information economy”,<sup>32</sup> much of the commons debate has moved from a focus on land to a focus on information.<sup>33</sup> The growth of intellectual property law and the resulting “proptertization” of information mean the enclosure of the public domain. This enclosure stifles political and cultural freedom. In response, the public domain movement seeks to protect the commons of information against the encroachment of private property.

For its advocates, protection of the public domain promotes freedom in a variety of ways.<sup>34</sup> It secures the availability of information from “diverse and antagonistic sources,” thereby protecting freedom of speech, which in turn enables individual self-authorship.<sup>35</sup> It also allows individuals to interact and create without restrictions, thereby sustaining innovation and

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<sup>32</sup> See Yochai Benkler, *The Wealth of Networks: How Social Production Transforms Markets and Freedom* (New Haven: Yale University Press, 2006) ch 2-4 [Benkler, *Wealth of Networks*].

<sup>33</sup> See Chander & Sunder, *supra* note 25 at 1333. For some, “[w]e are in the middle of a second enclosure movement, ... ‘the enclosure of the intangible commons of the mind’” (James Boyle, “The Second Enclosure Movement and the Construction of the Public Domain” (2003) 66:1-2 *Law & Contemp Probs* 33 at 37). See also Yochai Benkler, “Free as the Air to Common Use: First Amendment Constraints on the Enclosure of the Public Domain” (1999) 74:2 *NYUL Rev* 354 [Benkler, “Free as the Air”]. For Benkler:

The *public domain* is the range of uses of information that any person is privileged to make absent individualized facts that make a particular use by a particular person unprivileged.

Conversely,

The *enclosed domain* is the range of uses of information as to which someone has an exclusive right, and that no other person may make absent individualized facts that indicate permission from the holder of the right, or otherwise privilege the specific use under the stated facts (*ibid* at 362).

<sup>34</sup> See Jedediah Purdy, “A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates” (2005) 72:4 *U Chicago L Rev* 1237 at 1278-81 (for a discussion of the different ideas of freedom that underlie the debate). More generally, see David Lange, “Recognizing the Public Domain” (1981) 44:4 *Law & Contemp Probs* 147 at 171 (for an early and visionary formulation of the idea that a robust public domain is conducive to greater freedom).

<sup>35</sup> Benkler, “Free as the Air”, *supra* note 33 at 366, 394. What Benkler has in mind is what, in this article, I call a thick notion of liberal autonomy. In his view, properly designed commons are capable of yielding desiderata that are central to this thicker notion of individual autonomy: enhanced individual capacity to do more for and by oneself, a more genuinely participatory political system, social justice in the form of increased access to the basic instrumentalities of economic opportunity, as well as a more critical and self-reflective culture: see Benkler, *Wealth of Networks*, *supra* note 32 at 133-34.

productivity. The end result is an active, participatory cultural and civic life.<sup>36</sup>

A third strand of commons scholarship shifts the focus from community or freedom to efficiency. Law and economics scholars argue that, contrary to the Hardinian and Demsetzian narratives, common ownership may be efficient in some instances. They focus on variations in transaction costs to make sense of reversals from private property rights to open access or common property alternatives. In some cases, changes in relative prices due to technological advances or other outside causes may explain the reversal. For example, “[i]nput and output price changes might suddenly make farming in a given location ... unprofitable,” inducing farmers to cease policing boundaries.<sup>37</sup> That lack of policing may reinstate a regime of open access for hikers and hunters.<sup>38</sup>

Other law and economics scholars point to historically significant examples of efficient persistence of semicommon property.<sup>39</sup> The “open field” system, which displaced earlier, individual tenure in medieval and early modern Europe, had significant efficiency benefits. Peasants owned scattered strips of land<sup>40</sup> for grain growing but also used the land collectively

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<sup>36</sup> See Lawrence Lessig, “The Architecture of Innovation” (2002) 51:6 Duke LJ 1783 at 1789-90.

<sup>37</sup> Levmore, *supra* note 25 at S423-25. Levmore also provides an alternative explanation for the reversal: *ibid* at S425. Most reversals require some capacity on the part of the pre-existing property owners or potential beneficiaries to organize in interest groups. For example:

[A]fter some wilderness has evolved to a state of privately owned plots, citizens with recreational and environmental aims join to advance the cause of a “green belt” that will form continuous open space in and around a city. They may succeed in gaining legislation or administrative rules that make it difficult for private property owners to do much with certain lands (*ibid* at S246).

Such green belt is “unlikely to arise spontaneously” (*ibid*). “[G]overnmental intervention is probably required, and this ... is unlikely without some interest group activity” (*ibid* at S427). This is less of a bright story; it “raises suspicions and can easily be described in negative terms. ... Organized minorities ... may have brought about the reemergence of a commons even though transaction costs and technological change continues to favor evolution toward closed access” (*ibid* at S428). It is “possible that the change is inefficient and that it simply reflects the advantage of one interest group over another” (*ibid* at S431). “[A]bsent a good deal of local evidence,” Levmore argues, “we will generally be unable to distinguish between these two causes, so we will not know whether to regard rearrangements with favor or disfavor” (*ibid* at S433).

<sup>38</sup> See *ibid* at S423-25.

<sup>39</sup> See Smith, “Semicommon Property Rights”, *supra* note 25, at 144-46. See also Smith, “Exclusion Versus Governance”, *supra* note 25 at 478-83.

<sup>40</sup> Smith also notes that scattering is not an “efficiency-decreasing cultural [artifact]” but rather is a key to achieving efficiency. Scattering is defined as “a method of boundary

for grazing. “This enabled them to take advantage of economies of scale in grazing and private incentives in grain growing. ... The semi-commons allowed operation on two scales simultaneously.”<sup>41</sup>

Still others maintain that the number of owners is, along with the configuration of the asset and the scope of dominion, one of the three dimensions of property rights that private actors and policy-makers should adjust to maximize property values.<sup>42</sup> Examining these three aspects together shows how the optimal number of owners is not necessarily one. For example, underconsumption and overconsumption costs are a trade-off in large-asset management. Single owners may be unable to consume large assets on their own; however, reconfiguration into smaller units and privatization may be far more costly than the potential for overconsumption as a commons. Sometimes the latter is the optimal solution.

A communitarian ethos, freedom to connect and create, and efficiency are newcomers to the commons debate. Historically, the concern with greater economic equality has been central to experiments with common ownership. In Europe, between the twelfth and the nineteenth centuries, use rights on common village lands or land collectives provided the poorest layer of the rural population with resources such as timber or forage, and at times, with a small income.<sup>43</sup> Interestingly, equality has remained largely absent from the contemporary commons debate.

### ***B. The Fundamental Design Problem of Common Ownership: The Trade-Off Between Different Kinds of Freedom***

In their 2001 article, Hanoch Dagan and Michael Heller made a fresh start in the commons debate by highlighting and addressing the fundamental problem of common-ownership regimes. Can the commons be liberal? Can a commons regime successfully promote the end envisioned, be it “community” or “efficiency”, while also protecting individual co-owners’ negative freedom (i.e., their ability to change their minds, pursue new ends, and eventually, leave)? Until now, legal scholars and policy-makers

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placement that functions as a sanction on the picking and choosing of parcels associated with strategic behavior” (“Semicommon Property Rights”, *supra* note 25 at 133).

<sup>41</sup> *Ibid* at 132.

<sup>42</sup> See Bell & Parchomovsky, “Evolution”, *supra* note 25 at 78-79. See also Abraham Bell & Gideon Parchomovsky, “Reconfiguring Property in Three Dimensions” (2008) 75:3 U Chicago L Rev 1015 at 1037.

<sup>43</sup> On the role of the commons as social safety net, see generally Martina De Moor, Leigh Shaw-Taylor & Paul Warde, “Comparing the Historical Commons of North West Europe: An Introduction” in Martina De Moor, Leigh Shaw-Taylor & Paul Warde, eds, *The Management of Common Land in North West Europe, c. 1500-1850* (Turnhout, Belgium: Brepolis, 2002) 15 at 19-22; Thompson, *supra* note 15.

have relied on design principles that make happy solutions difficult to imagine. By and large, they have favoured the protection of the interests of co-owners as a group at the expense of liberal exit.<sup>44</sup> And historically, to liberal eyes, the communes that have achieved their goals appear utterly illiberal;<sup>45</sup> their success has depended upon limiting their individual members' exit options. For example, to achieve a high degree of equality while also preventing adverse selection, the kibbutz movement has made exit costly by requiring departing members to forfeit all, or almost all, of their claims to the group's joint assets.<sup>46</sup>

Dagan and Heller argue that happy solutions are possible and that there is no need for difficult trade-offs between co-owners' negative freedom and other substantive values. They have translated their commitment to liberal autonomy into a regime of default rules.<sup>47</sup> Minor fine tuning makes these rules applicable to a substantial subset of common-ownership settings, such as marital property, partnerships, condominiums, and close corporations. This regime, the liberal commons, facilitates efficient communitarian co-operation while also protecting a whole family of rights based on negative freedom, such as exit, dissociation, the right to mobility, and the right to a fair share of the common resource.

For example, applied to marital property, the liberal commons regime reinforces commitment to the marital community, where spouses share with each other without reference to individual desert. At the same time,

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<sup>44</sup> See Dagan & Heller, *supra* note 10 at 551-52.

<sup>45</sup> See Ellickson, *supra* note 23 at 1344.

<sup>46</sup> See Abramitzky, *supra* note 23 at 495-96. See also Ellickson, *supra* note 23 ("[a] commune that succeeds in promoting equality and thick social ties simultaneously impinges upon the classical-liberal values of individual liberty, privacy, and self-determination" at 1352).

<sup>47</sup> Rules in the sphere of individual dominion (Dagan & Heller, *supra* note 10 at 582-90) "counteract the potentially devastating effects that individual autonomy may have on the efficiency—even the viability—of common ownership" (*ibid* at 590). The aim is to deter overuse by setting restrictive limits on exploitation, tailored to the specific resource, and to prevent underinvestment through investment protection rules. Rules in the sphere of democratic self-governance (*ibid* at 590-96) seek to secure community and autonomy by supporting the commoners' co-operation and amplifying each co-owner's voice (i.e., ability to influence management from within). Besides procedural norms relating to disclosure, fair hearing, and consultation, Dagan and Heller suggest broad majority-rule jurisdiction for decisions that increase the pie and sharp limits on majority rule for decisions characterized as redistributive. Finally, and most importantly, rules regulating exit (*ibid* at 596-601) aim at protecting individual autonomy while preventing opportunistic behaviour and enhancing co-operation. This is achieved through three mechanisms: short cooling-off periods, reasonable exit taxes, and rights of first refusal.

the regime protects the individual spouse's negative freedom.<sup>48</sup> As an illustration, consider the difficult question of the proper division of a spouse's future earning potential gained during marriage. Those who care about protection of the marital community may favour the principle that academic degrees are marital assets subject to equal division. A key objection to that principle arises from negative freedom: the spouse who received the degree during the marriage would be locked into a career after the marriage. For example, a medical student might be obliged to practice as a physician in order to pay her former spouse half of the earning potential that they generated together.<sup>49</sup> A liberal commons regime solves the dilemma with the rule that the increased earning capacity is only subject to division after it is exercised and earnings are realized. Division safeguards community by recognizing that the development of careers during marriage is centrally collective, but dividing only what is realized in order to allow the spouse to make autonomous choices in the future.<sup>50</sup>

Dagan and Heller's liberal commons is an ambitious experiment in institutional design, but happy solutions to difficult trade-offs are not always possible. Take, for example, affordable-housing co-operatives, a form of common ownership that "has been edging closer to the policy mainstream in recent years."<sup>51</sup> They occupy "the fertile middle ground between arid dichotomies that have historically dominated American housing policy," where housing has had to be either publicly or privately owned.<sup>52</sup> Typically, ownership is split between a non-profit entity and the residents who own shares in the co-op. The residents' shares give occupancy rights but also come with obligations and limitations concerning aspects of the co-owners' autonomy, specifically the right to transfer and the right to use.<sup>53</sup> The right to transfer gives way to resale restrictions: "[o]ften, in exchange for very favourable public financing, [residents] ... must agree to restrictions on the amount of equity [they] ... can retain when the unit is sold."<sup>54</sup> These limits are meant to keep the unit affordable and hence

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<sup>48</sup> See Carolyn J Frantz & Hanoch Dagan, "Properties of Marriage" (2004) 104:1 Colum L Rev 75 at 78.

<sup>49</sup> See *ibid* at 110.

<sup>50</sup> See *ibid* at 111-12.

<sup>51</sup> John Emmeus Davis, *Shared Equity Homeownership: The Changing Landscape of Resale-Restricted, Owner-Occupied Housing* (Montclair, NJ: National Housing Institute, 2006) at 1, online: National Housing Institute <[http://www.nhi.org/research/522/shared\\_equity\\_homeownership/](http://www.nhi.org/research/522/shared_equity_homeownership/)>.

<sup>52</sup> *Ibid*.

<sup>53</sup> See *ibid*.

<sup>54</sup> Michael Diamond, "The Meaning and Nature of Property: Homeownership and Shared Equity in the Context of Poverty" (2009) 29:1 St Louis U Pub L Rev 85 at 89 (in the context of limited equity co-operatives). See also Duncan Kennedy, "The Limited Equity

available to other low-income buyers. There may also be constraints on who may buy units: for instance, the co-op may have a right of first refusal in order to allow it to purchase the unit for resale to buyers who are of low-income status.<sup>55</sup> Further, there may be limits on the right to pass the property on at death.<sup>56</sup>

Use entitlements are limited as well. First, owners are required to occupy the property,<sup>57</sup> and subletting is regulated or restricted.<sup>58</sup> Second, while residents have the right to manage the property, they may be subject to review by the non-profit entity, in order to prevent gold plating, deterioration, or abusive or discriminatory management.<sup>59</sup>

These limits on co-owners' negative freedom (i.e., on the right to freely use, transfer, and exit) vary in nature and in justification. The inability to pass one's share on at death is severe. Other limits are less invasive. Consent requirements, for instance, may amount to a mere reasonableness analysis not uncommon in common-interest communities, such as condominiums. Some limits, though motivated by concerns that may be criticized as paternalistic, are necessary to ensure the effectiveness and viability of the project. They reflect a trade-off between full autonomy for current co-owners and greater equality in access to housing for present and future middle- and low-income buyers. These trade-offs are nevertheless difficult because co-owners' negative-freedom interests are extremely weighty: compelling arguments can be made to support design principles that fully reflect these interests.<sup>60</sup>

In the case of marital property, the happier solutions of the liberal commons seem convincing but more difficult to achieve. Marriage delivers "unique goods" (e.g., intimacy, caring, and commitment) that are important to the individual spouses' self-fulfillment but are also collective in nature.<sup>61</sup> Sacrifices of a spouse's individual autonomy, such as the division of marital property on the basis of an equal-division rule rather than an

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Coop as a Vehicle for Affordable Housing in a Race and Class Divided Society" (2002) 46:1 *How LJ* 85 at 85-99; Duncan Kennedy & Leopold Specht, "Limited Equity Housing Cooperatives as a Mode of Privatization" in Gregory S Alexander & Grażyna Skąpska, eds, *A Fourth Way? Privatization, Property, and the Emergence of New Market Economies* (New York: Routledge, 1994) 267 at 271.

