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Common Interest Developments at the Crossroads of Legal Theory

Michael A. Heller*

I. Introduction

WHAT MAKES COMMON INTEREST DEVELOPMENTS (CIDs) interesting for legal theory?¹ In my view, CIDs should provoke our interest because they operate at the intersection of two axes of contemporary legal scholarship. The first axis concerns rights allocation, what I have called the spectrum from commons to anticommons property.² The second axis concerns governance institutions, which can occupy the space between private and public. These two dimensions define the theoretical field within which we create new forms of group property, and through which we solve emerging collective action dilemmas. CIDs are located at this crossroads, delicately poised between extremes on both the rights allocation and the decision-making axes.

A word on collective action dilemmas (CADs). They have become the legal scholar's full-employment program. With so few analytic arrows in our legal theory quiver, simple metaphors must do a lot of work. Both axes that I discuss in this essay could be understood as versions of CADs. The danger here is that the CAD perspective can easily expand to the point that it loses its bite: how do incentives shape community, when does law tame competition, and why do individuals ever cooperate? Looking at CIDs helps to bring the focus from these imponderable questions to more narrow and useful questions about creating well-functioning group property forms. We continue to be shocked to find cooperation in a CID world. Within CIDs, what explains virtuous cycles of cooperation and ameliorates vicious cycles of defection?

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1. The world of CIDs is heavy with acronyms, as the following paragraphs will attest. Please do excuse the blur of CIDs, CADs, TOCs, TACs, LADs, BLIDs, and such.

2. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621 (1998).

II. The Rights Allocation Axis

Let us examine the rights allocation axis from commons to anticommons. Conventional legal theory understood ownership in a much more constrained fashion as only covering the territory from commons to private (Figure 1).

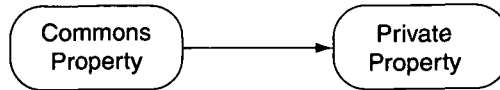


FIGURE 1: *The Conventional View of Rights Allocation*

At one end of the continuum was the commons—a setting in which multiple people could use a scarce resource. Commentators long ago noted that a resource held in such a structure was often prone to being overused—a phenomenon that Garrett Hardin crystallized in his “tragedy of the commons” image.³ Harold Demsetz suggested privatization as a cure for such tragedy, arguing that private property gives owners better incentives for conservation.⁴ In recent years, we have often reasoned that if some private property gives owners a reason to conserve, then more must be better. In this now standard view, privatization or breaking up of a shared resource can never go too far.

Although Figure 1 seems self-evident, it leads us astray. Breaking up a commons may cure wasteful overuse, but it also may inadvertently spark the opposite, which is. . . . Well, the English language lacks a word to describe wasteful underuse. That is why I coined the term the “tragedy of the anticommons,” which I define to be any setting in which owners each veto the others’ use of some resource. The opposite of “overuse” in a tragedy of the commons is “underuse” in a tragedy of the anticommons (Figure 2).



FIGURE 2: *The New, Improved Picture of Ownership*

If this essay were reduced to a single point, it would be to caution that ownership in CIDs can be divided too much. Until now, the world

3. See Garrett Hardin, *The Tragedy of the Commons*, SCIENCE, Dec. 13, 1968, at 1243.

4. See generally Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347 (1967).

of ownership has been understood through simple oppositions: misuse vs. reasonable use, commons vs. private, socialism vs. capitalism, state vs. market. Adding the anticommons perspective can change how we understand ownership at its most fundamental level. Privatization can go too far.

There exists a whole world of anticommons ownership on the far side of reasonable use, private property, markets, and capitalism. As Figure 2 highlights, private ownership, markets, the guts of capitalism itself, are best understood as a fragile balance poised between tragic extremes.

CIDs are revealing because they are blended institutions for rights allocation. They solve tragedies of rights allocation at both ends of the spectrum—concern about too many use rights (commons) and too many excluders (anticommons). CIDs usefully illustrate Demsetz's theory that private property emerges, in part, to overcome tragedies of the commons. Insiders invest in CID resources confident that they can not only exclude outsiders altogether, but also limit overuse by their insider neighbors of shared elements such as a pool, parking lot, or golf course.

In addition, CID governance mechanisms are structured to prevent tragedies of the anticommons. Condo boards, majority rules, partitions of classes of use, and decision-making can all be understood as tools that keep insiders from each vetoing the others' use of the collective resource. Much of the legal structure of CIDs is aimed at protecting the majority's ability to get things done, while limiting opportunism by minority interests. Too many veto rights can be created in a CID—say, for example, around termination and sale of the property as a whole when economic circumstances have substantially changed.

What makes CIDs work is that they blend together—in a single off-the-rack private property form—a combination of tools for limiting commons and anticommons tragedies. As an individual, you can use the collective resource, but only up to a point. Also, you can block uses you do not like, but again, only up to a point. CIDs channel both insiders and outsiders to act within a tight range vis-à-vis the collective resource. Conventionally, we label this form of rights allocation as “private property”: the equilibrium point along one axis of ownership.

III. The Governance Axis

Let us now consider the governance axis. Drilling down from CADs in general, property law focuses on particular sites for mediating conflict and cooperation; the space between sole and despotic dominion at

one extreme and public authority and control at the other. Conventionally, this axis is understood as a dichotomy between private and public forms (Figure 3).



FIGURE 3: *The Conventional Dichotomy of Decision-Making*

This dichotomy hides much that is interesting—at the cutting edge of legal theory—and all that is complex about CIDs. Between the two extremes of private and public, we have intermediate-level property forms. These intermediate forms govern resources that people want to manage at a scale above that possible for an individual decision-maker, but below the lowest level of public authority.