<sup>55</sup> See Davis, *supra* note 51 at 14.

<sup>56</sup> See *ibid* at 60.

<sup>57</sup> See *ibid* at 14.

<sup>58</sup> See Kennedy & Specht, *supra* note 54 at 271.

<sup>59</sup> See Kennedy, *supra* note 54 at 100.

<sup>60</sup> See generally Dagan & Heller, *supra* note 10.

<sup>61</sup> Frantz & Dagan, *supra* note 48 at 81-88.

individual-contribution principle, are entirely consistent with, and reflective of, this vision of marriage.

By contrast, the constraints on members' negative freedom that are typical of affordable-housing co-operatives may appear more puzzling and harder to justify. These communities differ from the liberal egalitarian community of marriage in several respects. First, they are large and heterogeneous. The intimate partial fusion of the marital couple is made possible by a commonality of emotions, interests, and projects. But members of an affordable-housing co-operative have widely diverse life plans. They belong to different layers of the worse off, entailing differences in aspirations and in prospects for socio-economic success. Some have the desire and ability for social mobility, while others are less upwardly mobile for cultural or socio-economic reasons.<sup>62</sup> Second, while marriage is usually conceptualized as voluntary, entry into an affordable-housing co-operative involves an aspect of coercion due to material insecurity and a limited availability of options. Would-be home owners with low incomes typically have a choice between home ownership under an affordable-housing regime or renting.<sup>63</sup> In Chicago, for example, limited equity co-operatives "have attracted and retained a population with an income that is too low to enter the private housing market, but too high for [them to qualify for] most subsidized housing."<sup>64</sup> Third, while spouses commit to a long-term marital project, members of affordable-housing communities envision different time horizons. Changes in a variety of life circumstances may make easier and less costly exit options more important.<sup>65</sup> Finally, while the unique goods that spouses expect from marriage are inherently collective, members of affordable-housing co-operatives rely on the benefits of cooperation and community while also seeking highly individualistic goods such as wealth accumulation and privacy. Housing is an economic good,<sup>66</sup> but it is also a guarantee of privacy, safety, and freedom.<sup>67</sup>

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<sup>62</sup> See Kennedy, *supra* note 54 at 103, 110.

<sup>63</sup> See Diamond, *supra* note 54 at 105.

<sup>64</sup> Davis, *supra* note 51 at 94.

<sup>65</sup> See Dagan & Heller, *supra* note 10 at 567-70 (discussing the costs of being locked in). For the limited equity co-operatives, the risk is that the seller who, after a change in circumstances, needs or wants to move out, will "not be able to obtain enough net proceeds to permit him or her to buy a home in the unsubsidized market" (Diamond, *supra* note 54 at 90).

<sup>66</sup> See Tim Iglesias, "Our Pluralist Housing Ethics and the Struggle for Affordability" (2007) 42:2 Wake Forest L Rev 511 at 519-30; Lorna Fox, *Conceptualising Home: Theories, Laws and Policies* (Oxford: Hart, 2007) at 7-11, 33-37.

<sup>67</sup> See Iglesias, *supra* note 66 at 530-38.

Another way to deal with the tension between the goals of common ownership and negative freedom is to argue that the constraints on negative freedom that are typical of affordable-housing co-operatives are justified by the members' consent. Full disclosure is an integral part of entering these commons. Prospective buyers or members learn the "rights, responsibilities, and limitations that accompany the property" that they are buying.<sup>68</sup> Buyers, one could say, are "happy slaves":<sup>69</sup> they are free agents bound only by their own choices. However, the consent argument presents a number of difficulties.

For instance, "consent theory is ... entangled in substantive concerns ... about when choice is [actually] voluntary."<sup>70</sup> A choice without reasonable alternatives is not voluntary.<sup>71</sup> As is mentioned above, members of affordable-housing co-operatives have limited alternatives. Consent theory also presupposes that the free agent has chosen her social role. Members of affordable-housing co-operatives may be steeped in a specific "culture of poverty"<sup>72</sup> or "culture of property"<sup>73</sup> because of a combination of unchosen characteristics, including ethnicity, class, and income. These determinants of their social role influence the choices that members of affordable-housing co-operatives make.

The example of affordable-housing co-operatives shows that happy solutions to difficult trade-offs are not always possible. The best that we can do is to provide a normatively appealing justification for such trade-offs. The next section of this article revisits the idea of equality of autonomy from the nineteenth-century European debate on common ownership. This notion restores the concern with economic equality to the commons debate and provides an appealing justification for hard trade-offs that disadvantage the negative freedom of individuals.

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<sup>68</sup> Davis, *supra* note 51 at 57.

<sup>69</sup> Don Herzog, *Happy Slaves: A Critique of Consent Theory* (Chicago: University of Chicago Press, 1989) at ix.

<sup>70</sup> *Ibid* at 246.

<sup>71</sup> See *ibid* at 225.

<sup>72</sup> Kennedy, *supra* note 54 at 103, 110.

<sup>73</sup> Marc Choko & Richard Harris, "The Local Culture of Property: A Comparative History of Housing Tenure in Montreal and Toronto" (1990) 80:1 *Annals of the Association of American Geographers* 73 at 73 (arguing that Montreal has long had a peculiar culture of property). "[W]e may expect the local combination of general forces [e.g., income, class, and ethnic composition] to give rise to autonomous and distinctively local processes. This, we argue, was the case in Montreal, where a variety of factors combined to create what we describe as a 'local culture of property'" (*ibid* at 75).

## II. The Debate on Collective Ownership in Nineteenth-Century Europe

### A. *Changing Attitudes Toward Collective Ownership*

The reassessment of Demsetz's and Hardin's tragic accounts of common ownership and the proliferation of antitragedy views is déjà vu to historians of European law. In Europe, a similar shift in attitude from pessimism and hostility toward communal proprietary regimes to renewed interest in them occurred significantly earlier. For a couple of decades late in the nineteenth century, collective property was a topic of research and heated debate among scholars, as well as a viable option for policy-makers.<sup>74</sup>

For centuries in most Western European countries, lands had been held, used, and managed in common by groups of owners. Collectively owned lands and collective use rights were "an essential lubricant of the rural economy."<sup>75</sup> They provided the lower strata of the rural population with sustenance and, at times, surplus income.<sup>76</sup> A vital element in the social and economic fabric, these forms of collective landownership dif-

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<sup>74</sup> Recently, in France and in Italy, a vast historiographical literature has rediscovered the nineteenth-century debates on common ownership. Earlier historiography emphasized the "destructive frenzy" that, since the French Revolution, has animated the legislature's repeated attempts to wipe out existing forms of common landownership. By contrast, recent revisionist scholarship foregrounds the existence, in the late nineteenth century, of a vibrant collectivist movement (i.e., a prolific strand of scholarly literature and policy discussions that reassessed the merits of common-ownership regimes). Revisionists argue that the debate over common ownership is important because it successfully disputed, and presented alternatives to, the ideological and cultural primacy of private property: see generally Paolo Grossi, *An Alternative to Private Property: Collective Property in the Juridical Consciousness of the Nineteenth Century*, translated by Lydia G Cochrane (Chicago: University of Chicago Press, 1981); Nadine Vivier, *Propriété collective et identité communale: Les biens communaux en France, 1750-1914* (Paris: Publications de la Sorbonne, 1998). See also Marie-Danielle Demélas & Nadine Vivier, eds, *Les propriétés collectives face aux attaques libérales (1750-1914): Europe occidentale et Amérique latine* (Rennes, France: Presses Universitaires de Rennes, 2003) (for a study of collective property in different European countries).

<sup>75</sup> PM Jones, *The Peasantry in the French Revolution* (Cambridge, UK: Cambridge University Press, 1988) at 19, 124-54. See also Thompson, *supra* note 15 at 73-150.

<sup>76</sup> For instance, in France, according to a cadastral survey of 1846, communally owned lands or lands burdened with collective-use rights amounted to nine per cent of the French territory; fifty-nine per cent of such lands were for grazing and approximately thirty-five per cent were cultivated: see Vivier, *supra* note 74 at 33. Similarly, in Italy, a widely cited survey of 1947 estimates that collective lands totalled ten per cent of the national territory: for a detailed analysis, see Nadia Carestiatto, *Beni comuni e proprietà collettiva come attori territoriali per lo sviluppo locale* [Communal Goods and Collective Property as Regional Actors for Local Development] (Doctoral Thesis, Università Degli Studi di Padova, 2008) [unpublished].

ferred widely but fell into three main types.<sup>77</sup> The first type consisted of use rights held in common by the inhabitants of a village or town over lands owned either by the town as public property or by a private landowner. These use rights were limited entitlements to specific uses, such as grazing, lumbering, and hunting.<sup>78</sup>

In contrast to these limited use rights, the second type of collective property consisted of lands owned in common by an open group, often the inhabitants of a village or town. The entitlement was ampler than a specific use right, each “owner” having the right to use and manage the land, to appropriate its fruits and profit, and to exclude non-owners. Each male individual who resided in the village for a certain period of time became an owner.<sup>79</sup>

The third type of communal property consisted of lands owned by a closed group, usually a small number of families and their descendants. These agrarian collectives were centuries old and numerous. They varied in name and organizational structure from region to region.<sup>80</sup> Most of them still exist.<sup>81</sup>

While these forms of collective ownership had existed for centuries, it was only in the eighteenth and nineteenth centuries that they became a matter of concern for the legislature. The development of a tragic attitude

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<sup>77</sup> This classification is standard in the Italian literature on collective property: see Fabrizio Marinelli, *Gli usi civici* [The Civil Use Rights] (Milan: Dott A Giuffrè, 2003); *Digesto delle discipline privatistiche: Sezione civile* [Digest of Private Law Disciplines: Civil Section], 4th ed (Turin: Utet, 1999), “*Usi civici*” [Civil Use Rights] by Alberto Germano at 542 ff.

<sup>78</sup> The origin of collective lands and use rights has, for centuries, been the object of intense debate. Proponents of the “immemorial common origins” theory (historians of Roman law and of ancient customary law—in France, the *coutumes*) argue that these lands are the original and natural property of the community of inhabitants of the village or town. By contrast, proponents of the “feudalist” theory (scholars of feudal law) argue that collective lands originated as rights of use over feudal land, which were granted in medieval times by a feudal lord to the local population, either as a benevolent concession or as a formal recognition of an actual use by the population dating back to remote, prefeudal times. With the end of feudalism, these lands became the public property of the village or town, and the inhabitants retained their use rights: see Vivier, *supra* note 74 at 42-43; Roger Graffin, *Les biens communaux en France: Étude historique et critique* (Paris: Guillaumin, 1899) at 41 (for France). See generally Romualdo Trifone, *Feudi e demani* [Fiefdoms and Domains] (Milan: Societa Editrice Libreria, 1909) (for Italy).

<sup>79</sup> This second form is known as *universita' agrarie* or *comunanze*: see Alberto Cencelli, *La Proprietà Collettiva in Italia* [Collective Property in Italy], 2d ed (Milan: Libraio Della Real Casa, 1920) at 25, 32.

<sup>80</sup> See *ibid* at 17-83 (for an analysis of agrarian collectives in various Italian regions).

<sup>81</sup> This is the case for the *partecipanze* of the Emilia region: see Legge 4 August 1894, n 397, in GU 5 september 1894, n 209 (It).

toward collective ownership, in many respects similar to Hardin's idea of a tragedy of the commons, raised the question of how to regulate collective ownership. In both France and Italy, the question was whether to suppress or to reorganize the existing collective landownership regimes. This question fuelled a passionate response from the parties involved (i.e., the landowners and the peasantry), attracting a great deal of attention among everyone from experts to the general public.<sup>82</sup>

The tragic attitude that prevailed for most of the nineteenth century came as no surprise. In Europe, the century following the French Revolution of 1789 was the "age of [individual] property".<sup>83</sup> "Whatever the grand words adorning the revolution," wrote Hippolyte Taine, "it was essentially a transformation of property"<sup>84</sup>—the transformation of a feudal system, based on privileges and prerogatives, into a modern social and legal system based on the individual's absolute property rights. Before the French Revolution, lands were subject to multiple claims. Property rights were split between a subject and users. The subject, usually a feudal lord, had direct or eminent ownership (i.e., title), while users had utile ownership (i.e., use rights).<sup>85</sup> The major achievement of the revolution was to reduce or to cancel feudal claims, instead awarding absolute property rights to the individuals who held utile ownership.<sup>86</sup> Hence, in the post-Revolutionary sensibility, the very idea of multiple owners came to be associated with feudalism and to be seen as backward.

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<sup>82</sup> See Jones, *supra* note 75 at 124-67 (discussing the struggle between landless peasants and landowners over collective lands and use rights in France at the time of the revolution). The crucial and heated phase of the debate, which involved policy-makers and law professors, took place in the 1880s and 1890s: see Grossi, *supra* note 74 at 196-231 (discussing the debate in the Italian parliament); Vivier, *supra* note 74 at 281-91 (discussing the "expert" debate among economists, lawyers, agronomists, and policy-makers in France).

<sup>83</sup> See Donald R Kelley & Bonnie G Smith, "What Was Property? Legal Dimensions of the Social Question in France (1789-1848)" (1984) 128:3 Proceedings of the American Philosophical Society 200 at 201. The authors argue that the period between 1789 and 1848 was the "age of property": "[N]ever was the alliance [between law and property] more conspicuous than in [this age]. ... The lawyers were the first to define 'bourgeois' property in the wake of the Revolution" and to translate it into the positive law of the civil code of 1804 (*ibid.*).

<sup>84</sup> Kelley & Smith, *supra* note 83 at 203, citing H Taine, *Les origines de la France contemporaine* (Paris: Librairie Hachette et Cie, 1878) at 386 [translated by Kelley & Smith]. See also John Henry Merryman, "Ownership and Estate (Variations on a Theme by Lawson)" (1974) 48:4 Tul L Rev 916 at 923.

<sup>85</sup> See Kelley & Smith, *supra* note 83 at 203-204. See Cornelia Munteanu, "Historical Remarks on the Legal Notion of Property" [2005] (supplement) Acta Universitatis Lucian Blaga 54 at 62 (on the doctrine of split ownership or double domain).

<sup>86</sup> See Kelley & Smith, *supra* note 83 at 203.

By contrast, individual ownership was seen as conducive to progress and happiness. As the French jurist Germain Garnier put it, “[T]he more earth is covered with societies of property owners, the greater the chance for happiness for the whole species.”<sup>87</sup> A tragic view of collective ownership dominated among lawyers and economists. One proponent of what we could call an early law and economics approach<sup>88</sup> asked, “What love or labour can one invest in these [collective] lands knowing that no personal benefit can result and that the only possible return would come from overusing them at the expense of others?”<sup>89</sup>

The general ideological commitment to individual property and the tragic tale of collective ownership were mirrored in legislation. Collective property was virtually absent from the civil codes of the “age of property”. In the *Code civil des Français* (1804), collective ownership was relegated to absolute marginality: article 542 barely mentioned it.<sup>90</sup> The Italian *Codice civile* of 1865 made no mention of collective ownership at all.<sup>91</sup> In addition, the legislature in both France and Italy attempted to wipe out the existing forms of collective land tenure in what historians describe as a “destructive frenzy”.<sup>92</sup> In France, the most important act of destructive frenzy was the law of June 10, 1793, which encouraged the enclosure of the commons.<sup>93</sup> In 1888, after a “tortuous legislative itinerary” where ad-

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<sup>87</sup> *Ibid* at 204, citing M Germain Garnier, *De la propriété dans ses rapports avec le droit politique* (Paris: G Clavelin, 1792) at 84 [translated by Kelley & Smith].

<sup>88</sup> Pio Barsanti, describing his methodological commitments, refers to “us, humble devotees of Law and Economics” (“noi, modesti cultori del Diritto e dell’Economia”); see *La Socialità nel Sistema Della Proprietà Privata* [Sociality in Systems of Property] (Lucca, Italy: Tipografia Giusti, 1880) at 43 [translated by author].

<sup>89</sup> *Ibid* (“[c]he amore, che cura volete voi che porti il privato a queste terre, quando egli sa che a lui non viene da ciò nessun vantaggio, e questo gli viene tutto dall’usufruire più largamente che può della proprietà collettiva?” at 37).

<sup>90</sup> Art 542 CcF (“Les biens communaux sont ceux à la propriété ou au produit desquels les habitants d’une ou plusieurs communes ont un droit acquis” [Common property is that to whose ownership or revenue the inhabitants or one or several communes have a vested right]).

<sup>91</sup> This omission reflects the liberal ideology of the Risorgimento, the movement of political and ethical “resurgence” that led to Italy’s unification in 1861. Individual autonomy (i.e., freedom from any prerogative attached to status or tradition and protection from state interference) was seen as the central pillar of the political and economic order of the new country. On the Risorgimento, see generally Lucy Riall, *The Italian Risorgimento: State, Society and National Unification* (London, UK: Routledge, 1994).

<sup>92</sup> Germano, *supra* note 77 (“smania distruggitrice” at 535). See also Grossi, *supra* note 74 (describing the destructive frenzy as “a monolithic attitude that without the slightest sign of sympathy had uprooted and destroyed these constructions [i.e., collective domains] in the name of the superior model of individual property” at 201).

<sup>93</sup> The law allowed for the commons to be divided with the favourable vote of at least one-third of the inhabitants. While absentee landlords and former feudal lords were exclud-

vocates of collective ownership fought vigorously, a law abolishing collective use rights in many provinces of central Italy was passed.<sup>94</sup>

However, by the late 1880s, the attitude toward collective ownership changed. The agrarian crisis that struck most of Europe in the 1880s and 1890s raised questions regarding the unequal distribution of land and made the need for agrarian reform urgent.<sup>95</sup> Also, in both France and Ita-

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ed from the ballot, every adult, male or female, had the right to vote. Once approved, partition was organized on a per capita basis, irrespective of age or sex, on the condition that the village had settled outstanding debts. Beneficiaries enjoyed full property rights over their parcels, but they could not sell them or transfer them in payment of debts for ten years: see generally Noelle L Plack, "Agrarian Individualism, Collective Practices and the French Revolution: The Law of 10 June 1793 and the Partition of Common Land in the Department of the Gard" (2005) 35:1 *European History Quarterly* 39 at 41-42.

<sup>94</sup> Grossi, *supra* note 74 at 201. Grossi notes that the efforts of the supporters of collective ownership were not vain: "For the first time a crack appeared" (*ibid*) in the destructive frenzy that had animated the legislator. As noted by Grossi, article 9 of the law provided that "in the presence of certain circumstances the Arbitration Commission could allow the entire parcel in question to be left to the users, in the case of the abolition of an encumbrance, in exchange for a yearly payment to the proprietor" (*ibid*).

<sup>95</sup> In France, the agrarian depression of the Second Republic (1848–52) and the phylloxera epidemic of the 1870s and 1880s triggered a cycle marked by overproduction, falling prices, strikes, and mass demonstrations. Socialism began to spread. Soon after the revolution, socialists had recruited peasants, many of who had not been radicals in the Revolutionary period, into local organizations that sponsored co-operatives. For instance, in Provence, small-scale owners embraced the party's program of total collectivization of the land. Collectivist doctrines mirrored and reinforced the peasants' own pre-existing practice of economic co-operation, especially in the wine industry: see generally Noelle Plack, *Common Land, Wine and the French Revolution: Rural Society and Economy in Southern France, c. 1789–1820* (Farnham, UK: Ashgate, 2009) at 85. On the rise of socialism among the peasantry, see generally Tony Judt, *Socialism in Provence, 1871-1914: A Study in the Origins of the Modern French Left* (Cambridge, UK: Cambridge University Press, 1979). Italy was also experiencing a dramatic agrarian crisis that badly affected the Mezzogiorno (the southern part of country), where the land was in the hands of few: the latifundia—large estates, usually under absentee ownership—were the dominant form of land tenure. Land was operated, with minimal investments in improvement and technology, by precarious sharecroppers and share tenants under short-term contracts with the owner. Inimical to agricultural production and explosive for social relations, this situation resulted in endemic violence and periodic insurrections. Anarchism flourished among the peasants. Bakunin's short stay in Naples in the 1860s contributed to the rapid spread of his notion of spontaneous and continual revolution among southern peasants. The peasant uprisings of the 1870s and 1880s were repressed by the Italian army and guard units of local landowners. However, the legitimacy of the newly formed national state was questioned: remote and powerless, the state started to be identified by many with the usurpations of the bourgeoisie. An effective policy response was needed: see Sidney G Tarrow, *Peasant Communism in Southern Italy* (New Haven: Yale University Press, 1967); Frank M Snowden, *Violence and the Great Estates in the South of Italy: Apulia, 1900–1922* (Cambridge, UK: Cambridge University Press, 1986).

ly, the conjuncture of economic crisis, social change, and collectivist propaganda brought into existence a rural socialist or anarchist political culture.<sup>96</sup> This development generated alarm among moderates and conservatives.

Faced with these challenges, a broad coalition of moderate and progressive policy-makers began to reassess collective ownership. Restoring the commons had long been a priority in the agenda of the socialist left. When, at the beginning of the 1890s, Jules Guesde's *Parti Ouvrier* launched a new strategy of alliance with the rural masses, the goal of improving and expanding the commons was among the party's priorities.<sup>97</sup> Similarly, in Italy, expropriating lands left idle and assigning them to co-operatives was an important item in the minimum program approved at the 1895 congress of the Socialist Party.<sup>98</sup>

The socialists' commitment to collective ownership was long standing. The moderates' interest in common ownership, however, was a product of the new European intellectual climate. To the moderates, collective ownership did not smack of socialism, because it had been rehabilitated by the work of European historians and legal scholars.<sup>99</sup> Henry Maine's *Ancient Law* argued that the institution of private property was not known in the ancient law and that land was owned by extended families and groups rather than by individuals.<sup>100</sup> Maine's work, extremely influential, sparked debate in intellectual circles in Italy and France. Émile de Laveleye's *De la propriété et de ses formes primitives* (1874) further developed and

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<sup>96</sup> See generally Judt, *supra* note 95 (discussing France); TR Ravindranathan *Bakunin and the Italians* (Kingston: McGill-Queen's University Press, 1988) (discussing Italy).

<sup>97</sup> See Vivier, *supra* note 74 at 285-86.

<sup>98</sup> "Il programma minimo del 1895: Riforme politiche economiche amministrative" [The Minimum Program of 1895: Administrative Reform of Economic Policy] in *Antologia socialista* [Socialist Anthology, 1857-1982], ed by Luca Guglielminetti (Socialisti.net) 16-17, online: [http://issuu.com/nclletterario/docs/antologia\\_socialista](http://issuu.com/nclletterario/docs/antologia_socialista).

<sup>99</sup> Historians debated the historical origins and forms of property: see Grossi, *supra* note 74 at 8-19. Participants in the debate were jurists and historians of law who were anti-formalists; that is, they were eager to challenge the dominant legal academic culture that "worked and operated ... under and in the shelter of the postulate of individual property, which it saw as the Pillars of Hercules of its consideration of legal problems and as the limit beyond which such consideration would have been illegitimate" (*ibid* at 5). They also had a "taste for the positive, which had been expressed philosophically alternately in historicist and naturalistic terms, found concrete expression for the jurist and the sociologist in an incessant curiosity, a curiosity which, far from being dilettante, tended toward a purified scientific observation of the totality of surrounding phenomena" (*ibid* at 12). Animated by this taste for the positive, participants in the debate engaged in erudite, ground-breaking investigations and data collection: see *ibid* at 12, 15.

<sup>100</sup> See *ibid* at 27-52, citing Henry Sumner Maine, *Ancient Law: Its Connection with Early History of Society, and Its Relation to Modern Ideas* (London, UK: John Murray, 1861).

spread the idea that collective ownership had been the established mode of ownership for most of Western history.<sup>101</sup>

The new cultural openness toward collective ownership was not limited to scholars. French painter Émile van Marcke, of the famous *École de Barbizon*, presented a canvas titled *Common Grazing Field in Normandy* at the Paris Salon of 1875.<sup>102</sup> It portrayed a stout, healthy cow on a lush, green common field, thereby visually portraying the newly rediscovered idea that the commons could be prosperous and productive.

***B. The Italian Bill on the Reorganization of Land Collectives and the Commitment to Equality of Autonomy***

In Italy, collective property, rehabilitated in the eyes of the intellectual and political elite, became an important item in the legislative agenda. For Italian lawyers, the 1890s were a moment of great political and intellectual energy. Property law seemed like a viable tool for experimental social change.<sup>103</sup> Lawyers and policy-makers of different political orientations vigorously backed legislative proposals for the reorganization of the existing land collectives. In March 1892, a large group of moderate-centrist MPs led by Tommaso Tittoni presented a bill on the reorganization of the collective domains in the former Papal States, and the bill was eventually approved in 1894 with the support of the Socialist Party.<sup>104</sup> The Tittoni bill was a hands-off, enabling piece of legislation rather than an ambitious exercise in institutional design. Its effect was simply to grant legal personality to the collectives and to accord them the power to draw up their regulatory statutes within a year.<sup>105</sup> What was unique about the Tittoni bill, however, was the normative discourse that led to its approval. In the parliamentary debate, conservatives and socialists both agreed that

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<sup>101</sup> See *ibid* at 53-70, citing Émile de Laveleye, *De la propriété et de ses formes primitives* (Paris: Librairie Germer Ballière, 1874).

<sup>102</sup> See Vivier, *supra* note 74 at 298.

<sup>103</sup> Grossi emphasizes the creativity of the collectivist jurists and their pragmatic attitude toward social change:

There was a singular, a notable quality in our debate [on collective ownership]. It did not remain an academic affair among university professors, confined to the dazzling prose of an inaugural lecture or of an innovative scientific essay. Rather, it tended in one way or another to be translated into an operative reality. As we will see in part two, this was one of the rare instances in which a mainly doctrinal matter has the freedom of the city in the chambers of Parliament, in which it acts as a stimulant to legislators and leaves its mark on several official reports and even on several acts of legislation (*supra* note 74 at 7).

<sup>104</sup> See *ibid* at 218-31.

<sup>105</sup> See *ibid* at 218.

collective landownership could make the autonomy that derives from landownership available on a more widespread basis.

The general sense among supporters of the bill was that the late eighteenth- and early nineteenth-century enclosures and the transfer of small parcels in full ownership to peasants had failed. The parcels were often too small to support a family. The new owners were released into an agricultural economy plagued by lack of capital, limited access to credit, and inadequate productive technologies. As a result, they lost their land in short time to a rising middle class that was eager to invest in land. Supporters of the bill believed that collective ownership, with its mechanisms for co-operation and coordination, would be more effective in promoting peasants' self-sufficiency and self-empowerment.

The notion of equality of autonomy was new to the normative discourse of European property lawyers. On the left, the idea of equality of autonomy was both novel and controversial. The very word "autonomy" smacked of bourgeois individualism,<sup>106</sup> but Deputy Matteo Imbriani of the Radical Party powerfully articulated the new idea in the parliamentary debates relating to the Tittoni bill. He advanced autonomy and social justice, the two great ideals that move radicals. Imbriani appealed to the revolutionary aspirations of the socialists and challenged those who dismissed autonomy as a bourgeois ideal. He started his discussion of autonomy by reminding fellow deputies that autonomy is associated with a fundamental sense of human dignity and is the motor of social change.<sup>107</sup> "Under feudalism," he asked, "wasn't it this autonomy that moved the minds, that told the maid, dragged to the lord's bed, rise, take out the weapon you are hiding in your braids and act?"<sup>108</sup> In contemporary parlance, Imbriani's notion of autonomy is "effective agency," that is, the actual material means to pursue one's life plans. "Our theory," he declared, "holds that all who are worthy of this name [human] because of their work, their genius and their virtue, should own a parcel of land that en-

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<sup>106</sup> See *Proprietà Collettiva e Lotta di Classe: Discorso del Deputato Enrico Ferri e Polemica col Deputato M. R. Imbriani* [Collective Property and Class Struggle: Deputy Enrico Ferri's Speech and Debate with Deputy M. R. Imbriani] (Rome: Tipografia Della Camera Dei Deputati, 1894) at 40. Ferri accused Imbriani of having betrayed the radical left by embracing individualism and by defending the bourgeoisie:

The Honourable Imbriani, speaking from the bench of the extreme left against a deputy of the same political sector, advocated ideas that sparked vivid enthusiasm in the other [conservative] side of the Chamber, thereby showing and confirming my statement that there are two currents: the individualist, of which the Honourable Imbriani is a representative, and the socialist (*ibid* [translated by author]).

<sup>107</sup> See *ibid* at 37 (contains a reproduction of Imbriani's speech, where he describes autonomy as "human dignity, human sentiments, human rights" [translated by author]).

<sup>108</sup> *Ibid* [translated by author].

sure their independence and ability to affirm themselves in the struggle of life ... for the benefit of all.”<sup>109</sup>

Imbriani convinced the socialists of the importance of equality of autonomy by defining autonomy as the availability of resources that enable individuals to carry out their projects. When the members of the Socialist Party signed the Tittoni bill, they signalled that they had abandoned their initial discomfort with the individualistic flavour of calls for greater equality of autonomy. Then, the socialists pushed the idea of equality of autonomy further. For Socialist Party MP Enrico Ferri, equality of autonomy required more than giving legal personality and self-regulatory power to existing collectives. It required making effective agency available to all, regardless of gender or age.