This intermediate level offers great challenges for legal theory and practice. Should we use a freedom of association prism or a regulatory capture lens? Do we concern ourselves with individual autonomy to enter a community, autonomy of insiders to exclude, or autonomy of majorities to suppress minorities? Are these contracts or constitutions? Part of why these questions seem difficult to answer is that we lack a fully articulated language for governance institutions that are publicly and privately situated. I have coined the term “property governance” to capture this intermediate and often invisible arena of decision-making (Figure 4).

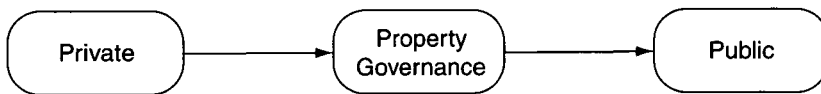


FIGURE 4: *Opening Up the World of Property Governance*

Now we are in a position to talk about property forms that solve CADs along both the axes of rights allocation and governance. What would the general solution to such dilemmas look like?

IV. The Liberal Commons Solution

Hanoch Dagan and I developed an answer a few years back, and have called it a “liberal commons.”⁵ Our ideal type of liberal commons identifies all the rules that any blended, intermediate-level property form

5. Hanoch Dagan & Michael A. Heller, *The Liberal Commons*, 110 Yale L.J. 549 (2001).

must address if it is to succeed. Every liberal commons form creates the conditions in which people can achieve the economic and social gains possible from cooperation, while also ensuring that individual autonomy exists on reasonable terms.

Liberal commons forms include not only CIDs but also corporations, partnerships, family property, trusts, and co-ownership. All these property forms must address the same three spheres of decision-making that we call: (1) the sphere of individual dominion, what individuals can do with the group resource without asking the others' permission; (2) the sphere of democratic decision-making, which governs people's relations with one another; and, (3) the sphere of community-enhancing entry and exit, the institutions for limiting opportunism as people leave and join the liberal commons.

As a matter of legal theory, CIDs do not sit out there all alone. Once situated along the two axes of rights and governance, CIDs take their place as another powerful form of a liberal commons (Figure 5).

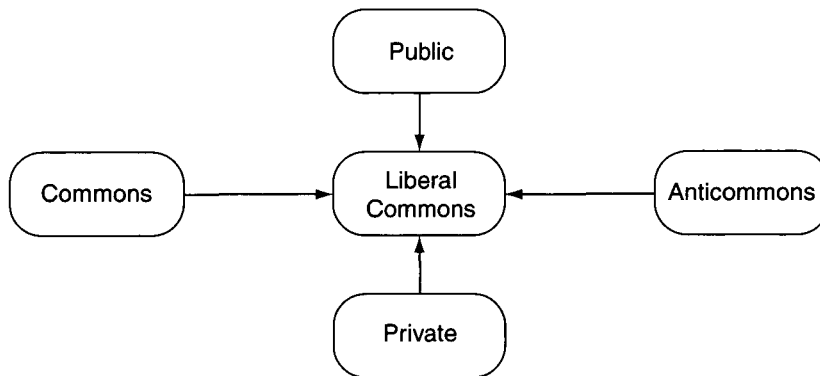


FIGURE 5: *Situating CIDs in a Liberal Commons Space*

V. Conclusion

The CID form entered American law just two generations ago. In the years since, upwards of 40 million Americans have joined CIDs. That growth is a stunning example of the power of law in action—of getting a liberal commons form right.

Over time, our analysis of CIDs should benefit from already-existing solutions to other liberal commons forms—that is, the wide world of institutions that solve blended, intermediate-level, collective action dilemmas. So, we might ask, how does partnership law offer guidance for CID governance? We might explore how freeze-out provisions in corporate law suggest reforms for protecting minority owners in a CID.

Or, we might draw from the often painful experience of partition in co-owned resources.

In addition, our widespread experience with CIDs can reflect back on analogous liberal commons forms—perhaps by deepening our understanding of copyright collectives or close corporations. Even more useful, CIDs can inform and inspire the creation of new types of property where people want to (1) constitute a community, (2) exclude outsiders, (3) stay below the radar of public coercion, and (4) cheaply provide certain place-bound collective goods. For examples, we have oil unitization and, more recently, business improvement districts (BIDs).

How many other gaps are out there yet to be filled? Well, what about a private property form for land assembly—one that eliminates the current impasse between the rigors of voluntary assembly and the inequity and inefficiency of eminent domain. It was this process of moving back from the CID to the liberal commons that inspired Rick Hills and this author to propose creation of land assembly districts (LADs).⁶ LADs could be another liberal commons form, one that draws on CID governance mechanisms to help neighbors (rather than cities) capture the assembly surplus from eminent domain.

This essay has situated CIDs at the crossroads of legal theory, between commons and anticommons along the axis of property law, between private and public on the axis of governance. CIDs are group resource regimes that solve a complex problem of property governance. In other words, CIDs are classic cases of a successful liberal commons.

By situating CIDs within this larger legal theory, they can do much more effective theoretical work. On the one hand, we can hope that many neighboring legal forms may provide solutions to the pressing problems within the CID world. Conversely, CID experience can be deployed to help solve new and unexpected resource dilemmas similar to the world of BIDs, LADs, and the like. Legal theory may have few arrows in its analytical quiver, but those we do have can be quite potent.

6. Michael A. Heller & Rick Hills, *The Art of Land Assembly* (ms. available from author).