Ferri argued that collectives would have to expand membership and management to make the resources that enable individuals to be autonomous available on a more widespread basis. In most collectives, access was closed: it was limited to the descendants of the original members or conditioned upon certain property requirements, such as ownership of a specified number of head of cattle. Membership was also limited to male residents in most cases. Female-headed peasant households represented a large and particularly disadvantaged segment of the rural poor, but they could not be owners under the Tittoni bill. Accordingly, the Socialist Party proposed two egalitarian amendments to the Tittoni bill. The first amendment opened up membership to all residents, male and female, between the ages of eighteen and sixty. The second allowed women to vote in elections of officers to the governing bodies.<sup>110</sup> Neither amendment made it into the final legislative text.

While the left had to work through its skepticism about autonomy, conservatives had to work through their unease about calls for equality. Count Alberto Cencelli Pertini noted in his 1892 book, *Collective Property in Italy*, that conservatives had long been committed to political equality but considered social and economic inequality natural and necessary.<sup>111</sup> The agrarian crisis and the peasant uprisings made conservatives realize that “since we proclaimed the principle of political equality, we should have expected that, sooner or later, the people would demand equality of material conditions.”<sup>112</sup> Cencelli and other moderate conservatives came to see greater economic equality as crucial to the stability of the existing social order. Inequality, Cencelli noted, quoting Aristotle, is the source of all

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<sup>109</sup> *Ibid* at 46 [translated by author].

<sup>110</sup> See *ibid* at 28-30.

<sup>111</sup> Cencelli, *supra* note 79 at 89.

<sup>112</sup> *Ibid* [translated by author].

revolutions.<sup>113</sup> In his book, Cencelli proposed to reorganize existing collectives along egalitarian lines.<sup>114</sup> Rules regulating entry, that is, access to the collective lands, were the backbone of Cencelli's proposal. Cencelli differentiated between grazing lands and agricultural lands. While access to the former would be open to all, agricultural lands would be divided in lots and assigned to individual residents or households, on the basis of need, for a term of twenty years or so.<sup>115</sup> For Cencelli, the foremost advantage of his proposal was that it would provide the possibility of autonomy to the rural proletariat. It would give the formerly landless assignee access to a parcel of land of which she could consider herself owner, about which she could make informed management and production decisions, and on which she could work more profitably than as a salaried worker.<sup>116</sup>

Conservatives and socialists advocated greater equality of autonomy for opposing reasons. The former deemed it necessary to stifle peasant unrest and to preserve the existing social and economic order.<sup>117</sup> The latter saw it as the closest they could get to an ideal society where a system of free land would be re-established and “[a] voluntary system of cooperation [would] ... establish itself spontaneously.”<sup>118</sup> At the same time, there were some fundamental points on which the parties could agree. These points made the debate surrounding the Tittoni bill unique in several respects.

First, it had the effect of reorienting, for a brief moment, the conversation on property law toward the new goal of expanding access to the autonomy afforded by property rights. This new goal temporarily displaced the old goal of maximizing the autonomy of the better off, who already owned land. Since the Enlightenment, philosophers and legal theorists have argued that property fosters individual autonomy. The general argument is that a system where individuals are granted the full package of property entitlements, comprising the right to exclude, to use, and to transfer, and where they are free to bargain in the market without inter-

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<sup>113</sup> See *ibid* at 88.

<sup>114</sup> See *ibid* at 94-101.

<sup>115</sup> See *ibid* at 97-99.

<sup>116</sup> See *ibid* at 100.

<sup>117</sup> See *ibid* at 100 (“the moral effects [of his proposed scheme of collective landownership] are significant. The proletarian, who occasionally may become violent and even worse, is turned into a conservative citizen; [collective property is] a safety valve against the spread of subversive ideas” at 100 [translated by author]).

<sup>118</sup> Achille Loria, *The Economic Foundations of Society*, translated by Lindley M Keasbey (London, UK: Swan Sonnenschein, 1910) at 7.

ference, makes individuals autonomous.<sup>119</sup> It frees them from the restraints that prevent them from acting on their actual desires. This autonomy involves many abilities: freedom of action, privacy, and self-expression. As Adam Smith saw, in Jedidiah Purdy's reading of Smith, property rights and markets afford individuals the ability to pursue their projects and to bargain over the terms of their co-operation.<sup>120</sup> Further, property provides, both literally and figuratively, the "necessary walls" that allow individuals to retreat into their sphere of privacy.<sup>121</sup> Finally, in the Hegelian tradition, ownership allows individuals to constitute themselves as people by extending their will over the objects of the external world.<sup>122</sup> Ferri, Cencelli, and the other participants in the 1894 debate took this belief in the autonomy benefits of property further. They argued that common ownership could allow a larger number of individuals to benefit from this autonomy.<sup>123</sup>

Second, participants in the debate shared the pragmatic belief that property law could be changed and improved to advance new goals. Earlier calls for equality had often rejected the very institution of property as unjust. Marx and Proudhon obviously come to mind. But Ferri, Cencelli, and Imbriani believed in property. They believed in the possibility of reshaping a system of property rules that, for centuries, had been centred on private property. They defied the conventional view of private property

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<sup>119</sup> For contemporary articulations of this argument see Richard A Epstein, "Property and Necessity" (1990) 13:2 Harv JL & Pub Pol'y 2. Epstein argues that "[i]f possession, use, and disposition turn out to be the ideal bundle of property rights, ... [so that] voluntary transactions take place between people who are in a position to sell and people who are in a position to buy, ... [t]his system would necessarily have a self-generating capacity with each successive ... transfer" and would produce "more by way of gains than it would produce by way of losses, ... [and] we would move to higher and higher levels of social satisfaction ... [and] private gratification" (*ibid* at 4). See also generally Richard Pipes, *Property and Freedom* (New York: Vintage Books, 1999); Milton Friedman with the assistance of Rose D Friedman, *Capitalism and Freedom* (Chicago: University of Chicago Press, 2002) at 7-21.

<sup>120</sup> See Adam Smith, *The Theory of Moral Sentiments* (Indianapolis: Liberty Classics, 1976); Adam Smith, *Lectures on Jurisprudence*, ed by RL Meek, DD Raphael & PG Stein (Oxford: Clarendon Press, 1978). On Smith's theory of property, the market, and freedom, see Purdy, *supra* note 34 at 1251-58.

<sup>121</sup> On property as privacy see Eduardo M Peñalver, "Property as Entrance" (2005) 91:8 Va L Rev 1889.

<sup>122</sup> See Hegel, *Philosophy of Right*, translated by TM Knox (Oxford: Clarendon Press, 1942) at 40-41. Among US property scholars, the Hegelian perspective is most importantly associated with the work of Margaret Radin: see Margaret Jane Radin, "Property and Personhood" (1982) 34 Stan L Rev 957.

<sup>123</sup> For a contemporary argument about property, equality, and freedom, see D Benjamin Barros, "Property and Freedom" (2009) 4:1 New York University Journal of Law & Liberty 36.

as natural and unshakable. What they had in mind was a hybrid system in which private property and common property would complement each other.

### III. The New Commons and Equality of Autonomy

This section turns to contemporary American property law and shows how the idea of equality of autonomy recuperated from the nineteenth-century European debate on collective ownership is key for expanding and redirecting the commons debate.

#### A. Equality of Autonomy

In nineteenth-century Europe, the parliamentary debate on the Tittoni bill that reorganized agrarian collectives set the stage for a new understanding of how property fosters individual autonomy. Today, we need a similar normative reorientation. Our conversation about the potential of common ownership should be expanded to include a similar notion of equality of autonomy. This notion of equality of autonomy should build upon insights from the European late nineteenth-century debate on common ownership, as well as recent debates in political philosophy. It should support equitable access to the means of obtaining autonomy, defined as the relative absence of restraints and the presence of resources enabling individuals to carry out their critically appraised projects and preferences.

The notion of equality of autonomy that I propose focuses on the *means* for autonomy rather than on the *condition* of autonomy. Proponents of egalitarian liberalism are faced with the question “Equality of what?”<sup>124</sup> Some have argued for equality of condition. The argument is

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<sup>124</sup> Egalitarians have long discussed the “*equalisandum*” (i.e., what it is that should be equalized): see Richard J Arneson, “Equality of What? Revisited” (for APSA), (5 August 2010), online: Social Science Research Network <<http://ssrn.com/abstract=1653981>>; John E Roemer, *Theories of Distributive Justice* (Cambridge, Mass: Harvard University Press, 1996) (on the debate in general). Participants in the “Equality of what?” debate have expressed a variety of views. John Rawls characterizes the need for equality in terms of “primary social goods”. These consist of everything that every rational man is presumed to want, including rights, liberties and opportunities, income and wealth, and the social bases of self-respect: see John Rawls, *A Theory of Justice* (Cambridge, Mass: Belknap Press of Harvard University Press, 1971). Amartya Sen shifts the focus from goods to what goods do for human beings. He proposes equality of basic capabilities. Justice requires that all members of society have basic capabilities to do and be what they have reason to value at a decent threshold level: see Amartya Sen, *Inequality Reexamined* (New York, Cambridge, Mass: Russell Sage Foundation, Harvard University Press, 1992). Ronald Dworkin argues for equality of resources: *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass: Harvard University Press, 2000). Dworkin’s is “a starting-gate theory identifying distributive justice with an equal

that one of the fundamental requirements of justice is that social and political institutions be arranged so as to allow people's conditions to be as equal as possible. Individuals should be made equal in subjective happiness, understood either in terms of hedonic states or preference satisfaction or the good life.<sup>125</sup> However, as many have noted, equality of condition fails as an expression of egalitarian concerns for two reasons.<sup>126</sup> First, it leaves little room for individual responsibility. For example, it requires that we compensate people for having expensive tastes. It fails to acknowledge that individuals should take responsibility for their overall life ambitions and discrete preferences, as well as the social costs of these choices. Furthermore, it minimizes the reward for individual effort. Second, critics have noted that equality of condition “[f]ails to recognize ‘expensive needs’: [that is, that] some people may simply not be able to be made ‘equal’ in any space/metric of ‘outcome,’” for example, people who are severely disabled or who have expensive medical requirements.<sup>127</sup>

The concept of autonomy that I embrace is multi-dimensional. It includes negative freedom, positive freedom, and relational self-determination. In their debates, Ferri, Imbriani, and Cencelli envisioned a positive or substantive autonomy. They realized that equal access to the possibility of autonomy requires equal access to land. They also realized that positive action is needed to redress the inequalities that result from private property in a market economy. The positive action that they had in mind was legislation that would reinvigorate a long neglected private-law tool—collective ownership. They had witnessed the failure, in the long term, of land enclosures as a means for achieving a more equal distribution of land. Hence, they came to see the potential of collective ownership. Today, common ownership remains an important tool for expanding access to resources that enable individual autonomy and human flourishing. It can do so better than individual ownership.

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initial allocation of material resources adjusted by an insurance scheme to compensate individuals for brute luck handicaps and low marketable talent, and after that with whatever results from people's choices in a fair framework for interaction including opportunities to insure against future brute luck misfortunes” (Arneson, *supra* note 124 at 1). G. A. Cohen argues that egalitarians should care about equality of access to advantage. The nature of advantage includes both resources and welfare: *On the Currency of Egalitarian Justice and Other Essays in Political Philosophy*, ed by Michael Otsuka (Princeton: Princeton University Press, 2011).

<sup>125</sup> In particular, see Syed, “Equality of What?”, *supra* note 20; Arneson, *supra* note 124 at 1-2.

<sup>126</sup> See Syed, “Equality of What?”, *supra* note 20.

<sup>127</sup> *Ibid.* See also Talha Syed, “Equality, Priority & Justice in Differential Needs: The Principle of Proportionate Benefit/Sacrifice” [forthcoming in 2013].

Take housing as an example. Distressed and underfunded, the public housing system often fails to deliver decent homes, a safe environment, and neighbourhood quality.<sup>128</sup> Also, for many, public or subsidized housing is not an option: their income is too high to qualify for most forms of subsidized housing but too low to allow them to enter the private market for housing.<sup>129</sup> By limiting equity and promoting self-government, forms of common ownership such as limited equity co-operatives are effective in securing long-term, good-quality, affordable housing. They are not a substitute for traditional public housing but rather a crucial complement to it. Another form of common ownership, co-housing arrangements, can have important advantages over individual home ownership. These arrangements allow co-owners to share the cost of the mortgage or rent, as well as the cost of utilities, maintenance, and insurance.<sup>130</sup> Further, through co-housing, co-owners can “share the cost of amenities that [they] couldn't afford on [their] ... own, such as a hot tub ... or large yard.” Both housing co-operatives and co-housing also make it easier to access other resources. For instance, they allow co-owners to share the cost of basic services such as child care or in-home care.<sup>131</sup>

Take, as a further example of common ownership, land or water. Standard regulatory mechanisms of land use, such as zoning, have limited effectiveness in preserving land-use diversity, open space, and ecologically sensitive lands in sufficiently large quantities. Mechanisms of private land use and open-space planning based on common ownership, such as land conservation trusts or water trusts, may be an important complement to standard land-use regulation.<sup>132</sup>

Common ownership can also expand access to leisure goods that are often too expensive to be owned individually. For example, fractional

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<sup>128</sup> I do not imply that public housing can never be a success story; incredible energy has been invested in redeveloping public housing, and experiments such as the Horner project in Chicago have been successful: see e.g. William P Wilen, “The Horner Model: Successfully Redeveloping Public Housing”, online: (2006) 1:1 *Northwestern Journal of Law & Social Policy* 62; Terry AC Gray, “De-concentrating Poverty and Promoting Mixed-Income Communities in Public Housing: The Quality Housing and Work Responsibility Act of 1998” (1999) 11:1 *Stan L & Pol’y Rev* 173.

<sup>129</sup> See Davis, *supra* note 51 at 94.

<sup>130</sup> See Janelle Orsi & Emily Doskow, *The Sharing Solution: How to Save Money, Simplify Your Life & Build Community* (Berkeley: Nolo, 2009) 137-88; Mark Fenster, “Community by Covenant, Process and Design: Cohousing and the Contemporary Common Interest Community” (1999-2000) 15:1 *J Land Use & Envtl L* 3.

<sup>131</sup> Orsi & Doskow, *supra* note 130 at 137.

<sup>132</sup> On water trusts, see Mary Ann King, “Getting Our Feet Wet: An Introduction to Water Trusts” (2004) 28:2 *Harv Envtl L Rev* 495.

ownership arrangements can bring the luxury of a vacation home or a sailing boat within the reach of many.<sup>133</sup>

Common ownership not only has the potential to equalize the means for positive autonomy but can also foster an autonomy that is thicker because it is relational. Relational autonomy is an idea that was largely foreign to the world of European late nineteenth-century policy-makers but that has gained prominence in contemporary debates. In recent years, some political philosophers arguing within liberalism have rejected the traditional hyperindividualism of liberal autonomy.<sup>134</sup> They argue that traditional, liberal autonomy assumes that authentic choice happens in an “inner citadel” of detached, higher-order reflection” and ignores the importance of other persons as sources of dialogue and meaning.<sup>135</sup> These philosophers have responded by broadening the notion of autonomy to include its social or relational preconditions. They suggest that authentic choice can only occur in social conditions that foster certain types of human relationships.<sup>136</sup> Authentic autonomy requires critical reflection on one’s own choices, which is more likely to happen in a social and discursive context.<sup>137</sup> Some individuals require the context of answering for their actions. Others require self-respect and self-trust, which emerge within relations of mutual recognition.<sup>138</sup>

Common-ownership schemes can provide this web of relations. Part of their attractiveness, for those who choose them, is co-owner immersion in a self-governance structure that facilitates human relations conducive to authentic choice. For example, there is vast support in the literature for the proposition that members of affordable-housing co-operatives value involvement in the community and in management of the co-operative for the sense of self-control it brings those members.<sup>139</sup> Notwithstanding this,

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<sup>133</sup> See Orsi & Doskow, *supra* note 130 at 167.

<sup>134</sup> See e.g. Christman, *Politics of Persons*, *supra* note 22 at 164-86; Paul Benson, “Free Agency and Self-Worth” (1994) 91:12 *Journal of Philosophy* 650; Jennifer Nedelsky, “Reconceiving Autonomy: Sources, Thoughts and Possibilities” (1989) 1:1 *Yale JL & Feminism* 7; Marina Oshana, *Personal Autonomy in Society* (Aldershot, UK: Ashgate, 2006); Anderson & Honneth, *supra* note 21 at 130-37.

<sup>135</sup> Christman & Anderson, “Introduction”, *supra* note 20 at 12.

<sup>136</sup> See e.g. Nedelsky, *supra* note 134.

<sup>137</sup> See Benson, *supra* note 134; Nedlesky, *supra* note 134.

<sup>138</sup> See Anderson & Honneth, *supra* note 21 at 132-35.

<sup>139</sup> See e.g. Kennedy, *supra* note 54 at 92; Susan Saegert & Lymari Benitez, “Limited Equity Housing Cooperative: A Review of the Literature” (np: City University of New York Graduate Center for the Taconic Foundation, 2003) at 8-10, online: Housing for All <[http://housingforall.org/Coop\\_paper\\_FV.pdf](http://housingforall.org/Coop_paper_FV.pdf)>.

common ownership may not be for everyone, and the particular relations of interdependence it involves may not be necessary for authentic choice.

### *B. Equality of Autonomy and the Trade-Offs of Common Ownership*

Designing a common-ownership regime that has the potential to foster greater equality of autonomy involves difficult trade-offs. The notion of equality of autonomy that I propose is grounded in value pluralism. It suggests that common-ownership regimes should promote greater equality in multiple, equally fundamental dimensions of autonomy, namely negative freedom, equality of access to basic material resources, relational self-determination, and responsibility. These dimensions of autonomy are incommensurable and sometimes conflict with each other. In order to increase equality in one dimension of autonomy, it may be necessary to curb another dimension of autonomy. Typically, increasing equality in the positive or relational dimensions of autonomy requires limiting the negative freedom of current co-owners. How do we choose between conflicting dimensions of autonomy?

In Part I, I discussed two ways that scholars have dealt with these tensions. One is to argue that co-owners have consented to these trade-offs. The other is Dagan and Heller's "liberal commons" balancing. Both of these responses, I suggested, are unsatisfying. The former raises difficult questions about the economic and social constraints on consent. The latter fails to discuss the hard cases where trade-offs simply cannot be avoided. In this section, I suggest another way to deal with the trade-offs of common ownership. I argue that when we ground the commitment to equality of autonomy in the context of specific resources, the trade-offs of common ownership appear less intractable. The peculiar characteristics of different resources, and the interests that they involve, guide and constrain normative reasoning. Often, it will be possible to balance different dimensions of autonomy. When balancing is not possible, arguments about the nature and the significance of the specific resource for thick autonomy justify equalizing positive freedom or relational autonomy, rather than maximizing negative freedom.<sup>140</sup>

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<sup>140</sup> A resource-specific approach is not new to property law. American courts have long engaged in resource-specific reasoning, for example, when deciding cases involving water, oil, and gas: see e.g. Eric T Freyfogle, "Context and Accommodation in Modern Property Law" (1989) 41 Stan L Rev 1529 [Freyfogle, "Context and Accommodation"]; Craig Anthony (Tony) Arnold, "The Reconstitution of Property: Property as a Web of Interests" (2002) 26:2 Harv Envtl L Rev 281. And property scholars have also repeatedly theorized a resource-specific approach. From the 1920s to the 1950s, a group of French and Italian law professors proposed a full-fledged resource-specific theory of property, which they described, visually, as a tree. The trunk of the property tree is the owner's right to ex-

Designing a common-ownership regime that promotes and accommodates different dimensions of autonomy is a resource-specific design process that involves several steps.

First, it requires Aristotelian practical reasoning. Gregory Alexander has described this practical reasoning as “fitting and refitting until a sense of complementarity” between the different dimensions of autonomy

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clusively control the use of a resource, mindful of property’s social function. For the theorists of the tree model, “social function” evokes a plurality of goals: egalitarian distribution of resources and communitarian management of resources, as well as productive efficiency. The branches of the property tree are the multiple resource-specific property regimes present in modern legal systems: family property, agricultural property, affordable-housing property, industrial property, etc. Each of these branches requires a different balance between the plural values evoked by the social function of property. And for each of these branches, this balance of values translates into specific rules limiting and structuring owners’ control rights: see Anna di Robilant, “Property: A Bundle of Sticks or a Tree?” 66 Vand L Rev [forthcoming in April 2013]. The resource-specific design that I propose also builds on an emerging contextualism in American property law. Eric Freyfogle’s work on natural resources shows that property law has long been understood as a matter of context, relativity, and accommodation: Freyfogle, “Context and Accommodation”, *supra* note 140; Eric T Freyfogle, “Water Justice” [1986] 2 U Ill L Rev 481. Thirty years ago, Margaret Radin was the first to recast certain aspects of existing property doctrine in light of the relationship between types of property and personhood: *supra* note 122. And recent developments in property theory suggest that a pluralistic and contextualist approach, similar to the one proposed by the Europeans in the 1920s–1950s, is gaining new prominence. In his recent book, Hanoch Dagan conceptualizes property as a set of “property institutions” that bear a family resemblance but that take on different forms in different social settings: *Property: Values and Institutions* (Oxford: Oxford University Press, 2011). See also Hanoch Dagan, “Reimagining Takings Law” in Gregory S Alexander & Eduardo M Peñalver, eds, *Property and Community* (Oxford: Oxford University Press, 2010) 39:

Rather than a uniform bulwark of exclusion or a formless bundle of rights, I believe that property should be construed as it actually is in law and in life: a set of institutions, each constituted by a particular configuration of rights. More precisely: the meaning of property, the content of an owner’s entitlements, varies according to the categories of social settings in which it is situated, and according to the categories of resources subject to property rights.

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... Because society regards different resources (such as land, chattels, copyright, and patents) as variously constitutive of their possessors’ identity, the law treats them differently and subjects them to different property configurations.

Correspondingly, the appropriate level of constitutional protection ensured to property should also depend on this dimension (*ibid* at 48-49 [footnote omitted]).

The specific variant of this approach to property analysis that I advance in this article builds on Talha Syed, “An Analytics of the Commons: Resources-Values-Entitlements” [forthcoming in 2013].

“is achieved”.<sup>141</sup> This fitting and refitting is contestable, but not arbitrary, because it is tailored to the specific resource: it requires discussing the characteristics of the specific resource. For example, resources differ in whether they are natural or human made, in how scarce they are, in their degree of rivalrousness and excludability, and in whether they are renewable or non-renewable, fragile or durable, and discrete or interconnected in essential ways to natural or human ecosystems.

Further, resources differ in the values and interests they implicate. Housing, commercial real estate, urban green space, and water all differ in how relevant they are to the different dimensions of autonomy. We will need to produce different accounts of the purpose and meaning of the resource. To choose between competing accounts, we may look at which one makes better sense of the resource’s historical meaning or its current social meaning, as reflected in the existing legal materials and in the rules regulating it. But ultimately, we are carried onto “contested moral terrain, where we can’t remain neutral toward competing conceptions of the good life.”<sup>142</sup>

Arguments about the relevance of a resource for real autonomy help to justify arguments about the just distribution of the resource. Legal engineers can draw on a strand of contemporary social and normative theory that offers a goods- or institution-specific answer to questions of distributive justice. Michael Walzer argues that every social good or set of goods constitutes a distributive sphere within which only certain distributive arrangements are appropriate. It is the shared meaning of goods, which is historical and culture-specific, that determines the appropriate distribution of goods.<sup>143</sup> In Michael Sandel’s honorific and teleological theory of justice, the just distribution of a certain resource depends on its purpose and on the values and virtues it honours.<sup>144</sup> “The choice between strictly egalitarian principles of allocation, principles based on status, time-

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<sup>141</sup> Alexander, *supra* note 19 at 1049. For Alexander, this “complementarity reasoning” means viewing values not “in binary, or zero sum terms, ... [by] choos[ing] one and discard[ing] the other.” Rather, values are “pieces of [a] ... puzzle [that must fit with each other]. ... There is no rejection of values, no trumping” (*ibid.*). Values are seen in relation with each other.

<sup>142</sup> Michael J Sandel, *Justice: What’s the Right Thing to Do?* (New York: Farrar, Strauss and Giroux, 2009) at 260.

<sup>143</sup> See Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* (New York: Basic Books, 1983).

<sup>144</sup> *Supra* note 142 at 188 (discussing the teleological goals inherent in Aristotle’s example that, in distributing flutes, one must seek out the best flute players).

related principles, desert or interpersonal comparisons of welfare depends on the characteristics of the goods to be allocated.”<sup>145</sup>

Finally, designing a commons requires the analytical ability to identify which entitlements are core elements of fostering the values we have associated with the specific resource and which entitlements can be modified, added, or dropped to expand access to the resource. We need to creatively configure co-owners’ bundles of entitlements over the common resource so as to equalize—and when possible, maximize—the dimension or dimensions of autonomy relevant to the particular resource.<sup>146</sup>

In some cases, this resource-specific approach will help avoid or minimize difficult trade-offs. Where forgoing some degree of autonomy is unavoidable in the commitment to greater equality of autonomy, a resource-specific analysis will uncover normatively appealing justifications for legal rules that impinge on individual co-owners’ autonomy. It will show that these sacrifices are not “illiberal”. Rather, they are consistent with a thicker, multi-dimensional notion of autonomy.

In the next section, I present two applications of this approach. I focus on the design of common-ownership regimes for two resources that are important preconditions for equality of autonomy, namely affordable housing and urban green space. I show how a resource-specific reconfiguration of property entitlements helps to make and justify some of the most difficult design decisions that regulators and courts face in outlining the legal regime of affordable-housing co-operatives and community gardens.

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<sup>145</sup> Anna di Robilant, “The Virtues of Common Ownership” (2011) 91:4 BUL Rev 1359 at 1372. See also Jon Elster, *Local Justice: How Institutions Allocate Scarce Goods and Necessary Burdens* (New York: Russell Sage Foundation, 1992).

<sup>146</sup> See Lee Anne Fennell, *The Unbounded Home: Property Values Beyond Property Lines* (New Haven: Yale University Press, 2009) (offering an example of this creative reconfiguration of entitlements). Fennell reconfigures the traditional home ownership bundle of rights so as to reflect the many values that homeowners seek from housing as a good in the early twenty-first century United States. Residential property not only serves as a resource in its own right but also as a placeholder for a quite different set of resources such as schools, ambiance, association, etc. Reconfiguring the home ownership bundle involves developing new forms of alienable entitlements such as tradable entitlements to engage in acts with aesthetic impacts and even tradable entitlements relating to association with preferred neighbours. It also involves reconfiguring home ownership in a way that decouples the investment volatility associated with off-site factors from the homeowner’s bundle: see *ibid* at 96-119, 173-96.

### C. Applications

#### 1. Affordable-Housing Co-operatives

As discussed in Part I, affordable-housing co-operatives share the entitlements typical of home ownership between the owner of residential property and some outside party representing the interests of a larger community, a public entity, or a private non-profit organization. Middle- or low-income buyers who meet certain eligibility criteria gain title to residential property. They acquire all the “sticks” of a homeowner: the right to use the property (i.e., to occupy it and to make decisions about its maintenance and improvement), the right to be immune from having their property taken, and the right to transfer (i.e., to pass the property to their heirs or to sell it). However, the outside party retains some control of both the right to use and the right to transfer. The property is to be occupied by the owner on a continued basis and subletting is restricted. Maintenance and improvements are subject to control by the co-operative’s governing body. The resale price is predetermined or the resale process is controlled, or both. Finally, although the homeowner has the right to pass her property to her heirs, the affordable-housing regime imposes certain conditions on inheritance, meaning that not every heir will have the right to occupy the property.

Affordable-housing co-operatives have become an increasingly attractive response to the shortage of good-quality affordable housing. New York has historically been at the forefront of the promotion of affordable-housing co-operatives. The 1955 *Mitchell-Lama Act* and then the Urban Homestead Assistance Board, an NGO that began in the 1970s during a wave of abandonment and foreclosure of buildings, facilitated the conversion of rental housing into affordable-housing co-operatives.<sup>147</sup> In recent years, many US cities have followed the lead. The city of Berkeley reacted to the loss of the rental-housing portion of the city’s inclusionary zoning program by supporting the creation of new limited equity housing.<sup>148</sup> In 2009, the *Palmer/Sixth Street Properties, LP v. Los Angeles (City of)* deci-

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<sup>147</sup> NY Priv Hous Fin Law § 10 (Consol 2012) [*Mitchell-Lama Act*]; See Gordon D MacDonald & Rosalind Tough, “New York City: Changing Social Values and the New Housing” (1963) 39:2 *Land Economics* 157.

<sup>148</sup> See the documentation available from the Berkeley City Council: memorandum from Councilmember Linda Maio to Honorable Mayor and Members of the City Council, “Facilitating Cooperative Home Ownership Units” (10 June 2008), online: City of Berkeley <[http://www.ci.berkeley.ca.us/uploadedFiles/Clerk/Level\\_3\\_-\\_City\\_Council/2008/06Jun/2008-06-10\\_Item\\_11\\_Facilitating\\_Cooperative\\_Home\\_Ownership\\_Units.pdf](http://www.ci.berkeley.ca.us/uploadedFiles/Clerk/Level_3_-_City_Council/2008/06Jun/2008-06-10_Item_11_Facilitating_Cooperative_Home_Ownership_Units.pdf)>. For the California region generally, see Allan D Heskin & Dewey Bandy, “Limited-Equity Housing Cooperatives in California: Proposals for Legislative Reform” (1989) 1:1 CPS Brief 1, online: Housing for All <<http://www.housingforall.org/ltreqhousing.pdf>>.

sion<sup>149</sup> invalidated a city ordinance requiring that twenty per cent of the rental units built must be affordable. Similarly, the now-dissolved Chicago Mutual Housing Department included the development of shared equity home ownership in its 2004–2008 affordable-housing plan.<sup>150</sup>

Shared equity home ownership promotes equality of autonomy by making housing available to middle- and lower-income individuals and families, a fundamental material precondition for autonomy, as well as for the relational benefits of an active community of neighbours. According to their advocates, shared equity co-operatives perform better than other types of subsidized housing in terms of affordability. The co-operative can use the entire property to secure up to ninety-eight per cent blanket financing because it holds the deed to the property. This arrangement allows for down payments as low as two per cent.<sup>151</sup> Most importantly, shared equity co-ops preserve affordability over the long term. The equity formula that specifies the price at which shares can be resold works together with the establishment of income maximums for prospective buyers in order to keep the units within the financial reach of predetermined income groups. By contrast, programs that use subsidies to sell homes to low-income buyers at below-market prices do not preserve the affordability of the housing for future buyers, because the unit may subsequently be sold at its market price.<sup>152</sup> Shared equity co-operatives also perform better than other affordable-housing tools in terms of housing quality. Limits on use rights, such as the co-operative board's direct control of maintenance decisions, translate into good-quality housing. By contrast, public housing has largely failed to deliver decent-quality housing units. The financial structure of public housing programs, as well as inadequate funding, has led to deferred maintenance and consequent building deterioration.<sup>153</sup>

Second, shared equity co-ops are effective means for equalizing access to the relational dimension of autonomy. They facilitate the development of vibrant and integrated neighbourhoods. While traditional public housing has often created conditions of social distress by concentrating the

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<sup>149</sup> 175 Cal App (4th) 1396 (available on WL Can) (App Ct 2009).

<sup>150</sup> See Chicago Mutual Housing Network & University of Illinois at Chicago, Nathalie P Voorhees Center for Neighborhood and Community Improvement, "Affordable Housing Cooperatives: Their Conditions and Prospects in Chicago" (April 2004), online: Housing for All <<http://housingforall.org/cmht.pdf>>.

<sup>151</sup> See *ibid* at 12.

<sup>152</sup> See Davis, *supra* note 51 at 90-95.

<sup>153</sup> See Michael H Schill, "Distressed Public Housing: Where Do We Go from Here?" (1993) 60:2 U Chicago L Rev 497 at 502-503; J Peter Byrne & Michael Diamond, "Affordable Housing, Land Tenure, and Urban Policy: The Matrix Revealed" (2007) 34:2 Fordham Urb LJ 527.

most disadvantaged segments of the population in segregated ghettos, shared equity co-ops have been successful at implementing mixed-income housing.<sup>154</sup> The participation of mixed-income residents in co-operative governance results in higher levels of social integration and stimulates community involvement and organization. Third, low monthly occupancy and operating costs, combined with home ownership training prior to purchase and foreclosure prevention assistance, ensure security of tenure, which in turn promotes neighbourhood stability.<sup>155</sup> Finally, shared equity co-operatives offer ample opportunity for individual development and education. By participating in management or in democratic co-operative governance, members acquire new skills and greater capacity for personal mobility.<sup>156</sup>

Limits on the right to use and the right to transfer are crucial in order to secure these benefits. At the same time, these limits significantly erode co-owners' negative freedom. Limits on the right to use force owners to relinquish independence, shrinking their control over their living space. Limits on the right to transfer make exit more costly and curtail owners' ability to build wealth. In other words, the design of shared equity co-ops involves a trade-off between full negative freedom for current co-owners and greater equality of positive and relational autonomy for the present and future generations of lower-income buyers. I believe that grounding the commitment to equality of autonomy in the context of housing as a specific resource helps us to discern which of these trade-offs may be minimized and which are unavoidable but can be justified with normatively appealing arguments.

In the specific context of housing, restrictions on use are particularly troublesome and should be minimized because ample use entitlements are crucial to advance the special interests implicated by housing as a resource. Arguments that emphasize the special nature of housing are prominent in law and policy debates.<sup>157</sup> The subjective importance of the "home" (i.e., the idea that a home is crucial to an individual's identity and self-expression, serving fundamental interests such as individual liberty, privacy, and security), has long pervaded North American culture. It is reflected in a wide range of legal doctrines that treat the home as special,

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<sup>154</sup> See *ibid* at 567-75; Susan Saegert et al, "Limited Equity Co-ops as Bulwarks Against Gentrification" [unpublished, archived at the City University of New York Graduate Center], online: The Graduate Center: City University of New York <[http://web.gc.cuny.edu/che/Lim\\_Equ\\_Co-ops.pdf](http://web.gc.cuny.edu/che/Lim_Equ_Co-ops.pdf)>.

<sup>155</sup> See Davis, *supra* note 51 at 95-101.

<sup>156</sup> See *ibid* at 111-14; Kennedy, *supra* note 54 at 92.

<sup>157</sup> See Iglesias, *supra* note 66 at 513-14.

from criminal law, to landlord and tenant law, to family law.<sup>158</sup> Further, the idea that housing is a fundamental human right is another central theme of housing law and policy discourse. Each individual has a legal right to housing that is decent, affordable, and secure. The notion of a right to housing is reflected in doctrines such as the implied warranty of habitability and in the *Fair Housing Act*.<sup>159</sup> In other words, a home is a fundamental need. It is a requirement for a decent life. It satisfies the physiological need for shelter and physical safety and stability. Further, it satisfies the psychological need for emotional stability, privacy, and identity or self-expression. These sets of needs are crucial preconditions for individuals to be truly autonomous. Ample use rights serve these fundamental interests and hence are a core component of the bundle of rights pertaining to housing as a resource.

A continued occupancy requirement limits an owner's ability to make her own life plans. A home is a necessity because it provides an individual with the physical and psychological stability necessary to make autonomous choices regarding one's career, family, interests, and commitments. A unit owner may need to be absent for a prolonged period to assist a family member, to volunteer in a political or charitable project, or to nurture her spirituality by retiring for a year in a monastic community. To be free to pursue these options, the owner needs to know that her unit will remain available for her and will generate a minimum income to help finance these projects.

While occupancy requirements stifle owners' material ability to form and pursue their life plans, the goal of preserving affordability can be met by regulating leasing and subletting. In the scheme that I suggest, the leasing or subletting of units is subject to eligibility approval through the same procedure that governs approval of new unit owners. Further, to preserve affordability, there is a cap imposed on the amount of rent that owners may charge. Finally, this rent is shared between the unit owner and the sponsor or the co-operative. The former is granted a fair return on her investment in the unit, including the value added by any improvements. The latter retains the surplus, if any, that is determined by factors beyond the owner's control (e.g., changes in the region's economy or in zoning law).<sup>160</sup> This design enables mobility for the owner, availability of the unit for other low-income applicants during the owner's absence, and allocation of the surplus portion of the rent to the sponsor or the co-

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<sup>158</sup> See *ibid* at 533-34.

<sup>159</sup> 42 USC § 3601 ff.; Iglesias, *supra* note 66 at 544. See also Frank I. Michelman, "The Advent of a Right to Housing: A Current Appraisal" (1970) 5:2 Harv CR-CLL Rev 207 [Michelman, "Right to Housing"].

<sup>160</sup> See Kennedy & Specht, *supra* note 54 at 271.

operative. The sponsor or co-operative can then invest the surplus in the project by subsidizing new units or improving the facilities.<sup>161</sup>

Another set of limits on the owner's right to use relates to maintenance and improvements. Unit owners are required to maintain their homes in good repair and are subject to control over the improvements they choose to make to increase the use value or the resale value of their units. Maintenance requirements are deemed necessary to preserve the habitability of the unit and to avoid major repair costs for the next low-income buyer who will someday purchase the unit.<sup>162</sup> Standards of good repair may be minimalist, requiring maintenance according to local building codes or insurance specifications. Standards of good repair may also be more demanding according to neighbourhood compatibility. In the scheme that I propose, owners are required to maintain their property in compliance with the local regulations. This maintenance requirement is preferable to the others because it simply reflects the duties imposed by legislation on all homeowners. It does not delegate the power to set maintenance standards to private insurance companies, and it does not impose more demanding requirements that might be justified in a condominium or a subdivision, but which would burden low-income owners.

Limiting the improvements that owners may choose to make to avoid gold plating<sup>163</sup> is typical of limited equity home ownership. Limits usually concern both the type of improvements allowed and the value that these improvements add to the owner's equity. In the strictest scheme, the sponsor's prior approval is required to ensure quality control, but once approved, none of these improvements add to the owner's equity or to the resale price. In the most liberal schemes, prior approval is not required, and the sponsor of the co-op board determines which improvements will be credited toward the owner's equity. Critics of shared equity schemes argue that these limits force owners to relinquish their independence, leaving them with "too little choice and too little control over their personal living space."<sup>164</sup> The ability to determine improvements free from external control is an important outlet for self-expression that allows the

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<sup>161</sup> What is sacrificed under this scheme is the ability of the owner to secure the transformative benefits that come with continued residency and involvement in the residents' community. But emotional stability, a sense of home, and civic engagement, while transformative, cannot be paternalistically imposed on low-income owners. Contrary to the material stability that comes from being able to rely on the continued availability of one's unit, these benefits are highly subjective, not necessarily linked to a real estate unit, and also may be derived from other sources.

<sup>162</sup> See Davis, *supra* note 51 at 60-61.

<sup>163</sup> See Kennedy, *supra* note 54 (defining gold plating as "improvements that make the unit unaffordable" at 100).

<sup>164</sup> Davis, *supra* note 51 at 90.

owner to maximize the use value of her home. It is also a means for wealth creation as the owner's investment is typically reflected in the appreciated market value of the home. On the other hand, costly improvements or major overhauls might increase the price of the unit beyond what would be affordable for future buyers of modest means.<sup>165</sup>

The trade-off in this case can be minimized. The sponsor or the co-op can publish a list of pre-approved improvements, the value of which is credited toward the owner's equity. The credit is calculated based on the change in the property value as a result of the improvement. This mechanism preserves the owner's autonomy in that it allows relatively ample opportunities for self-expression and some degree of wealth creation. Also, it is not more stringent than the limits faced by a great number of owners of market-rate residential property, for example in condominium complexes or subdivisions where architectural committees exert a variety of quality and aesthetic controls. The owner retains the ability to design and control living space by choosing among a variety of pre-approved functional and aesthetic improvements. What is foregone is the opportunity to receive credit for improvements that are luxuries, such as a Jacuzzi or Italian mosaic tiles. The ability to make luxurious improvements, however, is not crucial for self-expression when other reasonable options for personalizing the home are available. The owner also retains some ability to generate wealth by investing in the improvement of her home. The value credited toward the owner's equity depends not on the investment but rather on the actual increase in the unit's market value. This arrangement subjects owners of shared equity housing to the same risks that any homeowner faces. Even in market-rate housing, homeowners are not guaranteed a return on their investments. It is the market that determines which improvements increase the property's appraised value and by how much.

Regulating subletting and pre-approving specific improvements are ways to minimize the trade-offs and to fit the different dimensions of owners' autonomy together. By contrast, limits on the right to transfer are more difficult to minimize. "A resale formula establishes an upper limit on the price for which ... [the unit] may be resold — whether it is sold back to a sponsoring organization [or the co-op] or sold directly by one homeowner to another."<sup>166</sup> Resale formulas vary significantly, but they "are [usually] designed to allow homeowners to recoup their original downpayment, to recover any payments that have gone toward the amortization of their mortgage, and to realize a reasonable return on the homeowner's invest-

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<sup>165</sup> See Iglesias, *supra* note 66 at 526-27.

<sup>166</sup> Davis, *supra* note 51 at 64.

ment.”<sup>167</sup> These limits are the very design features that make it possible to preserve affordability over many years. They are unavoidable. Nonetheless, they significantly affect owners. They deprive owners of the full wealth-generating benefits of home ownership. Home ownership is a source of wealth in that it builds savings for households that otherwise might not be able to put money aside for the future. Home ownership also creates opportunities for capital gains when real estate markets are rising.

Scholars and policy-makers who believe in the potential of shared equity home ownership downplay the negative effects of these limits on owners’ negative and positive freedom with a variety of arguments. First, they argue that most owners do build wealth during their time in shared equity housing despite resale restrictions.<sup>168</sup> Second, experts point to the fact that low-income owners of market-rate housing often build very little wealth through home ownership. Since the market-rate housing that low-income people can afford tends to be old, in need of repair, and located in depressed areas, there is little or no market appreciation. Moreover, “low-income homeowners can only extract wealth from their homes if they are able to hang on to them for many years ... [and] to trade up to bigger and better housing over time. Too often, they do neither.”<sup>169</sup> Third, advocates of shared equity home ownership argue that the limited equity gained at the time of resale is compensated by a variety of other benefits to owners. Owners still benefit from the “transformative” effects of home ownership:<sup>170</sup> home ownership helps low-income people “to improve their class standing, social status, the kind of community they live in, and the quali-

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<sup>167</sup> *Ibid* at 65.

<sup>168</sup> A recent study of the Burlington Community Land Trust showed that homeowners realized a very respectable seventeen to twenty per cent return over a span of fourteen years when reselling their homes under one resale formula (John Emmeus Davis & Amy Demetrowitz, *Permanently Affordable Homeownership: Does the Community Land Trust Deliver on Its Promises? A Performance Evaluation of the CLT Model Using Resale Data from the Burlington Community Land Trust* (Burlington, Vt: Burlington Community Land Trust, 2003) at 18, table 5, online: Community-Wealth.org <[http://www.community-wealth.org/\\_pdfs/articles-publications/clts/report-davis.pdf](http://www.community-wealth.org/_pdfs/articles-publications/clts/report-davis.pdf)>). The study also found that, while owners of market rate homes earned a thirty-two per cent return under normal conditions, owners of limited equity housing earned twenty-nine per cent (*ibid* at 19, table 6). Both of these analyses note that these returns far exceed what owners would have realized had they put their money into a low-risk investment like a mutual fund (*ibid* at 20).

<sup>169</sup> Davis, *supra* note 51 at 8.

<sup>170</sup> See Thomas M Shapiro, *The Hidden Cost of Being African American: How Wealth Perpetuates Inequality* (Oxford: Oxford University Press, 2004) at 1-18, 183-99 (discussing transformative assets).

ty of their children's schools."<sup>171</sup> Further, owners enjoy greater stability of tenure than low-income owners of market-rate housing, as well as greater opportunities for social life and civic engagement. These aspects "might be just as important as wealth creation in improving the lives of low-income [people]."<sup>172</sup>

While these arguments are powerful, a more transparent defence of the limited right to transfer is to admit that the restriction is a significant one but also to argue that this choice is justified by the commitment to equalizing autonomy rather than maximizing it for some. Again, it is the special characteristics and interests implicated by the housing as a resource that justifies this outcome.

Housing is an economic good that is produced and exchanged on the market.<sup>173</sup> The investment value of a home is derived from both the increase in property value through appreciation and the long-term savings compared to renting due to the effects of inflation. Appreciation in the market value of housing may be supplemented by the owner's personal contribution of money and labour toward improvement of the property. What arguments about housing as an economic good obscure, however, is the fact that much of the appreciation is caused "by societal factors outside of the homeowner's control, ... [where] public investment in the city as a whole, private investment in the surrounding neighbourhood, changes in the regional economy, and changes in the way residential real estate is regulated, financed, and taxed" are among the main factors.<sup>174</sup>

Who deserves the surplus portion of the property's market value that reflects external societal factors? "Lockean theory has been plagued from the start by the difficulty of justifying a private right to that portion of the market price that reflects [societal factors and] scarcity rents."<sup>175</sup> How do we get from the Lockean principle that we own what we mix with our labour to the enrichment of the full market value of our property, including rents? The moral appeal of the Lockean theory "lies in its promise of 'proportion between remuneration and exertion.'"<sup>176</sup> But the price that a house fetches on the market results from market scarcity and other societal factors outside owner exertion. Arguably, the owner owns only the

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<sup>171</sup> Davis, *supra* note 51 at 105.

<sup>172</sup> *Ibid.*

<sup>173</sup> See Iglesias, *supra* note 66 at 514.

<sup>174</sup> Davis, *supra* note 51 at 65.

<sup>175</sup> Barbara Fried, "Wilt Chamberlain Revisited: Nozick's 'Justice in Transfer' and the Problem of Market-Based Distribution" (1995) 24:3 *Phil & Pub Aff* 226 at 230.

<sup>176</sup> *Ibid* at 228, citing John Stuart Mill, *The Principles of Political Economy* (Kitchener: Batoche Books, 2001) at 237.

value that equals her investment in the property, plus a fair return. Society has a claim on the rest. If a significant portion of the value belongs to society, then limiting the limited equity co-operative member's ability to pocket the full equity at the moment of resale appears less difficult to justify.

A limited right to transfer is also justified because housing is a fundamental need. The US Supreme Court has long been "imbued with ... the idea of housing as a need of outstanding importance, capable of generating unconventional legal claims."<sup>177</sup> As early as 1921, the court held that "[h]ousing is a necessary of life."<sup>178</sup> If housing is a resource of fundamental significance to humans, then it should be provided to all. Securing housing for individuals requires more than simply the negative assurance that housing will be available without arbitrary interference and according to the market rules normally governing access to goods. Rather, securing housing also requires the positive provision of means for the acquisition of housing, be it the provision of specific housing in kind or the provision of rent supplements.

The "right to housing" claim is distributive in essence. Socio-economic rights claims are distributive claims packaged in politically palatable rhetoric.<sup>179</sup> The term "right" suggests a "correlative duty on the part of another party, usually the state, to recognize and provide for what the right entails."<sup>180</sup> Making a plain distributive argument has advantages over couching the argument in the language of rights. First, it dispels the vagueness of rights claims and forces us to confront a number of more

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<sup>177</sup> Michelman, "Right to Housing", *supra* note 159 at 210.

<sup>178</sup> *Block v Hirsh*, 256 US 135 at 156, 41 S Ct 458 (1921).

<sup>179</sup> See memorandum from Talha Syed to Anna di Robilant, "Rights Arguments: An Analytics" [nd]. Syed notes that

[t]he following is the typical form taken by assertions of positive, socio-economic rights (at least when they are presented lucidly): "X is a fundamental need of all humans, and therefore all persons have a right to X." Thus, there are two parts: (1) the identification of some candidate X as being of fundamental significance for all humans; and (2) an assertion that what should follow normatively from (1) is the provision of such goods to all persons "as a matter of right." Regarding (1), the candidates can be anything from "minimum level of food," to "basic health care," to "decent shelter/housing," to "a job"—what unites them is that they are claimed to be "basic" physical or institutional goods, with "basic" meaning required for all humans to have a "decent" life. The second unifying feature of such claims is that securing the good(s) for individuals is understood to require more than simply the (negative) assurance of the absence of coercive interference in pursuit of such goods; rather, also needed is the (positive) provision of resources or other means for the acquisition of such goods (*ibid* at 3).

<sup>180</sup> Iglesias, *supra* note 66 at 541.

concrete questions. “Right to housing” claims often take the form of simple assertions. By contrast, “housing as a need” engages a series of informative questions: How intense is this need? How much housing is needed? How relative or idiosyncratic should the standard to determine whether the housing is adequate be? And further, how absolute should the assurance that this need will be satisfied be?<sup>181</sup> Second, it avoids the easy rebuttal that the political-moral claim of a right to housing is only weakly reflected in legal-institutional materials (i.e., that “courts and legislatures have stopped short of recognizing a full-blown individual right to housing”).<sup>182</sup>

## 2. Community Gardens

Community gardens are another form of common ownership with the potential to promote greater equality of autonomy by making green space, and the social, environmental, and health benefits that it provides, available to residents of distressed communities on a more equal basis. Surprisingly, community gardens have received little attention from property scholars. Community gardens arise “when [citizens] ... grow food, flowers, or greenery on [vacant urban land] ... that they do not own.”<sup>183</sup> Community gardens may be considered a form of common ownership because ownership entitlements are split. A municipality, land reserve agency, or land trust holds title as a public entity or private owner. Gardeners hold use rights, often forming a community-garden organization that takes the form of an unincorporated association or a non-profit corporation.<sup>184</sup> The broad outline of the ownership arrangement of community gardens is often set forth in state legislation or local ordinances. Typically, the municipality or other public or private titleholder leases the land to the gardeners’ association for a nominal fee or license. The lease is often short-term, and it may contain a clause that allows the public or private owner to regain possession of the land at any time.<sup>185</sup> Often, the public entity also as-

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<sup>181</sup> See Michelman, “Right to Housing”, *supra* note 159 at 207-208.

<sup>182</sup> Iglesias, *supra* note 66 at 549. See Michelman, “Right to Housing”, *supra* note 159 at 209.

<sup>183</sup> Jane E Schukoske, “Community Development Through Gardening: State and Local Policies Transforming Urban Open Space” (2000) 3:2 NYUJ Legis & Pub Pol’y 351 at 354-55. See generally Adrienne C Crow, “Developing Community Gardens: Removing Barriers to Improve Our Society” (2009-10) 2:2 Kentucky Journal of Equine, Agriculture & Natural Resource Law 219; Dorothy A Borrelli, “Filling the Void: Applying a Place-Based Ethic to Community Gardens” (2008) 9:2 VJEL 271 at 273-75.

<sup>184</sup> See Schukoske, *supra* note 183 at 365-71.

<sup>185</sup> See *ibid* (noting that the “duration of garden lot leases is specified in various authorizing laws, and ranges from as long as five years ... in Seattle, to two years in Boston, to as short as one growing season under New York law.” Some of these leases are “termi-

sumes the duty of providing material support and assistance to the gardeners.<sup>186</sup>

Gardeners' use rights are subject to a variety of requirements and duties. Typically, there are entry rules. The gardeners may be required to demonstrate a purpose including agriculture, gardening, or economic development. They may also be required to prove that the association has operated for at least a year and has a history of community gardening, or that the association is sponsored by a recognized community-gardening organization. Another frequent entry requirement is need.<sup>187</sup> Local ordinances governing community gardens may assign priority to needy individuals and families when allocating the lots. Gardeners' income rights (i.e., the right to derive income from the gardening activity) are also limited. Under most local ordinances, produce grown in the community gardens may not be sold.<sup>188</sup> Further, gardeners have duties. Most importantly, most community-gardens statutes require the gardeners' association to obtain property insurance and general liability insurance, and to accept "liability for injury or damage resulting from the use of the land for community gardening."<sup>189</sup>

Community gardens have been an important and visible feature of American cities since the 1980s.<sup>190</sup> The New York City Green Thumb project is probably the most well-known example of community gardens or at least the one that has attracted the greatest media attention.<sup>191</sup> Many of

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nable on short notice." For example, "[t]he Adopt-A-Lot program in Baltimore, Maryland ... provides renewable one-year leases, but the city reserves the right to terminate the agreement upon thirty days notice to use the lot for another public purpose, and upon five days notice in the event of complaints concerning the use of or conditions of the lot" at 365 [footnotes omitted]. See also Crow, *supra* note 183 at 229; Borrelli, *supra* note 183 at 282-83.

<sup>186</sup> See Schukoske, *supra* note 183 at 376 (noting that under the New York statutory scheme, municipal corporations may contribute initial site preparation, water systems, perimeter fencing, and other necessary equipment).

<sup>187</sup> See *ibid* (noting that, for example, the *Tennessee Community Gardening Act of 1977* (Tenn Code Ann § 43-24-101 (2012)) gives priority to "needy individuals and families in allocating the lots" at 377).

<sup>188</sup> See *ibid* (recognizing that "[u]nder Tennessee law, produce grown in community gardens may not be sold").

<sup>189</sup> *Ibid* at 376. See Crow, *supra* note 183 at 228.

<sup>190</sup> According to one source, "Currently, approximately 18,000 community gardens have been established across the United States and Canada" (Borrelli, *supra* note 183 at 274).

<sup>191</sup> See e.g. Robert Fox Elder, "Protecting New York City's Community Gardens" (2005) 13:3 NYU Envtl LJ 769 at 771-76; Lynn A Staeheli, Don Mitchell & Kristina Gibson, "Conflicting Rights to the City in New York's Community Gardens" (2002) 58:2-3 Geo-Journal 197; Sheila R Foster, "The City as an Ecological Space: Social Capital and Ur-

the gardens in New York City were created at the time of the fiscal crisis of the 1970s, when thousands of housing units scattered around the city were abandoned by their owners and eventually acquired by the city. There was no money to clear the lots because the city was on the verge of bankruptcy. Buildings deteriorated and collapsed, and the depressed market meant that few lots were sold. The gardens were formed by local residents reacting to the degeneration of their neighbourhoods, often with no city authorization. The city began to recognize the gardens legally, and in 1978, it established the Green Thumb project, which offered leases and assistance to the gardeners. The gardens became the object of much public controversy in the late 1990s, when the city sought to auction off the gardens land for residential and commercial developments.<sup>192</sup>

Community gardens foster greater equality of autonomy by securing access to important material preconditions for autonomy such as green space, clean air, and healthy food for residents of poor and minority neighbourhoods.<sup>193</sup> Green space and clean air are scarce and distributed unequally. Civil rights organizations and environmental law experts have raised the question of environmental racism (i.e., concern over the unequal distribution of environmental burdens and benefits).<sup>194</sup> In their effort to prevent the auctioning of the Green Thumb gardens, the New York City gardeners emphasized the unequal distribution of green space. In *New York City Environmental Justice Alliance v. Giuliani*, the plaintiff claimed that a violation of the *Civil Rights Act of 1964*'s regulatory scheme had occurred because the sale of the gardens had a disproportionately adverse impact on the city's African American, Asian American, and Hispanic populations.<sup>195</sup>

Community gardens also boost residents' relational dimension of autonomy. They promote the development of vibrant and active communities. Community gardens are crucial triggers of what scholars call a neighbourhood's "social capital". The term "social capital" describes "fea-

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ban Land Use" (2006) 82:2 Notre Dame L Rev 527 at 534-38; Christopher M Smith & Hilda E Kurtz, "Community Gardens and Politics of Scale in New York City" (2003) 93:2 Geographical Review 193.

<sup>192</sup> See Elder, *supra* note 191 at 777; Schukoske, *supra* note 183 at 385-88.

<sup>193</sup> See *ibid* at 352. See also Elder, *supra* note 191 at 792-94.

<sup>194</sup> See Regina Austin & Michael Schill, "Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-justice" (1991) 1 Kan JL & Pub Pol'y 69; Rachel D Godsil, "Remedying Environmental Racism" (1991) 90:2 Mich L Rev 394; Jon C Dubin, "From Junkyards to Gentrification: Explicating a Right to Protective Zoning in Low-Income Communities of Color" (1993) 77:4 Minn L Rev 739.

<sup>195</sup> 42 USC § 2000 (2006). See *New York City Environmental Justice Alliance v Giuliani*, 214 F (3d) 65 (available on WL Can) (2nd Cir 2000) [*Giuliani*].

tures of social organization such as networks, norms, and social trust that facilitate coordination and cooperation for mutual benefit.”<sup>196</sup> Some scholars contend that “there are no substitutes for community gardens” in terms of community creation and revitalization.<sup>197</sup> In the struggle against New York City garden auctions, the city’s greening community argued that the gardens are more than patches of green in the city. They are spaces where the residents of marginalized areas can gather and mobilize. As a green activist put it, the gardens are “a space of democracy, with a little ‘d.’”<sup>198</sup>

Why is equality of autonomy best promoted through common ownership of urban gardens, rather than through other means, such as regulation and zoning? First, land-use experts note that traditional zoning is often unsuccessful in protecting a community’s social capital. Traditional zoning fails to take into account the consequences that development projects have on the social fabric of the surrounding community because land-use regulation and decisions often happen in a highly individualized and ad hoc fashion rather than through a public deliberative process.<sup>199</sup> As Shelia Foster argues, “The liberal use of zoning amendments and variances situate private [developers’] interests ... as ... the main [influence] ... on land use decisions.” This dynamic “frustrate[s] efforts by communities to influence the design of new projects in a way that makes them compatible with the social and economic systems in the community.”<sup>200</sup> “Green zoning” provisions that mandate the creation of urban green spaces are also often inadequate. They tend to leave the responsibility for greening to individuals rather than fostering social capital.<sup>201</sup> Further, implementation of green zoning often requires, but lacks, significant funding and strict enforcement.<sup>202</sup> Most importantly, environmental justice scholars and activists note that zoning fails to protect low-income and minority communities. Zoning often functions as a vehicle for environmental racism rather than as a remedy to it. Without organizational resources and

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<sup>196</sup> Robert D Putnam, “Bowling Alone: America’s Declining Social Capital” (1995) 6:1 *Journal of Democracy* 65 at 67, cited in Schukoske, *supra* note 183 at 354. See also Foster, *supra* note 191 at 531.

<sup>197</sup> Smith & Kurtz, *supra* note 191 at 200.

<sup>198</sup> Staeheli, Mitchell & Gibson, *supra* note 191 at 201.

<sup>199</sup> See Foster, *supra* note 191 at 547-48. See also Alejandro Esteban Camacho, “Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions; Installment One” (2005) 24:1 *Stan Env’t LJ* 3 at 11-12.

<sup>200</sup> Foster, *supra* note 191 at 547-48.

<sup>201</sup> See Elder, *supra* note 191 at 794-95.

<sup>202</sup> See *ibid.*

political visibility, poor minority communities fail to secure zoning protection.<sup>203</sup>

While community gardening may be seen as a spontaneous and self-organized community action that succeeds where traditional land-use regulation has failed, the success of community gardens depends on the design of their ownership structure. The shape and distribution of co-owners' entitlements has to enable stability both for the gardeners and flexibility for the titleholder. Community gardens need permanence in order to deliver their promised benefits: a garden's success cannot be measured in one season. Cultivation and the creation of social capital happen over time. On the other hand, the municipality or public entity needs to have a substantial degree of flexibility to reassess priorities for the use of scarce vacant urban land. Eventually, the public authority may need to convert the land occupied by gardens to other uses that benefit the community at large or disadvantaged segments of the community. For example, the garden may be the most suitable land, or the only land, available for affordable-housing developments.

Once again, the central design question seems to concern exit, and allowing exit involves a difficult trade-off. In affordable-housing co-ops, exit involves a trade-off between full autonomy for current co-owners, who to be fully autonomous, need to be able to use and transfer their units freely, and greater equality of autonomy for low-income buyers, whose need for good-quality affordable housing is best satisfied by limiting the use rights and transfer rights of current co-owners. In the case of community gardens, exit may often involve a trade-off between greater equality of autonomy for residents of a distressed neighbourhood who seek greater access to green space and its benefits, and greater equality of autonomy for low-income people who are homeless or have inadequate housing.

The success of community gardens as a means of fostering more equal access to clean air, healthy food, and an active social life requires the limitation of the municipality's ability to exit the common-ownership scheme. Specifically, such success requires longer leases, with renewal or extension clauses and without clauses allowing the city to regain possession of the gardens upon short notice. By making exit more difficult for the city, however, these design features limit the city's ability to respond to changing public needs (e.g., the development of new affordable-housing units).

The struggle between New York City's municipal government and its community gardeners illustrates this tragic trade-off. In *Giuliani*, the city claimed that its plan to develop new housing and facilities for medical and

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<sup>203</sup> See Dubin, *supra* note 194 at 764-68.

related services on garden land constituted a legitimate justification for its actions. The city noted that it would devote some of the redeveloped land to affordable housing. In the course of the litigation, however, it emerged that the city had no concrete plan for the provision of affordable housing.<sup>204</sup> While the city may have overstated its commitment to developing affordable housing, “[p]olicies favoring environmental protection [and the preservation of open green space] ... are often assumed to conflict with ... [affordable-housing projects].”<sup>205</sup> This conflict arises because “[b]oth affordable housing and ... green space ... require the same scarce resource, urban land.”<sup>206</sup> Moreover, affordable housing and community green space are important preconditions for autonomy, and access to both is often framed in the language of rights.<sup>207</sup> “Right to housing” arguments have long been a part of housing debates and policies, and the idea of a right to green space is gaining prominence in land-use debates. For example, New York City gardeners have relied heavily on rights arguments that “[place] an absolute value on green space.”<sup>208</sup> Because they both require the use of scarce vacant land, equalizing access to housing in an urban setting seems to come at the expense of equalizing access to green space.<sup>209</sup>

In *Giuliani*, both the district court and the court of appeals insisted on the incompatibility between the goal of providing new housing and the goal of protecting the gardens. Both courts privileged the former over the latter. The district court denied a preliminary injunction seeking to prevent the city from selling the gardens. The court recognized that the gardening community would suffer irreparable harm and declared itself “sympathetic to the plaintiffs’ needs and concerns.” It went on to state, however, that “the City is acting in the public interest in creating affordable housing, market-rate housing units, elderly medical- and related-care facilities and other community or municipal facilities, including commercial space in neighborhoods which are predominantly minority and low-

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<sup>204</sup> See Foster, *supra* note 191 at 536, n 29.

<sup>205</sup> Adrienne Lyles-Chockley, “Building Livable Places: The Importance of Landscape in Urban Land Use, Planning, and Development” (2008-2009) 16:1-2 *Buff Envtl LJ* 95 at 103. See also Brian W Ohm & Robert J Sitkowski, “Integrating New Urbanism and Affordable Housing Tools” (2004) 36:4 *Urb Law* 857.

<sup>206</sup> Elder, *supra* note 191 at 800.

<sup>207</sup> See e.g. *ibid.*

<sup>208</sup> *Ibid.*

<sup>209</sup> Environmental concerns for green space tend “to focus on intergenerational distribution ... [i.e., preserving a healthy environment for future generations], while low-income housing policy concentrates on existing inequities” (Lyles-Chockley, *supra* note 205 at 103).

income.”<sup>210</sup> The court of appeals affirmed the judgment of the district court. It held that the city’s plan to build new housing constituted a substantial legitimate justification for the city’s action and that the plaintiff had failed to show a less discriminatory option was available to achieve the city’s legitimate governmental goals.<sup>211</sup>

The trade-off between equal access to green space and equal access to housing need not be inevitable. If the New York courts had a more pluralistic understanding of the values implicated by the resource of urban land, then they could have minimized the trade-off. The New York courts could have expanded their discussion of the use of vacant urban land beyond economic or development values to include ecological, social, and ethical concerns. That expanded discussion would have drawn on existing legal materials, as well as new scholarly work and emerging social movements. Instead, both courts’ decisions reflected a narrow vision of land-use planning that is governed by an economic ethic. The gardens were characterized as vacant land: a scarce resource that had to be developed for the most valuable use, namely high-end and affordable residential use, and commercial use. The New York courts thus failed to recognize that the meaning and value of urban land has been broadened in recent decades. Courts, scholars, and policy-makers have developed a plurality of urban land ethics. These new land ethics focus on the complexity of the interaction between physical, biological, and social processes in urban environments. They emphasize the need to develop urban land by preserving and integrating different uses. The creation of urban green space is a central theme of the new land ethics.<sup>212</sup>

An environmental ethic of urban land use emerged as early as the 1970s. The *National Environmental Policy Act of 1969* and its state counterparts required that agencies assess the impact of a proposed land use on the “human environment”.<sup>213</sup> As a more recent example, the environ-

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<sup>210</sup> *New York City Environmental Justice Alliance v Giuliani*, 50 F Supp (2d) 250 at 252 (available on WL Can) (SDNY 1999).

<sup>211</sup> *Giuliani*, *supra* note 195 at 72.

<sup>212</sup> See e.g. Patricia E Salkin, “From *Euclid* to Growing Smart: The Transformation of the American Local Land Use Ethic Into Local Land Use and Environmental Controls” (2002) 20:1 Pace Envtl L Rev 109; Foster, *supra* note 191.

<sup>213</sup> 42 USC § 4332 (1970) [*NEPA*]. Courts have rejected a narrow conception of “human environment” as coterminous with natural resources and instead interpreted *NEPA* as affording a broad protection of citizens’ quality of life. For example, *Hanly v. Mitchell* concerned an action to enforce compliance with *NEPA* regarding the erection of a jail and other facilities. The court noted that protection of the quality of life of residents included aspects such as “[n]oise, traffic, overburdened mass transportation systems, crime, congestion and even availability of drugs” (460 F (2d) 640 at 647 (2nd Cir 1972) (available on WL Can), cited in Foster, *supra* note 191 at 549).

mental ethic of urban land use underlies the wave of “smart growth” or “new urbanism” state and local land use laws that seek to balance urban development with environmental protection and sustainability.<sup>214</sup>

While the environmental ethic has largely focused on physical aspects of land use, other ethics are emerging that place emphasis on less-palpable aesthetic, ethical, and social aspects of urban land use. For example, an ethic that underscores the social significance of city space is emerging.<sup>215</sup> The ability of people who share a space in big cities to share in small-scale, everyday aspects of public life fosters well-being and self-respect. A community with sufficient amounts of social capital can also “purchase’ many other social (and economic) resources that create and sustain healthy neighbourhoods.”<sup>216</sup>

Urban land-use decisions can either strengthen or undermine a community’s social capital. Legal scholars who embrace a social ethic of urban land suggest that courts’ broad interpretations of *NEPA* and smart growth zoning ordinances have not gone far enough. These interpretations have failed to fully grapple with the burdens that land-use decisions impose on the social ties and networks within a community. These scholars argue that legal doctrine, regulation, and policy regarding urban land use should recognize the integration between land use and social relations in urban environments.<sup>217</sup>

These emerging plural ethics suggest a shift in the way urban land is valued. They underscore that equal access to the environmental, aesthetic, and social benefits of urban green space is important for human flourishing. It is an important precondition for equality of autonomy. Had the New York courts acknowledged this new approach to the resource of urban land, they could have designed a different ownership scheme for community gardens that minimizes the tragic trade-off between goods that are all important preconditions for equality of autonomy.

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<sup>214</sup> See Michael Lewyn, “New Urbanist Zoning for Dummies” (2006) 58:2 Ala L Rev 257 at 267-70.

<sup>215</sup> See e.g. Foster, *supra* note 191 at 540-41.

<sup>216</sup> *Ibid* at 543. One documented example of such purchasing is a situation where fatalities among comparable populations of low-income senior citizens during a heat wave were lower in a community with a “vibrant street life and plentiful commercial activity” than in a community marked by crime, vacant lots, and abandoned buildings. This discrepancy was due to the fact that, in the former, seniors were more likely to be visited by neighbours or to feel safe going outside (*ibid* at 543-44).

<sup>217</sup> See generally Foster, *supra* note 191.

Following a lawsuit by State Attorney General Spitzer in 2002, the city and the gardeners reached a compromise agreement.<sup>218</sup> The agreement provides a glimpse of how ownership entitlements could be shaped to allow community gardens to be successful. It could provide a model for local governments seeking to implement common ownership for community gardens. As we have seen, the crucial question is with respect to exit (i.e., the terms of the lease between the public entity holding title to the land and the gardeners or gardening associations). The agreement outlined a regime where the city has relatively ample exit rights, but the gardeners retain a degree of security.

Importantly, the agreement granted Green Thumb leases to gardens not yet registered.<sup>219</sup> While cities prefer revocable licenses with gardeners rather than leases, leases give gardeners greater security of tenure. In *Giuliani*, it was easy for the court to find that a license revocable at will did not provide the gardeners with a legally cognizable interest for standing to challenge decisions affecting the use of the gardens.

The agreement did not modify the term of the leases, but an ideal ownership scheme would feature terms long enough to elicit commitment by gardeners and to realize the social and health benefits of the gardens. A three- to five-year renewable lease of public lands affords a substantial period of time for the planning and implementation of the gardens. At the same time, a three- to five-year term would not hinder the governmental lessor's ability to plan for another use of the land, if needed. For example, some have noted that three years is well within the time span required to get new residential construction approved in New York City.<sup>220</sup> Additionally, a community garden ordinance may "provide for the possibility of permanent dedication to the parks department after [three to five] ... years' continuous use as a community garden."<sup>221</sup>

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<sup>218</sup> *Memorandum of Agreement*, Attorney General of the State of New York and Corporation Counsel of the City of New York, 17 September 2002, online: NYC.gov <[http://www.nyc.gov/html/om/pdf/community\\_gardens\\_agreement.pdf](http://www.nyc.gov/html/om/pdf/community_gardens_agreement.pdf)>. See also Elder's description of the agreement, *supra* note 191 at 785-88.

<sup>219</sup> *Ibid* at 786; *Memorandum of Agreement*, *supra* note 219 at 2. There is a terminological ambiguity here: Elder refers to leases, but the agreement talks about licenses. In US property law, a license is revocable at will, while a lease is not. The licenses in the agreement are not revocable at will (see *Rules & Regulations of the New York City Department of Parks & Recreation*, §6-03, online: City of New York Parks & Recreation <<http://www.nycgovparks.org/rules/section-6#licenses>>), so they are in fact the exact equivalent of a lease.

<sup>220</sup> Elder, *supra* note 191 at 798-99.

<sup>221</sup> Schukoske, *supra* note 183 at 391.

The need to achieve a good balance between stability for the gardens and flexibility for the city or other public entity also weighs against renewal or extension clauses that would lengthen the lease beyond the recommended three to five years. Covenants giving gardeners the power to be tenants for one or more terms beyond the end of the original term would increase the gardeners' security of tenure. Such covenants, however, would be too restrictive a limit on the city's exit rights. They would limit the city's ability to respond to new needs.

For the same reason, clauses allowing the city to terminate the agreement and repossess the land may be an important flexibility-enhancing feature. Garden advocates have largely viewed such clauses unfavourably because of their potential to severely undermine the stability of the gardens; however, such a position might not always be justified. Termination clauses should be coupled with duties imposed on the city. In case of termination, the city would be required to find alternate space for the gardens to the extent possible.

Section 8 of the agreement provides a promising model of an effective termination clause. First, it compels the city to provide alternate space for several gardens in the Bronx slated for development. Additionally, it requires the city to provide cleanup services and assistance with the procurement of alternate sites for the gardens by providing a list of other available vacant lots, if any, within one-half mile of the existing garden. Finally, the city is also obligated to restore any damage caused to garden lots planned for preservation that are disturbed by adjacent construction projects. Easier, flexibility-enhancing exit for the city should also be balanced with a duty to assist new gardeners in land preparation and by providing access to water. Studies have shown that access to resources is important to the success of the gardens. For example, installing a water line can be both expensive and time consuming.<sup>222</sup>

A local community-garden ordinance allowing easy exit for the local government or public agency, coupled with duties to find alternative space as well as duties of assistance would minimize the tragic trade-off between green space and affordable housing. However, it would not completely avoid these trade-offs. Urban land is a scarce resource, and the need for good-quality affordable housing is pressing. In many instances, some green space will be lost. Alternative space of a similar size and with similar characteristics may not be available. Allowing easy exit coupled with duties, however, would at least trigger a conversation among the actors involved, namely the municipal government, gardeners, residents, and affordable-housing organizations. Such a conversation could address

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<sup>222</sup> See *ibid* at 367, n 90.

fundamental questions such as how intense the competing needs are, how access to green space can be assured, and by what standard the adequacy of green space should be determined.

## Conclusions

In this article, I have argued that we should expand the focus of the commons debate to include equality of autonomy. In political theory, as well as in the public imagination, the commons have long been associated with notions of equality and inclusiveness. We should restore these ideas to contemporary commons discourse. In times of high inequality and economic instability, common-ownership regimes such as land trusts, limited equity housing co-operatives, neighbourhood-managed parks, and community-sustained agriculture have the potential to make resources that are crucial to individuals' autonomy available on a more equitable basis. Further, I have argued that a resource-specific analysis of property entitlements helps make and justify the difficult choices we often face in designing common-ownership schemes that seek to promote equality of autonomy.

The two claims that I made in this article concern normative orientation and institutional design. I have not weighed in on the larger question of whether, as some progressive scholars believe, "a very large extension of the commons framework is the way to resurrect an alternative narrative of social inclusion and direct satisfaction of social rights."<sup>223</sup> Nor have I discussed the fear some have expressed that the generalized enthusiasm for the commons may hide new forms of social control and exploitation.<sup>224</sup> I believe that the question of whether common ownership is desirable and effective depends on the resource: on the characteristics and also on the values and interests that the resource implicates. Generalized enthusiasm for common-ownership regimes must be tempered by a sensitivity to the particulars of the resource, in order to make informed decisions about the values and interests that society wishes to promote with respect to a given resource and the kind of property rights that will best give effect to these societal goals.

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<sup>223</sup> Ugo Mattei, "The State, the Market and Some Preliminary Questions About the Commons" (Part five of the "Du public au commun" project, delivered at L'Université de Paris 6, Paris, 6 April 2011), online: Du public au commun <<http://dupublicaucommun.com/tag/ugo-mattei/>>.

<sup>224</sup> See Goldman, *supra* note 9 at 3.